NO. 19-_____

In the Supreme Court of the United States

DELMAR L. HARDY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

LACEY STRACHAN
COUNSEL OF RECORD
STEVEN R. TOSCHER
EVAN J. DAVIS
HOCHMAN SALKIN TOSCHER PEREZ, P.C.
9150 WILSHIRE BOULEVARD
SUITE 300
BEVERLY HILLS, CA 90212
(310) 281-3200
STRACHAN@TAXLITIGATOR.COM

JULY 24, 2019 *COUNSEL FOR PETITIONER*

SUPREME COURT PRESS ♦ (888) 958-5705 ♦ BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

Willfulness—the intent to violate the law—is an element of certain federal criminal tax offenses, including IRC § 7206(1). Courts have long recognized that good-faith reliance on the advice of a tax professional negates willfulness, where there has been full disclosure of the material facts to the advisor. In *Cheek v. United States*, 498 U.S. 192 (1991), this Court held that a jury must consider a defendant's subjective belief in determining whether the defendant held a good-faith belief that he was complying with the tax laws. However, the district court in this case refused to give Mr. Hardy's requested reliance-on-accountant instruction based on the court's objective determination that Mr. Hardy's accountant had not actually received all documents necessary to accurately prepare Mr. Hardy's tax returns, disregarding Mr. Hardy's subjective belief that his accountant had all necessary records. In a decision that conflicts with other circuits and relies on a case that preceded *Cheek*, the Ninth Circuit affirmed the district court's refusal to provide the defendant's requested reliance-on-accountant instruction, holding that it is not an abuse of discretion to refuse to give such an instruction where the court has given an adequate instruction on specific intent. The questions presented are:

1. Does this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991), require a court to apply a subjective standard in determining whether there was evidence of full disclosure to support a reliance on a tax professional jury instruction in a criminal tax case?

2. Is a defendant entitled to a jury instruction on the defendant's reliance on a tax professional theory of defense in addition to a standard instruction on specific intent, where there is an adequate foundation for the defense?

LIST OF ALL PROCEEDINGS

United States of America v. Delmar L. Hardy
United States District Court, District of Nevada
Case No. 3:16-cr-00006-MMD-VPC
Date of Entry of Jury Verdict: September 22, 2017 (App.17a)
Date of Entry of Judgment: May 1, 2018

United States of America v. Del Hardy, Esquire, AKA Delmar L. Hardy
United States Court of Appeals for the Ninth Circuit
Case No. 18-10174
Decision Date: March 21, 2019 (App.1a)
Date of Order Denying Petition for Rehearing en banc: April 25, 2019 (App.19a)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS – Continued

Page

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Ninth Circuit is not reported and is reproduced at App.1a-3a. The District Court of Nevada order denying Mr. Hardy's renewed motion for judgment of acquittal and motion for a new trial is not reported and is reproduced at App.4a-16a. The District Court of Nevada ruling on defendant's proposed jury instruction was given at trial and the relevant portion of the trial transcript is reproduced at 31a-42a.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The U.S. Court of Appeals for the Ninth Circuit entered judgment on March 21, 2019. App.1a. The Ninth Circuit denied Mr. Hardy's timely petition for *en banc* review on April 25, 2019. This petition is filed within 90 days of Ninth Circuit's denial of *en banc* review and is therefore timely under Rules 13.1 and 29.2 of this Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. Article III, is reproduced at App.20a.
- U.S. Const. amend. VI, is reproduced at App.22a.

- 26 U.S.C. § 7206, is reproduced at App.22a.
- 26 U.S.C. § 7212, is reproduced at App.24a.

INTRODUCTION

In *Cheek v. United States*, 498 U.S. 192 (1991), this Court recognized that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Cheek v. United States*, 498 U.S. 192, 199–200 (1991). As a result, *Cheek* held that a subjective standard applies to determinations of willfulness, "to avoid criminalizing unwitting violations of the complicated and extensive tax laws." *United States v. Bishop*, 291 F.3d 1100, 1106 (9th Cir. 2002).

As a result of this complexity, taxpayers frequently seek out the assistance of tax professionals. This Court has previously acknowledged the importance of taxpayers being able to rely on the assistance of tax professionals in complying with their tax obligations, explaining:

> When an accountant or attorney advises a taxpayer on a matter of tax law, such as whether a liability exists, it is reasonable for the taxpayer to rely on that advice. Most taxpayers are not competent to discern error in the substantive advice of an accountant or attorney.

United States v. Boyle, 469 U.S. 241 (1984). Reliance on a tax professional is not only a complete defense

to criminal liability, but also a defense to any civil penalties for accuracy-related errors in the taxpayer's returns.

There was ample evidence in the record to support that Mr. Hardy provided his accountant with full access to the financial records necessary to accurately prepare Mr. Hardy's returns and that Mr. Hardy subjectively believed at the time that his accountant had everything he needed. The district court's refusal to allow the instruction in the face of this evidence is in direct conflict with *Cheek*. Under *Cheek*, Mr. Hardy's subjective intent with respect to his defense was a jury question.

On appeal, the Ninth Circuit did not acknowledge this error in the district court's ruling on the disputed jury instruction, instead affirming the district court on the basis of Ninth Circuit precedent that pre-dated *Cheek* and conflicts with decisions in the Sixth, Fourth, Second Circuit, Fifth, and Seventh Circuits. *United States v. Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990) ("We recognize that a number of circuits have held in tax fraud cases that it is reversible error to refuse to give an instruction on good faith reliance on expert advice where some evidence exists to support such a defense.").

This circuit split has created a significant disparity in the rights of federal criminal tax defendants, depending on the circuit in which the case is brought. With the intricacies and complexities of the self-reporting federal tax system, the state of mind element of these crimes is critical to distinguish a criminal taxpayer from a confused taxpayer. This Court should grant certiorari to resolve this circuit split and to

clarify the application of *Cheek* in cases involving reliance-on-professionals defenses.

STATEMENT OF CASE

A. The Charges

After a jury trial, Mr. Hardy was convicted of three counts of filing a false tax return in violation of 26 U.S.C. § 7206(1) (counts two, three, and four of the indictment), relating to cash income from the Hardy Law Group that was not reflected on his tax returns. Mr. Hardy was also charged with a structuring conspiracy for an unrelated business (count one), of which he was acquitted; and with obstructing or impeding the IRS relating to how flow-through profit and expenses from an entity, XYZ, were reported on two of his tax returns, in violation of 26 U.S.C. § 7212 (count five). Count five was dismissed post-verdict as a result of *Marinello v. United States*, 584 U.S. ___ (2018).

B. Evidence at Trial of Mr. Hardy's Reliance on His Accountant

Mr. Hardy defended counts two through four by asserting that he relied on his bookkeeper, Ms. Mack, to provide all financial records to his CPA, Mr. Muhlenberg, and relied on Mr. Muhlenberg to prepare tax returns that properly reported all of his income. The record at trial was replete with evidence that Mr. Hardy (and his bookkeeper, who was tasked with transmitting records to the accountant and admitted she alone chose not to include cash in the QuickBooks

program) subjectively believed that the accountant had all necessary records to prepare complete and accurate returns. This erroneous but honestly held assumption led to the subjective belief—held by Mr. Hardy, as well as his bookkeeper, Ms. Mack, and the accountant, Mr. Muhlenberg—that the returns reflected all income, including income received in cash.

C. Mr. Hardy's Requested Reliance-on-Accountant Instruction

Mr. Hardy proposed a "Reliance on Tax Professional" jury instruction on September 17, 2017. App.26a-30a. The instruction applied to counts two through five, and stated in relevant part:

> Evidence that in good faith Mr. Hardy followed the advice of his tax preparer is inconsistent with such unlawful intent. The Government has not proved intent if you find that before acting, Mr. Hardy 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.

Mr. Hardy argued that access to information, instead of delivery, should be sufficient to constitute full disclosure. App.33a-37a. Further, Mr. Hardy argued that the standard for determining whether there was full disclosure should be subjective. App.37a. He argued:

> This goes back, again, to the subjective intent issue. I mean, if a taxpayer turns over what

> he believes to be the complete and full disclosure—as in this case Mr. Hardy believed that the cash was in the QuickBooks—this seems to be a trap for a taxpayer to somehow—I mean, we've heard testimony Mr. Hardy understood that the cash was in the QuickBooks. So when he provided the QuickBooks, he believed that full disclosure had been provided. App.37a.

The government did not dispute that Mr. Hardy's accountant was provided with access to all of the material information necessary to accurately prepare the returns, including access to the records of the cash receipts. The government instead argued: "I think the evidence here is that there was access provided, but not disclosure." App.32a. In addition to Mr. Muhlenberg having full access to all necessary documents, both parties and the court acknowledged that Ms. Mack had testified that she had told Mr. Muhlenberg about the cash receipt books and that she believed she had given them to him. App.35a, 36a, 38a.

The court concluded that the "full disclosure" requirement "means actual disclosure, not constructive disclosure or theoretical disclosure" and gave the example that providing "access to a computer that has all relevant information" is not sufficient to constitute full disclosure of all relevant information. App.39a-40a. The court rejecting Mr. Hardy's argument that the standard should be the taxpayer's subjective belief, because "intent goes to willfulness" and "does not entitle an instruction of good faith reliance on the tax professional." App.40a. After concluding that the testimony at trial showed a lack of full disclosure to

Mr. Muhlenberg, the court explained: "Whether intentional or inadvertent, it doesn't matter." App.41a.

Relying on the case *United States v. Bishop*, 291 F.3d 1100, 1106 (9th Cir. 2002), which was a bench trial, the court ruled that the good faith reliance instruction does not apply to Counts Two through Four and denied Mr. Hardy's request. App.38a, 42a. However, the court gave a good faith reliance instruction with respect to Count Five. App.42a. The following instruction was read to the jury with respect to Count Five:

> One element that the government must prove beyond a reasonable doubt for Count Five is that the defendant had the unlawful intent to obstruct or impede the due administration of the Internal Revenue laws. Evidence that in good faith defendant followed the advice of his tax preparer is inconsistent with such an unlawful intent.
>
> Unlawful intent has not been proved if the defendant, before acting, made full disclosure of all the material facts to a tax preparer, received the tax preparer's advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith. App.47a.

D. Post-Trial Proceedings and Ninth Circuit Appeal

After the verdict, Mr. Hardy filed a renewed motion for judgment of acquittal and a motion for a new trial, arguing in pertinent part that the district court erred in refusing to give the reliance on tax professional instruction as to Counts Two through Four, because

the evidence showed that he provided all information to his accountant. App.12a-13a. The court denied his motion. App.13a,16a.

Mr. Hardy appealed to the Ninth Circuit, arguing that despite abundant testimony from Mr. Hardy, Ms. Mack, and Mr. Muhlenberg that Mr. Hardy relied on Mr. Muhlenberg and that both Mr. Hardy and Ms. Mack believed in good faith that Mr. Muhlenberg possessed cash receipts records and included cash receipts in the tax returns, the district court refused to give Mr. Hardy's requested theory-of-the-defense instruction concerning reliance on an accountant. Mr. Hardy argued that the district court erroneously concluded based on *Bishop*, a bench trial irrelevant to whether a jury instruction should have been given, that making records available electronically and directing an accountant to records were insufficient to satisfy the "full disclosure" requirement.

The Ninth Circuit affirmed the district court's ruling, explaining that the district court did not abuse its discretion by declining to give Mr. Hardy's requested reliance on the advice of an accountant instructions, because "[t]he district court adequately instructed the jury on specific intent, telling it that the government was required to prove both specific intent and that Hardy did not have a good faith belief that he was complying with the law." App.2a. The Ninth Circuit relied on *United States v. Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990), which held 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." App.2a. Mr. Hardy sought timely panel rehearing and *en banc*

review, which the Ninth Circuit denied on April 25, 2019. App.19a.

REASONS FOR GRANTING THE WRIT

I. NINTH CIRCUIT PRECEDENT ON WHICH THE DECISION BELOW WAS BASED CONFLICTS WITH THIS COURT'S DECISION IN *CHEEK.*

The district court refused to give Mr. Hardy's reliance-on-accountant instruction, which was his theory of the defense, because it found pursuant to *United States v. Bishop*, 291 F.3d 1100, 1106 (9th Cir. 2002), that there was insufficient evidence that Mr. Hardy actually disclosed to his accountant all necessary records to prepare the tax return. In so finding, the district court commented "[w]hether intentional or inadvertent, it doesn't matter." App.41a. This is in direct conflict with this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991).

Cheek mandates that willfulness is a subjective standard, not objective. In the context of a reliance on accountant defense, the distinction between intentionally withholding information from the accountant preparing your return and inadvertently withholding information from the accountant preparing your return goes to the very question of willfulness. Under *Cheek*, that question must be answered by the jury. *Cheek*, 498 U.S. at 203.

In *Cheek*, this Court disagreed the Courts of Appeals' requirement that "a claimed good-faith belief must be objectively reasonable if it is to be considered

as possibly negating the Government's evidence purporting to show a defendant's awareness of the legal duty at issue." *Id.* The Court explained that such a requirement "transforms the inquiry into a legal one and would prevent the jury from considering it." *Id.* This Court noted that "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Id.*

The Ninth Circuit's requirement in *Bishop* that a reliance on a professional defense requires an objective inquiry into whether there was full disclosure is similarly flawed and conflicts with this Court's holding in *Cheek*. *Bishop* purported to consider *Cheek* and determined that the long-standing objective test for reliance instructions was consistent with *Cheek*. *Bishop*, 291 F.3d at 1106. However, *Bishop* merely noted that two out-of-circuit, post-*Cheek* cases upheld an objective test for reliance without noting that neither case analyzed the effect of *Cheek* on the objective test. *Bishop*, 291 F.3d at 1106-07, citing *United States v. Becker*, 965 F.2d 383, 387 (7th Cir. 1992); *United States v. Masat*, 948 F.2d 923, 930 (5th Cir. 1991). However, neither *Becker* nor *Masat* discussed *Cheek*'s profound impact on the reliance instruction; they were merely decided after *Cheek* and used an objective "actual delivery" test to refuse to give a reliance instruction, without considering that *Cheek* had changed the landscape. *Bishop* took comfort in those decisions when none was merited. *Becker* and *Masat* appear to have overlooked the effect of *Cheek*, and *Bishop* claimed the cases supported an objective test when they did not.

In addition to the constitutional concerns with preventing a jury from considering a defendant's reliance on a professional defense, an objective full disclosure requirement is fundamentally inconsistent with the reason why willfulness is an element of the crime. This Court in *United States v. Boyle*, 469 U.S. 241 (1984), recognized that "[t]o require the taxpayer to challenge the attorney, to seek a 'second opinion' or to try to monitor counsel on the provision of the Code himself would nullify the very purpose of seeking the advice of a presumed expert in the first place." It would be directly contrary to *Cheek* to deny a taxpayer a reliance on a professional instruction where the taxpayer subjectively believed that he had provided his accountant with all information needed to prepare his return, but because of the complexity of the tax law, he was unaware that additional information was needed. In such situations, taxpayers rely on their professionals to let them know if additional information is needed. A failure by a professional to make such an inquiry does not have any bearing on a taxpayer's intent.

This conflict is not unexpected, as this Court has not provided guidance regarding the role good-faith belief plays in objective tests, such as in reliance defenses. The Court has been silent as to what an appellate court should do when it is confronted with a defendant's subjective belief that full disclosure of documents to an accountant for tax purposes was given. Because the decision below conflicts with this Court's precedent and this case provides an ideal vehicle to address a constitutional question not yet decided, this Court's review is warranted.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT REGARDING WHETHER A COURT'S FAILURE TO INSTRUCT A JURY ON THE DEFENDANT'S GOOD FAITH RELIANCE ON A PROFESSIONAL DEFENSE CONSTITUTES REVERSIBLE ERROR.

Relying on *United States v. Dorotich*, 900 F.2d 192 (9th Cir. 1990)—a case that predates this Court's decision in *Cheek*—the Ninth Circuit held here that the district court did not abuse its discretion by failing to instruct the jury on Mr. Hardy's good faith reliance on a professional defense, because the "district court adequately instructed the jury on specific intent." This holding not only disregards the importance of having a jury properly consider a defendant's claim of good faith, as this Court explained in *Cheek*, but also deepens an already existing circuit split.

Dorotich recognized that five circuits concluded a court must "give an instruction on a good-faith reliance on expert advice where some evidence exists to support such a defense." *Dorotich*, 900 F.2d at 194 (citing *United States v. Duncan*, 850 F.2d 1104, 1117-1118 (6th Cir. 1988), overruled on other grounds by *Schad v. Arizona*, 501 U.S. 624 (1991); *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); and *United States v. Phillips*, 217 F.2d 435, 440-441 (7th Cir. 1954)). Despite acknowledging these circuits, however, *Dorotich* found that *United States v. Solomon*, 825 F.2d 1292 (9th Cir. 1987), precluded the court from adopting the sister circuits' reasoning, notwithstanding the fact that the issue in *Solomon* was whether a pure "good-faith" instruction

was adequate while the issue in *Dorotich* was whether a good-faith reliance-on-accountant instruction was required. *Id.* at 194.

There persists a circuit split as to whether failure to instruct directly on a good faith reliance on a professional defense is reversible error. The central issue regarding this split is how clearly courts must convey a defendant's theory of defense and the breadth of a good faith defense under *Cheek*: is a generic "good faith" instruction sufficient under the Constitution and *Cheek*, or are courts required to minimize juror confusion and accurately instruct that reliance on professionals negates willfulness if held in subjective good faith? For example, the Seventh Circuit in *United States v. Brimberry*, 961 F.2d 1286, 1291 (7th Cir. 1992), held a *Cheek* instruction "necessarily encompass[es] the good-faith reliance" defense, and, in *Becker*, the court expressed the view that a *Cheek* instruction appropriately "focus[es] the jury's attention on whether the defendant had a good-faith belief he was acting lawfully." *Becker*, 965 F.2d at 388.

However, in stark contrast to the Ninth Circuit decisions discussed above, the Eleventh Circuit found reversible error when a court denied an instruction for a reliance defense because it was for the jury to determine whether the defendants, among other things, "fully and completely" reported income to their accountant in good faith. *United States v. Kottwitz*, 614 F.3d 1241, 1271 (11th Cir. 2010), *opinion withdrawn in part on denial of reh'g*, 627 F.3d 1383 (11th Cir. 2010). There, a defendant "to the best of [his] knowledge and belief [. . .] made available [. . .] all [f]inancial records and related data." Similarly, in *Mitchell*,

after a defendant testified to turning over all relevant information, the Fourth Circuit found a court's charge to the jury "should have at least included the substance" of a reliance instruction, holding error despite the court instructing the jury to acquit if the defendant believed he was acting lawfully "in good faith." *Mitchell*, 495 F.2d at 287-288.

Other circuits are less clear on whether a "good-faith instruction invariably eliminates the need for a court to consider an advice-of-counsel instruction." *United States v. Powers*, 702 F.3d 1, 10 (1st Cir. 2012); *see United States v. Allen*, 670 F.3d 12, 15 (1st Cir. 2012). In *United States v. Regan*, 937 F.2d 823, 830 (2d Cir. 1991), *amended* 946 F.2d 188 (2d Cir. 1991), the Second Circuit determined a generalized good-faith charge was "prejudicial error that tainted all of the tax hierarchy charges" after it failed to "squarely present" the reliance defense to the jury, as they are the "ultimate discipline to a silly argument." *Id.* (not overturned due to no plain error given that the defendant did not object to the charge to the jury) (citing *United States v. Burton*, 737 F.2d 439, 443 (5th Cir. 1984)).

This issue is an exceedingly important one. The Ninth Circuit's decision in this case and in prior cases have deprived defendants of their right to have the jury instructed on their theory of defense. As noted in *Cheek*, "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Cheek*, 498 U.S. at 203. Given the constitutional concerns with the lower court's decision, it is vital for this Court to uphold a defendant's "opportunity

to present his theory of defense." *Duncan*, 850 F.2d at 1117.

The prejudice to Mr. Hardy from the court's failure to instruct the jury on his theory of defense was especially pronounced here, where the absence of such an instruction may have signaled to the jury that a good faith reliance defense was inapplicable to the false return counts. No instruction explicitly permitted the jury to accept Mr. Hardy's subjective reliance theory. Additionally, the court compounded the problem by giving the reliance instruction only as to Count Five rather than to Counts Two through Four. In doing so, the court strongly implied that reliance on a professional was no defense to Counts Two through Four.

Certiorari review is important to resolve this split.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

LACEY STRACHAN
COUNSEL OF RECORD
STEVEN R. TOSCHER
EVAN J. DAVIS
HOCHMAN SALKIN TOSCHER PEREZ, P.C.
9150 WILSHIRE BOULEVARD
SUITE 300
BEVERLY HILLS, CA 90212
(310) 281-3200
STRACHAN@TAXLITIGATOR.COM

COUNSEL FOR PETITIONER

JULY 24, 2019