No. 07-14

# In the Supreme Court of the United States

STANLEY L. WADE, PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTIONS PRESENTED

1. Whether the district court's admission of statements by an Internal Revenue Service attorney and petitioner's wife for a non-hearsay purpose was plain error.

2. Whether the district court's admission of a letter written to petitioner by his attorney violated the attorney-client privilege when petitioner had disclosed the letter to a third party.

3. Whether the district court properly admitted the testimony of an expert summary witness.

4. Whether the district court's consideration of the Sentencing Guidelines violated the Sixth Amendment.

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 30-65) is unpublished, but it is available at 203 Fed. Appx. 920.

## JURISDICTION

The judgment of the court of appeals was entered on October 30, 2006. A petition for rehearing was denied on December 7, 2006 (Pet. App. 66-67). On February 22, 2007, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including May 6, 2007, and the petition was filed on May 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioner was convicted

on one count of conspiracy to defraud the United States, in violation of 18 U.S.C. 371; one count of bankruptcy fraud, in violation of 18 U.S.C. 157; one count of making a false statement in a bankruptcy proceeding, in violation of 18 U.S.C. 152; and three counts of evasion of assessment of tax for the years 1997 through 1999, and one count of evasion of payment, for the years 1982 through 1984, both in violation of 26 U.S.C. 7201. The district court sentenced petitioner to 100 months of imprisonment. Pet. App. 31-32. The court of appeals affirmed. *Id.* at 65.

1. Petitioner owned eight apartment complexes. The rental of the apartments generated more than $4 million in taxable income. In 1992, petitioner transferred the ownership of the apartment complexes to sham entities called "Unincorporated Business Organizations" (UBO) and did not report any of the rental income on the tax returns he filed. On May 31, 2001, petitioner filed for bankruptcy and falsely represented that he had no management or ownership interests in any business and had no real property assets. Gov't C.A. Br. 5; Pet. App. 32-33.

a. At trial, the district court admitted statements of petitioner's wife, Janet Wade, and of an Internal Revenue Service (IRS) lawyer, Richard Kennedy, through a third-party witness, Adam Passey, petitioner's nephew. Passey testified that he heard Janet say to petitioner, "you are going to get me put in jail over this." Pet. App. 37. Passey also testified about a conversation that he had with Richard Kennedy. Passey testified that he asked Kennedy, "Richard, have you ever seen a UBO be used for tax benefit purposes, ever?" Passey testified that Kennedy replied, "no, I've never seen it, Adam. I've prosecuted and dealt with approximately 65 of

these. Every single time they are used for income tax savings and that type of thing, they are always blown away. They never prevail. They are never successful." *Id.* at 39-40. According to Passey, he revealed the contents of this conversation to petitioner. *Id.* at 39. Neither Kennedy nor petitioner's wife testified at the trial.

b. The district court also admitted, over petitioner's objection, a letter that petitioner's attorney, David Black, wrote to petitioner, the contents of which contained advice addressing the legality of using UBOs to shield income generated by petitioner's apartment complexes from federal taxes. Pet. App. 33. Specifically, the letter advised that there was "'no exemption from reporting or taxation in general that applies to a UBO' and that the IRS was likely to prosecute if [petitioner] persisted in failing to report income from the properties nominally held by the UBOs." *Ibid.* (citation omitted). Petitioner showed the letter to Passey, a "third part[y] to the attorney/client relationship between Mr. Black and [petitioner and his wife]." *Id.* at 34.

c. The district court permitted Steven Roberts, an IRS revenue agent, to testify as an expert summary witness. Pet. App. 47. Agent Roberts testified that petitioner's income was reportable under the grantor trust rules because of the attributes of ownership petitioner maintained. *Id.* at 48. Agent Roberts explained that the attributes of ownership included "control." *Ibid.* Additionally, Agent Roberts testified that petitioner should have reported rental income from the UBOs on his own tax returns because the UBOs operated businesses and their income was attributable to petitioner because the UBOs were shams. *Ibid.*

d. The district court sentenced petitioner to 100 months of imprisonment. Pet. App. 32. At sentencing,

the court informed petitioner's attorney that it had reviewed the "considerable material" counsel had submitted to the court. *Id.* at 63. The court also allowed petitioner's attorney approximately 90 minutes to argue objections to the presentence investigation report (PSR) and ten minutes to argue a motion for a downward departure. *Id.* at 62. Petitioner himself was allowed an unlimited period of time in which to address the court. *Id.* at 63. When determining the sentence, the district court expressly recognized the advisory nature of the Guidelines, *id.* at 64-65, and sentenced petitioner to a within-Guidelines term of 100 months of imprisonment, Gov't C.A. Br. 50.

2. The court of appeals affirmed. Pet. App. 30-65.

a. Petitioner argued for the first time on appeal that the admission of Passey's testimony (discussed above) recounting statements of petitioner's wife and IRS lawyer Richard Kennedy, without petitioner's having the opportunity to cross-examine them, violated the Confrontation Clause. The court of appeals reviewed the claim for plain error and concluded that the admission of Passey's testimony was "not error, plain or otherwise." Pet. App. 42. The court recognized that the Sixth Amendment requires the trial court to exclude hearsay that is testimonial in nature. *Id.* at 40. The court held, however, that the two statements at issue were "not testimonial," because they lacked the "formality [that] is indeed essential to testimonial utterance." *Id.* at 41 (quoting *Davis* v. *Washington*, 126 S. Ct. 2266, 2278 n.5 (2006)). The court also concluded that, "[i]n any case, the statements were not testimonial because they were not offered for their truth." *Id.* at 41-42. The court noted that the Confrontation Clause has no application to statements that are not offered for the truth of the

matter asserted. *Id.* at 42. The court determined that both of the statements at issue were offered to prove that petitioner was on notice that his conduct was illegal and that their use for this purpose "did not implicate the Confrontation Clause." *Ibid.* (emphasis omitted).

b. Petitioner also argued that the content of attorney David Black's letter was attorney work product and that its admission by the district court violated the attorney-client privilege. Pet. App. 33. The court of appeals held that petitioner waived the privilege by disclosing the letter's contents to Passey. *Id.* at 34-36. The court cited the district court's finding that petitioner and his wife were clients of Black "in their individual capacities." *Id.* at 34. The court of appeals concluded that the disclosure of the letter to Passey "had no connection with any responsibilities Mr. Passey had to [petitioner and his wife] individually." *Id.* at 34-36.[1]

c. Petitioner also challenged the admission of a portion of the testimony of Agent Roberts. Pet. App. 47. Petitioner contended, among other things, that the district court impermissibly allowed the IRS agent to testify about the law by stating legal conclusions. *Id.* at 47-48. The court of appeals recognized that its precedents prohibit testimony that purely addresses questions of law, but drew a distinction between "discoursing broadly over the entire range of the applicable law," which is impermissible, and "focus[ing] on a specific question of fact," which is permissible. *Id.* at 49 (quoting *Specht* v. *Jensen*, 853 F.2d 805, 809 (10th Cir. 1988) (en banc), cert. denied, 488 U.S. 1008 (1989)). The court held that it agreed with the First and Seventh Circuits that "a

[1] The court of appeals observed that petitioner "d[id] not address the fact that he also disclosed the letter to his nephew, Mr. Passey." Pet. App. 36.

properly qualified IRS agent may analyze a transaction and give expert testimony about its tax consequences." *Id.* at 50 (citing *United States* v. *Windfelder*, 790 F.2d 576, 581-582 (7th Cir. 1986), and *United States* v. *Mikutowicz*, 365 F.3d 65, 72 (1st Cir. 2004)). Applying that principle, the court concluded that the district court properly admitted Agent Roberts's testimony. *Id.* at 50-51.

d. The court of appeals also rejected petitioner's challenges to his sentence. Pet. App. 62-65. The court rejected petitioner's claim that his attorney was given insufficient time to present his sentencing arguments, observing that petitioner's attorney was given multiple opportunities to address the court, both orally and in writing, and that petitioner himself was allowed an unlimited period of time in which to address the court. *Id.* at 63. The court also rejected petitioner's contention that the district court applied the Sentencing Guidelines in a mandatory fashion, violating *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 64. The court noted that the district court explicitly acknowledged the advisory nature of the Guidelines after *Booker, ibid.*, and rejected petitioner's related contention that the district court impermissibly calculated the sentence based on facts not found by a jury, *ibid.*

Finally, the court rejected petitioner's claim that the district court did not consider various factors under 18 U.S.C. 3553(a) (2000 & Supp. IV 2004). The court held that the district court did not have to "march through" every factor under Section 3553(a) in arriving at a reasonable sentence and that petitioner in any event had not shown that the court failed to consider certain factors or that consideration of the allegedly excluded factors would have affected his sentence. Pet. App. 64-65.

**ARGUMENT**

1. Petitioner contends (Pet. 10-13) that the court of appeals' decision upholding the trial court's admission of the out-of-court statements of petitioner's wife and IRS attorney Richard Kennedy was erroneous and conflicts with this Court's decision in *Crawford* v. *Washington*, 541 U.S. 36 (2004). Because petitioner did not raise a Confrontation Clause objection in the district court, review is for plain error. See Pet. App. 40. Under the plain-error standard, petitioner would be entitled to relief only if he could show that (1) there was error; (2) the error was plain; (3) the error affected his substantial rights; and (4) the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). As the court of appeals held, petitioner cannot establish that the district court's admission of the statements was error, much less plain error. The Confrontation Clause "does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted." *Crawford*, 541 U.S. at 60 n.9 (citing *Tennessee* v. *Street*, 471 U.S. 409, 414 (1985)); see *United States* v. *Faulkner*, 439 F.3d 1221, 1226 (10th Cir. 2006). The court of appeals concluded (Pet. App. 42) that the statements at issue here were not offered to prove the truth of the matter asserted, but were offered to show that petitioner was on notice that use of the UBOs to shield income from federal tax was illegal. That fact-bound conclusion was correct and in any event does not warrant further review.

2. Petitioner renews his contention (Pet. 13-16) that the admission of a letter written to him by his attorney violated the attorney-client privilege. According to petitioner, the court of appeals' decision upholding admis-

sion of the letter conflicts with this Court's decision in *Upjohn Co.* v. *United States*, 449 U.S. 383 (1981), and the Eighth Circuit's decision in *Diversified Industries, Inc.* v. *Meredith*, 572 F.2d 596, 610 (1978) (en banc). There is no conflict, however. Both of the cases on which petitioner relies address the attorney-client privilege in the corporate context. In contrast, the court of appeals here left undisturbed the district court's finding that Black represented petitioner and his wife in their individual capacities and did not represent the UBOs, Pet. App. 34, and it concluded that the disclosure of the letter to Passey "had no connection with any responsibilities Mr. Passey had to [petitioner and his wife] individually," *id.* at 36. The court's fact-bound determination that petitioner waived the privilege by disclosing the letter to a third party does not warrant this Court's review.

3. Petitioner contends (Pet. 16-22) that the court of appeals' decision upholding the district court's admission of an IRS agent's expert testimony about the tax consequences of petitioner's transactions conflicts with the Federal Rules of Evidence, decisions of other federal circuit courts, and prior decisions of the Tenth Circuit. Petitioner's contention lacks merit.

As numerous courts of appeals have held, the Federal Rules of Evidence permit expert testimony by an IRS agent that expresses an opinion as to the proper tax consequences of a transaction. See, *e.g.*, *United States* v. *Mikutowicz*, 365 F.3d 65, 72 (1st Cir. 2004); *United States* v. *Monus*, 128 F.3d 376, 385-386 (6th Cir. 1997), cert. denied, 525 U.S. 823 (1998); *United States* v. *Townsend*, 31 F.3d 262, 270 (5th Cir. 1994), cert. denied, 513 U.S. 1100 (1995); *United States* v. *Windfelder*, 790 F.2d 576, 581 (7th Cir. 1986); *United States* v. *Gold*, 743

F.2d 800, 817 (11th Cir. 1984), cert. denied, 469 U.S. 1217 (1985). The decisions on which petitioner relies are not to the contrary. Those cases involved testimony or proffered testimony that addressed purely legal questions and was thus inadmissible.[2] Petitioner does not cite any cases in which a court of appeals has held it impermissible in a criminal tax case to allow an IRS expert to testify about the tax consequences of a given transaction.

"The primary limitation" on the type of evidence at issue here "is that the agent may not testify about the defendant's state of mind when the challenged" transaction occurred. *Mikutowicz*, 365 F.3d at 72 (citing Fed. R. Evid. 704(b) (expert may not "state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto")). In this case, the IRS agent gave his opinion about the tax consequences of petitioner's transfer of income-generating

[2] See *Snap-Drape, Inc.* v. *Commissioner*, 98 F.3d 194, 198 (5th Cir. 1996) (reports at issue "consist[ed] of nothing more than legal arguments"), cert. denied, 522 U.S. 821 (1997); *Nieves-Villanueva* v. *Soto-Rivera*, 133 F.3d 92, 99 (1st Cir. 1997) (expert testimony explained holdings of various Puerto Rico Supreme Court opinions); *Burkhart* v. *Washington Metro. Area Transit Auth.*, 112 F.3d 1207, 1212-1214 (D.C. Cir. 1997) (expert gave legal conclusion as to legal question involved and "grossly misstated the law"); *Berry* v. *City of Detroit*, 25 F.3d 1342, 1353-1354 (6th Cir. 1994) (expert defined legal term), cert. denied, 513 U.S. 1111 (1995); *Aguilar* v. *International Longshoreman's Union, Local 10*, 966 F.2d 443, 447 (9th Cir. 1992) (expert provided testimony as to matters of law that were for court's determination); *Adalman* v. *Baker, Watts & Co.*, 807 F.2d 359, 366 (4th Cir. 1986) (proffered expert opinion as to meaning and applicability of securities laws); *Marx & Co.* v. *Diners' Club, Inc.*, 550 F.2d 505 (2d Cir.) (expert gave opinion as to legal obligations of parties under agreement), cert. denied, 434 U.S. 861 (1977).

real estate to a UBO and did not testify about petitioner's state of mind. Further review of the court of appeals' fact-bound determination that Agent Roberts's testimony stayed within permissible bounds is not warranted.

4. Petitioner argues (Pet. 22-28) that the court of appeals erred in upholding the district court's procedures at sentencing. According to petitioner (Pet. 22), the sentencing court improperly enhanced his sentencing range on the basis of facts not submitted to the jury. He also alleges (Pet. 23) that the district court "refused to hear mitigating evidence at [his] sentencing." Petitioner's arguments are without merit.

Under *United States* v. *Booker*, 543 U.S. 220 (2005), judicial fact-finding is permissible as long as application of the Sentencing Guidelines is not mandatory. While petitioner suggests that the district court effectively treated the Guidelines as mandatory, the record is to the contrary: the district court explicitly acknowledged their advisory nature. Pet. App. 64. Thus, petitioner's complaint that his sentence was based on facts not found by the jury does not warrant review.

Nor does his objection that the district court "refused to hear mitigating evidence." Pet. 23. At sentencing, the court noted that it had read the considerable material submitted by the defense, and it advised defense counsel to "spend some time on those matters that are going to determine or decide whether or not your client serves and how long." Pet. App. 63 (citation omitted). After defense counsel had spent approximately 90 minutes arguing 16 objections to the PSR, the court allowed him ten more minutes to argue a fully briefed motion for a downward departure. *Ibid.* Petitioner was

then given "as long as he would like" to address the court. *Ibid.*

A sentencing court may place reasonable time limits on a defendant's sentencing arguments. See *Ashe* v. *North Carolina*, 586 F.2d 334, 336-337 (4th Cir. 1978), cert. denied, 441 U.S. 966 (1979); Fed. R. Crim. P. 32(i)(4)(A) (court must provide the defendant and counsel for the parties "an opportunity to speak"). Here, the district court gave the defense ample time to present its case and petitioner "point[ed] to nothing that [his attorney] planned to say that might have affected his sentence." Pet. App. 63. Thus, as the court of appeals held (*ibid.*), the district court did not abuse its discretion.[3]

**CONCLUSION**

The petition for writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner further argues (Pet. 27) that "by not allowing [him] to make a submission at sentencing regarding mitigating factors justifying a downward departure, the Circuit has accorded a presumption of reasonableness to sentencing within the sentencing Guidelines ranges." As this Court recently held in *Rita* v. *United States*, 127 S. Ct. 2456, 2462-2468 (2007), a reviewing court may apply a presumption of reasonableness to a sentence imposed within a properly calculated Guidelines range.