No. 02-228

In the Supreme Court of the United States

DANIEL ENRIGHT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether, in order to establish willfulness in this prosecution for attempted evasion of federal motor fuel excise tax and conspiracy to commit that offense, the government was required to establish that petitioner knew the identity of the person responsible for paying the tax.

2. Whether the court of appeals failed to read petitioner's briefs in violation of his due process rights.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A6) is not published in the Federal Reporter, but is reprinted in 46 Fed. Appx. 66.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on April 18, 2002. A petition for rehearing was denied on May 14, 2002. Pet. App. 24a-25a. The petition for a writ of certiorari was filed on August 12, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial in the United States District Court for the District of New Jersey, petitioner was convicted on one count of conspiring to defraud the United States and to commit tax evasion, 26 U.S.C. 7201, wire fraud, 18 U.S.C. 1343, and money laundering, 18 U.S.C. 1957, in violation of 18 U.S.C. 371; fourteen counts of attempting to evade federal motor fuel excise taxes, in violation of 26 U.S.C. 7201; eleven counts of wire fraud, in violation of 18 U.S.C. 1343; eleven counts of money laundering, in violation of 18 U.S.C. 1957; and one count of evading currency reporting requirements, in violation of 31 U.S.C. 5316 and 5322. Petitioner was sentenced to 200 months of imprisonment and was ordered to pay $1,000,000 in restitution. Pet. App. 2a-3a.

1. Petitioner and his co-conspirators participated in a "daisy chain" scheme to evade excise taxes on the sale of certain kinds of fuel, including diesel fuel and gasoline.[1] Before and during the execution of the scheme, petitioner was president of PetroPlus Oil (PetroPlus), a company that bought and sold motor fuel. Petitioner and his co-conspirators made it appear as if excise taxes owed on motor fuel bought by PetroPlus had been paid by other entities. Neither those entities nor PetroPlus paid the taxes, however, which amounted to $132,376,800. Pet. App. 3a; Gov't C.A. Br. 3, 6-18.

a. During the prosecution period, 1989 through 1995, the Internal Revenue Code imposed a tax on "the sale

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[1] Petitioner's co-conspirators included Demetrios Karamanos and Richard Pedroni, who were tried with petitioner and convicted of various offenses. Gov't C.A. Br. 2 n.2. Pedroni's and Karamanos's convictions were affirmed by the court of appeals, and Pedroni and Karamanos have filed petitions for a writ of certiorari (Nos. 02-240 and 02-320).

of any taxable fuel by the producer or the importer thereof or by any producer of a taxable fuel." 26 U.S.C. 4091(a) (1988). "Taxable fuel" included diesel fuel. 26 U.S.C. 4092(a)(1)(A) and (a)(2) (1988). Diesel fuel is "number two oil," which can be used both as motor fuel and as home heating oil. Gov't. C.A. Br. 4.

From 1989 to 1995, neither the federal government nor the State of New Jersey imposed an excise tax on the sale of number two oil used as home heating oil. On taxable sales of motor fuel, the federal excise tax rate ranged from 15 cents to 20.1 cents per gallon. The State of New Jersey, during a part of the prosecution period, imposed an additional excise tax and a gross receipts tax on taxable sales of number two oil. Gov't C.A. Br. 4.

b. Petitioner entered into an agreement with representatives of Kings Motor Oils (Kings), including petitioner's co-defendant and co-conspirator, Demetrios Karamanos, in a scheme to avoid payment of motor fuel excise taxes. Karamanos generally purchased, or caused a company that Kings controlled to purchase, number two fuel as tax-free home heating oil. Kings or the Kings-controlled company then "sold" the fuel down through a chain of companies, known as a daisy chain or line. The conspirators used the chains in an attempt to "muddy the waters, so to speak, of any investigative authority." C.A. App. A2076-A2077. At the bottom of the chain, PetroPlus purchased the number two fuel from a company that invoiced the fuel as diesel fuel on which the required motor fuel excise taxes purportedly had been paid. In reality, the required excise taxes had not been paid. PetroPlus received virtually every gallon of fuel sold by Kings. Gov't C.A. Br. 6-7.

The daisy chains, which were used to avoid a direct connection between PetroPlus and Kings, involved an

elaborate network of other companies (the middle companies) created by Kings. The middle companies never came into possession of the oil. Many of the middle companies were sham companies that existed for no purpose other than to create paperwork to make it appear that PetroPlus bought diesel fuel on which the federal excise tax had been paid, when in fact no taxes had been paid. Gov't C.A. Br. 8.

In a typical chain, at least one company below Kings (or the other company at the top of the chain) invoiced the fuel to another middle company as home heating oil. Kings then instructed another middle company in the chain, known as the "burn company," to invoice the fuel as diesel fuel at a price that purportedly included an amount for federal excise taxes. The burn company then invoiced to at least one other company the fuel that had apparently been transformed from tax-free home heating oil into "tax-paid" diesel fuel (fuel on which excise taxes had already been paid). At that point, the fuel would be sold to PetroPlus as tax-paid diesel fuel. Gov't C.A. Br. 9.

Kings often operated more than one chain at a time. Petitioner and Karamanos set up the chains, and Karamanos instructed Kings's bookkeeper and others on which companies would be used in the chains and the order of the companies in the chains. Because a special formula was used to determine the price charged to PetroPlus for the fuel, Kings personnel informed the middle companies of the number of gallons, the unit price, and the amount of the taxes to list on the invoices. On occasion, Kings's bookkeeper simply prepared the invoices for the middle companies to send. The invoices did not reflect actual sales of fuel, and were used only to conceal the fraud. PetroPlus was the only party in the chains that actually received oil. The

other companies in the chains simply received and sent out paperwork. Gov't C.A. Br. 9-11.

In an effort to ensure that the scheme succeeded and that no one could make a direct connection between PetroPlus and Kings, petitioner dictated which companies were allowed to invoice PetroPlus. C.A. App. A1707, A1749. Petitioner also demanded that the companies invoicing PetroPlus have valid licenses and documentation, and he required the companies to provide him, for each and every invoice, a certification stating that all taxes had been paid. *Id.* at A1707, A1745, A2058, A2064-A2065, A2099-A2101, A2105-A2106, A2146. He believed that the certifications would protect him, and he would not accept any invoice or wire any money in payment of an invoice until he received a certification. *Id.* at A1745, A1747. Petitioner wanted to preserve his ability to claim that he purchased the fuel legitimately so that he could shift the blame for the tax evasion to companies up the chain. *Id.* at A1726.

In the course of the conspiracy, the conspirators wired $596,255,927 through the middle companies. The conspiracy evaded federal excise taxes totaling $132,376,800. It also defrauded the State of New Jersey of $11,892,297 in excise taxes and gross receipts taxes. The annual gross receipts of PetroPlus, which equaled $18,168,997 in the year before the conspiracy, grew to a level of $209,774,103 at the height of the conspiracy. PetroPlus purchased and sold as diesel fuel a total of 666 million gallons of number two fuel on which there was no payment of motor fuel excise taxes. Gov't C.A. Br. 17-18.

2. a. On August 3, 1995, a federal grand jury returned a 39-count indictment charging petitioner and 24 co-defendants with, *inter alia*, wire fraud, excise tax

evasion, money laundering, and conspiracy to commit those offenses and to defraud the United States. On August 27, 1996, the grand jury returned a superseding indictment. Gov't C.A. Br. 2-3.

Each of the 14 counts of tax evasion (C.A. App. A300-A327) concerned a different fiscal quarter, and alleged that, for the particular quarter, petitioner and the other defendants "did knowingly, willfully and unlawfully attempt to evade and defeat and aided, abetted, counseled, commanded, induced and procure[d] and caused the evasion and defeat of federal excise taxes of approximately [a specified amount] due and owing from PetroPlus, Inc. to the United States of America on the sale of motor fuel for the quarter ending [on a specified date], by," *inter alia*, "employing, and causing to be employed, 'daisy chain' schemes," "making and causing to be made, false invoices and documents," "concealing, and causing to be concealed, the source and destination of the motor fuel," and "other conduct, the likely effect of which would be to mislead or conceal."

b. In instructing the jury on the element of willfulness with respect to the tax evasion counts, the district court charged:

> The word "willfully," as used in section 7201, means a voluntary, intentional violation of a known legal duty. Under Section 7201, a defendant has a legal duty not to act to evade a tax obligation. Thus, to find a defendant guilty, you must find that the Government has proven that he or she acted voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by the tax laws that a defendant knew there was a legal duty to pay. An act is done "knowingly" only if it is done purposely and deliberately and not

> because of mistake, accident, negligence, or other innocent reason.
>
> Although, as I previously instructed, you must find beyond a reasonable doubt that PetroPlus owed unpaid taxes, it is not required that you find a particular defendant knew who was the proper taxpayer. However, you must find beyond a reasonable doubt that a defendant acted voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by law that a defendant knew there was a legal duty to pay.

Pet. App. 7a. On June 19, 1998, the jury found petitioner guilty on 37 of the 39 counts charged in the indictment, including counts alleging tax evasion, wire fraud, money laundering, evasion of currency reporting requirements, and conspiracy to defraud the United States and to commit tax evasion, wire fraud, and money laundering. Gov't C.A. Br. 2-3; C.A. App. A129.

3. The court of appeals affirmed. Pet. App. 1a-18a. The court rejected petitioner's argument that, in order to establish the statutory element of willfulness on the tax evasion counts, the government was required to prove that he knew that PetroPlus was the taxpayer. The court explained that, "[a]mong other things, what the government had to prove was that PetroPlus was the taxpayer, not that [petitioner] knew that PetroPlus was the taxpayer." *Id.* at 8a. As a result, the court reasoned, a "belief that someone other than PetroPlus owed the taxes did not constitute a defense to the crimes charged in the superseding indictment." *Id.* at 8a-9a. The court observed that petitioner "testified that he knew the taxes had not been payed," and it found "ample evidence in the record from which a

reasonable jury could infer that [petitioner] acted willfully to evade the taxes." *Id.* at 10a.

ARGUMENT

1. Petitioner asserts (Pet. 14-29) that the government was required to prove that he knew that PetroPlus owed the unpaid taxes in order to establish the statutory element of willfulness on the counts alleging attempted tax evasion. That claim lacks merit and does not warrant this Court's review.

a. The offense of attempted tax evasion bars "[a]ny person" from "willfully attempt[ing] in any manner to evade or defeat any tax imposed by this title or the payment thereof." 26 U.S.C. 7201. The term "willful" in the federal criminal tax statutes means the "voluntary, intentional violation of a known legal duty." *Cheek* v. *United States*, 498 U.S. 192, 200 (1991) (quoting *United States* v. *Bishop*, 412 U.S. 346, 360 (1973)). "Willfulness" in the context of "criminal tax cases" thus "requires the government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." 498 U.S. at 192.

Petitioner, focusing on the language of the indictment, argues that the legal duty in this case was to pay taxes owed by PetroPlus, and that the government thus was required to prove that petitioner knew that PetroPlus owed the taxes. Pet. 16. That is incorrect. The relevant legal duty, *i.e.*, the duty "imposed by the provision of the statute or regulation [petitioner] is accused of violating," *Cheek*, 498 U.S. at 201-202, was a duty not to evade taxes on sales of motor fuel, regardless of whether he knew that those taxes were owed by PetroPlus or instead believed that the taxes were owed

by some other company participating in the evasion scheme.

Section 7201 addresses the evasion or defeat of "any tax" by "[a]ny person" in "any manner." 26 U.S.C. 7201. The offense therefore "is not limited to * * * those who evade taxes that they may owe themselves, but rather it encompasses * * * any person who attempts to evade the tax of anyone." *United States* v. *Townsend*, 31 F.3d 262, 267 (5th Cir. 1994), cert. denied, 513 U.S. 1100 (1995). As a result, the government, to establish the willfulness element of the offense, need only establish that a defendant knew that a tax was owed and that he acted voluntarily and intentionally to evade or defeat payment of the tax, regardless of his knowledge of who in fact owed the tax.

The excise taxes at issue in this case are imposed on the "sale of any taxable fuel." 26 U.S.C. 4091(a) (1988). The government thus was required to prove that petitioner knew that the law imposed a tax on the sales of fuel and that he voluntarily and intentionally participated in a scheme to evade or defeat that tax. The challenged instructions accurately described the elements of the offense, informing the jury that it was required to find that petitioner "acted voluntarily and intentionally and with the specific intent to keep from the Government a tax imposed by the tax laws that [petitioner] knew there was a legal duty to pay." Pet. App. 7a.

b. Contrary to petitioners' assertion (Pet. 14-16), the decision of the court of appeals does not conflict with this Court's decision in *Cheek*, 498 U.S. at 192. Petitioner contends that, because *Cheek* requires establishing the defendant's knowledge of the relevant legal duty, the government was required in this case to show that petitioner knew that PetroPlus owed the excise

taxes. Pet. 16. As explained, however, the relevant duty was the duty not to evade payment of taxes on the sale of fuel, regardless of who was believed to owe those taxes. The jury instructions required the jury to find that petitioner knew of—and intentionally violated—that duty, and the court of appeals' decision upholding the conviction on those instructions is consistent with *Cheek*.

The decision of the court of appeals also does not conflict (Pet. 18-19) with the Fifth Circuit's decision in *United States* v. *Wisenbaker*, 14 F.3d 1022 (1994). In that case, the defendant argued that the indictment charged him only with evading his own taxes, and that proof that he assisted his customers in evading their excise taxes thus constructively amended and varied from the indictment. The Fifth Circuit rejected that claim, concluding that the "indictment contain[ed] no terms restricting it to an allegation that [the defendant] failed to pay his own taxes." *Id.* at 1027. Petitioner contends that here, unlike in *Wisenbaker*, the indictment was restricted to allegations that he evaded payment only of taxes that PetroPlus was obligated to pay. He bases that contention (Pet. 19-20) on language in the tax evasion counts of the indictment stating that petitioner was charged with the knowing and willful failure to pay taxes "due and owing from PetroPlus." *E.g.*, C.A. App. A300. According to petitioner, *Wisenbaker* thus supports his claim that the government was required to prove his knowledge that PetroPlus owed the taxes at issue.

Petitioner errs in his reading of the indictment. The indictment alleged that the taxes at issue were "due and owing from PetroPlus," and the district court required the government to prove that fact. See Pet. App. 4a-6a. The indictment also alleged that peti-

tioner's evasion of that tax was "knowing and willful." But the indictment did not require the government to prove petitioner's specific knowledge of *PetroPlus*'s tax obligation, any more than the evasion counts' description of the fiscal quarter for which the excise taxes were due and the amount of taxes alleged to have been due for that quarter (see, *e.g.*, C.A. App. A300) required the government to prove that petitioner knew the *amount* of taxes that were owed or the *quarter* for which those taxes were owed. What the indictment "fairly encompassed" (Pet. App. 13a) was an offense in which petitioner acted knowingly and willfully to evade taxes *and* the taxes were due and owing from PetroPlus.[2] Accordingly, this case, like *Wisenbaker*, does not involve restrictive language in the indictment that limited the government's theory of the case.

Petitioner also asserts that the court of appeals' decision conflicts with that court's opinion in *United States* v. *Schramm*, 75 F.3d 156, 162 (3d Cir. 1996). Petitioner's allegation of an intra-circuit conflict does not warrant review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam). In any event, the decision below does not conflict with *Schramm*. In that case, the court of appeals reversed the defendant's conviction on the ground that, although

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[2] As the court of appeals explained, the indictment was replete with details about the organization of the daisy chain scheme and specific acts and individuals involved. Pet. App. 14a. Petitioner was thereby put on notice of the nature of the charges so that he could prepare his defense. The law did not require that the government establish petitioner's knowledge of the particular taxpayer, and the indictment cannot be construed to add such a superfluous requirement. Even if it could, the trial court need not charge the jury on such a theory. See *United States* v. *Miller*, 471 U.S. 130, 145 (1985).

the indictment charged a conspiracy to evade Pennsylvania's Fuel Use Tax, the district court had allowed the jury to find the defendant guilty based on his evasion of a different tax not charged in the indictment, the Fuel Oil Franchise Tax. *Schramm*, 75 F.3d at 162-164. Here, the indictment alleged, and the evidence at trial established, that petitioner evaded payment of federal excise taxes on the motor fuel transactions described in the indictment. Neither the evidence presented by the government nor the district court's jury instructions allowed the jury to find petitioner guilty based on his evasion of a different type of tax or a tax resulting from a different group of transactions.

2. Petitioner contends (Pet. 21-25) that the court of appeals violated his due process rights by failing to read his briefs. That fact-bound contention lacks merit and does not warrant review.

The court of appeals' opinion separately addresses each of the claims petitioner raised on appeal, making clear that the court gave careful consideration to the arguments in petitioner's briefs. Petitioner relies (Pet. 21) on the court of appeals' statements that he cited "no legal authority" either in support of his claim that the government was required to show that he knew that PetroPlus owed the taxes, Pet. App. 6a, or in support of his claim that the government was permitted to constructively amend the wire fraud counts in the indictment by "chang[ing] the identity of the state tax payer from PetroPlus to 'anyone,'" Pet. App. 14a n.3. As to the first of those statements, although petitioner cited a number of authorities in the course of his general argument concerning the jury instructions, the court of appeals' statement was in apparent reference to his specific analysis of whether the government was required to prove petitioner's knowledge that Petro-

Plus owed the federal taxes. That specific discussion (Pet. C.A. Br. 66-67) contained no citation of legal authority. As to the court of appeals' second statement, petitioner cited no legal authority in support of his claim that the wire fraud counts in the superseding indictment are fairly read to allege that PetroPlus was the state taxpayer. See Pet. C.A. Br. 70-71; Gov't C.A. Br. 45-49.[3]

[3] Petitioner argued in the court of appeals that the proof at trial and the jury instructions constructively amended and caused a variance from the terms of the wire fraud counts in the indictment. See Pet. App. 14a. According to petitioner's argument, the government alleged in those counts that PetroPlus owed the New Jersey excise taxes, but the district court did not require the government to prove that PetroPlus was the state taxpayer. *Id.* at 14a n.3. The petition, although alluding to the constructive amendment and variance arguments raised in the court of appeals (Pet. i, 8-9, 12 n.8, 18 n.11), does not renew those arguments. In any event, those fact-bound claims, which turn on the specific wording of the superseding indictment, would not warrant this Court's review and were correctly rejected by the court of appeals. The wire fraud counts alleged a scheme to defraud the State of New Jersey of excise taxes and gross receipts taxes owed to the State. See, *e.g.*, C.A. App. A278-A279. The fraudulent scheme did not depend on who in fact owed the taxes, and the allegations in the indictment did not suggest otherwise.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 2002