No. 19-139

In the Supreme Court of the United States

DELMAR HARDY, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner was entitled to the specialized good-faith reliance-on-accountant jury instruction that he proposed, where the district court instructed the jury that the government was required to prove that his filing of false tax returns was willful and also gave a general good-faith instruction.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 15

TABLE OF AUTHORITIES

Cases:

Boyle v. *United States*, 556 U.S. 938 (2009) 7
Bursten v. *United States*, 395 F.2d 976 (5th Cir. 1968) 11
Cheek v. *United States*, 498 U.S. 192 (1991) 6, 7, 10
Keeble v. *United States*, 412 U.S. 205 (1973) 9
Kotteakos v. *United States*, 328 U.S. 750 (1946) 13
Marinello v. *United States*, 138 S. Ct. 1101 (2018) 5
Mathews v. *United States*, 485 U.S. 58 (1988) 9
United States v. *Bowling*, 619 F.3d 1175 (10th Cir. 2010) 11
United States v. *Brimberry*, 961 F.2d 1286 (7th Cir. 1992) 12
United States v. *Dorotich*, 900 F.2d 192 (9th Cir. 1990) 6, 11
United States v. *Duncan*, 850 F.2d 1104 (6th Cir. 1988) 11
United States v. *Ervasti*, 201 F.3d 1029 (8th Cir. 2000) 11
United States v. *Evangelista*, 122 F.3d 112 (2d Cir. 1997), cert. denied, 522 U.S. 1114 (1998) 10, 11
United States v. *Frame*, 236 Fed. Appx. 15 (5th Cir. 2007) 11

Cases—Continued: Page

United States v. *Gambler*, 662 F.2d 834 (D.C. Cir. 1981) 11
United States v. *Gross*, 961 F.2d 1097 (3d Cir.), cert. denied, 506 U.S. 965 (1992) 10
United States v. *Head*, 697 F.2d 1200 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983).......... 11
United States v. *Kottwitz*, 614 F.3d 1241 (11th Cir.), modified on reh'g, 627 F.3d 1383 (11th Cir. 2010).......... 12, 13
United States v. *Mancuso*, 42 F.3d 836 (4th Cir. 1994).......... 10, 11
United States v. *Martinelli*, 454 F.3d 1300 (11th Cir. 2006), cert. denied, 549 U.S. 1282 (2007).......... 13
United States v. *McGill*, 953 F.2d 10 (1st Cir. 1992) 10
United States v. *Mitchell*, 495 F.2d 285 (4th Cir. 1974).......... 11
United States v. *Park*, 421 U.S. 658 (1975).......... 7
United States v. *Phillips*, 217 F.2d 435 (7th Cir. 1954).......... 11
United States v. *Platt*, 435 F.2d 789 (2d Cir. 1970).......... 11
United States v. *Pomponio*, 429 U.S. 10 (1976)...... 6, 7, 8, 10
United States v. *Sassak*, 881 F.2d 276 (6th Cir. 1989)....... 11
United States v. *Upton*, 91 F.3d 677 (5th Cir. 1996), cert. denied, 520 U.S. 1228 (1997) 10, 11
United States v. *Verkuilen*, 690 F.2d 648 (7th Cir. 1982).......... 11
United States v. *Walker*, 26 F.3d 108 (11th Cir. 1994) 11

Statutes and rule:

18 U.S.C. 371 3
26 U.S.C. 7206(1) 1, 3
26 U.S.C. 7212(a) 3

Rule—Continued: Page

Fed. R. Crim. P. 52(a) 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 764 Fed. Appx. 610. The order of the district court (Pet. App. 4a-16a) is not published in the Federal Supplement but is available at 2018 WL 772080.

JURISDICTION

The judgment of the court of appeals was entered on March 21, 2019. A petition for rehearing was denied on April 25, 2019 (Pet. App. 19a). The petition for a writ of certiorari was filed on July 24, 2019. 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 Nevada, petitioner was convicted on three counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). C.A. E.R. 1. The district

court sentenced petitioner to 25 months of imprisonment, to be followed by one year of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet App. 1a-3a.

1. Petitioner was an attorney in Reno, Nevada, and owned a successful law firm. Gov't C.A. Br. 3-4; see Gov't C.A. Supp. E.R. 22, 51, 115-140, 241-242. The firm received substantial cash payments from clients, totaling over $400,000 from 2008 to 2010 alone. Gov't C.A. Br. 3-4; see Gov't C.A. Supp. E.R. 173.

Petitioner created separate bookkeeping procedures for payments received in cash as opposed to checks. Checks were entered into the firm's accounting system and deposited into the firm's bank account. But petitioner directed his employees to refrain from recording cash payments in the accounting system and to deliver those payments directly to petitioner. Gov't C.A. Supp. E.R. 2-10, 18-23, 49, 60-61, 75, 141-144. When attorneys working for petitioner earned fees that had been paid in cash, petitioner offered them the opportunity to receive their share of the fees in cash. *Id.* at 133-135. But he told one attorney that he preferred when such attorneys opted to receive their share of a cash fee via check, because petitioner "g[o]t to keep both halves"—apparently meaning that he could retain all of the cash and deduct the check as a business expense. *Id.* at 134; see *id.* at 133-135.

As petitioner knew, his accountant used the information in the law firm's accounting system to prepare petitioner's annual tax returns, including the Schedule C form that reported the firm's expenses and income. Gov't C.A. Supp. E.R. 72-75, 112. The accountant thus prepared returns for petitioner that did not report the firm's cash receipts, because—by petitioner's design but unbeknownst to petitioner's accountant—cash payments were not reflected in the accounting system. *Id.* at 74-

75, 79-80, 95, 101. Petitioner's returns failed to report $92,549, $199,833, and $125,591 in cash receipts, for the years 2008, 2009, and 2010, respectively. Gov't C.A. Br. 8; see Gov't C.A. Supp. E.R. 173. Petitioner's tax returns for these years therefore significantly underreported his firm's net profits. Petitioner signed the false returns under penalty of perjury and caused them to be filed with the Internal Revenue Service (IRS). Gov't C.A. Br. 9; see Gov't C.A. Supp. E.R. 76-77, 147, 180-181.

In 2012, two federal agents interviewed petitioner about his interest in a business that was suspected of involvement in bank fraud. Gov't C.A. Br. 11-12. The agents inquired about the characterization of that business on petitioner's 2009 and 2010 tax returns. *Id.* at 12. Although they did not ask petitioner about the law firm's income or mention cash receipts, *ibid.*, petitioner shortly thereafter ordered his firm's business manager to total the cash receipts that the firm had received in 2009 and 2010, Gov't C.A. Supp. E.R. 32-34. Petitioner's accountant then prepared amended returns for 2009 and 2010 that acknowledged the cash receipts. *Id.* at 79-94. The amended returns reported significantly higher net profits for petitioner's law firm. *Ibid.*; see *id.* at 308, 311.

2. A federal grand jury indicted petitioner on the charges at issue here—three counts of filing false tax returns in violation of 26 U.S.C. 7206(1)—as well as one count of corruptly endeavoring to obstruct the IRS in violation of 26 U.S.C. 7212(a), and one count of conspiracy to structure financial transactions in violation of 18 U.S.C. 371. C.A. E.R. 25-30. The last two counts relating to a business other than the law firm. See *id.* at 8-9, 25-26, 30.

Petitioner proceeded to a jury trial. Before deliberations, the district court instructed the jury that on the

false-return counts, the government had to prove beyond a reasonable doubt that petitioner acted "willfully" in filing false returns. Pet. App. 44a. The court further explained that, to do so, "the government must prove beyond a reasonable doubt that the defendant knew federal tax [law] imposed a duty on him, and that the defendant intentionally and voluntarily violated that duty." *Ibid.*

The district court also instructed the jurors that the government was required to establish that petitioner did not act in good faith. It told jurors that "[a] defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully, even if his understanding of the law is wrong or unreasonable." Pet. App. 45a. It further instructed jurors that "in order to prove the defendant acted willfully, the government must prove beyond a reasonable doubt the defendant did not have a good faith belief that he was complying [with] the law." *Ibid.*

The district court further instructed the jury that the false-return counts required proof that petitioner knew that the tax returns were false as to a material matter. Pet. App. 44a. The court told jurors that they could not convict petitioner of filing a false return if they found that petitioner believed that his tax returns accurately reported his income. *Id.* at 45a.

The district court denied petitioner's request for a more specialized instruction on the false-return counts addressing reliance on advice from a tax professional. Pet. App. 42a. Petitioner's proposed instruction stated that "[e]vidence that in good faith [petitioner] followed the advice of his tax preparer is inconsistent with" the statute's intent requirement. *Id.* at 28a. It stated that "[t]he Government has not proved intent if you find that

before acting, [petitioner] made full disclosure to a tax professional of all relevant tax-related information of which he had knowledge, received the tax professional's advice as to a specific course of conduct that he followed, and reasonably relied on that advice in good faith." *Ibid.*

The district court found that such an instruction was unwarranted on the false-return counts because the record did not contain evidence that petitioner did in fact make full disclosure of all relevant tax-related information of which he had knowledge to a tax professional before the returns were filed. Pet. App. 38a-42a. But the court granted petitioner's request for a reliance-on-accountant instruction for the obstruction count, finding evidence from which a jury could conclude that petitioner had made full disclosure to his accountant before seeking advice about how to characterize the business entity that was the subject of the obstruction count. *Id.* at 42a; Gov't C.A. Supp. E.R. 236-238.

The jury found petitioner guilty of each of the false-return counts and the obstruction count. Pet. App. 17a-18a. It acquitted him of conspiring to structure financial transactions. *Id.* at 17a. After trial, the government moved to dismiss the obstruction count in light of *Marinello* v. *United States*, 138 S. Ct. 1101 (2018), which clarified the scope of tax obstruction. Gov't C.A. Br. 3, 15-16. The district court sentenced petitioner to 25 months of imprisonment, to be followed by one year of supervised release. C.A. E.R. 2-3.

3. The court of appeals affirmed in a non-precedential opinion. Pet. App. 1a-3a. As relevant here, the court determined that the district court did not abuse its discretion when it declined to give the specialized reliance-on-accountant instruction that petitioner sought. *Id.* at

2a. The court of appeals agreed that "[g]ood faith reliance on a qualified accountant" is "a defense to willfulness in cases of tax fraud and evasion." *Ibid.* (citation omitted). But it stated that "if 'the trial court adequately instructs on specific intent, the failure to give an additional instruction on good faith reliance upon expert advice is not reversible error.'" *Ibid.* (quoting *United States* v. *Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990)). The court found that the district court had not abused its discretion in this case because it "adequately instructed the jury on specific intent, telling it that the government was required to prove both specific intent and that [petitioner] did not have a good faith belief that he was complying with the law." *Ibid.*

ARGUMENT

Petitioner renews (Pet. 9-15) his contention that the district court abused its discretion in declining to give his proposed supplemental good-faith instruction for the false-return charges against him. The court of appeals correctly rejected petitioner's contention in an unpublished opinion, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. The district court did not abuse its discretion in declining to give the specialized advice-of-accountant instruction that petitioner sought on the false-return counts against him.

a. This Court has given guidance on jury instructions in tax cases in *United States* v. *Pomponio*, 429 U.S. 10 (1976) (per curiam), and *Cheek* v. *United States*, 498 U.S. 192 (1991). In *Pomponio*, this Court found adequate a district court's instructions concerning willfulness on tax charges. 429 U.S. at 10, 13. The district court in *Pom-*

ponio had told jurors that they could find the defendants guilty of falsifying tax returns only if they found they had acted willfully, which "was defined in the instructions" to mean "'voluntarily and intentionally and with the specific intent to do something which the law forbids.'" *Id.* at 11. The Court determined that the district court had "adequately instructed the jury on willfulness," and that "[a]n additional instruction on good faith was unnecessary." *Id.* at 13. That conclusion comports with the broader principle that "[a] trial judge has considerable discretion in choosing the language of an instruction so long as the substance of the relevant point is adequately expressed." *Boyle* v. *United States*, 556 U.S. 938, 946 (2009); see *United States* v. *Park*, 421 U.S. 658, 675 (1975) (holding that the district court did not abuse its discretion in giving an instruction that "was not misleading and contained an adequate statement of the law").

In *Cheek*, this Court explained that a defendant acts "willfully" in the context of the tax laws only if he intentionally violates a known legal duty, 498 U.S. at 200-202. A defendant therefore does *not* act willfully if he has a good-faith belief that his actions are lawful. *Ibid.* Applying that principle, the Court found error in a jury instruction stating that a defendant's belief in the lawfulness of his actions must be objectively reasonable in order to negate willfulness. *Id.* at 203. In rejecting that additional requirement, however, the Court adhered to the definition of willfulness that it upheld in *Pomponio*. See *id.* at 200-201.

b. The district court's instructions here—which were more extensive than the instructions in *Pomponio* and recognized the holding in *Cheek*—were not an abuse of discretion. The court gave instructions that explained

the concept of willfulness and made clear that petitioner could not be convicted on the false-return counts if he had a good-faith belief that his conduct was lawful—whether based on advice of an accountant or any other source. Specifically, the court explained that "to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant knew federal tax [law] imposed a duty on him, and that the defendant *intentionally and voluntarily* violated that duty." Pet. App. 44a (emphasis added). The court also advised jurors that "[a] defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully, even if his understanding of the law is wrong or unreasonable." *Id.* at 45a. The court then further explained that the government must negate good faith, stating that "in order to prove the defendant acted willfully, the government must prove beyond a reasonable doubt the defendant did not have a good faith belief that he was complying [with] the law." *Ibid.*

Pomponio established that a district court need not give any specific instruction on good faith so long as the court's instructions made clear that willfulness requires that the defendant have intentionally violated the law. 429 U.S. at 13. *A fortiori*, a district court does not abuse its discretion where—as here—it not only gives the required guidance on willfulness but also expressly states that a defendant cannot be convicted unless the government disproved good faith. See Pet. App. 45a ("A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully, even if his understanding of the law is wrong or unreasonable"); *ibid.* ("[T]he government must prove beyond

a reasonable doubt the defendant did not have a good faith belief that he was complying [with] the law.").

Furthermore, the district court did not abuse its discretion for the independent reason that petitioner did not present evidence from which jurors could find applicable the proposed advice-of-accountant instruction. Petitioner sought an instruction that would tell jurors he did not act willfully if, among other requirements, he "*made full disclosure* to a tax professional of all relevant tax-related information of which he had knowledge" and "reasonably relied" on the professional's "advice in good faith." Pet. App. 28a (emphasis added). The district court found, however, that the record did not contain evidence from which jurors could conclude that petitioner had made full disclosure of all relevant facts to a tax professional. *Id.* at 40a-41a (discussing evidence).

A requested instruction is appropriate only if the record contains sufficient evidence for the jury to find the facts addressed in the instruction. See *Mathews* v. *United States*, 485 U.S. 58, 63 (1988) (stating that a defendant is entitled to an instruction on a defense if "there exists evidence sufficient for a reasonable jury to find in his favor" on the defense); *Keeble* v. *United States*, 412 U.S. 205, 208 (1973) (lesser-included offense instruction appropriate "if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater"). Because the record did not contain evidence from which the jury could find that petitioner made "full disclosure to a tax professional" before filing the false returns—the circumstance addressed in petitioner's proposed instruction, Pet. App. 28a—the district court did not err in denying the additional instruction petitioner sought.

2. Contrary to petitioner's contention (Pet. 9-11), the unpublished decision below does not conflict with *Cheek.* As noted above, *Cheek* held that a defendant lacks willfulness with respect to tax crimes when he has a good-faith belief that his actions are lawful, even if that belief is unreasonable. 498 U.S. at 200-203. The district court in this case expressly instructed jurors on that point of law, telling them that they could not find willfulness if petitioner had an unreasonable belief in the lawfulness of his actions. Pet. App. 45a. *Cheek* did not address the circumstances under which a defendant is entitled to specialized instructions addressing reliance on expert advice. As noted above, that is an issue on which *Pomponio* provides guidance, in its holding that no specific good-faith instruction is required if a jury is properly instructed on willfulness. 429 U.S. at 13. And nowhere does *Cheek* suggest that a defendant is entitled to an expert-advice instruction premised on "full disclosure," Pet. App. 28a, when jurors could not find on the record at trial that full disclosure had occurred, see *id.* at 40a-41a

Nor does any circuit conflict exist regarding whether a district court must give a specialized accountant-advice instruction on facts like those here. Following *Pomponio*, all of the courts of appeals with criminal jurisdiction have recognized that it is not reversible error to refuse to give a separate good-faith instruction if the jury is correctly instructed on specific intent. See *United States* v. *McGill*, 953 F.2d 10, 12-13 (1st Cir. 1992); *United States* v. *Evangelista*, 122 F.3d 112, 118-119 (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. *Upton*, 91 F.3d 677, 683 (5th Cir. 1996), cert. denied, 520 U.S. 1228 (1997);

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. *Bowling*, 619 F.3d 1175, 1184-1185 (10th Cir. 2010); *United States* v. *Walker*, 26 F.3d 108, 110 (11th Cir. 1994) (per curiam); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981).

Petitioner invokes (Pet. 12-13) the statement of the Ninth Circuit in *Dorotich* that a conflict exists regarding good-faith instructions. But all but one of the decisions on which the Ninth Circuit relied in *Dorotich* predate this Court's guidance in *Pomponio* that a district court that properly instructs on willfulness need not give any separate instruction discussing good faith. See *Dorotich*, 900 F.2d at 194 (citing *United States* v. *Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988); *United States* v. *Mitchell*, 495 F.2d 285, 287-288 (4th Cir. 1974); *United States* v. *Platt*, 435 F.2d 789, 792 (2d Cir. 1970); *Bursten* v. *United States*, 395 F.2d 976, 981-982 (5th Cir. 1968); *United States* v. *Phillips*, 217 F.2d 435, 440-441 (7th Cir. 1954)). And all the circuits discussed in *Dorotich* have subsequently held, as noted above, that an appropriate instruction on specific intent suffices. *Evangelista*, 122 F.3d at 118-119 (2d Cir.); *Mancuso*, 42 F.3d at 847 (4th Cir.); *Upton*, 91 F.3d at 683 (5th Cir.); *Sassak*, 881 F.2d at 280 (6th Cir.); *Verkuilen*, 690 F.2d at 655-656 (7th Cir.). Indeed, a number of those circuits have specifically found no abuse of discretion in declining to give reliance-on-accountant instructions. See *United States* v. *Head*, 697 F.2d 1200, 1212 (4th Cir. 1982), cert. denied, 462 U.S. 1132 (1983); *United States* v. *Frame*,

236 Fed. Appx. 15, 17-18 (5th Cir. 2007); *United States* v. *Brimberry*, 961 F.2d 1286, 1290-1291 (7th Cir. 1992).

Petitioner errs in suggesting (Pet. 13-14) that *United States* v. *Kottwitz*, 614 F.3d 1241, 1271 (11th Cir.) (per curiam), modified on reh'g, 627 F.3d 1383 (11th Cir. 2010) (per curiam), illustrates a conflict on the facts of petitioner's case. The court of appeals in *Kottwitz* concluded that a district court abused its discretion in declining to provide a reliance-on-accountant good-faith instruction, even though the court had given instructions addressing willfulness and good faith more generally. *Id.* at 1260-1262, 1270-1274. But *Kottwitz* made plain that such a specialized good-faith instruction may be required only if the defendant "present[ed] evidence that he disclosed all of the relevant facts to a competent tax advisor," *id.* at 1271—a requirement that the district court here expressly found that petitioner did not satisfy, Pet. App. 38a-42a. The court in *Kottwitz* specifically explained that no such instruction is required "if the defendant failed to disclose 'material facts'" to the advisor. 614 F.3d at 1271 (citation omitted); see *id.* at 1273 (instruction may properly be denied if "there is no evidence that the defendant * * * informed the advisor of all of the facts" or "there is evidence that the defendant personally failed to record receipts, provide his accountant with the underlying records, or inform his accountants of additional income").

Kottwitz does not reflect a general principle that a district court abuses its discretion if it declines to give a specialized reliance-on-accountant instruction—in addition to general instructions on willfulness and good faith—even in cases in which a defendant *does* present evidence that he disclosed the material facts to an advisor. *Kottwitz* did not abrogate the Eleventh Circuit's

previous decision in *Walker*. To the contrary, it reaffirmed that a district court abuses its discretion in denying a requested instruction only if, *inter alia*, "the instruction was not substantially covered by the given charge." *Kottwitz,* 614 F.3d at 1270. Indeed, it cited as an example of a case in which a "reliance instruction" was "not necessary" one in which the instructions "required that the jury rule out good faith in order to convict the defendant." *Id.* at 1273 (citing *United States* v. *Martinelli*, 454 F.3d 1300, 1316 (11th Cir. 2006), cert. denied, 549 U.S. 1282 (2007)). Such instructions were given here.

3. In any event, this case would be a poor vehicle for addressing any question about specialized good-faith instructions. For multiple reasons, any error in failing to give a specialized instruction was harmless beyond a reasonable doubt. See Fed. R. Crim. P. 52(a); *Kotteakos* v. *United States*, 328 U.S. 750, 776-777 (1946).

First, the advice-of-accountant instruction that petitioner sought addressed a factual scenario not supported by the evidence—the inference that jurors could draw if petitioner had made full disclosure of the facts relevant to the returns and then reasonably relied on the advice of an accountant concerning those facts. Pet. App. 28a (instruction); see *id.* at 38a-42a (district court's findings that the record did not support those predicate facts). Instead, petitioner's defense centered on the claim that petitioner did not know the returns were false—a separate element—because he believed that the cash receipts had been disclosed and reported on his tax returns. See Gov't C.A. Supp. E.R. 249-250, 253, 256-257, 259. Under those circumstances, the jury could not have found petitioner's advice-of-accountant instruction relevant, and its omission therefore did not harm petitioner.

Second, any error in omitting the particular instruction sought here was harmless because as noted above, the district court's instructions on good faith and willfulness already made clear that the jury should not find petitioner guilty if jurors believed petitioner had acted in good faith—whether in reliance on an accountant's advice or for any other reason. See Pet. App. 44a-45a.

Finally, the overwhelming evidence that petitioner deliberately failed to disclose the cash receipts to his accountant confirms that a reliance-on-accountant instruction would not have altered the jury's verdict. The trial evidence demonstrated that petitioner directed his employees to give cash receipts directly to him rather than depositing them in the bank and that petitioner was the person who decided that the cash receipts would not be entered into the firm's accounting system. Gov't C.A. Supp. E.R. 1-10, 20-22, 49, 51, 53, 60-62, 75, 116-125, 132, 137-139, 141-145, 190, 278-279. Petitioner's comments to one of the firm's attorneys that he preferred "to keep both halves" of cash fees, *id.* at 134, and the fact that he reported income of approximately $200,000 per year on loan and credit-card applications, while his tax returns reported zero taxable income, further demonstrated that petitioner knew his returns significantly underreported his income, *id.* at 24-25, 78, 87-90, 92, 272. And petitioner's order to his business manager in 2012—immediately following questioning by an IRS agent—to tally up the cash receipts for 2009 and 2010 so that amended returns could be filed also showed his knowledge that these tax returns had falsely omitted his cash receipts. *Id.* at 32-49, 67-71, 114. Petitioner's case would therefore be an unsuitable vehicle for addressing specialized good-faith instructions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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