

No. \_\_\_\_

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October Term, 2019

IN THE  
Supreme Court of the United States

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MANUEL ANTONIO SEVERINO,  
*Petitioner,*

v.

UNITED STATES OF AMERICA,  
*Respondent.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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## QUESTION PRESENTED FOR REVIEW

Mr. Manuel Antonio Severino was charged and convicted on thirteen counts of aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2) (Counts 1-13 of a 17-count indictment). That federal law makes it unlawful to **willfully** aid or assist in the preparation or filing of a federal income tax return “which is fraudulent or is false as to any material matter.” 26 U.S.C. § 7206(2). This Court’s precedent holds that “willfulness in [the § 7206] context simply means a voluntary, intentional violation of a known legal duty.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 460-61 (1973).

This petition raises the following question:

**Whether, in a prosecution for aiding and assisting in the preparation or filing of false tax returns under 26 U.S.C. § 7206(2), the government is required to prove beyond a reasonable doubt that the accused voluntarily and intentionally violated a known legal duty as required by this Court’s precedent; or whether, as the Eleventh Circuit held here, it is sufficient if the government merely proves a lower mens rea standard by proving that the accused simply acted with the intent to do something the law forbids?**

## **INTERESTED PARTIES**

There are no parties to the proceeding other than those named in the caption of the case.

## **RELATED CASES**

There are no related cases.

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for the Eleventh Circuit**

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**PETITION FOR WRIT OF CERTIORARI**

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Mr. Manuel Antonio Severino respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in case number 18-12336, in that court on September 3, 2019, *United States v. Manuel Antonio Severino*, which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida

## **OPINION BELOW**

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment and commitment of the United States District Court for the Southern District District of Florida, is contained in the Appendix (A-1).

## **STATEMENT OF JURISDICTION**

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the RULES OF THE SUPREME COURT OF THE UNITED STATES. The decision of the court of appeals was entered on September 3, 2019. This petition is timely filed pursuant to Sup. Ct. R. 13.1. The district court had jurisdiction because petitioner was charged with violating federal criminal laws. The court of appeals had jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742, which provide that courts of appeals shall have jurisdiction for all final decisions of United States district courts.

## **CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

Petitioner intends to rely upon the following constitutional provision:

### **U.S. Const., amend. V:**

No person shall be . . . compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

### **U.S. Const., amend. VI:**

In a criminal prosecution, 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(2):**

Any person who – 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 – shall be guilty of a felony.

**STATEMENT OF THE CASE**

**COURSE OF PROCEEDINGS AND DISPOSITION**

**IN THE DISTRICT COURT**

A federal grand jury in the Southern District of Florida charged Mr. Manuel Severino with thirteen counts of aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2) (Counts 1-13), two counts of wire fraud in violation of 18 U.S.C. § 1343 (Counts 14,15), and two counts of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1) (Counts 16,17). (DE 36). Following a jury trial, Mr. Severino was convicted on all seventeen counts. (DE 68). The district court sentenced Mr. Severino to a 65-month term of imprisonment. (DE 89).

**STATEMENT OF FACTS**

Mr. Manuel Antonio Severino is a forty-five year-old naturalized United States Citizen. Presentence Report (PSR) at ¶¶ 54, 58. Mr. Severino had a difficult childhood with little stability. Born in the Dominican Republic, Mr. Severino was raised by his single mother and maternal grandmother until he was five. He then went to live with his paternal grandmother until he was 14, then with his step grandmother until he was 17 and finally at 17, he came to the United States to live with his mother. PSR ¶ 55. For the past twenty-seven years, Mr. Severino has been a hard-working, law-abiding resident of the United States, becoming a United States Citizen in 2011.

Mr. Severino was raised in poor socio-economic conditions where he often did not have proper clothes to wear, and he was subjected to verbal and physical abuse from his father. *Id.* He dropped out of school at fourteen. *Id.* He has not had any

other formal education. PSR ¶ 63. For nearly two decades, until his arrest in this case, Mr. Severino worked as a cook at a Cuban restaurant in West Palm Beach, Florida. PSR ¶ 65.

For the past twenty-five years Mr. Severino has been in a committed, serious relationship with his common-law wife, Linda Ortiz. PSR ¶ 57. Together, they have raised three children, two of whom are still minors. *Id.*

Prior to this case, Mr. Severino had no involvement with the justice system aside from a couple of minor traffic issues. PSR ¶¶ 44-50. Mr. Severino had zero criminal history points. PSR ¶ 48.

In the instant case, Mr. Severino came to the attention of IRS investigators when they noted a large number of tax returns filed electronically via two IP addresses found to be connected to Mr. Severino. (DE 80:182). A federal grand jury in the Southern District of Florida charged Mr. Manuel Severino with thirteen counts of aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2) (Counts 1-13), two counts of wire fraud in violation of 18 U.S.C. § 1343 (Counts 14,15), and two counts of aggravated identity theft in violation of 18 U.S.C. § 1028A(a)(1) (Counts 16,17). (DE 36). Mr. Severino proceeded to trial.

## **TRIAL**

### Nidia Sierra Sanchez

Nidia Sierra Sanchez testified on behalf of the government. (DE 79:237). Ms. Sanchez testified that, although retired for four or five years, she filed taxes back when she was working as a seamstress. *Id.* at 239. She testified that she neither

spoke nor read English and that she had her tax returns prepared by Mr. Severino. *Id.* Ms. Sanchez testified that she would take her paperwork to Mr. Severino's house and that he would prepare her tax return on his computer. *Id.* at 241, 242. Ms. Sanchez testified that Mr. Severino did not charge her for helping her prepare her taxes and that he did so as a favor for a common friend. *Id.* at 243. Ms. Sanchez could not recall whether she saw or signed her return after it was prepared. *Id.*

The prosecutor showed Ms. Sanchez her 2014 tax return. *Id.* Ms. Sanchez testified that although claimed on the return, she never paid tuition to go to nurse assistant training school and never told Mr. Severino that she had. *Id.* at 244. Similarly, she testified that, although claimed on her return, she never spent \$4,000 on qualified education expenses and that she never told Mr. Severino that she had. *Id.* at 245. She testified that Manuel had prepared that tax return. *Id.* The prosecutor also questioned her regarding her 2015 tax return. She again testified that she had not attended nor paid tuition for a nurse assistance training school, and that she had not sought a credit on her taxes for such a tuition payment. *Id.* at 246. On cross-examination, Ms. Sanchez admitted that she, not Mr. Severino, received the refunds from the government. *Id.* at 250.

Rita Alicia Llerena

Ms. Rita Alicia Llerena testified on behalf of the government. (DE 80:18). Ms. Llerena testified that Mr. Severino was her sister's husband and that she had known him for over twenty years. *Id.* at 20, 21. She also testified that Mr. Severino had prepared her tax returns for the prior ten years. *Id.* at 21, 22. Ms. Llerena testified

that Mr. Severino also prepared taxes for her daughter, Guadalupe Vasquez-Clark, and her son-in-law, Jason Clark. *Id.* at 24. Ms. Llerena testified that she would typically send images of her W-2 forms, and the W-2 forms of her daughter and son-in-law, to Mr. Severino. *Id.* However, she never actually saw Mr. Severino prepare their tax returns. *Id.* at 43. After her tax returns were filed, she, her daughter and her son-in-law would receive tax refunds. *Id.* at 32, 33. Ms. Llerena never stated that she paid Mr. Severino any money for preparing her tax returns and the tax returns of her daughter and son-in-law. Neither her daughter, Guadalupe Vasquez-Clark, nor her son-in-law, Jason Clark, testified at trial.

Although she presently works as a cashier at Walmart, Ms. Llerena testified that she had previously attended Florida Career College and Medvance as an adult student. *Id.* at 20. Ms. Llerena testified that she had never instructed Mr. Severino to request education credits on her tax returns, “not even while [she] was [ ] going to school.” *Id.* at 21. She testified that the education credits on her tax returns prepared by Mr. Severino were not accurate. *Id.* at 25, 26, 30, 31. She also testified that two of her sons were incorrectly listed as dependents on her 2015 tax return. *Id.* at 39.

Ms. Llerena also testified regarding Jason Clark’s tax returns. *Id.* at 26. She testified that she could not remember whether she sent Jason Clark’s 2013 to 2015 W-2s to Mr. Severino or not but she believed Mr. Severino had prepared Jason Clark’s 2013 to 2015 tax returns. *Id.* at 27. She testified that she had never provided Mr. Severino with any information regarding Jason Clark incurring educational expenses

and that any credit for such expenses on his tax returns were not accurate. *Id.* at 28, 35, 37, 38.

Ms. Llerena also testified regarding her daughter's 2013 to 2015 tax returns. *Id.* at 29. Again, Ms. Llerena could not recall whether she sent her daughter's W-2 forms to Mr. Severino, but she believed Mr. Severino had prepared her daughter's 2013 to 2015 tax returns. *Id.* at 29. Ms. Llerena testified that the educational credits claimed for her daughter on her daughter's tax returns for education expenses as a student at Medvance and a nursing student were incorrect. *Id.* at 29, 30, 33, 34, 36. Ms. Llerena conceded that her daughter had been a student at Medvance. *Id.* at 29, 30.

Kenneth Anthony Mestre

Kenneth Mestre testified on behalf of the government. (DE 80:54). Mestre testified that he is the adult son of Rita Llerena and that he lives with her in North Carolina. *Id.* He also testified that he is Mr. Severino's nephew. *Id.* at 55.

Mr. Mestre testified that he had never given Mr. Severino permission to use Mr. Mestre's name or social security number for any purpose. The prosecutor showed Mr. Mestre the tax return for a man named Hugh Parks that listed Mr. Mestre as the nephew and dependent of Hugh Parks. Mr. Mestre testified that he did not know a Hugh Parks and that he was not related to anyone named Hugh Parks although his name and social security number appeared on the tax return for Hugh Parks. *Id.* at 55-59.

Raul Mendoza

Raul Mendoza testified on behalf of the government. (DE 80:148). Mr. Mendoza testified that he was employed as a handyman. Mr. Mendoza had some high school education and trade education, but he always had someone else prepare his tax return. *Id.* at 149, 150. Mr. Mendoza testified that for tax year 2013, he had his tax returns prepared by Mr. Severino. Mr. Mendoza testified that he went to Mr. Severino's house and that Mr. Severino's wife entered his information into a computer. Mr. Mendoza testified that he paid Mr. Severino \$50 for preparing his tax return and that Mr. Severino told him to expect a \$500 refund. *Id.* at 150-155.

When the prosecutor showed Mr. Mendoza his 2013 tax return, Mr. Mendoza testified that he had not provided Mr. Severino with any information regarding Mr. Mendoza having incurred educational expenses or having attended Palm Beach State College as noted on his return. *Id.* at 151-156. Mr. Mendoza also testified that he received a refund of \$500 from the government by way of Mr. Severino and that he was not aware that his refund was actually \$1,206.00. *Id.* at 157-158.

Jorge Oviedo

Mr. Jorge Oviedo, Mr. Mendoza's brother, testified on behalf of the government. (DE 80:162, 174). Mr. Oviedo testified that he was originally from Honduras and that he never went beyond the sixth grade in school. *Id.* at 162, 163. He testified that he has worked construction jobs and works doing pressure cleaning. Mr. Oviedo testified that he has had different individuals prepare his tax returns, but that the last time he had his return prepared by Mr. Severino whom he was told would prepare his tax return for "very little money." *Id.* at 163, 164.

Mr. Oviedo testified that he went to Mr. Severino's house and gave Mr. Severino his name, date of birth and social security number. *Id.* at 165. He also testified that he told Mr. Severino where he was employed and that he had children but that his children were independent adults. Mr. Oviedo testified that Mr. Severino prepared his tax return, but that he never saw the return. He also testified that Mr. Severino told him he would get a refund of \$800 to \$1,200 but that he never received a refund. *Id.* at 167. When the prosecutor showed Mr. Oviedo his 2014 tax return, he testified that the person listed as his niece, and as having incurred educational expenses, was not his niece and that he did not know the person. *Id.* at 167, 168. Although the tax information showed that Mr. Oviedo had been given a \$2,816 refund, Mr. Oviedo testified that he had never received a refund. *Id.* at 169.

#### IRS Agents

Several IRS agents testified on behalf of the government. Agent Stacey Perez testified that the IRS became aware of Mr. Severino when they noted a large number of tax returns that were electronically filed from two IP addresses later identified with Mr. Severino's home with no preparer listed on the tax returns. (DE 80:182). The agent testified that individuals who get paid to prepare tax returns for others are required to sign the return as a preparer. *Id.* The agents testified to the large number of tax returns filed from those IP addresses, the large percentage of those returns that declared American Opportunity credits for educational expenses, and the large number of those claimed credits that were unsubstantiated. *Id.* at 184-190. Georgann Taylor testified that of the tax returns filed with the IP addresses

associated with Mr. Severino in which an American opportunity credit were claimed, 97% and 96% were unsubstantiated, that is there was no tax form from the claimed school. (DE 81: 62, 63). The agents testified that educational institutions are required to file a federal tax form for any individual incurring educational expenses.

One IRS agent, Stanley Lottman, was allowed to testify as an expert witness in IRS practices and procedures for filing and process income tax returns and refunds." (DE 79:180, 181). Mr. Lottman had 36 years of experience as an IRS agent dealing with the numerous Treasury regulations and laws governing taxes. *Id.* at 179. Mr. Lottman explained that the American opportunity credit is a credit that an individual can take against taxes based on expenses for post secondary education. *Id.* at 186. Under IRS regulations, an individual incurring those expenses is supposed to put those expenses on a specific IRS form, form 8863, and attach that form to the individual's tax return. The educational institution has to abide by another IRS regulation in which the institution is required to file another IRS form, form 1098T, that is sent to the IRS and to the individual incurring the expenses. *Id.* at 186-188. However, the credit can only be taken if the expenses were incurred at a qualified school. *Id.* In addition, not only can the individual incurring the expenses request the credit, but also the parent of the individual if the individual is a dependent. *Id.*

#### Rule 29

Following the Government's case-in-chief, counsel for Mr. Severino moved for a judgment of acquittal. (DE 80:241). As to Counts 1-13, counsel for Mr. Severino argued that there had been no evidence that Mr. Severino had elected the American

opportunity credit for all the counts. Counsel for Mr. Severino also argued that as to Counts 1-13, that “there has been no evidence that he acted in breach of a known legal duty, which is a necessary finding with the elements of the offense.” *Id.* at 242. The district court never addressed that specific point and instead the district court went through the witnesses who had actually testified, and although some of the victims had not testified, the district court found that the evidence was sufficient to send Counts 1-13 to the jury. *Id.* at 242-245.

As to Counts 14 and 15, counsel for Mr. Severino argued that there had been insufficient evidence presented to prove a scheme to defraud. *Id.* at 245. Counsel also argued that there was insufficient evidence proving that Mr. Severino actually filed the returns for the victims listed on Counts 14 and 15. *Id.* at 247-249. Counsel made a similar argument as to Counts 16 and 17. *Id.* at 249. The district court denied the motion for a judgment of acquittal. *Id.* at 249, 250. There was no defense case presented.

At the charging conference, counsel for Mr. Severino requested a jury instruction that would have required the jury to find that Mr. Severino intentionally violated a known legal duty. (DE 256-258). In fact, counsel for Mr. Severino cited this Court’s decision in *United States v. Pomponio*. *Id.* at 258. Nevertheless, the district court denied the request. *Id.* at 259. Mr. Severino was convicted on all counts. (DE 68). Based on the advisory sentencing range, the district court imposed a sentence of 33 months on counts 1-13 and a sentence of 41 months on counts 14 and 15. The two sentences were ordered to run concurrently. As required by statute, the district court

imposed a mandatory consecutive sentence of twenty-four months as to Counts 16 and 17 for a total sentence of 65 months' imprisonment. (DE 89). Mr. Severino timely appealed.

On appeal, Mr. Severino argued, *inter alia*, that the district court erred when it rejected his requested instruction that the jury was required to find that Mr. Severino knowingly violated a known legal duty. Mr. Severino also argued that the government failed to prove beyond a reasonable doubt that he had knowingly violated a known legal duty. The Eleventh Circuit rejected those arguments and affirmed Mr. Severino's convictions.

## REASONS FOR GRANTING THE WRIT

The holding of the Eleventh Circuit that a jury instruction and proof that Mr. Severino acted with “the intent to do something the law forbids” satisfies the willfulness element of 26 U.S.C. § 7206(2) is in direct conflict with this Court’s established precedent, *United States v. Pomponio*, 429 U.S. 10 (1976); *United States v. Bishop*, 412 U.S. 346, 460-61 (1973), requiring proof beyond a reasonable doubt that Mr. Severino intentionally violated a known legal duty, and the Eleventh Circuit’s holding also creates a direct conflict with other circuits.

Mr. Manuel Antonio Severino was charged and convicted on thirteen counts of aiding and assisting in the preparation of false tax returns in violation of 26 U.S.C. § 7206(2) (Counts 1-13 of a 17-count indictment). That federal law makes it unlawful to **willfully** aid or assist in the preparation or filing of a false federal income tax return. 26 U.S.C. § 7206(2). Specifically, that provision states as follows:

Any person who – 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 – shall be guilty of a felony.

26 U.S.C. § 7206(2).

This Court has held that “willfulness in [the § 7206] context simply means a voluntary, intentional violation of a known legal duty.” *United States v. Pomponio*, 429 U.S. 10, 12 (1976); *United States v. Bishop*, 412 U.S. 346, 460-61 (1973). Other

Circuit Courts of Appeal have faithfully followed *Pomonio* and *Bishop* and have held the willfulness element in § 7206(2) requires proof of a voluntary, intentional violation of a known legal duty. *See United States v. Stadtmauer*, 620 F.3d 238, 247 (3d Cir. 2010); *United States v. Aaron*, 590 F.3d 405, 409 (6th Cir. 2009); *United States v. Gurary*, 860 F.2d 521, 523 (2d Cir. 1988); *see also United States v. Toto-Ngosso*, 407 Fed.App'x 687, 689-90 (4th Cir. 2011) (unpublished); *United States v. Amundsen*, 967 F.2d 592 at \*2 (9th Cir. 1992) (unpublished).

Following the Government's case-in-chief, counsel for Mr. Severino moved for a judgment of acquittal. (DE 80:241). As to Counts 1-13, counsel for Mr. Severino argued that there had been no evidence that Mr. Severino had elected the American opportunity credit for all the counts. Counsel for Mr. Severino also argued that as to Counts 1-13, that "there has been no evidence that he acted in breach of a known legal duty, which is a necessary finding with the elements of the offense." *Id.* at 242. The district court never addressed that specific point and instead the district court went through the witnesses who had actually testified, and although some of the victims had not testified, the district court found that the evidence was sufficient to send Counts 1-13 to the jury. *Id.* at 242-245.

At the charging conference, counsel for Mr. Severino, consistent with this Court's precedent, requested a jury instruction that would have required the jury to find that Mr. Severino intentionally violated a known legal duty. (DE 256-258). In fact, counsel for Mr. Severino specifically cited this Court's decision in *United States*

*v. Pomponio.* *Id.* at 258. Nevertheless, the district court denied the request. *Id.* at 259.

No other instruction given by the Court accurately covered the requisite scienter requirement. Rather than give the scienter instruction mandated by controlling precedent and requested by counsel for Mr. Severino, the district court instructed the jury as follows:

It is a federal crime to willfully aid or assist to prepare under the internal revenue laws a document that is false or fraudulent as to any material fact. The defendant can be found guilty of this crime only if all the following facts are proved beyond a reasonable doubt: . . . and five, the defendant did so with the intent to do something the defendant knew the law forbids.

(DE :66, 67) (emphasis added).

On appeal, the Eleventh Circuit held that the requested instruction, that the government must prove that Mr. Severino intentionally violated a known legal duty, was “substantially covered” by the instruction requiring only that the jury find that Mr. Severino “intended to do something the law forbids.” *Severino*, at 12. Similarly, the Eleventh Circuit held that the government’s proof that Mr. Severino intended to do something the law forbids satisfied the willfulness element of § 7206(2). Those holdings are contrary to the established law in this Court.

In *Pomponio*, this Court addressed the willfulness requirement in a prosecution for willfully filing false tax returns in violation of 26 U.S.C. § 7206. *Pomponio*, 429 U.S. at 10. This Court, in a per curiam opinion, held that the government was required to prove the intentional violation of a known legal duty. *Id.* at 12. The *Pomponio* decision merely echoed what this Court had previously held,

that for both misdemeanor and felony prosecutions of filing false tax returns, the willfulness element requires proof of an intentional violation of a known legal duty. *See United States v. Bishop*, 412 U.S. 346, 460-61 (1973). This Court cited the specific nature of tax laws as requiring a heightened willfulness standard. *Id.* This Court has consistently applied that same higher willfulness standard, requiring intentional violation of a known legal duty, to offenses in which the conduct is not inherently illegal such as financial structuring. *See Ratzlaf v. United States*, 510 U.S. 135, 147-149 (1994). In contrast, this Court has applied a lower willfulness standard, requiring only that the defendant know that his conduct was unlawful, where the illicit nature of the conduct is more apparent and there is less of a chance that innocent people will be ensnared in a criminal prosecution. *See Bryan v. United States*, 524 U.S. 184, 194-199 (1998) (applying the lower willfulness standard to a prosecution for selling firearms without a license).

The failure to give the requested instruction seriously impaired Mr. Severino's ability to present an effective defense in that the failure relieved the government of its burden to prove an essential element of the offense beyond a reasonable doubt. That was certainly true here where the government relied on circumstantial evidence to prove the intent requirement in the § 7206(2) offense. However, the district court's refusal to properly instruct the jury as to that essential element, as requested by counsel for Mr. Severino, relieved the prosecution of its burden of proving that element as required.

In addition to the fact that the jury was improperly instructed on the willfulness element, as argued above, the government failed to present any evidence that Mr. Severino intentionally violated a known legal duty.

The government's evidence against Mr. Severino consisted mainly of friends, family and neighbors of Mr. Severino testifying that Mr. Severino had prepared their tax return for free as a favor or for a modest fee. There was no evidence presented by the government that Mr. Severino had any great level of knowledge or sophistication with regard to preparing tax returns for others. There was no evidence that he worked as an official tax preparer or that he had signed up with the IRS in order to be able to prepare and electronically file returns on behalf of others. In fact, the evidence presented a complete lack of sophistication from Mr. Severino. Based on the testimony from the IRS agents who reviewed the numerous returns filed from Mr. Severino's home computer, it appears that Mr. Severino routinely requested educational tax credits on behalf of the individuals he filed tax returns for without verifying or even asking whether they had incurred those expenses.

The IRS agents testified that the educational institutions were required to file specific forms with the IRS for anyone incurring educational expenses and that the specific form, for the specific individual student, would be used to verify the requested credit on a tax return. There was no evidence that Mr. Severino was aware of any regulation and requirements associated with claiming the educational costs credit. There was also no evidence that Mr. Severino was aware of what his legal obligations

were concerning filing tax returns for other people or whether he would even be allowed to file tax returns for other individuals legally.

Mr. Severino was an unsophisticated defendant. He quit school as a teenager in the Dominican Republic and had no more formal education. For nearly twenty years he worked the same job: a cook at a Cuban restaurant. There was no evidence that he had ever taken a course or been trained in tax preparation of any kind. In sum, there was no evidence that Mr. Severino was aware of any legal duty regarding assisting others with tax returns, filing tax returns for others electronically or requesting specific credits under the tax laws. The people he filed tax returns for were family, friends, neighbors. He did not charge them very much to help them file tax returns. For some people he charged nothing at all.

There was no sophistication to the offense either. Even the district court noted the lack of sophistication. (DE 98:26, 28). People would come to him asking for help. They would often not bring him W2s or other documentation that a trained tax preparer would know to request. He would ask them questions and accept their answers and enter the information online for them. Although the evidence showed that he may have profited some by his actions, there was no evidence of a lavish lifestyle that one would typically associate with large profits from a sophisticated fraud.

There was no evidence that Mr. Severino had been made aware of the legal duty involved in the offense either from the IRS or from a third party. The offense and the scheme charged by the government was complicated enough that the

government required the testimony of an expert witness with over 30 years' experience with the intricacies of IRS regulations to properly explain it to the jury.

Even viewed in the light most favorable to the jury, the evidence failed to prove beyond a reasonable doubt that Mr. Severino was aware of any legal duty regarding his actions let alone that he intentionally violated that duty. At best, the jury would have had to rely on mere speculation that there was a legal duty, that Mr. Severino was clearly aware of that legal duty, and that he then intentionally violated that known legal duty. Such mere speculation is insufficient to support a conviction.

Mr. Severino argued the lack of evidence on a known legal duty in his motion for judgment of acquittal. (DE 80:242). Had the jury been properly instructed regarding the heightened *mens rea* requirement, there would have been NO evidence that Mr. Severino was aware of his legal duty let alone that he had a specific intent to violate that legal duty. However, the district court's erroneous instruction prevented Mr. Severino from arguing that the government had failed to prove that essential element because the erroneous instruction relieved the government of its burden to prove every essential element of the offense beyond a reasonable doubt.

Plainly, the Eleventh Circuit court of appeals applied an incorrect standard for the willfulness element required for a prosecution for filing false tax returns. The Eleventh Circuit failed to apply the standard applied by the precedent of this Court and followed by other circuits that the government must prove the intentional violation of a known legal duty. That was the standard requested by Mr. Severino at his trial. The standard applied by the Eleventh Circuit, requiring only that Mr.

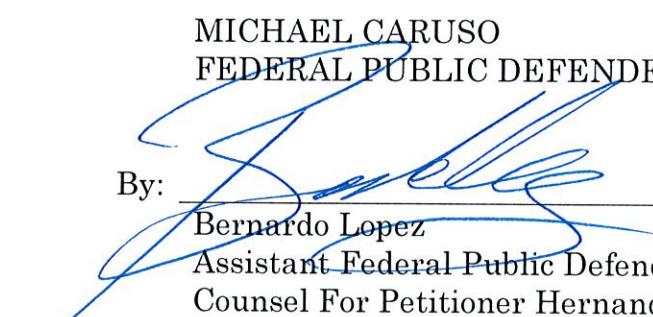
Severino knowingly did something that the law forbids, violated Mr. Severino's Fifth Amendment and Sixth Amendment rights. Had the proper standard been applied, Mr. Severino's conviction would not stand.

## CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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