No. 07-553

In the Supreme Court of the United States

WARD FRANKLIN DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
NATHAN J. HOCHMAN
Assistant Attorney General
ALAN HECHTKOPF
ELISSA HART-MAHAN
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in denying petitioner's motion to stay proceedings to allow him to investigate alleged errors in selecting the jury pool, when the motion was untimely and was not supported by an affidavit.

2. Whether the district court's jury instruction on good faith was erroneous.

3. Whether the district court's jury instruction on the elements of tax evasion constituted plain error.

4. Whether sufficient evidence supported petitioner's conviction for attempting to obstruct the administration of the internal revenue laws.

5. Whether the district court's application of *United States* v. *Booker*, 543 U.S. 220 (2005), at sentencing violated the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and rule: Page

In the Supreme Court of the United States

No. 07-553

WARD FRANKLIN DEAN, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 487 F.3d 840.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 25, 2007. A petition for rehearing was denied on July 27, 2007 (Pet. App. 41a-42a). The petition for a writ of certiorari was filed on October 25, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The appendix to the petition lacks page numbers. For convenience, this brief will refer to the appendix as if its pages were numbered from 1a to 48a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Florida, petitioner was convicted on six counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of attempting to obstruct the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 30a. He was sentenced to 84 months of imprisonment, to be followed by three years of supervised release. *Id.* at 31a-32a. He was also ordered to pay approximately $291,000 in restitution. *Id.* at 35a. The court of appeals affirmed. *Id.* at 1a-28a.

1. In 1996, petitioner, a medical doctor, became a tax protestor. Pet. App. 2a. Although he earned at least $136,000 that year, petitioner filed a "zero" return—that is, a return that stated that he had no income and owed no taxes. *Id.* at 2a-3a. Petitioner "also submitted a revised W-4 form to his employer, claiming that he was exempt from federal income tax withholding." *Id.* at 3a. Petitioner disregarded the returns prepared by his accountant for the 1996 and 1997 tax years, which reflected his actual income and tax liabilities. *Ibid.* He also ignored correspondence from the Internal Revenue Service (IRS) informing him that his "zero" returns were inaccurate and frivolous and that he was required to pay income tax. *Ibid.* Petitioner went on to file "zero" returns for the 1997 through 2001 tax years, in spite of the fact that he continued to earn substantial income. *Id.* at 3a-4a.

In its investigation of petitioner's actual tax debt, the IRS sought to obtain copies of petitioner's financial records by issuing summonses to petitioner's employer and to banks where he had accounts. Pet. App. 4a. Petitioner responded by sending letters to each of those par-

ties advising them that they were "under no obligation to comply with this *fraudulent* 'Summons,'" which, he said, was "a *phony document* sent by a 'Revenue Agent' who has no authority to send a lawful summons to *anyone*." *Ibid.* Meanwhile, in 2002, the district court upheld a $500 penalty that the IRS had imposed on petitioner for filing a frivolous return for the 1997 tax year. *Id.* at 4a-5a. Petitioner earned more than $240,000 in 2002, but he failed to file a tax return. *Id.* at 5a.

2. A grand jury sitting in the Northern District of Florida returned an indictment charging defendant with six counts of tax evasion, in violation of 26 U.S.C. 7201, and one count of attempting to obstruct the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a). Pet. App. 5a. After several delays caused by petitioner, Gov't C.A. Br. 15-23, the district court set a trial date of December 5, 2005. Pet. App. 5a.

On November 24, 2005, petitioner moved to inspect the jury records. Pet. App. 5a. The district court granted the motion on December 1, and petitioner's representative inspected the records the next day. *Ibid.* On December 5—the day the trial was scheduled to begin—petitioner moved to stay the proceedings for failure to comply with the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, in selecting the grand and petit jurors. Pet. App. 5a-6a. Specifically, petitioner alleged that the information he received about potential petit jurors suggested that some of them might not be qualified to serve as jurors under the district's jury plan. *Id.* at 6a. Petitioner also alleged that he had been denied access to the records dealing with grand jury selection. *Ibid.*

The district court held a hearing on petitioner's motion. At the hearing, petitioner conceded that any ques-

tions about the qualifications of the petit jurors could be resolved during voir dire. Pet. App. 6a. The district court agreed to delay the trial to allow petitioner an opportunity to review the grand jury list, but it denied the motion to stay the proceedings, explaining that the motion was untimely and did not include an affidavit, as required by statute. *Id*. at 6a-7a. The court also stated that it believed the motion lacked merit. *Id.* at 7a.

3. At trial, petitioner testified that he had a good-faith belief that he did not have to pay income tax. Gov't C.A. Br. 8. The district court instructed the jury:

> A defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in [good] faith. Nevertheless, you may consider whether the defendant's belief was actually reasonable as a factor in deciding whether he held that belief in good faith.

Pet. App. 16a.

The jury returned a verdict of guilty on all counts. Pet. App. 7a. At sentencing, the district court applied *United States* v. *Booker*, 543 U.S. 220 (2005), and treated the Sentencing Guidelines as advisory, imposing a sentence above the Guidelines range. Pet. App. 23a; Gov't C.A. Br. 13-15. Petitioner was sentenced to 84 months of imprisonment, to be followed by three years of supervised release; he was also ordered to pay approximately $291,000 in restitution. Pet. App. 31a-35a.

4. The court of appeals affirmed. Pet. App. 1a-28a. The court rejected petitioner's argument that the district court should have stayed proceedings to allow further investigation of the selection of the jury pool. The

court of appeals agreed with the district court that the motion was procedurally deficient in two respects: it was untimely, and it was not supported by an affidavit as required by the statute. *Id.* at 11a-14a.

The court of appeals also rejected petitioner's challenge to the jury instructions and to the sufficiency of the evidence. It held that the district court's instruction on good faith correctly explained that a good-faith belief negates the willfulness element required for a conviction under 26 U.S.C. 7201. Pet. App. 15a-18a. Reviewing for plain error, it also concluded that the jury instructions had correctly stated the elements of an offense under Section 7201. *Id.* at 18a-20a. And it determined that petitioner's letters to his employer and to his banks, instructing them that summonses from the IRS were "phony" and "fraudulent," provided a sufficient basis for the jury to conclude that he had attempted to impede the administration of the internal revenue laws. *Id.* at 21a-22a.

Finally, the court of appeals held that the application of *Booker* at sentencing was consistent with the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3, and with due process. Pet. App. 22a-24a.

ARGUMENT

Petitioner contends (Pet. 6-40) that the district court should have granted a stay of proceedings based on alleged deficiencies in selecting the jury pool, that the district court's jury instructions were erroneous, that the evidence was insufficient to convict him of attempting to impede the administration of the internal revenue laws, and that the district court's application of *United States* v. *Booker*, 543 U.S. 220 (2005), violated the Ex Post Facto Clause, U.S. Const. Art. I, § 9, Cl. 3. The

court of appeals carefully considered these arguments and rejected all of them. Its decision does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner asserts (Pet. 6-16) that the district court's denial of his motion to stay the proceedings violated the Jury Selection and Service Act of 1968, 28 U.S.C. 1861 *et seq.*, and that the opinion of the court of appeals conflicts with this Court's opinion in *Test* v. *United States*, 420 U.S. 28 (1975) (per curiam). Contrary to petitioner's argument, the district court's decision was consistent both with the statute and with *Test*.

The Jury Selection and Service Act governs the selection of grand and petit juries in federal court. The Act requires each federal district court to devise a written plan for the random selection of jurors. 28 U.S.C. 1863(a). See Gov't C.A. Br. App. E (jury plan for the Northern District of Florida). The Act also provides that "[t]he parties in a case shall be allowed to inspect, reproduce, and copy" records relating to the jury selection process "at all reasonable times." 28 U.S.C. 1867(f). A defendant who wishes to challenge the jury-selection process must present that challenge "before the voir dire examination begins, or within seven days after the defendant discovered or could have discovered, by the exercise of diligence, the grounds therefor, whichever is earlier." 28 U.S.C. 1867(a). Any motion to stay the proceedings must contain a "sworn statement of facts which, if true, would constitute a substantial failure to comply with [the Act]." 28 U.S.C. 1867(d). The procedures prescribed in Section 1867 "shall be the exclusive means by which a person * * * may challenge any jury on the ground that such jury was not se-

lected in conformity with the provisions of [the Act]." 28 U.S.C. 1867(e).

As the court of appeals explained, petitioner's motion to stay the proceedings was procedurally deficient for two independent reasons. Pet. App. 13a-14a. First, the motion was untimely. Petitioner was indicted on March 17, 2005, but he did not move to stay the proceedings until December 5. Petitioner could have investigated the alleged problems with the jury selection procedures at any time after the indictment, but he did not raise the issue until immediately before the trial was scheduled to begin—more than eight months later, and far more than "seven days after [petitioner] discovered or could have discovered, by the exercise of diligence, the grounds" for his challenge. 28 U.S.C. 1867(a). Petitioner has made no effort to explain the delay. Second, petitioner's motion to stay the proceedings did not contain "a sworn statement of facts which, if true, would constitute a substantial failure to comply with the provisions of [the Act]." 28 U.S.C. 1867(d). Thus, the court of appeals correctly concluded that petitioner's motion to stay the proceedings was procedurally barred.

Contrary to petitioner's suggestion (Pet. 10-14), the decision of the court of appeals is also consistent with *Test*. In *Test*, this Court held that a litigant has a right to inspect jury selection materials under Section 1867, 420 U.S. at 30, but it emphasized that "the statute does limit inspection to 'reasonable times,'" *id.* at 30 n.4. *Test* does not create an unqualified right to inspect jury selection records at any time, nor does it compel a district court to grant a motion to stay the proceedings that does not conform to the requirements of Section 1867. Petitioner's argument rests on the erroneous premise that the district court did not permit him to inspect the

jury selection records. In fact, the district court *granted* his motion to inspect the records. What the district court denied was petitioner's motion to stay the proceedings, and that denial was compelled by the plain language of Section 1867.

2. Petitioner next contends (Pet. 16-23) that the district court's instruction on good faith was erroneous. Petitioner is incorrect.

In order to convict a defendant of a federal tax crime, the government must prove that the defendant acted willfully, that is, that he voluntarily and intentionally violated a known legal duty. See *Cheek* v. *United States*, 498 U.S. 192, 201 (1991). In *Cheek*, this Court held that a defendant's "good-faith belief that he was not violating any of the provisions of the tax laws" negated willfulness. *Id*. at 202. Consistent with *Cheek*, the district court in this case instructed the jury that "[a] defendant does not act willfully if he believes in good faith that he is acting within the law or that his actions comply with the law. This is so even if the defendant's belief was not objectively reasonable as long as he held the belief in [good] faith." Pet. App. 16a.

Petitioner objects (Pet. 21-23) that the court went on to explain that the jury could "consider whether the defendant's belief about the tax statutes was actually reasonable as a factor in deciding whether he held that belief in good faith," Pet. App. 16a, but that statement was also correct. As the Court noted in *Cheek*, "the more unreasonable the asserted beliefs or misunderstandings are, the more likely the jury will consider them to be nothing more than simple disagreement with known legal duties imposed by the tax laws and will find that the Government has carried its burden of proving knowledge." 498 U.S. at 203-204. Several courts of appeals

have approved similar instructions, concluding that *Cheek* permits the jury to consider the reasonableness of a defendant's claimed belief in evaluating whether the defendant actually believed it in good faith. See *United States* v. *Pensyl*, 387 F.3d 456, 459-460 & n.1 (6th Cir. 2004); *United States* v. *Hilgeford*, 7 F.3d 1340, 1343-1344 & n.1 (7th Cir. 1993); *United States* v. *Grunewald*, 987 F.2d 531, 536 (8th Cir. 1993). Petitioner does not allege that the decision of the court of appeals to approve the instruction in his case is inconsistent with any decision of any other court of appeals.

Petitioner asserts (Pet. 19-20) that the district court should have instructed the jury that the government had the burden of negating his good-faith defense. In light of the district court's instruction that the government had to prove that defendant knew of his legal obligations and that petitioner did not willfully violate the law if he had a good-faith belief in the legality of his actions, such an instruction would have been superfluous. A jury is presumed to follow its instructions, see *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000), and here, the jury could not have found petitioner guilty without finding that the government had proved petitioner's knowledge of the law beyond a reasonable doubt, nor could it have convicted petitioner if it had found that petitioner was acting in good faith. Accordingly, the district court's good-faith instruction was sufficient.

3. Petitioner argues (Pet. 23-29) that the district court erred in instructing the jury on the elements of tax evasion. Because petitioner failed to preserve that claim, it was subject to review for plain error only, Pet. App. 18a; see Fed. R. Crim. P. 52(b), and therefore petitioner could prevail only if the error were "obvious." *Johnson* v. *United States*, 520 U.S. 461, 467 (1997). The

court of appeals correctly determined that there was no error.

Tax evasion under 26 U.S.C. 7201 involves "willfully attempting in any manner to evade or defeat any tax imposed by the Internal Revenue Code." *Sansone* v. *United States*, 380 U.S. 343, 350 (1965). The elements of tax evasion are "willfulness, the existence of a tax deficiency, and an affirmative act constituting an evasion or attempted evasion of the tax." *Id.* at 351 (citations omitted). The filing of a false tax return constitutes an affirmative act under 26 U.S.C. 7201. *Sansone*, 380 U.S. at 351-352.

Here, the district court instructed the jury that it could find petitioner guilty of tax evasion only if the government proved beyond a reasonable doubt, "[f]irst: That [petitioner] owed substantial income tax in addition to that declared in his tax return; and [s]econd: That [petitioner] knowingly and willfully attempted to evade or defeat such tax." Pet. App. 46a-47a. The district court further instructed the jury that petitioner could attempt to evade the tax "by willfully failing to report all of the income which he knew he had during that year." *Id.* at 47a. That instruction required the jury to find that petitioner filed a false tax return in order to find him guilty of tax evasion. Although the instruction did not include the phrase "affirmative act," the instruction, when read as a whole, included the three elements identified by this Court in *Sansone*.

Contrary to petitioner's theory, there is no risk that the jury found petitioner guilty based on a finding that he failed to act. In this case, it was undisputed that petitioner filed several returns that reported both his income and his tax liability as "zero." Under the district court's instruction, the jury could find guilt only if it

found that those "zero" returns substantially understated petitioner's tax liability or income and that the understatement was a willful attempt to evade tax. The instruction was entirely consistent with *Sansone* and with the pattern instructions cited by petitioner (Pet. 26-29).

4. Petitioner asserts (Pet. 29-37) that there was insufficient evidence presented at trial to support his conviction under 26 U.S.C. 7212(a) for corruptly impeding or obstructing the due administration of the internal revenue laws. That claim lacks merit.

The courts of appeals have interpreted Section 7212(a) broadly to encompass actions such as filing false tax forms with the IRS, see *United States* v. *Bowman*, 173 F.3d 595, 600 (6th Cir. 1999); filing a false return and false forms, see *United States* v. *Winchell*, 129 F.3d 1093, 1099 (10th Cir. 1997); aiding in the concealment of assets, see *United States* v. *Wilson*, 118 F.3d 228, 234-235 (4th Cir. 1997); and creating a sham corporation to disguise income, see *United States* v. *Popkin*, 943 F.2d 1535, 1541 (11th Cir. 1991), cert. denied, 503 U.S. 1004 (1992). See also *United States* v. *Hanson*, 2 F.3d 942, 947 (9th Cir. 2003) (filing of false IRS forms reporting payments that had never been made and claiming a tax refund that was not due); *United States* v. *Mitchell*, 985 F.2d 1275, 1277, 1279 (4th Cir. 1993) (fraudulent claim and use of tax-exempt status, and inducing others to file false returns); *United States* v. *Kuball*, 976 F.2d 529, 529-531 (9th Cir. 1992) (filing forms that falsely report payments and income and improperly seek a refund); *United States* v. *Williams*, 644 F.2d 696, 701 (8th Cir.) (aiding and abetting the filing of false W-4 forms), cert. denied, 454 U.S. 841 (1981).

In this case, in addition to filing numerous false returns, petitioner sent letters to his banks and employers designed to prevent them from cooperating with the IRS investigation of his income. That conduct easily falls within the scope of Section 7212(a). Contrary to petitioner's assertions (Pet. 33), the letters went beyond advising financial institutions to comply with the law. The letters stated that the summonses sent by the revenue agent who was investigating petitioner were "phony" and "fraudulent," despite the fact that petitioner had received copies of all of the summonses and knew that they came from the IRS. Pet. App. 21a. "The letters closed by threatening legal action against anyone who complied with [the IRS summonses]." *Ibid*. In light of the substantial evidence of petitioner's efforts to disrupt the IRS's investigation, the jury could reasonably conclude that petitioner corruptly endeavored to interfere with the administration of the internal revenue laws.[2]

5. Finally, petitioner contends (Pet. 37-40) that his sentence violates the Ex Post Facto Clause because the district court applied *Booker* in sentencing him to a term that exceeded the range specified by the Sentencing Guidelines. That theory has been rejected by every court of appeals to consider it.

---

[2] Petitioner argues (Pet. 34-37) that his conviction violates the First Amendment. Petitioner did not raise that claim before the district court, see Gov't C.A. Br. 30-31, and the court of appeals did not address it. In any event, the argument lacks merit because there was ample evidence that petitioner's letters were false and fraudulent, and the First Amendment does not protect speech that constitutes fraud or public deception. See, *e.g.*, *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 612 (2003).

The Ex Post Facto Clause prohibits the retroactive application of laws that increase the punishment for a given crime. See *Rogers* v. *Tennessee*, 532 U.S. 451, 456 (2001). The text of the clause is directed to legislatures, not courts. While the Ex Post Facto Clause does not apply to judicial action, this Court has held that "limitations on *ex post facto* judicial decisionmaking are inherent in the notion of due process," *ibid.*, which requires that a defendant have "fair warning" of the criminal penalty resulting from his conduct, *id.* at 459-461.

This Court's decision in *United States* v. *Booker*, 543 U.S. 220 (2005), altered the federal sentencing regime by making the Sentencing Guidelines advisory rather than mandatory. In the wake of *Booker*, a district court must calculate the appropriate advisory Guidelines range and consider all of the factors set out in 18 U.S.C. 3553(a) (2000 & Supp. V 2005) before sentencing, but the sentence need not be within the advisory Guidelines range. See 543 U.S. at 260-261; *United States* v. *Rita*, 127 S. Ct. 2456, 2464 (2007). In this case, the government argued at sentencing that the district court should impose an above-Guidelines sentence because of petitioner's extensive obstructive conduct and because of his role in encouraging others not to pay taxes. Gov't Sentencing Mem. 1-7. The government argued that either an upward departure under the Guidelines or an upward variance based on the Section 3553(a) factors would be appropriate. The court ultimately imposed an above-Guidelines sentence.

Petitioner claims that, because his sentence exceeded the advisory Guidelines range, the retroactive application of this Court's holding in *Booker* violated the Ex Post Facto Clause. This Court's decision in *Booker*, however, did not enact a statute; accordingly, the Ex

Post Facto Clause has no direct application. Nor does the retroactive application of *Booker* in sentencing for pre-*Booker* crimes transgress due process notice concerns. Even under the pre-*Booker* sentencing regime, the district court could have departed upward and imposed exactly the same sentence. See *United States* v. *Lata*, 415 F.3d 107, 112 (1st Cir. 2005). Because petitioner had fair notice that he could be subject to a sentence above the Guidelines range, this Court's decision in *Booker* did not bring about an "unexpected and indefensible" change in the law, and therefore it did not violate the ex post facto principles protected by the Due Process Clause. *Rogers*, 532 U.S. at 457.

Every court of appeals to consider the question has determined that the retroactive application of *Booker* does not violate the Ex Post Facto Clause. See *United States* v. *Barton*, 455 F.3d 649, 656-657 (6th Cir.), cert. denied, 127 S. Ct. 748 (2006); *United States* v. *Pennavaria*, 445 F.3d 720, 723-724 (3d Cir.), cert. denied, 127 S. Ct. 531 (2006); *United States* v. *Davenport*, 445 F.3d 366, 370 (4th Cir. 2006); *United States* v. *Alston-Graves*, 435 F.3d 331, 343 (D.C. Cir. 2006); *United States* v. *Austin*, 432 F.3d 598, 599-600 (5th Cir. 2005); *United States* v. *Vaughn*, 430 F.3d 518, 524-525 (2d Cir. 2005), cert. denied, 547 U.S. 1060 (2006); *United States* v. *Dupas*, 419 F.3d 916, 921 (9th Cir.), cert. denied, 547 U.S. 1011 (2006); *United States* v. *Jamison*, 416 F.3d 538, 539 (7th Cir. 2005); *United States* v. *Lata*, 415 F.3d 107, 110-112 (1st Cir. 2005); *United States* v. *Duncan*, 400 F.3d 1297, 1304 (11th Cir.), cert. denied, 546 U.S. 940 (2005). Particularly in light of the fact that the retroactive application of *Booker* is a matter of steadily diminishing importance and has no prospective significance for crimes committed after the January

2005 decision in *Booker*, this Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NATHAN J. HOCHMAN
Assistant Attorney General

ALAN HECHTKOPF
ELISSA HART-MAHAN
Attorneys

JANUARY 2008