No. 18-8417

IN THE SUPREME COURT OF THE UNITED STATES

ROBERT JACKSON, 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, in this prosecution for knowingly presenting false or fictitious claims against the United States, in violation of 18 U.S.C. 287, the district court abused its discretion in rejecting petitioner's proposed instructions on willfulness and good faith.

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OPINION BELOW

The memorandum opinion of the court of appeals (Pet. App. A1-A5) is not published in the Federal Reporter but is reprinted at 757 Fed. Appx. 547.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 2018. The petition for a writ of certiorari was filed on March 7, 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 Central District of California, petitioner was convicted on one count of conspiracy to defraud the United States by obtaining payment of a false or fictitious claim, in violation of 18 U.S.C. 286, and four counts of submitting false or fictitious claims against the United States, in violation of 18 U.S.C. 287. He was sentenced to three months of imprisonment, to be followed by two years of supervised release. Judgment 1-2; see Gov't C.A. Br. 3-4, 15-16. The court of appeals affirmed. Pet. App. A1-A5.

1. Petitioner and several other members of the U.S. Marine Corps Forces Reserve paid kickbacks to another reservist, Bladamir Flores, who submitted false claims for travel reimbursement on their behalf. Pet. App. A3; Gov't C.A. Br. 3-8. Flores submitted inflated reimbursement claims for petitioner, who subsequently paid back to Flores a percentage of the reimbursements he received. Gov't C.A. Br. 4, 6-7.

Petitioner was charged with 11 counts of submitting "false, fictitious, or fraudulent" claims against the United States, in violation of 18 U.S.C. 287, and one count of conspiring to defraud the United States by obtaining payment of a false, fictitious, or fraudulent claim, in violation 18 U.S.C. 286. Indictment 1-7, 16; see Gov't C.A. Br. 3. As relevant here, Section 287 provides that "[w]hoever makes or presents to any person or officer in the civil,

military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent," is subject to a fine and imprisonment. Before trial, the government provided notice that it intended to proceed solely on the theory that petitioner submitted and conspired to submit false and fictitious claims against the United States, and all references to "fraudulent" claims were therefore struck from the indictment at trial. Gov't C.A. Br. 4.

At trial, petitioner argued, as relevant here, that he suffered from traumatic brain injury and post-traumatic stress disorder and, as a result, lacked the mental state required to violate 18 U.S.C. 287. Pet. C.A. E.R. 279-282, 284, 1308-1312, 1323-1324; Gov't C.A. Br. 9-13. Petitioner requested a jury instruction stating that in order to find him guilty of making a false or fictitious claim against the United States, in violation of 18 U.S.C. 287, the government had to prove that he "willfully" made a claim against the United States for money or property, defining "willfully" as acting "with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with bad purpose to disobey or to disregard the law." Pet. C.A. E.R. 82-83, 101. Petitioner also requested an instruction on "good faith" stating, among other things, that

"[t]he 'good faith' of any or all of the defendants is a complete defense to the charges in the indictment since good faith on the part of any or all of the defendants is simply inconsistent with the intent to defraud, which is an essential part of the charges." Id. at 89.

The district court rejected petitioner's proposed instructions. Pet. C.A. E.R. 112, 299-301, 1155. The court instead instructed the jury that in order to find petitioner guilty of making false claims against the United States, in violation of 18 U.S.C. 287, the government had to prove beyond a reasonable doubt that (1) petitioner "presented or caused to be presented a claim against the United States to any department or agency of the United States," (2) "the claim was false or fictitious," and (3) petitioner "knew the claim was false or fictitious." Pet. C.A. E.R. 1261. The court further instructed the jury that "[a] claim is false or fictitious if untrue when made and known to be untrue when made by the person making it or causing it to be made" ibid.; that "[a]n act is done knowingly" if it is done "without ignorance, mistake or accident," id. at 1263; and that the jury could not find that petitioner acted with the requisite knowledge if it found that petitioner "actually believed that the claims were legitimate" or "was simply careless," ibid.

The jury found petitioner guilty on one count of conspiracy to defraud the United States by obtaining payment of a false or

fictitious claim, in violation of 18 U.S.C. 286, and four counts of submitting false or fictitious claims against the United States, in violation of 18 U.S.C. 287. He was sentenced to three months of imprisonment, to be followed by two years of supervised release. Judgment 1-2; see Gov't C.A. Br. 3-4, 15-16

2. The court of appeals affirmed. Pet. App. A1-A5.

As relevant here, the court of appeals determined that "[t]he district court did not err by failing to instruct the jury that it could only convict on the § 287 false claims charges if they found that [petitioner] acted 'willfully' or with 'intent to defraud.'" Pet. App. A3. "When the Government proceeds on the theory that a defendant submitted 'false or fictitious' rather than 'fraudulent' claims," the court of appeals explained, "the Government needs to prove only knowledge." Ibid. The court also found petitioner's "argument that the district court erred by failing to instruct on a 'good faith' defense [to be] unpersuasive for a similar reason." Ibid. (citing United States v. Milton, 602 F.2d 231, 233 (9th Cir. 1979)). The court explained that "'[t]he failure to give an instruction on a "good faith' "defense is not fatal so long as the court clearly instructed the jury' on the necessary intent element." Ibid. (quoting United States v. Dorotich, 900 F.2d 192, 193 (9th Cir. 1990)) (citation omitted). And "[h]ere," the court determined, "the district court properly instructed on the knowledge element." Ibid.

ARGUMENT

Petitioner renews his contention (Pet. 7-11) that when instructing the jury on the elements of making false or fictitious claims, in violation of 18 U.S.C 287, the district court was required to instruct the jury on willfulness and good faith. The court of appeals correctly determined that the district court did not commit reversible error in rejecting those proposed instructions, and the court of appeals' decision is consistent with precedent from the other courts of appeals. This Court has previously denied petitions raising similar claims. See Green v. United States, 549 U.S. 1055 (2006) (No. 06-5392); Strong v. United States, 522 U.S. 984 (1997) (No. 97-5704). It should follow the same course here.

1. Section 287 imposes criminal penalties on anyone who "makes or presents * * * any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent." 18 U.S.C. 287. Contrary to petitioner's contention (Pet. 7-8), the statute's specification of a "knowing" mens rea forecloses any requirement of proof that the defendant acted willfully -- i.e., "with a bad purpose" or "with knowledge that his conduct was unlawful," Bryan v. United States, 524 U.S. 184, 191 n.13, 193 (1998) (citation and internal quotation marks omitted); it instead "merely requires proof of knowledge of the facts that constitute the offense," id. at 193. See, e.g.,

United States v. Clarke, 801 F.3d 824, 827 (7th Cir. 2015) ("[T]he government need not prove willfulness in a § 287 case."); United States v. Cook, 586 F.2d 572, 574-575 (5th Cir. 1978) (holding that willfulness is not an element of an offense under Section 287), cert. denied, 442 U.S. 909 (1979).

For his argument to the contrary, petitioner relies (Pet. 7-8) on United States v. Maher, 582 F.2d 842 (4th Cir. 1978), cert. denied, 439 U.S. 1115 (1979), but that decision does not support his position. In Maher, the trial court had refused to instruct the jury that a false claim offense under Section 287 requires an intent to defraud and instead had instructed the jury that the government had to prove that the defendant knowingly caused a false claim to be made and that the defendant acted "willfully," by acting "with either a consciousness that he was doing something wrong or with a specific intent to violate the law." Id. at 845. The court of appeals held that a false claim offense under Section 287 "does not require proof of a specific intent to defraud." Id. at 847. The court also found that the district court had properly instructed the jury that Section 287 "may be violated by the submission of a false claim, a fictitious claim, or a fraudulent claim, if * * * the defendant acted with knowledge that the claim was false or fictitious or fraudulent and with a consciousness that he was either doing something which was wrong or which violated the law." Ibid. (citation omitted).

In approving the trial court's jury instructions, which included a requirement of knowledge of wrongdoing or illegality, however, the court in Maher did not hold that a jury must be so instructed. Instead, "[t]he primary issue" confronting the court in that case was "whether the criminal intent essential for conviction [under Section 287] is * * * limited to a specific intent to defraud." 582 F.2d at 843. To the extent that the Fourth Circuit in Maher "assume[d] that the defendant must be willful as well as knowing" to violate Section 287, that assumption was "not [a] holding[]," and "[a]ll the decisions * * * that actually discuss the issue agree" that "willfulness need not be proved." United States v. Catton, 89 F.3d 387, 392 (7th Cir. 1996).

If the Fourth Circuit were ever squarely presented with the issue, it likely would recognize that "willfulness" is not a requisite element under Section 287. No language in the statute requires proof that the defendant acted "willfully" or with any intent to violate the law; to the contrary, it specifies that a defendant violates the statute if he or she makes a claim "knowing such claim to be false, fictitious, or fraudulent." 18 U.S.C. 287 (emphasis added); see United States v. Daughtry, 48 F.3d 829, 832-833 n.* (4th Cir.) ("The word 'willfully' does not appear in § 287 -- the district court apparently read it into the statute."), vacated on other grounds, 516 U.S. 984 (1995). As this Court

explained in Bryan, which was decided after Maher, "unless the text of the statute dictates a different result, the term 'knowingly' merely requires proof of knowledge of the facts that constitute the offense." 524 U.S. at 193 (footnote omitted). There is nothing in the text of Section 287 indicating that Congress intended a different meaning for the term "knowing." Accordingly, the Fourth Circuit has, since Maher, rejected an argument that a district court had plainly erred by declining "to specifically instruct the jury that the making and presenting of false claims under § 287 must have been 'willful.'" United States v. Johnson, 464 Fed. Appx. 175, 176 (2012) (per curiam) (citing, inter alia, Catton, 89 F.3d at 392).

2. The court of appeals also correctly determined that the district court did not commit reversible error in rejecting petitioner's proposed good-faith instruction. A separate instruction on good faith is not required where the trial court correctly instructs on the mental state required for the charged offense. See United States v. Pomponio, 429 U.S. 10, 13 (1976) (per curiam); see also Cheek v. United States, 498 U.S. 192, 201 (1991). That is the case here.

As discussed, Section 287 imposes criminal penalties on anyone who "makes or presents * * * any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false" or "fictitious." The district court correctly

instructed the jury that the government had to prove beyond a reasonable doubt that "the defendant knew the claim was false or fictitious." Pet. C.A. E.R. 1261. The court further instructed the jury that "[a]n act is done knowingly without ignorance, mistake or accident," and that the jury "may not find such knowledge * * * if you find that the defendant actually believed that the claims were legitimate or if you find that the defendant was simply careless." Id. at 1263. Any jury that found that petitioner "knew the claim was false or fictitious," id. at 1261, and did not conclude that petitioner "believed that the claims were legitimate" or that he was "simply careless," id. at 1263, necessarily would also not have concluded that petitioner acted "in good faith" -- i.e., "on a belief or an opinion honestly held," id. at 89 -- under the instruction he requested. Because the substance of any good-faith defense was covered by the instructions given, a separate instruction on good faith was unnecessary. See Pomponio, 429 U.S. at 13 (Because "[t]he trial judge * * * adequately instructed the jury on willfulness," "[a]n additional instruction on good faith was unnecessary"); see also Cheek, 498 U.S. at 201.

The courts of appeals have held, in accordance with Pomponio and Cheek, that it is not reversible error for a district court to decline to give a separate good-faith instruction if the jury is adequately instructed on the mental state required for conviction.

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. McElroy, 910 F.2d 1016, 1026 (2d Cir. 1990); United States v. Gross, 961 F.2d 1097, 1103-1104 (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. Rashid, 383 F.3d 769, 778 (8th Cir. 2004), cert. denied, 543 U.S. 1080 (2005), and judgment vacated on other grounds, 546 U.S. 803 (2005); United States v. Dorotich, 900 F.2d 192, 193-194 (9th Cir. 1990); United States v. Bowling, 619 F.3d 1175, 1183-1185 (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).[1] And courts have specifically applied the principle that it is not reversible error to refuse to give a good-faith instruction when the jury is otherwise adequately instructed on the "knowing" mental state requirement under 18 U.S.C. 287. See, e.g., United States v. James, 712 Fed. Appx. 154, 157 (3d Cir. 2017); Dorotich, 900 F.2d at 193.

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[1] To the extent that the Tenth Circuit may previously have employed a different approach, see Br. in Opp. at 8-9, Green, supra (No. 06-5392), it no longer does so, see Bowling, 619 F.3d at 1183.

Petitioner errs in contending (Pet. 11) that the decision below conflicts with the "Sixth Circuit's recognition of the good faith defense" in United States v. Nash, 175 F.3d 429, cert. denied, 528 U.S. 888 (1999), in which that court affirmed a defendant's Section 287 conviction, notwithstanding that the district court had affirmatively instructed the jury to ignore any evidence regarding good faith in deciding the defendant's guilt on Section 287 false claim counts. Id. at 432, 437. The Sixth Circuit found that limiting instruction erroneous, stating that if the defendant "truly believed in good faith that he was not obligated to pay income taxes, and that he was owed these refunds, then he could not have filed his refund claims knowing that they were false, fictitious, or fraudulent." Id. at 437. But the court reasoned, inter alia, that because the jury had been clearly instructed that it had to find the defendant "knew" the claims were false, fictitious, or fraudulent, "[t]he district court's failure to give[] an additional instruction regarding the good faith defense was therefore harmless error." Ibid.

The result and reasoning of Nash do not conflict with the decision below in this case, which similarly found no reversible error in the absence of a good-faith instruction. And indeed, both Nash and the decision below relied on Dorotich for the principle that "[t]he failure to give an instruction on a 'good faith' defense is not fatal so long as the court clearly instructed

the jury, as to the necessity of specific intent as an element of the crime." Pet. App. A3 (quoting Dorotich, 900 F.2d at 193); see Nash, 175 F.3d at 437 (same).[2] This Court's review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 2019

[2] Some courts have suggested that good faith is not a defense to a charge of violating Section 287. See United States v. Croteau, 819 F.3d 1293, 1307 (11th Cir.) ("[I]t is not clear whether good faith is a defense to a § 287 violation."), cert. denied, 137 S. Ct. 254 (2016); Clarke, 801 F.3d at 828 (good-faith instruction was not necessary because "willfulness is not an element of a § 287 claim"); United States v. Jirak, 728 F.3d 806, 814 (8th Cir. 2013) ("Cheek does not persuade us to conclude that evidence of a good faith belief defense is relevant" when a defendant has been charged with violating Section 287), cert. denied, 572 U.S. 1102 (2014). Those decisions likewise accord with the result below.