No. 02-868

In the Supreme Court of the United States

RONALD W. SKEDDLE, 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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QUESTION PRESENTED

Whether the district court abused its discretion when it denied petitioner's motion for attorneys' fees, costs, and expenses under the Hyde Amendment, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A29-A36) is not published in the Federal Reporter, but is reprinted at 45 Fed. Appx. 443. The opinion of the district court (Pet. App. A1-A28) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 29, 2002. The petition for a writ of certiorari was filed on November 27, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After the presentation of the defense's case during a jury trial, the United States District Court for the Northern District of Ohio granted petitioner's motion

for a judgment of acquittal on two counts of willfully making and subscribing false tax returns, in violation of 26 U.S.C. 7206(1). See Pet. App. A21-A24; Gov't C.A. Br. 3. After his acquittal, petitioner filed a motion under the Hyde Amendment, Pub. L. No. 105-119, Tit. VI, § 617, 111 Stat. 2519, for an award of attorneys' fees, costs, and expenses. The district court denied the motion. Pet. App. A1. The court of appeals affirmed. *Id.* at A29-A36.

1. Petitioner is a former president and chief executive officer of Libbey-Owens-Ford Company (LOF). Petitioner and a vice-president of LOF established a company called Computer Technology Management, Inc. (CTM), which obtained a contract to perform computer work for LOF. The contract provided the LOF executives a profit of "approximately $9,000,000 from undisclosed self-dealing with LOF." Pet. App. A1 n.1; see *id.* at A19, A30-A31.

The LOF executives used a three-tiered structure of corporations to conceal their role in CTM. Earnings from CTM's computer contract flowed to three second-level corporations operated by a friend of the LOF vice-president, and then to three other corporations including SWR Corporation (SWR), which received petitioner's share of the proceeds. To further conceal his own participation in the computer contract, petitioner named his five children as the owners of SWR. Pet. App. A19-A20, A30-A31.

SWR's corporate tax returns for 1991 and 1992 reported that SWR's business was "consulting" and that SWR rendered "computer services." The returns claimed salary deductions for money paid to petitioner's children, although none of the children (who then ranged from 9 to 21 years-old) was employed by SWR. Consulting agreements purported to reflect services

that SWR would provide the second-level companies, but neither petitioner nor his children provided computer consulting services to any of the second-level companies during 1991 or 1992. Pet. App. A20, A22; Gov't C.A. Br. 8-9.

2. In 1995, petitioner and six co-defendants were indicted on mail fraud, wire fraud, conspiracy, and money laundering charges, of which they were acquitted. In 1998, a federal grand jury returned a superseding indictment charging petitioner and two co-defendants with tax fraud and tax conspiracy. Two counts of the superseding indictment charged petitioner with making and subscribing false corporate tax returns, in violation of Section 7206(1). Pet. App. A31; Gov't C.A. Br. 3. The tax conspiracy count was dismissed before trial. Pet. App. A21.

During petitioner's trial, the government attempted to show that SWR's 1991 and 1992 returns were false insofar as they reported that: (1) petitioner's children were the owners of SWR; (2) SWR received gross receipts from the business activity of consulting and the product or service of computer services; and (3) SWR was entitled to claim deductions for salaries and other specified business expenses. Pet. App. A22; Gov't C.A. Br. 14-15. The government advised the court after presenting its case that it could not prove that petitioner falsely claimed that his children were the owners of SWR. Pet. App. A22. Petitioner then challenged the government's other two theories in a motion for a judgment of acquittal under Federal Rule of Criminal Procedure 29. The district court denied the Rule 29 motion because, based on the evidence presented by the government, "the jury could have convicted." *Id.* at A22-A23. Petitioner renewed his Rule 29 motion after

the defense presented its case, and the district court granted the motion at that time.

3. After his trial, petitioner filed a motion under the Hyde Amendment to recover attorneys' fees, costs, and expenses from the government. The Hyde Amendment provides in relevant part:

> [T]he court, in any criminal case (other than a case in which the defendant is represented by assigned counsel paid for by the public) * * * may award to a prevailing party, other than the United States, a reasonable attorney's fee and other litigation expenses, *where the court finds that the position of the United States was vexatious, frivolous, or in bad faith*, unless the court finds that special circumstances make such an award unjust.

18 U.S.C. 3006A note (emphasis added). The district court denied petitioner's motion, concluding that the government's prosecution was not—as the Hyde Amendment requires—"frivolous, vexatious, or in bad faith." Pet. App. A25-A28.

4. The court of appeals affirmed in an unpublished opinion. Pet. App. A29-A36. The court of appeals stated that under the "frivolous" prong of the Hyde Amendment's test, a prevailing defendant who does not show that the prosecution was malicious nevertheless may obtain an award if "the government's position completely lack[ed] evidential or legal merit." *Id.* at A33. The court added, however, that "[t]he Hyde Amendment is not aimed at the general run of prosecutions, or even those that the government loses, but instead at instances of 'prosecutorial misconduct.'" *Ibid.*

Applying the Hyde Amendment standards, the court of appeals considered each of the three theories underlying the government's tax-fraud prosecution. As to

the theory that petitioner's children were not the true owners of SWR, the court concluded that the government's argument—that the children's titular ownership should not be dispositive in light of petitioner's entire scheme—"certainly was not so clearly defective so as to lead us to suspect that the government was up to something nefarious." Pet. App. A35. The court likewise concluded that the government's second theory —that SWR did not receive any gross receipts for consulting or selling computer services—"was not so patently without merit that we must agree that the government had to be aware of its defects." *Ibid.* Finally, the court determined that the government's contention that SWR was not entitled to claim deductions for expenses, including salaries paid to petitioner's children, was based on a "reasonable, if ultimately unsuccessful" theory. *Id.* at A36. The court therefore determined that the district court did not abuse its discretion when it denied petitioner's motion for an award. *Id.* at A34.

ARGUMENT

Petitioner asserts (Pet. 9-16) that the court of appeals erred in affirming the district court's denial of his motion for an award under the Hyde Amendment. Petitioner's contention lacks merit and does not warrant this Court's review.

1. Petitioner argues primarily that the unpublished decision of the court of appeals incorrectly "add[s] a subjective component to the 'frivolous' prong of the Hyde Amendment" (Pet. 13) and therefore conflicts with decisions of other courts that "have held that a legal position is 'frivolous'" within the meaning of the Hyde Amendment "if it is *objectively* without any arguable merit" (Pet. 11). See Pet. 11-13 (discussing

United States v. *Braunstein*, 281 F.3d 982, 995 (9th Cir. 2002); *United States* v. *Knott*, 256 F.3d 20, 29-30 (1st Cir. 2001), cert. denied, 534 U.S. 1127 (2002); *United States* v. *Gilbert*, 198 F.3d 1293, 1304 (11th Cir. 1999)). According to petitioner, the Sixth Circuit has in this case "engrafted" onto the Hyde Amendment's frivolousness standard, in addition to that objective test, a "*subjective* component, that the Government must also be 'up to something nefarious.'" Pet. 11.

Petitioner's argument is unfounded. The court of appeals plainly stated that the Hyde Amendment authorizes an award against the United States if the government's position in the unsuccessful prosecution was frivolous, and that this test "appears only to require that the government's position completely lack[ed] evidential or legal merit." Pet. App. A33. The court of appeals approvingly cited *Knott*, *supra*, as "recognizing that the 'frivolous' element does not require a finding of maliciousness." *Ibid.* Thus, the court of appeals *rejected* the subjective standard that petitioner claims it adopted. There is no conflict with the other decisions on which petitioner relies. Furthermore, the court of appeals' unpublished and non-precedential decision could not create an inter-circuit conflict in any event. See Pet. App. A29; *Manufacturers' Indus. Relations Ass'n* v. *East Akron Casting Co.*, 58 F.3d 204, 208 (6th Cir. 1995) (unpublished Sixth Circuit decision "has no precedential value").

2. As the basis for his allegation of a circuit conflict, petitioner relies (Pet. 12) on the court of appeals' statement (Pet. App. 35) that the government's ownership theory "was not so clearly defective so as to lead us to suspect that the government was up to something nefarious." That statement addressed petitioner's argument "that the government's prosecution of him

was 'vexatious, frivolous, or in bad faith.'" *Id.* at A34. Therefore, in addition to rejecting petitioner's claim that the government's ownership theory was frivolous for lacking factual or legal merit, the court also was rejecting petitioner's claim that the government's position was "vexatious" or "in bad faith." See *id.* at A33. The court's conclusion that the government's position on ownership of SWR "was not so clearly defective so as to lead us to suspect that the government was up to something nefarious," *id.* at A35, resolved all of those objective and subjective issues collectively. It was not a statement limited to petitioner's assertion that the government's position was frivolous. As noted, the court of appeals had already addressed the correct application of the Hyde Amendment's "frivolous" test, saying that it "appears only to require that the government's position completely lack evidential or legal merit." *Id.* at A33.

3. Petitioner further contends that the government's prosecution in this case "was clearly frivolous, because it was foreclosed by binding precedent." Pet. 15 (internal quotation marks omitted). The court of appeals considered and rejected petitioner's assertion that the government's theories were completely devoid of merit under settled precedent. It determined that the government's ownership theory was not manifestly "defective," Pet. App. A35; that the government's theory about SWR's failure to engage in the claimed line of business was not "patently without merit," *ibid.*; and that the government's theory about salary payments to petitioner's children and other claimed business expenses was not "all that absurd" but, rather, "reasonable," *id.* at A35-A36. Those fact-bound determinations do not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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