No. 07-67

In the Supreme Court of the United States

MICHAEL J. KOTULA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the admission of excerpts of civil deposition transcripts under the co-conspirator exception to the hearsay rule was consistent with the Confrontation Clause of the United States Constitution.

2. Whether the district court erred in declining to sever petitioner's trial from that of a co-defendant.

3. Whether the district court erred in declining to give a separate instruction on the good-faith defense to a criminal tax prosecution.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 52-165) is not published in the Federal Reporter but is reprinted in 200 Fed. Appx. 472.

JURISDICTION

The judgment of the court of appeals was entered on October 10, 2006. A petition for rehearing was denied on April 19, 2007 (Pet. App. 166-167). The petition for a writ of certiorari was filed on July 16, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the Northern District of Ohio, petitioner was found guilty of one count of conspiracy to defraud the Internal Revenue Service (IRS) and

to commit tax crimes, in violation of 18 U.S.C. 371, and one count of attempting to evade income tax, in violation of 26 U.S.C. 7201. Pet. App. 53. The court of appeals affirmed petitioner's conspiracy conviction, vacated his tax-evasion conviction, and vacated his sentence. *Id.* at 164.

1. In 1985, petitioner began working for Gary Harris, the owner of a network of businesses known as the "GH Group." Pet. App. 54. Petitioner acted as Harris's "right-hand man," and he had managerial authority throughout the GH Group. *Ibid.* Harris operated his businesses through a maze of shell corporations and "trusts" that he controlled using nominee officers, directors, and owners who were loyal to him. *Ibid.* He colluded with a promoter of abusive offshore "trusts" and "untaxing" packages to enhance the secrecy of his business operations. *Ibid.* In addition, he acquired "bank accounts" with the Natural Coin Exchange, a "warehouse bank" operated by an anti-tax organization known as the Christian Patriot Association. *Id.* at 55. Harris himself did not file income tax returns, and many of his "trusts" and shell corporations did not do so either. *Ibid.* Between 1995 and 2000, his companies earned hundreds of thousands of dollars in unreported income each year. *Ibid.*

2. A federal grand jury in the Northern District of Ohio returned an indictment charging petitioner, Harris, and Tamara Schwentker-Harris with conspiracy to defraud the IRS, in violation of 18 U.S.C. 371. Pet. App. 57. The indictment also charged Harris with three counts of tax evasion and petitioner with one count of tax evasion, in violation of 26 U.S.C. 7201. *Ibid.*

Before trial, petitioner moved to sever his case from those of his co-defendants, asserting that he wished to

call Harris as a witness on his behalf, and that Harris would be willing to testify only if the trials were severed. Pet. App. 32. The district court denied the motion, finding that Harris did not have "a true desire to testify" but was simply seeking to "cause delay." *Id.* at 36.

3. At trial, the government introduced transcripts of Harris's depositions from civil litigation in a Pennsylvania state court. Pet. App. 153. In those transcripts, Harris discussed some of his business enterprises, and he mentioned petitioner's role in the businesses. *Id.* at 138-142. The district court admitted the transcripts as statements by a co-conspirator in furtherance of the conspiracy under Federal Rule of Evidence 801(d)(2)(E). Pet. App. 135-136.

The district court instructed the jury that to find any defendant guilty of conspiracy, the jury had to be convinced beyond a reasonable doubt that the government had proved an agreement to unlawfully, willfully, and knowingly attempt to evade taxes due, or to unlawfully, willfully, and knowingly submit false income tax returns, and that the defendant had knowingly and voluntarily joined the conspiracy. Pet. App. 177. The court further instructed the jury that "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." *Id.* at 179. Petitioner requested that the jury be instructed that a defendant's good faith is a defense to a charge of tax evasion, but the district court declined to give such an instruction. *Id.* at 3.

The jury returned a verdict of guilty on all counts, and the district court denied petitioner's post-verdict motion for a judgment of acquittal. Pet. App. 1-51. Petitioner was sentenced to 60 months of imprisonment. *Id.* at 58.

4. The court of appeals affirmed petitioner's conspiracy conviction, vacated his tax-evasion conviction, and vacated his sentence, remanding for resentencing. Pet. App. 52-165.

The court of appeals held that Harris's deposition transcripts were properly admitted because Harris intended to use the deposition "to help restore his control" of the assets that were at issue in the litigation and thereby "regain a tool that had been useful to him and the alleged conspiracy." Pet. App. 143. Because the statements in the deposition were made in furtherance of the conspiracy, they were properly admitted under Rule 801(d)(2)(E). *Id.* at 144. The court of appeals also held that the district court did not abuse its discretion in denying a severance, because petitioner had failed to show that a joint trial had resulted in "substantial prejudice" to his defense. *Id.* at 145 (quoting *United States* v. *Beverly*, 369 F.3d 516, 534 (6th Cir.), cert. denied, 543 U.S. 910 (2004)). And the court held that petitioner's requested instruction on good faith was unnecessary because the district court's willfulness instruction "adequately advised the jury of the *mens rea* element" of the offenses. *Id.* at 94.

The court of appeals concluded that petitioner was entitled to a new trial on his tax-evasion conviction. Pet. App. 162. That conviction was based on petitioner's failure to report a capital gain on a sale of land; petitioner claimed that the land was about to be condemned and that he had sold it to avoid eminent domain, thus allowing him to defer the gain under 26 U.S.C. 1033 (Supp. IV 2004). Pet. App. 154-155. The court of appeals concluded that the district court had erred in failing to instruct the jury that a good-faith belief that there were reasonable grounds to fear eminent domain would be a

defense to the charge. *Id.* at 161. Additionally, the court concluded that petitioner was entitled to resentencing under *United States* v. *Booker*, 543 U.S. 220 (2005). Pet. App. 164. The court therefore remanded for a new trial on the tax-evasion charge and for resentencing. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 6-30) that the district court erred in admitting Harris's deposition transcripts, denying a severance, and refusing to give a separate jury instruction on good faith. The court of appeals correctly rejected those arguments. Its decision is consistent with the decisions of this Court, and petitioner fails to demonstrate any conflict between the decision below and that of any other court of appeals. Further review is not warranted.

1. As an initial matter, this Court's review is unwarranted at this time because the court of appeals vacated petitioner's sentence and remanded to the district court for a new trial on one of the charges and for resentencing, so the case is still in an interlocutory posture. This Court routinely denies petitions by parties challenging interlocutory determinations that may be reviewed at the conclusion of the proceedings. See, *e.g.*, *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). That practice ensures that all of a defendant's claims will be consolidated and presented in a single petition. Here, the interests of judicial economy would be best served by denying review now and allowing petitioner to reassert his claims at the conclusion of the proceedings, if he still wishes to do so at that time.

2. Petitioner claims (Pet. 6-16) that the decision of the court of appeals affirming the admission of excerpts of Harris's civil deposition transcripts under Federal Rule of Evidence 801(d)(2)(E) contravenes this Court's ruling in *Crawford* v. *Washington*, 541 U.S. 36 (2004). That claim does not warrant this Court's review, particularly because it was not explicitly addressed by the court of appeals and was not raised in the district court.[1]

The challenged deposition transcripts resulted from civil litigation involving Harris and the charitable trust to which he had "donated" an amusement park that he owned. As the court of appeals explained, the district court could reasonably have found that Harris intended

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[1] At trial, petitioner objected to the introduction of the transcripts on the ground that Harris's statements were not made in furtherance of a conspiracy, but he did not specifically raise a Confrontation Clause objection. Gov't C.A. Br. 50; see *Untied States* v. *Chau*, 426 F.3d 1318, 1321-1322 (11th Cir. 2005) (hearsay objection is insufficient to preserve a Confrontation Clause claim); *United States* v. *Dukagjini*, 326 F.3d 45, 60 (2d Cir. 2003) (same), cert. denied, 541 U.S. 1092 (2004). Petitioner states (Pet. 16 n.8) that he objected to the Harris deposition testimony "on the ground that it deprived him of the right of cross-examination," but the supporting record citation does not bear out that contention; it establishes only that, in the court of appeals, petitioner *asserted* that he had preserved his claim. Pet. App. 136-137 (quoting Pet. C.A. Br. 37-38). Moreover, the record citations on which petitioner relied in the court of appeals (Pet. C.A. Reply Br. 15 n.4) demonstrate that, in opposing the admission of the transcripts, petitioner never mentioned the Confrontation Clause or his cross-examination rights. Because petitioner's claim of constitutional error was not preserved, it was subject to review for plain error only. See Fed. R. Crim. P. 52(b). Petitioner could prevail only if the error under *Crawford* were "obvious." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997). In light of the uniform holdings of the courts of appeals that *Crawford* does not bar the admission of co-conspirator statements, see note 2, *infra*, petitioner could not make that showing.

to advance the tax-fraud conspiracy through his depositions, since Harris, by prevailing in the lawsuits, would retain operational control over the amusement park. Pet. App. 142. The court recognized that control of the park was important to the conspiracy, since it was a major source of cash for Harris and was virtually audit-proof. *Ibid.* The court therefore held that the deposition testimony was properly admitted under Rule 801(d)(2)(E), and it did not separately address petitioner's claim that its admission contravened *Crawford*'s prohibition of "testimonial hearsay." *Id.* at 136, 143-144.

The admission of the transcripts was consistent with *Crawford*. The principal evil that the Confrontation Clause addresses is the government's use of *ex parte* accusatory statements made in the context of a criminal investigation and prosecution. See *Crawford*, 541 U.S. at 50. Although the Court did not define "testimonial hearsay" in *Crawford*, see *id.* at 68 n.10, it strongly suggested that certain well established categories of non-hearsay, including Rule 801(d)(2)(E) statements, do not constitute "testimonial hearsay" and thus are not subject to the requirement of actual confrontation, see *id.* at 56. Accordingly, the courts of appeals that have addressed the issue have held uniformly that statements properly admitted under Rule 801(d)(2)(E) are not "testimonial hearsay."[2]

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[2] See, *e.g.*, *United States* v. *Ramirez*, 479 F.3d 1229, 1249 (10th Cir. 2007); *United States* v. *Larson*, 495 F.3d 1094, 1099 n.4 (9th Cir. 2006) (en banc); *United States* v. *Carson*, 455 F.3d 336, 365 (D.C. Cir. 2006), cert. denied, 127 S. Ct. 1351 (2007); *United States* v. *Sullivan*, 455 F.3d 248, 258 (4th Cir. 2006); *United States* v. *Martinez*, 430 F.3d 317, 329 (6th Cir.), cert. denied, 547 U.S. 1034 (2006); *United States* v. *Jenkins*, 419 F.3d 614, 618 (7th Cir.), cert. denied, 546 U.S. 1051 (2005); *United States* v. *Robinson*, 367 F.3d 278, 292 n.20 (5th Cir.), cert. denied, 543

The fact that Harris's statements were "testimonial" in the sense of being made under oath does not, by itself, mean that their use at trial would violate the Confrontation Clause. The deposition was not part of an "interrogation[] by law enforcement officers," *Crawford*, 541 U.S. at 53, and Harris was not an "accuser" making "a formal statement to government officers," *id.* at 51. Rather, his deposition was taken in civil litigation to which the government was not a party. And Harris made the statements not for the purpose of providing information for government enforcement efforts but for the purpose of furthering a criminal conspiracy of which he was a part. Such a conspiratorial agenda is a far cry from the testimonial statements that implicate the Confrontation Clause. Cf. *Davis* v. *Washington*, 126 S. Ct. 2266, 2273-2274 (2006) (distinguishing between statements made to the police for the primary purpose of establishing or proving past events relevant to criminal prosecution, which are testimonial, and statements made in interrogation for the purpose of enabling "police assistance to meet an ongoing emergency," which are not).

U.S. 1005 (2004); *United States* v. *Reyes*, 362 F.3d 536, 540-541 & n.4 (8th Cir.), cert. denied, 542 U.S. 945 (2004). Although none of these cases involved co-conspirator statements in the form of deposition testimony, that consideration is not dispositive. See p. 8, *infra*. Cf. *United States* v. *Stewart*, 433 F.3d 273, 291-292 (2d Cir. 2006) (allowing the admission of co-conspirators' statements in formal interviews with government investigators because they were primarily "offered for purposes other than to establish the truth of the matter asserted" and "the truthful portions of the testimonial statements were made in furtherance of a conspiracy to obstruct justice"); but cf. *United States* v. *Holmes*, 406 F.3d 337, 348-350 (5th Cir.) (expressing uncertainty as to whether civil deposition transcripts admitted under Rule 801(d)(2)(E) were "testimonial," but finding it unnecessary to resolve the issue), cert. denied, 546 U.S. 871 (2005).

Petitioner asserts (Pet. 12) that the decision of the court of appeals "is contrary to the decisions of several other federal courts." He cites two such decisions, but neither is from a court of appeals, and thus neither establishes a conflict requiring resolution by this Court. See *United States* v. *Saner*, 313 F. Supp. 2d 896 (S.D. Ind. 2004), and *United States* v. *W.R. Grace*, 455 F. Supp. 2d 1199 (D. Mont. 2006). At least one of the decisions, moreover, is distinguishable from this case. In *Saner*, the district court excluded from evidence certain inculpatory statements an alleged conspirator had made to a federal prosecutor who was seeking "to gather evidence against [the defendants] to be used at trial." *Saner*, 313 F. Supp. 2d at 901. The government did not invoke Rule 801(d)(2)(E) as a basis for the admissibility of the statements. See *id.* at 898. More importantly, the statements in *Saner* were obtained by the federal prosecutor for use in the very case he was assembling. Here, by contrast, the statements at issue were made in the course of civil litigation between private parties in state court, and the government had no involvement in their production.

Even if the admission of the transcripts were contrary to *Crawford*, review by this Court still would not be warranted because any error did not prejudice petitioner, particularly given that, on plain-error review, see note 1, *supra*, petitioner bears the burden to show prejudice. See *United States* v. *Olano*, 507 U.S. 725, 735 (1993) (defendant who raises a forfeited claim must show an effect on his substantial rights); *Lee* v. *Illinois*, 476 U.S. 530, 547 (1986) (Confrontation Clause violation is subject to harmless-error review). Petitioner argues (Pet. 15) that Harris's testimony was prejudicial because it "fingered" him as an "administrative assistant" for a

number of Harris entities and as part of the amusement park management team. But long before petitioner was "fingered" in Harris's deposition transcripts, he already had been identified, in the unchallenged testimony of several witnesses, as a manager of the amusement park. Pet. App. 151-154. Harris's statement that "I think [petitioner] was with [the management team] early," *id.* at 138, added nothing of substance to the government's case. And Harris's statement that petitioner was an "administrative assistant" for some of his companies added nothing to petitioner's own characterization of himself as the vice-president of operations for the GH Group—and as one who was responsible for the review, drafting, and administration of GH Group contracts, and the "legal administration and secured financing" of GH Group companies. Gov't C.A. Br. 25.

3. Petitioner also contends (Pet. 16-20) the district court should have severed his trial from those of his co-defendants. The court of appeals correctly rejected that claim. This Court has emphasized that "[t]here is a strong preference in the federal system for joint trials of individuals who are indicted together." *Zafiro* v. *United States*, 506 U.S. 534, 537 (1993). A severance is appropriate "only if there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence." *Id.* at 539. And the "determination of risk of prejudice and any remedy that may be necessary" is committed "to the sound discretion of the district courts." *Id.* at 541. As the court of appeals explained, petitioner has not come close to showing that the district court abused its discretion here. Pet. App. 144-146.

Petitioner's argument rests (Pet. 17) on a declaration supplied by his co-defendant Harris that listed various "exculpatory" statements that Harris would make as a witness for petitioner in the event that Harris's trial were severed from petitioner's trial. Noting that petitioner's severance motion was untimely, Pet. App. 32, and that Harris had made repeated efforts to delay the trial, including by filing several frivolous motions, *id.* at 35-36, the district court concluded that Harris's declaration "was not based on a true desire to testify but was merely a tactic to once again cause delay," *id.* at 36. That finding—which petitioner does not address here—was by itself a sufficient basis for denying the motion to sever.

In any event, even had Harris been genuinely willing to testify, petitioner would not have been entitled to a severance. According to petitioner (Pet. 19-20), the proffered testimony would have established that he had no decision-making responsibility for the finances of any Harris entity; that he acted strictly according to orders and directions from Harris; and that he had no involvement in the creation of Harris's offshore accounts, trusts, or affiliated companies. But none of the proffered testimony would have negated petitioner's involvement in the tax-fraud conspiracy. Petitioner's argument rests on the unstated premise that a conspirator who lacks a financial stake in the agreement, or is unaware of important acts in furtherance of the agreement, or was only following orders, cannot be guilty of conspiracy. That premise is false. See*, e.g., Salinas* v. *United States*, 522 U.S. 52, 63-65 (1997) (defendant need not participate in all aspects of a conspiracy or agree personally to commit criminal acts); *Blumenthal* v. *United States*, 332 U.S. 539, 557 (1947) (defendant may become

member of conspiracy without knowing all details of unlawful scheme); *United States* v. *Brandon*, 17 F.3d 409, 438 (1st Cir.) (in prosecution for conspiracy and bank fraud, rejecting "just following orders" defense in light of defendant's intent to participate in scheme), cert. denied, 513 U.S. 820 (1994); *United States* v. *Warner*, 690 F.2d 545, 550 (6th Cir. 1982) (defendant may become member of scheme even if he agrees to play only minor role). The lack of any truly exculpatory content in Harris's proposed testimony undermines the suggestion that this case falls within the narrow exception to the strong federal policy for joint trials.

The absence of prejudice from the denial of a severance is underscored by consideration of the serious credibility problems that Harris would have had as a witness. Based on his relationship with petitioner, see Gov't C.A. Br. 25-26, and his virulent anti-tax beliefs, see Pet. App. 54-55, Harris would have been subject to obvious impeachment for bias. And before petitioner's prosecution began, Harris had sustained four recent felony convictions for crimes of deceit—three for tax evasion and one for racketeering. See *id.* at 56. Those facts also would have been used to impeach Harris. Petitioner suggests (Pet. 20) that the district court could not consider Harris's lack of credibility in ruling on the motion to sever, but in evaluating the probable effect of the proffered evidence, the court necessarily had to consider whether the jury was likely to believe it. See *United States* v. *DiBernardo*, 880 F.2d 1216, 1229 (11th Cir. 1989) (in context of motion to sever, approving trial court's consideration of credibility of proffered testimony); *Byrd* v. *Wainwright*, 428 F.2d 1017, 1021 (5th Cir. 1970) (same).

Petitioner errs in suggesting (Pet. 17-20) a circuit conflict on the standards for severing trials of co-conspirators. He cites only one decision post-dating *Zafiro*, and in that case, the Eleventh Circuit held that the district court did not abuse its discretion in granting a severance, where the alleged co-conspirators offered to testify that the defendant was not involved in a conspiracy with him. See *DiBernardo*, 880 F.2d at 1228-1229. Here, in contrast, Harris's testimony was not exculpatory, and Harris had extreme credibility problems. Nothing in the fact-specific holding of *DiBernardo* suggests that the Eleventh Circuit would have required the district court to grant a severance in this case.

4. Finally, petitioner contends (Pet. 21-30) that the court of appeals erred in affirming the district court's denial of a jury instruction on good faith. Petitioner is mistaken.[3]

The district court instructed the jury that the government was required to show that petitioner acted willfully, and that "[t]o act willfully means to act voluntarily and deliberately and intending to violate a known legal duty." Pet. App. 179. The court of appeals concluded that "the instructions adequately advised the jury of the *mens rea* element" necessary to support petitioner's

[3] Although petitioner requested an instruction on good faith, he expressly limited that request to the tax-evasion charge. Petitioner's present assertion (Pet. 21 n. 12) that he proposed a good-faith instruction with regard to the conspiracy count is unfaithful to the record of the jury charge conference, during which he unambiguously and emphatically stated that his proposed instruction related only to the tax-evasion count. Gov't C.A. Br. 69; Pet. App. 3-4. Because the court of appeals reversed petitioner's tax-evasion conviction, the instructions pertaining to that count are not relevant here, and petitioner's challenge to the instructions on the conspiracy count is subject to review for plain error only.

conspiracy conviction. *Id.* at 94. The court determined that by convicting petitioner of conspiracy, the jury necessarily rejected the possibility that petitioner had acted in good faith. *Ibid.*

The decision of the court of appeals is entirely consistent with this Court's decisions. In *United States* v. *Bishop,* 412 U.S. 346 (1973), this Court interpreted the term "willfully," for criminal tax offenses, to require "a voluntary or intentional violation of a known legal duty." *Id.* at 360; see *United States* v. *Pomponio*, 429 U.S. 10, 12 (1976) (per curiam). In *Cheek* v. *United States*, 498 U.S. 192 (1991), the Court explained that "the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable." *Id.* at 202. In other words, "one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." *Ibid.* As this Court has observed, an instruction on a criminal tax defendant's alleged good faith thus adds nothing to a proper instruction on willfulness. See *id.* at 201; *Pomponio*, 429 U.S. at 12.

The decision of the court of appeals is also consistent with the approach taken by other circuits. In the criminal fraud setting, for example, nearly every circuit court of appeals has held that the district court need not instruct on good faith if its other instructions adequately inform the jury of the specific intent needed to support conviction.[4]

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[4] See, *e.g.*, *United States* v. *Nivica*, 887 F.2d 1110, 1124 (1st Cir. 1989), cert. denied, 494 U.S. 1005 (1990); *United States* v. *Evangelista*,

Only the Tenth Circuit has held that it is reversible error not to give a separate good-faith instruction when a defendant raises a defense of good faith. See *United States* v. *Harting*, 879 F.2d 765 (10th Cir. 1989). Its decision is nearly 20 years old, and, like the other circuits that once required a separate good-faith instruction, the Tenth Circuit may well reconsider its position. Compare, *e.g.*, *United States* v. *Regan*, 937 F.2d 823 (2d Cir. 1987), amended, 946 F.2d 188 (2d Cir. 1991), cert. denied, 504 U.S. 940 (1992), with *United States* v. *Evangelista*, 122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); compare *United States* v. *Morris*, 20 F.3d 1111 (11th Cir. 1994), with *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994). This Court has repeatedly denied review in cases raising the same issue as that presented by petitioner here. See, *e.g.*, *Lewis* v. *United States*, 534 U.S. 814 (2001) (No. 00-1605); *Bates* v. *United States*, 520 U.S. 1253 (1997) (No. 96-7731); *Von Hoff* v. *United States*, 520 U.S. 1253 (1997) (No. 96-6518).

Petitioner points (Pet. 24-25) to decisions of the Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits, which, he says, conflict with the court of appeals' decision on the question "whether a good faith instruction setting forth the government's burden is required in a

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122 F.3d 112, 118 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998); *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir.), cert. denied, 506 U.S. 965 (1992); *United States* v. *Mancuso*, 42 F.3d 836, 847 (4th Cir. 1994); *United States* v. *Storm*, 36 F.3d 1289, 1294 (5th Cir. 1994), cert. denied, 514 U.S. 1084 (1995); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982); *United States* v. *Ervasti*, 201 F.3d 1029, 1041 (8th Cir. 2000); *United States* v. *Dorotich*, 900 F.2d 192, 193-194 (9th Cir. 1990); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

tax case." But none of the cases that he cites holds that a separate good-faith instruction is necessary if the district court has already given a proper instruction on the state of mind necessary for conviction.

Petitioner suggests (Pet. 26-27) that the district court "expressly excluded" the conspiracy count from the coverage of its definition of willfulness, with the result that the jury was deprived of an instruction on an essential element of the offense. Even if petitioner were correct, that case-specific issue would not warrant review. In any event, petitioner misinterprets the district court's instructions. In delivering its instructions on the elements of tax evasion, the court stated that "[i]n order to sustain its burden of proof for the crimes of attempted income tax evasion as alleged in Counts 1, 2—*I'm sorry, Counts 2, 3, 4, and 5* of the indictment, the government must prove that [petitioner] acted 'willfully.'" Pet. App. 179. Petitioner claims (Pet. 27 n.15) that the italicized language constitutes the court's "express exclusion" of the willfulness definition from Count 1. A more reasonable reading of the instruction, however, is that the court was merely specifying parenthetically those counts of the indictment that charged tax evasion: Counts 2-5, but not Count 1. With regard to the conspiracy count, the court repeatedly informed the jury that to find petitioner guilty, it had to find that he had knowingly and voluntarily joined an agreement to "willfully" evade taxes or file false tax returns. Pet. App. 177. The court of appeals appropriately rejected petitioner's strained interpretation of the jury charge. *Id.* at 94.

Finally, petitioner maintains (Pet. 28) that in the interest of consistency, the reversal of his tax-evasion conviction should have resulted in the reversal of his con-

spiracy conviction as well. The tax-evasion conviction was based on evidence that petitioner had concocted a sham transaction in order to take advantage of the deferral-of-gains provisions of 26 U.S.C. 1033 (Supp. IV 2004). The district court instructed the jury that Section 1033 applied only if "a taxpayer sells property to the government under threat * * * of eminent domain." Pet. App. 158. The court of appeals reversed, relying on an IRS Revenue Ruling that it read for the proposition that Section 1033 applies whenever "the property owner has reasonable grounds to believe" that the property may be subject to eminent domain. *Ibid.* Even assuming that that is a correct statement of the law, it has nothing to do with the *mens rea* necessary for a conspiracy conviction. And as the court of appeals recognized earlier in its opinion, "the instructions adequately advised the jury of the *mens rea* element. By convicting [petitioner] of conspiracy to defraud the IRS (and by convicting [petitioner] of tax evasion), the jury necessarily found [he] did not have a good-faith belief that [he was] not violating the tax laws." *Id.* at 94.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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