APPENDIX TABLE OF CONTENTS

MEMORANDUM* OPINION OF THE NINTH CIRCUIT (MARCH 21, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEL HARDY, Esquire, AKA Delmar L. Hardy,

Defendant-Appellant.

No. 18-10174

D.C. No. 3:16-cr-00006-MMD-VPC-1

Appeal from the United States District Court
for the District of Nevada
Miranda M. Du, District Judge, Presiding

Before: M. SMITH, WATFORD, and HURWITZ, Circuit Judges.

Delmar Hardy was convicted under 26 U.S.C. § 7206(1) of three counts of willfully filing false tax returns. We have jurisdiction of this appeal under 28 U.S.C. § 1291 and affirm.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

1. "Good faith reliance on a qualified accountant has long been a defense to willfulness in cases of tax fraud and evasion." *United States v. Bishop*, 291 F.3d 1100, 1106 (9th Cir. 2002). We have made clear, however, 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." *United States v. Dorotich*, 900 F.2d 192, 194 (9th Cir. 1990) (internal quotation marks and citation omitted). The 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. The district court therefore did not abuse its discretion by declining to give Hardy's requested instruction about reliance on the advice of an accountant.

2. The district court did not abuse its discretion in giving a deliberate ignorance instruction. *See United States v. Jewell*, 532 F.2d 697, 700 (9th Cir. 1976) (en banc). The instruction was appropriate in light of evidence that Hardy instructed his office manager to account for cash receipts in a different manner than other payments and did not direct her to send cash receipt records to his accountant. Moreover, although Hardy claimed not to pay attention to his tax returns, his accountant testified that he closely monitored his return's description of a closely held corporation.

3. The court did not abuse its discretion in admitting evidence of Hardy's expenditures and claimed income during the tax years at issue as evidence of his awareness of underreporting of income. *See United States v. Marabelles*, 724 F.2d 1374, 1379 (9th Cir. 1984) ("Although direct proof of a taxpayer's intent to

evade taxes is rarely available, willfulness may be inferred by the trier of fact from all the facts and circumstances of the attempted understatement of tax.").

4. The district court also did not abuse its discretion in excluding expert evidence that accurate tax returns would still have resulted in relatively low liability for Hardy. An absence of tax liability is not a defense to false reporting. *See United States v. Marashi*, 913 F.2d 724, 736 (9th Cir. 1990) ("A violation of 26 U.S.C. § 7206(1) is complete when a taxpayer files a return which he does not believe to be true and correct as to every material matter.") (internal quotation marks omitted).

5. The district court did not abuse its discretion in denying a new trial after its post-verdict dismissal, at the government's request, of Hardy's conviction for one count of corruptly endeavoring to obstruct the due administration of the internal revenue laws, in violation of 26 U.S.C. § 7212(a). The court appropriately rejected Hardy's argument that "spillover" evidence from the dismissed count tainted the convictions on the false tax return counts. *See United States v. Lazarenko*, 564 F.3d 1026, 1043-44 (9th Cir. 2009) (listing relevant factors). The court's instructions—a "critical factor," *id.* at 1043—delineated the different elements of each charged offense. And, the jury, although returning guilty verdicts on four of the counts in the indictment, acquitted on the remaining count. "The fact that the jury rendered selective verdicts is highly indicative of its ability to compartmentalize the evidence." *United States v. Cuozzo*, 962 F.2d 945, 950 (9th Cir. 1992).

AFFIRMED.

ORDER OF THE DISTRICT COURT OF NEVADA (FEBRUARY 7, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DELMAR L. HARDY,

Defendant.

Case No. 3:16-cr-00006-MMD-VPC

Before: Miranda M. DU, United States District Judge

I. Summary

After a trial lasting about two weeks, the jury returned a verdict of guilt against Defendant Delmar L. Hardy ("Hardy") on four of the five counts charged in the Indictment—three counts of false tax returns and one count of corruptly obstructing or impeding due administration of the Internal Revenue laws. (ECF No. 176.) Hardy has filed two post-trial motions: (1) a renewed motion for judgment of acquittal (ECF No. 183); and (2) a motion for a new trial (ECF No. 184). After substitution of counsel, Hardy moved to supplement these two motions. (ECF Nos. 197, 198).

The Court has reviewed the briefs relating to these motions. (ECF Nos. 183, 184, 185, 186, 187, 188, 197, 198, 206, 207, 208, 209.) For the reasons discussed herein, Hardy's motions are denied.

II. Relevant Background

The Indictment charged conduct relating to two separate factual situations. The first situation involved a limited liability company, XYZ Real Estate, LLC ("XYZ"), formed in approximately July 2009. Hardy and Antonio Servidio were members with equal membership interests in XYZ and established XYZ to acquire real properties. Count Five of the Indictment alleges that, between approximately December 2010 and November 2011, Hardy "did corruptly endeavor to obstruct and impede the due administration of the Internal Revenue laws by concealing A.S.'s contributions to, and taxable interests in, XYZ" and by "executing United States Income Tax Return, Form 1040, for each of tax years 2009 and 2010, showing on Schedule E the rental income and expenses incurred by XYZ as that of Hardy [sic] for each of those tax years." (ECF No. 1 at 8.)

The second situation involved Hardy's tax returns for three tax years. Counts Two through Four of the Indictment allege that Hardy made and subscribed false individual tax returns for tax years 2008, 2009 and 2010 in violation of 26 U.S.C. § 7206(1). (*Id.* at 4-8.) The Indictment further identifies the specific items that Hardy knew to be false. For example, Count Two alleges that Hardy's individual income tax return, specifically Form 1040, for the 2008 tax year identified Hardy's business income and adjusted gross income as a loss when he knew his business

income was substantially greater and his adjusted gross income was substantially greater than a loss. (ECF No. 1 at 5.) Counts Three and Four relate to the 2009 and 2010 tax years and include additional allegations relating to Hardy's taxable income, total tax, and the rental income and expenses incurred by XYZ. (*Id.* at 5-6.)

III. Renewed Motion for Judgment of Acquittal

A. Legal Standard

The test for denial of a judgment of acquittal pursuant to Federal Rule of Criminal Procedure 29 is the same as the test for reviewing a claim that the evidence is insufficient to support a conviction. *See, e.g.*, *United States v. Tucker*, 641 F.3d 1110, 1118-19 (9th Cir. 2011); *United States v. Abner*, 35 F.3d 251, 253 (6th Cir. 1994). A criminal defendant's challenge to the constitutional sufficiency of evidence to support a criminal conviction is governed by *Jackson v. Virginia*, 443 U.S. 307, 319 (1979). *Jackson* requires a court, upon such a motion, to construe the evidence "in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* (emphasis in original).

B. Counts Two Through Four

Hardy contends that there was insufficient evidence to support the jury's verdict on Counts Two through Four because the government did not offer evidence to support the offenses charged and instead relied on a new offense not charged in the Indictment. (ECF No. 183 at 3-4.) Hardy insists that because the

Indictment identifies specific line items on his individual tax returns, and the government's witness testified as to false gross receipts on Schedule C, the government effectively attempted to amend the Indictment. The government responds that the Indictment provides sufficient notice of the offenses. (ECF No. 185 at 4-5.) The Court agrees with the government.

The government is not required to state its theory of the case or allege supporting evidence in an indictment; rather, the government need only allege the "essential facts necessary to apprise a defendant of the crime charged." *United States v. Buckley*, 689 F.2d 893, 897 (9th Cir. 1982) (quoting *United States v. Markee*, 425 F.2d 1043, 1047-48 (9th Cir. 1970), *cert. denied*, 400 U.S. 847 (1970)).

For Counts Two through Four, the Indictment alleges that Hardy made and subscribed individual tax returns for tax years 2008, 2009 and 2010 in which "Hardy did not believe to be true and correct as to every material matter" in violation of 26 U.S.C. § 7206(1). (ECF No. 1 at 4-8.) These allegations provide sufficient notice as to the information that Hardy did not believe to be true but that was material to each tax return, particularly since Hardy filed amended tax returns in 2012 to correct the omission of substantial amounts of cash receipts from his 2009 and 2010 tax years. While the Indictment did not indicate that the gross receipt line items were false, the false information as to the gross receipts affected the information on the line items enumerated in the Indictment. Thus, the Court concludes that the Indictment sufficiently informs Hardy of the nature of the offenses charged in Counts Two through Four.

Construing the evidence in the light most favorable to the prosecution, the government offered sufficient evidence such that a rational juror could find the essential elements of the offenses charged beyond a reasonable doubt. Among the elements that the government must establish to support Counts Two through Four is that when Hardy filed an individual tax return for three tax years—2008, 2009 and 2010—he knew the returns contained false information as to a material matter. 26 U.S.C. § 7206(1). The government offered evidence to show that the false information relating to gross income was material and Hardy had knowledge that the returns contained such false, material information. First, there was ample evidence throughout the testimony of Brent Muhlenberg that the 2009 and 2010 returns were amended because of gross errors resulting from the omission of cash receipts and the same omission of cash receipts was made in connection with the 2008 returns.[1] Second, John Saccamano, an agent for the Internal Revenue Service, testified that the changes in gross income as a result of the omission of the cash receipts for the three tax years at issue would have a material impact on the IRS's calculation of Hardy's income. Finally, Patricia Mack testified that on a couple of occasions where she and Hardy would discuss the profit and loss statements, Hardy commented about how he made more money than all the attorneys combined. She testified that, in response, she pointed out to Hardy that the attorneys

---

[1] Muhlenberg testified that the 2008 returns were not amended because he erroneously assumed the statute of limitations had expired, and because the 2009 and 2010 returns were amended to reflect the changes with respect to XYZ.

made more if they had counted the cash received. This evidence is sufficient for a rational juror to find that Hardy had knowledge that his returns for the three tax years at issue did not include the cash income of his law firm.

Hardy further argues that the Court's decision to exclude evidence of tax liability prejudiced him because the government was allowed to present evidence of income and total tax without Hardy being permitted to point out that the resulting tax liability was minimal and therefore immaterial.[2] However, the Ninth Circuit has instructed that "whether there was an actual tax deficiency is irrelevant because the statute [section 7206(1)] is a perjury statute."[3] *United States v. Scholl*, 166 F.3d 964, 980 (9th Cir. 1999). In excluding evidence of tax liability, the Court had also agreed with the government that because actual tax liability is not relevant, permitting Hardy to offer evidence that the resulting tax liability was trivial would pose Fed. R. Evid. 403 concerns.

C. Count Five

Hardy construes Count Five as alleging that "it was improper to attribute all of the rental income

---

[2] The government correctly points out, the Court permitted Hardy to offer evidence to compare total gross receipts to cash receipts as well as evidence regarding the deductions and expenses omitted from the returns to show other errors that Muhlenberg had made. (ECF No. 185 at 6.)

[3] Hardy relies on *United States v. Uchimura*, 125 F.3d 1282, 1285 (9th Cir. 1997) to argue that "the lack of tax deficiency is relevant to a jury's determination of materiality." (ECF No. 183 at 5.) However, *Uchimura* involves whether the materiality is an element of a section 7206 offense and should be submitted to the jury.

and expenses XYZ incurred to [ ] Hardy." (ECF No. 183 at 6.) Based on this construction, Hardy insists that there was no evidence that he was aware of the requirements relating to reporting of partnership interests or income and had relied on Muhlenberg to prepare his returns to reflect his interest in XYZ. (*Id.* at 7-8.) Hardy also contends that the government improperly expanded the charge in the Indictment to allege that a partnership return, Form 1065, should have been filed.

First and foremost, the Court agrees with the government that the Indictment is sufficient to give Hardy notice that the act of concealing Servidio's involvement—Servidio's "contributions to, and taxable interests in XYZ . . . by showing on Schedule E the rental income and expenses incurred by XYZ as that of Hardy"—was the act that "corruptly endeavor[ed] to obstruct and impede the due administration of the Internal Revenue laws." (ECF No. 1 at 8.) Again, the government is not required to include its theory or set forth what evidence supports the offense charged in the Indictment. *See Buckley*, 689 F.2d at 897.

Moreover, the government offered evidence that Hardy and Servidio were equal owners of XYZ, but Hardy claimed 100 percent of XYZ's income and expenses on his own personal returns. Servidio testified that Hardy knew Servidio wanted to keep his name out of XYZ and Hardy told him the only way to protect Servidio was to keep Servidio as a silent partner in XYZ. Muhlenberg testified that Hardy told him to make sure the capital account for XYZ reflected Hardy and Servidio's equal ownership (*i.e.*, a 50-50 split). However, when Muhlenberg asked Hardy for Servidio's social security number to prepare the K-1

form for XYZ, Hardy told Muhlenberg that Servidio did not want to be listed. Saccamano testified that the way Hardy's returns were filed failed to disclose Servidio's ownership in XYZ to the IRS, who would not know to look at XYZ in the event of an audit of Servidio. Viewing this evidence in the light most favorable to the prosecution, a rational juror could find that Hardy endeavored to obstruct and impede the due administration of the Internal Revenue laws. A rational juror could have found that while Hardy relied on Muhlenberg to complete the returns, Muhlenberg was following Hardy's instruction not to include Servidio's interest in XYZ on the returns.

IV. Motion for a New Trial

A. Legal Standard

Pursuant to Federal Rule of Criminal Procedure 33(a), "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Although determining whether to grant a motion for a new trial is left to the district court's discretion, "it should be granted only in exceptional cases in which the evidence preponderates heavily against the verdict." *United States v. Pimentel*, 654 F.2d 538, 545 (9th Cir. 1981) (citation and internal quotation marks omitted). Moreover, the defendant bears the burden of persuasion. *United States v. Endicott*, 869 F.2d 452, 454 (9th Cir. 1989). Such an extraordinary remedy is appropriate, for example, when a court makes an erroneous ruling during the trial and that, but for that erroneous ruling, the outcome of the trial would have been more favorable to the defendant. *See United States v. Butler*, 567 F.2d 885, 891 (9th Cir. 1978).

B. Evidence of Net Worth

Hardy contends that the Court erroneously permitted the government to present a "net worth/ expenditures method" of establishing taxable income without going through the procedure established in *Holland v. United States*, 348 U.S. 121 (1954). (ECF No. 184 at 3.) The government responds that any evidence offered relating to Hardy's expenses and net worth (*i.e.*, Hardy's income as claimed in his mortgage and credit card applications) was relevant as to Hardy's knowledge that his tax returns for the three tax years at issue showing zero taxable income were false. (ECF No. 186 at 4.) The Court agrees with the government. This evidence did not go to Hardy's taxable income and the government did not rely on it to demonstrate his taxable income. Instead, the government relied on other evidence—including Hardy's amended returns for the 2009 and 2010 tax years, Muhlenberg's testimony as to the omissions of cash receipts on these returns and Saccamano's testimony as to the cash income omitted on these returns—to establish Hardy's taxable income. Evidence of Hardy's expenses and claimed income was offered to show Hardy's knowledge that the income information on his returns was false.

C. Reliance on Tax Professional Instruction

Hardy argues that the Court committed error in refusing to give the reliance on tax professional instruction as to Counts Two through Four based on the Court's finding that the evidence proffered at trial did not support giving this instruction. (ECF No. 184 at 5-7.) In particular, Hardy insists that the evidence showed that he provided all information to

Muhlenberg and reasonably relied on Muhlenberg to determine what records were required to prepare accurate returns. The Court disagrees and finds it correctly declined to give this instruction.

In *United States v. Bishop*, 291 F.3d 1100, 1106 (9th Cir. 2002), the Ninth Circuit held that "a defendant claiming good faith reliance on the advice of a tax professional must have made full disclosure of all relevant information to that professional." Here, the Court found that the good faith reliance instruction did not apply to Counts Two through Four because there was no evidence that Muhlenberg had been given full and accurate information about the cash income for the relevant tax years. The Court offered as example that Muhlenberg was not given information showing cash income received or the amount of cash income received before the returns at issue were filed because the cash income was not in Quickbooks and Muhlenberg was not given the cash receipts before the returns at issue were filed. Patricia Mack testified that she was given a box of cash receipts and was told to get them to Muhlenberg after election night on November 6, 2012. Moreover, there were testimonies, including from Hardy and Stephanie Rice, that Hardy found a box of cash receipt books that were not provided to Muhlenberg, and Hardy testified that this incident occurred in the summer of 2012. Those testimonies alone show a lack of full disclosure of information about the cash income to Muhlenberg. The Court again concludes that the evidence did not support giving the requested instruction.

V. Motions to Supplement

Hardy seeks leave to supplement his renewed motion for judgment of acquittal and motion for a new trial to assert additional grounds relating to Count Five based upon *Marinello v. United States*, (No. 16-1144). (ECF Nos. 197, 198.) The government opposes Hardy's motions. The Court agrees with the government.

There is no dispute that the motions to supplement were filed long after the deadline for filing post-trial motions—fourteen days—had expired. Fed. R. Crim. P. 29(c)(1); Fed. R. Crim. P. 33(b)(2). Hardy has not presented good cause to extend the deadline to permit supplementations to raise arguments unrelated to the two post-trial motions that were timely filed. While Hardy substituted new counsel in place of Joseph Low,[4] the government correctly points out that Hardy's other attorneys, Leah Wigren and Steven Wilson, continue to represent Hardy. Ms. Wigren has been extensively involved in filing pretrial motions and post-trial motions. Based on the Court's observations, Mr. Wilson attended the majority of the trial, was involved in presenting arguments as to the jury instructions, and appeared to consult with Mr. Low throughout the trial. Moreover, the proposed supplementations are based on *Marinello*, but the Supreme Court granted the petition for certiorari in *Marinello* on June 27, 2017, over two months before the start of trial. That Hardy's team of attorneys and former counsel may not have been aware of the Court granting

---

[4] The jury returned a verdict on September 22, 2017. (ECF No. 176.) Hardy filed the motion to substitute counsel about two months later on December 19, 2017. (ECF No. 191.)

the petition in *Marinello* does not excuse Hardy's delay. Under these circumstances, the Court finds that Hardy has not established good cause to reopen the briefing on the post-trial motions.

Moreover, even setting aside the delay in bringing the motions to supplement, the Court agrees with the government that the proposed supplements do not warrant reopening the briefing. Hardy's arguments are grounded on how the Supreme Court might rule in *Marinello*, but the trial, including the jury instructions given and the Court's rulings, proceeded based on binding Ninth Circuit case law existing at the time. Hardy cites to no authority to support his request that the Court should permit a defendant to raise arguments based on anticipated rulings in a case pending before the Supreme Court after the jury returned a verdict of guilt. Nor does Hardy offer any authority to support that *Marinello* should be applied retroactively in the event the Supreme Court were to change the essential elements of a section 71212(a) offense.

For these reasons, Hardy's motions to supplement (ECF No. 197, 198) are denied.

{ Continued on the next page }

VI. Conclusion

The Court notes that the parties made several arguments and cited to several cases not discussed above. The Court has reviewed these arguments and cases and determines that they do not warrant discussion as they do not affect the outcome of Hardy's motions.

It is therefore ordered that Hardy's renewed motion for judgment of acquittal (ECF No. 183), motion for a new trial (ECF No. 184) and motions to supplement (ECF Nos. 197, 198) are denied.

DATED THIS 7th day of February 2018.

/s/ Miranda M. Du
United States District Judge

VERDICT FORM
(SEPTEMBER 22, 2017, 2018)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DELMAR L. HARDY,

Defendant.

Case No. 3:16-cr-00006-MMD-VPC

Before: Miranda M. DU, United States District Judge

We, the jury, empaneled in the above-captioned case upon our oath do hereby state that we find the following unanimous verdict:

COUNT 1

Our verdict as to Count One-Conspiracy to Structure Financial Transactions is as follows:

Defendant Delmar Hardy NOT GUILTY

COUNT 2

Our verdict as to Count Two-Making and Subscribing a False Tax Return for Tax Year 2008 is as follows:

Defendant Delmar Hardy GUILTY

COUNT 3

Our verdict as to Count Three-Making and Subscribing a False Tax Return for Tax Year 2009 is as follows:

Defendant Delmar Hardy GUILTY

COUNT 4

Our verdict as to Count Four-Making and Subscribing a False Tax Return for Tax Year 2010 is as follows:

Defendant Delmar Hardy GUILTY

COUNT 5

Our verdict as to Count Five-Corruptly Obstructing or Impeding the Due Administration of the Internal Revenue Laws is as follows:

Defendant Delmar Hardy GUILTY

/s/ Foreman of the Jury

Dated: 9/22/2017

ORDER OF THE NINTH CIRCUIT DENYING PETITION FOR REHEARING EN BANC (APRIL 25, 2019)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

DEL HARDY, Esquire, AKA Delmar L. Hardy,

Defendant-Appellant.

No. 18-10174

D.C. No. 3:16-cr-00006-MMD-VPC-1
District of Nevada, Reno

Before: M. SMITH, WATFORD, and HURWITZ, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc, Dkt. 37, are DENIED.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. Const. Art. III—The Judiciary

Section 1.

The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2.

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.[1]

---

[1] This clause has been affected by the Eleventh Amendment.

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3.

Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted.

U.S. Const. amend. VI—
Jury Trials for Crimes, and Procedural Rights

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 U.S.C. § 7206, I.R.C. § 7206—
Fraud and False Statements

> Any person who—
>
> **(1) Declaration under penalties of perjury**.—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; or
>
> **(2) Aid or assistance**.—Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent

of the person authorized or required to present such return, affidavit, claim, or document; or

(3) Fraudulent bonds, permits, and entries.—Simulates or falsely or fraudulently executes or signs any bond, permit, entry, or other document required by the provisions of the internal revenue laws, or by any regulation made in pursuance thereof, or procures the same to be falsely or fraudulently executed, or advises, aids in, or connives at such execution thereof; or

(4) Removal or concealment with intent to defraud.—Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, or any property upon which levy is authorized by section 6331, with intent to evade or defeat the assessment or collection of any tax imposed by this title; or

(5) Compromises and closing agreements.—In connection with any compromise under section 7122, or offer of such compromise, or in connection with any closing agreement under section 7121, or offer to enter into any such agreement, willfully—

(A) Concealment of property.—Conceals from any officer or employee of the United States any property belonging to the estate of a taxpayer or other person liable in respect of the tax, or

(B) Withholding, falsifying, and destroying records.—Receives, withholds, destroys, mutilates, or falsifies any book, document, or record, or makes any false statement, relating to the estate or financial condition of the

taxpayer or other person liable in respect of the tax;

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 3 years, or both, together with the costs of prosecution.

26 U.S.C. § 7212, I.R.C. § 7212—
Attempts to Interfere with
Administration of Internal Revenue Laws

(a) Corrupt or forcible interference. —

Whoever corruptly or by force or threats of force (including any threatening letter or communication) endeavors to intimidate or impede any officer or employee of the United States acting in an official capacity under this title, or in any other way corruptly or by force or threats of force (including any threatening letter or communication) obstructs or impedes, or endeavors to obstruct or impede, the due administration of this title, shall, upon conviction thereof, be fined not more than $5,000, or imprisoned not more than 3 years, or both, except that if the offense is committed only by threats of force, the person convicted thereof shall be fined not more than $3,000, or imprisoned not more than 1 year, or both. The term "threats of force", as used in this subsection, means threats of bodily harm to the officer or employee of the United States or to a member of his family.

(b) Forcible rescue of seized property.—

Any person who forcibly rescues or causes to be rescued any property after it shall have been seized under this title, or shall attempt or endeavor so to do, shall, excepting in cases otherwise provided for, for every such offense, be fined not more than $500, or not more than double the value of the property so rescued, whichever is the greater, or be imprisoned not more than 2 years.

DEFENDANT DELMAR HARDY'S PROPOSED JURY INSTRUCTION (SEPTEMBER 17, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DELMAR HARDY,

Defendant.

3:16-cr-00006-MMD-VPC

Delmar Hardy, by and through counsel, proposes the following jury instruction.

Counsel respectfully requests that the Court include this instruction in its jury charge. Counsel believes this instruction accurately reflects the case law and other authority cited here, and is a true statements of the law and facts. *See* Exhibit A, Memorandum in support of this instruction.

The Proposed Jury Instruction is:

1. Reliance on Tax Professional

Dated this 17th day of September, 2017

By: /s/ Leah R. Wigren
Counsel for Del Hardy

MR. HARDY'S PROPOSED JURY INSTRUCTION NO. 3:
Reliance on Tax Professional

In Counts Two through Four, the Government must prove beyond a reasonable doubt that Mr. Hardy filed false tax returns.

In Count Five, the Government must prove beyond a reasonable doubt that Mr. Hardy knowingly tried to instruct or impede the due administration of the IRS laws.

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.

AUTHORITY: *Cheek v. United States*, 498 U.S. 192, 201 (1991); *United States v. Bishop*, 291 F.3d 1100 (9th Cir. 2002); *United States v. Van Allen*, 524 F.3d 814 (7th Cir. 2008).

5.9 *Pattern Jury Instructions, Criminal Cases*, Ninth Circuit 2010; 6.12 *Pattern Criminal Jury Instructions*, Seventh Circuit (2012).

MEMORANDUM IN SUPPORT OF PROPOSED JURY INSTRUCTION ON RELIANCE OF TAX PROFESSIONAL

Counsel for Mr. Hardy relied on the following in drafting the attached proposed jury instruction for reliance on a tax professional:

United States v. Bishop, 291 F.3d 1100 (9th Cir. 2002). Good faith reliance on a qualified accountant has long been a defense to willfulness in cases of tax fraud and evasion. [A] defendant may rebut the Government's proof of willfulness by establishing good faith reliance on a qualified accountant after full disclosure of tax-related information.

Willfulness is an element in all criminal tax cases. "Willfulness, as construed by our prior decisions in criminal tax cases, requires the Government to prove that the law imposed a duty on the defendant, that the defendant knew of this duty, and that he voluntarily and intentionally violated that duty." *Cheek v. United States*, 498 U.S. 192, 201 (1991). "[C]arrying this burden requires negating a defendant's claim of ignorance of the law or a claim that because of a misunderstanding of the law, he had a good-faith belief that he was not violating any of the provisions of the tax law. This is so because one cannot be aware that the law imposes a duty upon him and yet be ignorant of it, misunderstand the law, or believe that the duty does not exist." *Id.* at 202. The Court almost 60 years ago interpreted the statutory term "willfully" as used in the federal criminal tax statutes as carving out an exception to the traditional rule. [That ignorance of the law is no defense]. This special treatment of criminal tax offenses

is largely due to the complexity of the tax laws. *Cheek*, 498 U.S. at 200.

In the end, the issue is whether, based on all the evidence, the Government has proved that the defendant was aware of the duty at issue, which cannot be true if the jury credits a good-faith misunderstanding and belief submission, whether or not the claimed belief or misunderstanding is objectively reasonable. *Cheek*, 498 U.S. at 202.

"The rationale behind the subjective standard in *Cheek* is to avoid criminalizing unwitting violations of the complicated and extensive tax laws." *Bishop*, 291 F.3d at 1106.

Counsel also read *United States v. Van Allen*, 524 F.3d 814, 823 (7th Cir. 2008). In that case, the Seventh Circuit listed these factors for a reliance on professional advice jury instruction: A defendant, (1) before taking action, (2) in good faith sought the advice of an attorney whom he considered competent, (3) for the purpose of securing advice on the lawfulness of his possible future conduct, (4) and made a full and accurate report to his attorney of all material facts which the defendant knew, (5) and acted strictly in accordance with the advice of his attorney who had been given a full report.

By: Leah Wigren

Dated: September 17, 2017

DISTRICT COURT'S RULING ON JURY INSTRUCTIONS—RELEVANT EXCERPT (SEPTEMBER 20, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DELMAR HARDY,

Defendant.

No. 3:16-cr-00006-MMD-VPC

Volume XI

Before: The Honorable Miranda M. DU,
District Judge

[September 20, 2017 Transcript, p.2855]

MR. WILSON: I think instead of true it should be false.

THE COURT: Yes. So it would be—the instruction will now read: "You may find the defendant acted knowingly if you find beyond a reasonable doubt that the defendant was aware of a high probability that the income reported on his tax returns for 2008, 2009, 2010 tax years were true—were false, and deliberately avoided learning the

truth. You may not find such knowledge, however, if you find that the defendant actually believed that his tax returns were correct." That would be—"believed that the income reported on his tax returns were correct; or, if you find the defendant was simply careless." That would now be the instruction.

All right. The last instruction is the good faith reliance instruction. I made my ruling on Count Five, finding that that instruction applies to Count Five. As I explained, I think several days ago, I find that the evidence supports my finding that Mr. Hardy made full disclosure of all materials of XYZ ownership relating to XYZ ownership to Mr. Muhlenberg.

Mr. Low wanted to present evidence of full disclosure relating to the tax returns and the income in the income tax returns to support giving the instruction to Count Two to Four. Is there any more that you wanted to add, other than what you provided to me, I think it was last night, Mr. Low?

MR. LOW: Besides what Mr. Hardy testified, yes, there is. And that would be what Mr. Hardy has testified to.

THE COURT: All right. What's the government's response to the argument that there's been evidence of full disclosure?

MR. LANGSTON: Your Honor, I think the evidence here is that there was access provided, but not disclosure. You know, simply providing someone with access to your computer system—you know, if you can imagine that the cash receipt books—

or that the cash receipt summaries that are in evidence had been in a file somewhere on a computer, but you had not, in fact, directed Mr. Muhlenberg to the file, I don't think that that's full disclosure, although that would be full access. And for those reasons, we don't believe that there is sufficient evidence that he disclosed all the material facts.

Mr. Muhlenberg testified that he was unaware of the cash receipt books. And I think the evidence here suggests that there may have been theoretical access, but not disclosure.

THE COURT: Mr. Wilson.

MR. WILSON: I think that's—

THE COURT: Or Mr. Low? Who wants to argue? You both may chime in if you'd like.

MR. WILSON: Okay.

I think that's a fine line, Your Honor. I mean, what the law requires is full disclosure. Again, Mr. Hardy disclosed, through his office, all available financial documents, QuickBooks, Time Slips. The cash receipt books would have been available to Mr. Muhlenberg. Mr. Hardy—so this word about "access," I don't read this—I mean, the government is creating, I guess, it's an affirmative obligation that a taxpayer identify and then somehow ensure that the return preparer has received and reviewed everything. And I don't think that's the standard. I think as long as—full disclosure, to me, is if you have an accountant like Mr. Muhlenberg, who is in the office, I think, once every couple months, I think

he has access. And, I think Patti Mack's testimony, what Mr. Low submitted last night in the transcript, confirms that she tried to instruct Mr. Muhlenberg on how to use Time Slips.

I don't read the disclosure to mean that Mr. Hardy has to sit down with his accountant and go through, item by item, and make sure that Mr. Muhlenberg has picked up or reviewed what was available to him.

I mean, and I would go a little further. I think giving the blind indifference instruction without the reliance instruction is an error because I think if the Court is somehow—

THE COURT: They go to a different issue though.

MR. WILSON: Not really. I mean, if the government is arguing that he had blind indifference, and Mr. Hardy's defense is, well, maybe I, maybe I didn't know exactly what was on the return because I relied on my accountant. I gave him full access.

So the cases I've read, there is—and I wish I had it with me. I didn't know it was going to be an issue, but there are citations where courts have held that giving the blind indifference instruction in combination with a reliance instruction protects the defense that Mr. Hardy, I believe has put on sufficient evidence. I don't think Mr. Hardy has to prove beyond a reasonable doubt that there was full disclosure. I think Mr. Hardy has to present sufficient evidence that the Court could find that Mr. Muhlenberg had everything he knew, everything he believed he needed to prepare a tax return. And if Mr. Muhlenberg made a decision not to access something, I don't

know how you can hold Mr. Hardy accountable for that.

MR. LOW: I have one addition, and it's factual only, if I may. You will recall that Mr. Muhlenberg did say that he did come into the cash receipt records somewhere in the April, May 2012 time frame, through the summer. That's important because it goes to the amendments and when Mr. Muhlenberg had all the information for sure. And that is why the debate on the date as to when some Excel spreadsheet was made is being fought so aggressively.

So, you do have facts to support that Mr. Muhlenberg not only had access, but he also had them personally.

THE COURT: So if he had—but the issue isn't whether he had access after the original returns were filed but before the amended returns were filed, because Count Two and Four go to the initial returns.

MR. LOW: Yes. And that's why I relied upon the Patti Mack information that I cited—I'm sorry—that I drew to your attention in a rough, because Patti Mack said that she believed that she gave them to him and that he had them as well. That is enough foundation right there, factually. And, oh, by the way, it is uncontested because it's the government's witness, who they put on and called, and nobody had discredited that or suggested it wasn't true in any way.

THE COURT: So to be clear, if there is—I'm not resolving factual disputes.

MR. LOW: Right.

THE COURT: So if there's any evidence, that's what I would rely on.

MR. LOW: And that point alone—sorry. I interrupted.

THE COURT: Anything else?

MR. LOW: No. I submit.

MR. LANGSTON: Yes, Your Honor. I believe the things that are alluded to by Mr. Low, without citing them, you know, it's—and I can just go through them line by line, but page 6, that's offered to teach him to use Time Slips.

Page 95, that was not admitted for the truth of the matter asserted and it references 2012.

Page 50, I think it was, again, about access, she told him about the cash receipt books, but did not provide them.

Page 77 is what Mack believed that—Mack believed that Muhlenberg may have had them, but she didn't know that he did. And, again, I don't know that Mack's belief as to this is relevant. It's whether the defendant provided full disclosure.

Page 103 talks about Time Slips.

And I think page 104 talks about the books were given, again, in 2012.

The issue is they are certainly permitted to argue under the willfully matter, that Mr. Hardy believed his returns were correct because he thought he had provided everything. But in order to be able to rely on the accounting instruction, in order to be entitled to it, he's saying that I

relied on my accountant's advice. And you're only allowed to do that if you provided full disclosure to your accountant of all the facts. And that wasn't done here.

MR. WILSON: If I may, Your Honor.

THE COURT: Yes.

MR. WILSON: 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. Unlike the *Bishop* case, where the accountant in that case affirmatively notified the taxpayer, I don't have all the records necessary, in this case there was no question. And again, this—the disclosure is that Mr. Hardy provided everything he believed was necessary—he's not an accountant. If Mr. Muhlenberg needed something else, or he thought there was a discrepancy, had he asked Mr. Hardy that, and Mr. Hardy had refused it, as the taxpayer did in *Bishop*, then I would agree there's not full disclosure. But, I don't know how a taxpayer provides what he believes has already been provided.

MR. LANGSTON: And Your Honor, if I may. The subjective intent standard was specifically rejected by *Bishop*. And I think the issue here is—and taking Mr. Wilson's scenario—if a taxpayer provides a packet of information to an accountant

and inadvertently omits some of the information, the taxpayer able to argue that under willfulness. But they can't say my accountant told me I was entitled to this deduction, if they didn't provide the information to their accountant necessary to make that assessment.

Mr. Hardy may well—Mr. Hardy certainly is arguing that he believed he provided all the information, but I actually think it is an undisputed fact here that he did not, in fact, provide the information.

THE COURT: All right. I want to address, first of all, the fact that both sides alluded to in the rough transcript that's not an official record, and I did review the rough transcript—and as I said, I also relied on my notes and my memory—and none of the sections cited show that Ms. Mack testified that she gave—she actually gave the cash receipt books to Mr. Muhlenberg before the original returns were filed. And that's also consistent with my recollection of the testimony that came in. But let me give you—so for the record, I did review each of the citations that Mr. Low gave me. In addition to that, I also looked at other portions of the rough transcript, including on page 84, on the September 11th morning, where there's testimony that Mrs. Mack thought Mr. Muhlenberg had the cash receipts books, but it turns out he had not gotten them.

With respect to the good faith reliance instruction for Counts Two to Four, I'm going to give you my ruling. I find that the instruction does not apply. In *United States versus Bishop*—this is 291 F.3d 1100. The PIN cite is 1106. It's a Ninth Circuit,

2002 decision. The Court explained that, and I quote: "A defendant may rebut the government's proof of willfulness by establishing good faith reliance on a qualified accountant after full disclosure of tax-related information," end quote.

In that case, the government argued that if a defendant did not make full disclosure to his tax professional, then he probably did not act in good faith. The Court addressed the boundaries of this defense and held that, and I quote again: "A defendant claiming good faith reliance on the advice of a tax professional must have made full disclosure of all relevant information to that professional."

The Seventh Circuit decision, *United States versus Allen*—524 F.3d 814. It's a Seventh Circuit, 2008 decision—that Mr. Wilson cited to previously, provides for the same requirement; and that is, a defendant—that is that the defendant made full disclosure—a full and accurate report to the attorney whose advice defendant claimed to have relied on. In that case, the Seventh Circuit affirmed the District Court's decision not to give the good faith reliance on advice of counsel instruction because of a missing key item of evidence, advice of counsel, because counsel testified that she did not advise defendant to omit assets or business from the bankruptcy petition, and defendant did not show that such advice was given.

I think these decisions support the requirement of full disclosure to the tax professional, or any professional, whether legal or an accountant professional, whose advice a defendant relies on

means actual disclosure, not constructive disclosure or theoretical disclosure. This is because one cannot claim to act on advice of a professional and on the advice given, if one only gives, I quote, access to a computer that has all relevant information, but do not actually disclose the relevant information.

Now, to be sure, I agree with Mr. Wilson that full disclosure requires evidence that—full disclosure does not require evidence that the professional actually reviewed the materials that were disclosed. Disclosure talks about the obligation of the defendant to disclose, not the tax professional's obligation to review what was disclosed.

Mr. Wilson also argues that subjective belief of a taxpayer as to what he provided to his tax preparer is important. But, I agree with Mr. Langston that intent goes to willfulness. It does not entitle an instruction of good faith reliance on the tax professional.

And in this case, Mr. Muhlenberg was not given information showing cash income received or the amount of cash income received before the returns at issue were filed because the cash income was not in QuickBooks and he was not given the cash receipt books before the returns were filed.

Ms. Mack testified that she was given a box of cash receipts and was told to get them to Mr. Muhlenberg after Election Night on November 6th, 2012. There was testimony, including from Mr. Hardy and Ms. Rice, that Mr. Hardy found a box of cash receipt books that were not provided to Mr. Muhlenberg. And Mr. Hardy himself

testified that that occurred in the spring or summer of 2012, after the original returns were filed.

These testimonies, alone, show a lack of full disclosure to Mr. Muhlenberg. Whether intentional or inadvertent, it doesn't matter. There was testimony that Mr. Muhlenberg had access to all financial documents. The fact that Mr. Muhlenberg was offered access to Time Slips, which contained tax income information, and all information on Ms. Mack's computer, via remote access, does not meet the full disclosure requirements for the good faith reliance instruction either, because I cannot find that the advice Mr. Hardy relies upon was based on full disclosure of information.

Mr. Hardy cannot claim that his failure to include cash income on his returns are based on Mr. Muhlenberg's advice not to claim them on his returns, when there's no evidence that the cash income was disclosed to Mr. Muhlenberg, or that the cash receipt books were disclosed to Mr. Muhlenberg before the returns were filed.

Mr. Hardy testified, I think yesterday, that Mr. Muhlenberg must have the cash receipt books in 2009 because Mr. Muhlenberg did the financials in connection with Mr. Hardy's divorce. But, that testimony is no different than saying that Mr. Muhlenberg must have the cash receipt books because he prepared the tax returns. It's not evidence that the cash receipt books were fully disclosed to Mr. Muhlenberg.

I agree it's not Mr. Hardy's burden to show that he acted in good faith or that he did not act willfully. It's the government's burden. I find that the good faith reliance instruction, however, based on the evidence in this case, does not apply to Counts Two through Four because there's no evidence that Mr. Muhlenberg was given full and accurate information about the cash and income for the relevant period of 2008 through 2010.

And on that basis, I deny the request to give the good faith reliance instructions for Counts Two through Four, but it will be given for Count Five.

[. . .]

TRANSCRIPT OF INSTRUCTIONS TO THE JURY—RELEVANT EXCERPTS (SEPTEMBER 21, 2017)

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

UNITED STATES OF AMERICA,

Plaintiff,

v.

DELMAR HARDY,

Defendant.

No. 3:16-cr-00006-MMD-VPC

Volume XII

Before: The Honorable Miranda M. DU,
District Judge

[September 21, 2017 Transcript, p. 2963]

> . . . deposit, withdraw, or otherwise participate in transferring a total of more than $10,000 in cash or currency, using a financial institution or bank, by intentionally setting up or arranging a series of separate transactions, each one involving less than 10,000 in order to evade the currency reporting requirement that would have applied if fewer transactions had been made.

If you find from your consideration of all the evidence that the government has failed to prove any of these elements beyond a reasonable doubt as to the charge of structuring, then you should find the defendant not guilty of that charge.

The defendant is charged in Counts Two through Four of the Indictment with filing a false tax return in violation of Section 7206(1) of Title 26 of the United States Code.

In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant signed and filed a tax return for the year 2008 with respect to Count Two; Year 2009 with respect to Count Three; and year 2010 with respect to Count Four, that he knew contained false information as to a material matter;

Second, the return contained a written declaration that it was signed subject to the penalties of perjury; and

Third, in filing the false tax returns, the defendant acted willfully.

A matter is material if it had a natural tendency to influence or was capable of influencing the decision or activities of the Internal Revenue Service.

In order to prove that the defendant acted willfully, the government must prove beyond a reasonable doubt that the defendant knew federal tax imposed a duty on him, and that the defendant intentionally and voluntarily violated that duty.

A defendant who acts on a good faith misunderstanding as to the requirements of the law does not act willfully, even if his understanding of the law is wrong or unreasonable. Nevertheless, merely disagreeing with the law does not constitute a good faith misunderstanding of the law because all persons have a duty to obey the law whether or not they agree with it. Thus, in order to prove the defendant acted willfully, the government must prove beyond a reasonable doubt the defendant did not have a good faith belief that he was complying the law.

An act is done knowingly if the defendant is aware of the act and does not act through ignorance, mistake, or accident. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence in deciding the defendant acted knowingly.

You may find that the defendant acted knowingly if you find, beyond a reasonable doubt, that the defendant was aware of a high probability that the income reported on his tax returns for 2008, 2009, and 2010 tax years was false, and deliberately avoided learning the truth. You may not find such knowledge, however, if you find that the defendant actually believed the income reported on his tax returns were correct, and if you find that the defendant was simply careless.

The defendant is charged in Count Five of the Indictment with corruptly endeavoring to impede the due administration of the Internal Revenue laws, in violation of Section 7212(a) of Title 26 of the United States Code.

In order for you to find the defendant guilty of this charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant knowingly tried to obstruct or impede the due administration of the Internal Revenue laws; and

Second, the defendant did so corruptly.

Corruptly means to act knowingly and dishonestly, with the specific intent to obtain an unlawful advantage or benefit for oneself or for another.

To obstruct or impede means to engage in some act or take some step to hinder, delay, or prevent the proper administration of the Internal Revenue laws.

Due administration of the Internal Revenue laws includes the Internal Revenue Service carrying out its lawful functions, including to ascertain income, compute, assess and collect income taxes, audit tax returns and records, and investigate possible criminal violations of the Internal Revenue laws.

The government does not have to prove that the administration of the Internal Revenue laws was actually obstructed or impeded. It only has to prove that the defendant corruptly tried to do so.

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.

The punishment provided by law for this crime is for the Court to decide. You may not consider punishment in deciding whether the government has proved its case against . . .

[. . .]