No. 02-240

In the Supreme Court of the United States

RICHARD PEDRONI, 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 the jury instructions allowed the jury to find petitioner guilty of conspiracy to commit tax evasion without finding that petitioner voluntarily and intentionally violated a known legal duty.

2. Whether the evidence was sufficient to require an instruction on petitioner's defense of good-faith reliance on the advice of a tax professional.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 5a-16a) is not published in the Federal Reporter, but is reprinted at 45 Fed. Appx. 103.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 2002. Pet. App. 5a. A petition for rehearing was denied on May 30, 2002. Pet App. 1a-2a. The petition for a writ of certiorari was filed on August 14, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

STATEMENT

Following a jury trial, petitioner was convicted on one count of conspiracy 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. Pet. App. 5a-6a. He was sentenced to 37 months of imprisonment and was ordered to pay restitution of $500,000. Pet. App. 6a.

1. a. 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.[1] Petitioner operated Pedroni Fuels, a fuel supply company. During the execution of the scheme, Pedroni Fuels sold diesel fuel to PetroPlus Oil (PetroPlus), a company that bought and sold motor fuel and that was operated by petitioner's co-defendant, Daniel Enright. PetroPlus bought the fuel in transactions that required it to pay excise taxes when it sold the fuel for highway use in motor vehicles. Petitioner and the other conspirators, however, set up an elaborate scheme involving the creation of paperwork that made it appear that the taxes owed had been paid by other entities in "daisy chains" of companies between Pedroni Fuels and PetroPlus. None of those entities in fact had paid the taxes. Pet. App. 6a-7a; Gov't C.A. Br. 3.

The scheme originated with an agreement between Enright and representatives of Kings Motor Oils (Kings). Kings purchased, or caused a company Kings

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[1] Petitioner's co-conspirators included Demetrios Karamanos and Daniel Enright, who were tried along with petitioner and convicted of various offenses. Gov't C.A. Br. 2. Enright's and Karamanos's convictions were affirmed by the court of appeals, and Enright and Karamanos (joined by petitioner) have filed petitions for a writ of certiorari (Nos. 02-228 and 02-320).

controlled to purchase, tax-free fuel for delivery to PetroPlus. Pedroni Fuels was one of Kings's suppliers and, on a monthly basis, Pedroni Fuels was informed of the amount of fuel Kings was to provide to PetroPlus. Petitioner would call Kings in order to determine which company in the daisy chain should be invoiced for the fuel supplied by petitioner to PetroPlus. Gov't C.A. Br. 3-4, 6-7.

Petitioner insisted that companies he invoiced have an IRS certification form (Form 637) authorizing them to engage in tax-free sales, which would give the appearance that the conspirators "were doing legitimate business." C.A. App. A2074. If petitioner reviewed documents and certifications for a company in the daisy chain involved in one of his transactions and found the documents to be lacking, petitioner contacted Kings, not the actual purchaser, and requested that Kings identify another company with adequate documentation. Although Pedroni Fuels nominally sold the fuel to Kings-controlled companies, Pedroni Fuels typically transferred the fuel directly from its account at a terminal to PetroPlus's account at the terminal. Thus, while petitioner arranged to have companies in the daisy chain invoiced for the fuel, he knew that the real purchaser of the fuel was PetroPlus. Gov't C.A. Br. 6-9.

Kings, or a company controlled by Kings, "sold" the fuel down through the daisy chain of companies and created paperwork falsely representing the fuel as fuel on which taxes had been paid by the time of the eventual sale to PetroPlus. PetroPlus then sold the fuel to legitimate retailers for a price that included the amount of the tax that supposedly had been paid. In approximately 78 transactions between January 11, 1990, and June 24, 1992, Pedroni Fuels supplied PetroPlus, through the daisy chain scheme, with roughly 47

million gallons of fuel on which over $9 million in federal and state excise tax was not paid.[2] Gov't C.A. Br. 4, 9.

b. On August 3, 1995, a grand jury in the District of New Jersey returned an indictment charging petitioner and 24 co-defendants with tax evasion, wire fraud, money laundering, and conspiracy. On August 27, 1996, the grand jury returned a superseding indictment. On June 19, 1998, following a nine-month trial, the jury found petitioner guilty on one count charging him with conspiracy 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. Petitioner was acquitted on the other counts. Pet. App. 5a-6a; Gov't C.A. Br. 2.

2. On appeal, petitioner challenged, *inter alia*, the sufficiency of the evidence to support his conviction and certain of the trial court's jury instructions. Pet. App. 6a. After briefing and oral argument, petitioner submitted a letter brief elaborating arguments (1) that the district court failed to properly instruct the jury on "willfulness" in connection with the conspiracy count and (2) that the district court should have given the jury an instruction concerning the defense of good-faith reliance on the advice of an accountant.

The court of appeals affirmed. Pet. App. 5a-16a. In rejecting petitioner's argument that the evidence was insufficient to convict him, the court explained that "[i]t did not matter that Pedroni sold to middle companies in the daisy chain that had 637 Licenses (making the initial transactions tax-exempt) because Pedroni clearly knew that he was in effect selling to PetroPlus and that

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[2] In total, the conspirators evaded over $132 million in federal excise taxes and defrauded the State of New Jersey out of over $11 million in taxes. Gov't C.A. Br. 9.

taxes were not being payed along the chain." *Id.* at 7a. Addressing petitioner's challenges to the jury instructions, the court explained that "a District Court's failure to give a good-faith defense instruction does not constitute an abuse of discretion, so long as the charge included detailed instructions on the elements of the crime." *Id.* at 8a. "Consistent * * * with our practice to view the entire jury charge as a whole," the court concluded, "the record is clear that the District Court adequately charged the jury on willfulness." *Ibid.*[3]

ARGUMENT

1. Petitioner asserts (Pet. 9-10, 11-16) that the court of appeals erred in upholding the district court's jury instructions on "willfulness." That contention lacks merit and does not warrant this Court's review.

According to petitioner, the jury instructions on "willfulness" failed to comply with this Court's decision in *Cheek* v. *United States*, 498 U.S. 192 (1991). Petitioner asserts (Pet. 12-13) that, because one of the alleged objects of the charged conspiracy was tax evasion, the instructions on the conspiracy count should have required the jury to find the element of "willfulness" applicable to the offense of tax evasion. See *Ingram* v. *United States*, 360 U.S. 672, 678 (1959) ("conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself"). Under *Cheek*, the element of "willfulness" under the federal criminal tax statutes means the "voluntary, intentional violation of a known legal duty." 498 U.S. at 200. Petitioner contends (Pet. 13) that the instructions on

[3] Because the court of appeals' opinion is unpublished, it does not establish binding precedent. See 45 Fed. Appx. at 103.

conspiracy erred in failing to incorporate the words "violation of a known legal duty."

Petitioner's argument is without merit. As petitioner correctly assumes (Pet. 12), the district court's general instruction on knowledge and willfulness applied to the conspiracy count. In fact, the jury instructions on the conspiracy count specifically required finding "a given defendant's knowing and willful participation in" the conspiracy. C.A. App. A633. The general instruction on "knowing and willful" required the jury to determine that "the defendant knowingly and willfully violated the law," and it explained that a "person acts 'willfully' if he or she acts voluntarily and intentionally and with the specific intent or purpose to do something the law forbids or with the specific intent to omit something the law requires him or her to do—in other words, with a bad purpose or evil intent to either disobey or disregard the law." *Id.* at A590.

That language is consistent with this Court's decisions construing the element of willfulness under the criminal tax statutes. This Court, in fact, upheld virtually identical language in *United States* v. *Pomponio*, 429 U.S. 10, 11 (1976) (per curiam). Contrary to petitioner's argument (Pet. 12-13), this Court has not suggested that jury instructions on willfulness must contain the exact words "violation of a known legal duty." That requirement can be conveyed in a number of different ways, see *Bryan* v. *United States*, 524 U.S. 184, 194 & n.17 (1998) (discussing *Cheek* and *Pomponio*); *United States* v. *Bishop*, 412 U.S. 346, 360 (1973), and it was sufficiently captured by the instruction in this case. See *United States* v. *Evangelista*, 122 F.3d 112, 116 (2d Cir. 1997) (upholding substantially similar instruction), cert. denied, 522 U.S. 1114 (1998); *United States* v. *McGuire*, 79 F.3d 1396, 1405-1406

(same), vacated on other grounds, 90 F.3d 107 (5th Cir. 1996). The jury's finding that petitioner acted (C.A. App. A590) "with the specific intent or purpose to do something the law forbids or with the specific intent to omit something the law requires him or her to do—in other words, with a bad purpose or evil intent to either disobey or disregard the law," entailed in the context of this case a determination that petitioner knew that the law required payment of taxes on the motor fuel sales described in the indictment. See *Pomponio*, 429 U.S. at 11-13; *McGuire*, 90 F.3d 1405-1406; *United States* v. *Powell*, 955 F.2d 1206, 1211 (9th Cir. 1992) ("government may prove willful conduct by establishing either: (1) that the defendant acted with a bad purpose or evil motive, *or* (2) that the defendant voluntarily, intentionally violated a known legal duty").[4]

2. Petitioner argues (Pet. 10-11, 16-22) that the district court should have instructed the jury on the defense of good-faith reliance on the advice of a tax

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[4] Because the jury instructions on the conspiracy count required a finding that petitioner acted willfully, this case does not implicate any conflict (Pet. 14-16) on whether the *Cheek* definition of willfulness for a substantive tax offense also applies to conspiracies to commit a substantive tax offense. In any event, there is no conflict. The courts of appeals agree that, where one or more of the charged objects of a conspiracy is a substantive tax offense having willfulness as an element, a willfulness instruction must be given on the conspiracy charge with respect to that object. The decisions described by petitioner as adopting a contrary view (Pet. 15) in fact involve conspiracies to defraud the United States by impeding the Internal Revenue Service, which, unlike conspiracies to commit a substantive tax offense, do not implicate the element of willfulness. See *United States* v. *Cyprian*, 23 F.3d 1189, 1201 (7th Cir.), cert. denied, 513 U.S. 879 (1994); *United States* v. *Derezinski*, 945 F.2d 1006, 1012 (8th Cir. 1991).

professional. That fact-bound contention lacks merit and does not warrant review.

Petitioner, relying on this Court's decision in *Mathews* v. *United States*, 485 U.S. 58 (1988), argues that "any time a defendant raises an affirmative theory of his defense, he is entitled to a jury instruction on that issue." Pet. 16. That is incorrect. *Mathews* explained that, "[a]s a general proposition a defendant is entitled to an instruction as to any recognized defense *for which there exists evidence sufficient for a reasonable jury to find in his favor*." 485 U.S. at 63 (emphasis added). In order to be entitled to an instruction on the defense of good-faith reliance on the advice of a tax professional, therefore, the record must contain sufficient evidence for a reasonable jury to conclude that the defendant made a full disclosure of the relevant facts to the professional, that he received and followed advice as to the specific course of conduct in light of those disclosed facts, and that he relied on the professional's advice in good faith. See *Evangelista*, 122 F.3d at 116; *United States* v. *Ibarra-Alcarez*, 830 F.2d 968, 973 (9th Cir. 1987). None of the decisions relied on by petitioner suggests an obligation to instruct the jury on good-faith reliance even in the absence of sufficient record evidence to support the defense.

There was no evidentiary basis in this case for an instruction on good-faith reliance. Petitioner stresses (Pet. 3-4, 16) that his accountant advised him to make tax-free sales of fuel only to those companies that could verify possession of the proper IRS documentation (a 637 License) permitting the company to engage in tax-free transactions. As the court of appeals explained, however, "[i]t did not matter that [petitioner] sold to middle companies in the daisy chain that had 637 Licenses (making the initial transactions tax-exempt)

because [petitioner] clearly knew that he was in effect selling to PetroPlus and that taxes were not being payed along the chain." Pet. App. 7a. There is no evidence from which a reasonable jury could conclude that petitioner made full disclosures to his accountant of the fact that the sales were in actuality to PetroPlus, of the transfer of fuel directly to PetroPlus's account despite the chain of invoices to middle companies in the daisy chain, or of the "numerous examples" in the record "of similar deceptions." *Ibid.* In addition, no jury could have found petitioner's reliance to be in good faith, given that he papered the transactions with invoices that made it seem that he sold the fuel to other entities in the chain so that PetroPlus would appear to receive the fuel with the taxes having already been paid on it.

Contrary to petitioner's contention (Pet. 10), moreover, the court of appeals did not hold "that the *Cheek* instruction on willfulness obviates the need for a separate instruction on reliance upon advice of a tax professional." Petitioner conflates two different good-faith instructions—a general one on good-faith misunderstanding of the law and a specific one (on which he now relies) concerning good-faith reliance on the advice of a professional. As petitioner correctly explained in his post-argument submission to the court of appeals (Pet. C.A. Supp. Br. 3), the defense of good-faith reliance is "*not simply 'a good faith defense*.'" The court of appeals did not specifically address petitioner's contention that he should have received an instruction on good-faith reliance. Instead, the opinion only addresses the general good-faith instruction, and holds correctly that a separate instruction on good-faith is not necessary when the trial court has adequately instructed the jury

on the element of willfulness. Pet. App. 8a.[5] There is no warrant for this Court to grant review of petitioner's fact-bound claim, which lacks an evidentiary basis and was not specifically addressed by the court of appeals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5] In his opening and reply briefs in the court of appeals (Pet. C.A. Br. 39-42; Pet. C.A. Rep. Br. 14-18), petitioner argued that the district court erred in not giving a general good-faith instruction on the conspiracy count. Petitioner mentioned that he relied on his accountant (Pet. C.A. Br. 42 n.10; Pet. C.A. Rep. Br. 14), but he did not develop the argument that the court should have instructed the jury on good-faith reliance on the advice of a tax professional. In his post-argument letter brief, petitioner specifically claimed for the first time in the court of appeals that the district court erred by not instructing the jury on good-faith reliance on the advice of a professional.