No. ____

October Term, 2020

IN THE
Supreme Court of the United States

OLRY MAURIVAL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

AMENDED PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

I. WHETHER THE VERDICT OF GUILT WAS SUPPORTED BY SUFFCIENT EVIDENCE TO SUSTAIN A CONVICTION, AND THE EVIDENCE, VIEWED IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT, WITH ALL REASONBLE INFERENCES AND CREDIBILITY CHOICES IN FAVOR OF THE JURY'S VERDICT, WAS SUFFICIENT SUCH THAT ANY RATIONAL TRIER OF FACT COULD NOT HAVE FOUND THAT THE ESSENTIAL EVIDENCE REQUIRED FOR THE GOVERNMENT TO PROVE THE OFFENSES OF CONSPIRACY TO DEFAUD THE UNITED STATES OF AMERICA, AIDING AND ASSISTING THE PREPARATION OF FALSE TAX RETURNS and MAKING AND SUBSCRIBING A FALSE TAX RETURN.

II. DID THE DISTRICT COURT ERR BY ALLOWING A WITNESSES TO TESTIFY AS TO HEARSAY IN VIOLATION OF F.R.E. 801(d)(2)E WHEN THE STATEMENT, OFFERED AND ACCEPTED OVER OBJECTION, WAS MADE BY AN UNINDICTED CO-CONSPIRATOR AT A TIME CLEARLY OUTSIDE OF THE CHARGED CONSPIRACY AND NOT MADE IN FURTHERANCE OF THE CONSPIRACY, AND ADDUCED SOLELY TO IDENTIFY APPELLANT IN CONNECTION WITH THE CONSPIRACY. FURTHER, THE STATEMENT'S INTRODUCTION WAS VIOLATION UNDER *CRAWFORD* AND U.S. CONST. AMEND. VI.

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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PETITION FOR WRIT OF CERTIORARI

Mr. Olry Maurival 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 19-15163 in that the court on March 22, 2021, *United States v. Maurival,* which affirmed the judgment and commitment of the United States District Court for the Southern District of Florida, and the denial of a Petition for Rehearing en banc that was denied on May 14, 2021, with a corresponding Mandate issue on May 24, 2021.

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, as well as the Order denying the Petition for Rehearing en banc 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 March 22, 2021, and a timely Petition for Rehearing en banc was filed and denied on May 14, 2021. This petition is timely in that this Honorable Court has extended the time period for filing a Petition for Writ of Certiorari to 150 days due to the COVID-19 pandemic, thereby making the Petition for Certiorari to be due not later than August 19, 2021, but a Petition for Rehearing en banc was filed. This was disposed and denied on May 14, 2021. 150-days from that date is September 29, 2021. 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 PROVISIONS INVOLVED

Petitioner intends to rely upon the following constitutional provision:

U.S. Const., amend. VI:

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. [Emphasis added].

Statement of the Case

A. Course of the case in the Court below

On April 9, 2019, an Indictment was returned in the Southern District of Florida charging Appellant and co-defendants Paula Pognon and Amos Regusme[1] with one count of one count of Conspiracy to Defraud the United States and Eight Counts of Aiding and Assisting the Preparation of False Tax Returns and Two Counts of Making and Subscribing a False Tax Return. The Government did not seek a warrant for any of the defendants, instead requesting that a Summons be issued for each of them.

[1] Pognon was charged in Count I the 371 Conspiracy Count along with Counts X-XIV, i.e. Aiding and Assisting the Preparation of a False Tax Return. Regusme was only charged in the 371 Conspiracy count (Count I)

Appellant proceeded to trial, with jury selection beginning on September 9, 2019 before the Hon. James I. Cohn in Ft. Lauderdale, Florida. On September 16, 2019, the Jury returned a verdict of Guilty as to Counts I through IV, Counts VI – VII, Count IX & Counts XV-XVI. The Court granted the defense's Rule 29 motion as to Counts V and VIII. (D.E. 87). On September 4, 2019, the Defendant was sentenced for the crime to 60 months as to Count I, 10 months as to Counts II, III, IV, VI, VII, IX, XV and XVI, to be served concurrently to each other and consecutively to the term imposed in Count I; 36 months Supervised Release as to all counts; a $900.00 special assessment was imposed along with restitution ordered in the amount of $703,788.75, of which $51,420.00 was ordered joint and several with Paula Pognon and $12,758.00 ordered joint and several with Amos Regusme.

A Notice to Appeal was timely filed on December 24, 2019 (R.163).

Statement of Facts

It was established that Olry Maurival had been issued employer identification number 46-0797884 for Glory Marketing Services[2] in September 2007, in addition to an EIN number for Glory Marketing and Financial Services, Inc. in August of 2012. Id. @ 78-80. These were separate and distinct. Maurival applied for three separate EFIN's (electronic filing identification numbers). This

[2] This was identified as a sole proprietorship.

was permissible to do. Id. @ 86. He was then allowed to e-file clients tax returns from three different locations. Appellant was also issued a PTIN by IRS designating him as a commercial tax preparer for profit.

The Government called Stephanie Legato, a registered nurse, who had worked at Lakeside Medical Center from 2011 until 2016.[3] She testified that Appellant had prepared her taxes for years 2012-2014 (D.E. 142:40), filing the return under his corporate entity called Glory Marketing and Services. During the time Appellant's office prepared her returns, the witness stated Appellant had advised her he was beginning a "side business" for which he would be "working on [sic] the room next door and he was going to do another business, but I don't know what it was." Id. @ 48. Legato provided her W-2 and mortgage statement as well as an educational statement to assist with the preparation of returns.

Legato was presented with her 2012 return. She indicated she had advised Appellant that she drove 30 minutes to get to work, but didn't remember giving him any specific mileage, nor did she remember any other data requested by Appellant.[4] Id. @49-51. On cross-examination she explained that the return would

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[3] The witness' maiden name was Brugh. "SB" is the individual listed in Count I, Paragraphs 11,14, 21 of the Indictment as well as Counts II, IV and IX of the Indictment.

[4] On the 2012 return, mileage was shown on the return to be 29,545 miles with 21,453 miles being "business miles included." For 2013 the return showed 29,545 miles, of which 24,536 were delineated as business purposes. 2014 showed 29,000 miles, with 25,300 shown as business purposes mileage.

be generated in the office while she waited, stating: "I just know he printed it and handed me the folder." Id. @ 58. The witness claimed her copy was missing the itemized mileage being used for reduction of her taxes. On cross-examination she conceded:

Q: …"I'm basically asking you if it could have been more or less that amount of miles based on what you told Mr. Maurival?

A: I couldn't say.

Id. @ 64-65

The same questions and similar answers followed for tax years 2013 and 2014. The witness paid Maurival's company $100.00 to do the return, but this fee was not paid up front, but rather subtracted from the refund tendered by the Internal Revenue Service.

The Government called Internal Revenue Agent Gary Linda to review the 2012 individual tax return for Olry Maurival. The agent noted that, within the return, Appellant had selected that revenues would be treated using the accrual method, rather than cash. Id. @ 116. The total receipts indicated on this 1040 form was $26,500.00 and taxable income was indicated to be $4,010. Glory Marketing and Financial Services, Inc. reported in 2012 gross revenues of $28,496 with $518.00 of taxable income. Agent Linda also testified that on Appellant's 2012 personal income tax return he had claimed credits for federal taxes paid on fuels for a fuel tax credit, claiming "off-highway business use." Id. @ 126. This credit

amounted to $1,025.00. Agent Linda admitted that he had done no independent investigation of any deductions claimed on Appellant' 2012 return (D.E. 143:35).

Two similar returns with accordant fuel credits were introduced for taxpayers Jose D. Perez and Ms. Santiago. This particular credit stemmed from a nonprofit educational organization that would be entitled to a credit for fuel purchased in the course of its business. These had been prepared by David Brutus, an employee of Glory Marketing Svc. (D.E. 143:6-7). Agent Linda never spoke with either the taxpayer or the tax preparer in these instances. Id. @ 39. Neither was he aware as to whether the deductions/credits had ever been reversed and/or disallowed by IRS. Jose Perez testified that he had never advised the tax preparer, David Brutus, that he had purchased 1500 gallons of fuel for a fuel credit during his employment as a Boynton Beach Police Officer. Id. @61. He advised that he drove 5 miles per day in his personal car to the school where he was stationed. Once there, he used a patrol car and filled up with a city-issued gas card. He also denied telling the preparer that he drove a total of 27,556 as reported on his tax return. Finally, he denied advising the preparer that he had contributed $1,300 for charitable contributions. Mr. Perez also denied that either he or his wife reported to Mr. Brutus that his wife had incurred $1,090 on work-related expenses.

Agent Linda also later testified in the trial that he had been asked to perform certain tax computation using bank account records given to him by the case agent

relating to Appellant in his individual name. The checks he documented were to those written to Viety Maurival, Jaezy Diaz and to David Brutus, but no testimony or information was available to Agent Linda or any of the other IRS investigators concerning at least 17 other tax preparers that were written checks from accounts controlled by Appellant. The calculations he performed often showed, for varying taxpayers, that had the standardized deduction been employed instead of the erroneous itemized deductions, their liability often was nominally changed.

Agent Linda testified that a Report 4549-A was produced showing a Tax-examination change for Appellant's return in 2013 assessing an increase from the reported $35,000 of gross receipts to $432,954. These were numbers arrived at by Agent Linda after examining tax preparation fees that went into Appellant's bank account Id. @ 36-37. This gave a resultant tax liability of $150,702. (D.E. 145:21-22). He also stated that he knew payments had been made by Maurival to other tax preparers. He agreed that payments made to other tax preparers were essentially transfers of tax preparation fees that had been generated under Appellant's EFIN number at the location, and that those amounts would not necessarily be income to Appellant. Id. @ 38. For 2012, the additional amount of taxes due was $144,490 following the IRS Report 4549-A, that was produced showing a Tax-examination change for Appellant's returns.

Also introduced was a return filed for Tamesha Frith, and prepared by Vitey Maurival on behalf of Glory Marketing Services. The return claimed an earned income credit (EIC) – a credit which increases with an increased number of dependents. The return for Ms. Firth also differed in its reporting of income on line 7 of her 1040. Income was reported of $16,662.00, but a W-2 from Publix Supermarkets reported wages of $6,461.00. The remaining $10,201 was noted to arise from household help income, which would allow for a higher claim of the EIC. Ms. Frith testified she never advised Vitey Maurival that she had earned any household help income, and was only employed by Publix. Id. @ 83. She denied any "Off-Highway Business Use" as reported on Exhibit 23 – her 1040 for 2011. Her testimony was equivalent for her 1040 return, prepared for 2012 (Ex. 24) , her 1040 for 2013 (Ex. 25); and 1040 for 2014 (Ex. 26).

Tax returns were introduced from Ryan and Nicole Gillis for tax years 2012-14. These were prepared by Appellant through Glory Marketing and Svc. They claimed $6,665 of educational expenses for deductions. Id. @ 16. Mr. Gillis was unable to remember if Appellant asked him any personal questions about his lifestyle. Gillis disputed the mileage reported for business purposes for he and his wife as well as "Tuition and Fees Deduction." Additionally, Gillis stated that as to the fuel expense, he stated: "I believe the gas came up when we talked about the miles. And again, I told him that—I think he asked what—how much I spent a

week in gas, and I told him about $60.00 a week. The deduction for in-home day-care services for Gillis' son was accurate. The other deduction for teacher expenses was also accurate, as was the notation for union dues attributable to the wife's position as a teacher. Also, in 2013, moving expense were accurately portrayed, as was Gillis' estimate of fuel expenses being commensurate with $1,900. Id @ 207.

Melanie Steets testified for the Government that prior to being married, she was known as Melanie Cole. The Appellant had produced a tax return for her in 2012. The return showed 39,456 miles driven with 29,514 used in business travel. She did not remember Appellant asking her how many miles she drove to work, and opined that she did not believe this was accurate. She indicated she drove 60 minutes roundtrip three days a week. There were also discrepancies under uniform expenses, charitable expenses, and continuing education expenses. There were similar discrepancies for 2013 and 2014, although in 2014 she advised that she told Appellant that she was driving more since she had started a second job. Id. @ 152-53. In response to questions about mileage stated on the return, her response was that she didn't think she drove as much as what was reported to the IRS. She also qualitatively stated that she "didn't recall" whether the numbers represented on her return were.

Taxpayer Claudia Mendez testified that Jaezy Diaz was married to her cousin. Diaz had prepared her tax returns for 2012-14. Id. @ 163. According to the returns, she was working for Glory Marketing and Svc. Usually, the tax data was supplied by her to Diaz by text message. For each of the tax years above, business miles, for which a deduction was claimed, were disputed by the witness, stating that it was a topic that was never discussed, nor did she have such qualifying expenses. The same was true for deductions taken for uniforms. Although uniform expenses were incurred, she reported them to be less than those on her return. The testimony was similar for disputed Off-highway Business Use of Fuel, Charitable Deductions and miscellaneous expenses.

For each of the personal 1040 returns, Agent Linda stated that a tax preparer was entitled to rely on information provided by the taxpayers.

Agent Stephan Robinson with the Criminal Investigation Division of IRS testified that a search of Appellant's office and those rented by others at 2101 Vista Parkway, West Palm Beach, Fl occurred on July 30, 2015 pursuant to a search warrant. This was identified as an office used by Glory Marketing. Inside Suite 121 on a bookshelf were two books entitled: "How to Pay Zero Tax," 2012 edition, and "2013 Tax Fundamentals." The court permitted varying pages to be introduced that had been highlighted in the first such source, respectively. Id. @ 122. Agent

Robinson also testified he searched a third suite that day – Suite 270. This suite was occupied by Jaezy Diaz and her business partner. Id. @ 133.

S/A Louis Babino of the IRS C.I.D. testified that he had compared Glory Marketing and Svc. with national and state averages of returns filed for similar businesses. He also testified to summaries introduced that showed that the three locations under EFIN's belonging to Appellant showed that there was a total of 7,193 returns filed during years 2011-2014. Out of those, 7,137 claimed refunds. Id. @ 221. This 99% figure compared to the next closest of 79% within the state of Florida in 2011. Returns prepared and filed under Appellant's particular EFIN numbers showed 1,076 filed, with 1,059 showing a refund. Returns prepared under Appellant's EFIN's showed unreimbursed employee expenses in 29% of the total returns prepared, whereas 10% was the highest national average for that deduction by other professional preparers. In other years, the ratio was 16% vs. 10%. When comparing the American Opportunity Tax Credit, Appellant's prepared returns showed 29% claiming the credit vs. the highest comparable claim of 10% in the state. Summaries indicated that for returns prepared by all of the Appellant's related businesses, the EIC was claimed on 64% of the returns, whereas the next highest average, either nationally or statewide was 24 %. Similarly, those returns prepared under Appellant's individual EFIN showed ratios of 59% for the EIC being claimed. Finally, returns for Appellant's businesses, in total showed claims

for the Fuel Tax Credit of about 2%, whereas nationwide, such incidents of claim were also rounded to 2% (D.E. 144:8).

Taxpayer Sandra Freymuth was called by the Government. She had her taxes prepared by Jaezy Diaz. The communication was never in person but, rather, through telephone and email. She had provided W-2's for her and her husband as well as information from the mortgage on their home. There were discrepancies regarding mileage claimed on the return, which she denied being asked or providing. The same was true for itemized deductions noted as "Other Expenses" as well as charitable contributions. The witness denied being asked or providing this information. Over defense counsel's objection, Ms. Freymuth was allowed to provide hearsay statements that were violative of F.R.E. 801(d)(2)(E) in that the statements were not within the scope of the conspiracy and was not in furtherance of the conspiracy. Following notice of an audit by IRS, and a back-assessment of $7360, occurring in June of 2016, relating to mileage-based deductions, Freymuth contacted Diaz.[5] This discussion occurred almost one year after the conclusion of the charged conduct in Count I of the Indictment (D.E. 1). After Freymuth requested to speak with her supervisor, Diaz then directed her to Olry Maurival. She describes speaking with someone telephonically who identified himself with that name. She never broaches the topic that whom she believes is Diaz' boss that

[5] The letter from the IRS was received in June of 2016. Id. @ 46

inaccurate and false deductions were claimed on the return. Freymuth simply asks for Diaz' boss to intercede and obtain a refund for the tax preparation fees.

Taxpayer Claudia Fuentes testified she hired Appellant's corporate entity, Glory Marketing and Svc. to prepare her 2014 taxes in 2015. Appellant was identified as the preparer. The business mileage claimed was denied by Ms. Fuentes as to its quantity, yet she was unsure as to whether or not she was asked about mileage. Id. @ 64.

Taxpayer Carla Spikes testified that Vitey Maurival prepared taxes for her for 2011-2014. She provided him W-2's and general information such as expenditures for health insurance, uniforms, and travel. She denied seeing the claim for or providing information related to her return's claim for nontaxable use of gasoline, educational credits, other expenses and disputed the mileage being claimed on the returns for business travel. This was identical for the three year's tax returns that were prepared.

Christopher Manuel testified that he worked as a government liaison for Universal Tax Systems – the company who owns the TaxWise software. He described TaxWise as a forms-based software, aiding in the preparation of IRS returns for various entities, Id. @ 94, adding that it was designed to be used by paid preparers. He identified documents showing Olry Maurival had purchased the

software in 2011. He later became a reseller of the software to other preparers in 2013. Records indicated Appellant was noted to be associated with 8 different offices, suggesting he'd been a reseller selling the software to those preparers opening other locations. Manuel stated that his company's software could be used by multiple people within the same location and that this was not unusual.

Manuel also testified that the software required the user to specifically input numbers for "Qualified Expenses," or "off-highway business use" for fuel deductions/credits, as well as deductions based on yearly business mileage driving totals. He also conceded on cross-examination that the software had no diagnostic warning to alert preparers if deduction or credits were disproportionate for a particular return. Id.@ 152. This diagnostic warning system was not in place for the tax years 2011-2014. Id. @ 160.

Meshawn Jean Louis testified as the custodian of records for the Tax Products Group. The company is a third-party fee payment processor used for taxpayers who are not able to pay for their tax preparation fees up front when they file their return with an independent tax preparer online. In such instances, the full refund goes to Tax Products Group. They deduct the tax preparation fees, their administrative fees, and disburse the remainder to the taxpayer. She related that for tax years 2010-2015 Glory Marketing and Services and Olry Maurival were approved to use Tax Product's services, under the same EFIN number. Appellant

also had a second EFIN that allowed him to received tax preparation fees from Tax Products Group in 2014. She helped the Government introduce records showing that Appellant was paid $475,415.84 for tax preparation fees in 2012. Her records also showed that Appellant was paid $461,167.09 in tax preparation fees in 2013. On cross-examination she agreed that her records only show payments made under the EFIN's used by Appellant, not necessarily income to the Appellant. She also was forced to admit that there may be multiple tax preparers or ERO's using a single EFIN, and that her records would not show who had been paid from those proceeds.

Special Agent Alisa Watkins, a member of the IRS Criminal Investigation Division testified as the last Governmental witness. She testified as to items seized on July 30, 2015 within a storage facility leased by Appellant and searched pursuant to a search warrant. Bank records from Citibank dating from 2011 were introduced, as were IRS publications covering Household employers tax guide and household employee, earned income credit (EIC), and an articles detailing Tax Return Preparer Fraud, as well as how to choose a tax return preparer and avoid preparer fraud. Id. @ 74-8.

Agent Watkins also testified about varying discrepancies made on Appellant's personal tax returns beginning in 2011, including business mileage

deductions and off-highway fuel.[6] She also summarized prior testimony from Agent Linda regarding Appellant's 2012 and 2013 taxes, which were the subject of Counts XV and XVI. She was permitted to further testify as to returns filed by Appellant that pre-dated and post-dated the time alleged for the conspiracy and any overt acts or substantive counts alleged in the Indictment. Finally, the Government introduced summaries made by the Agent reviewing bank records from Citibank, Wells Fargo and Chase accounts -- (4) four in total. Gross receipts of $392,460 were unreported on Appellant's 2012 tax return. Gross receipts of $425,052 were missing from his 2013 tax return. On cross-examination she admitted that she saw evidence of checks being written to various preparers, aside from Mr. Brutus, Vitey Maurival, Paula Pognon and Jaezy Diaz. Many of these the Agent chose not to interview. Id. @ 146-47. By her own admission, she stated that she would not make the assumption that they were being paid for filing tax returns under Appellant's EFIN. Id. Counsel for Appellant asked if during her review of the bank records she noticed checks made out to preparers named: Licece Clark, Magolle Manuel, Robert Bowman, Orpha Maurival, Stephanie Maxis, Jean Jewels, Ivana Castro, Ivinis Gevelus. With the exception of Orpha Maurival and Ms. Castro, she denied familiarity with any of the named preparers. Only after being pressed by defense counsel did she admit that the reason these names were

[6] This was not objected to by defense counsel, but it does not constitute conduct for which he was charged in the Indictment under Counts XV and XVI.

unfamiliar was that she had not reviewed all of the bank records, but rather what another unidentified IRS employee had identified for her in a spreadsheet. Id. @ 150. The only amounts included in the summaries prepared by her for the jury were those that had been selected arbitrarily by another IRS employee(s) who had prepared the spreadsheets. The decision by Agent Watkins was then made to go out and speak to four of these preparers, but none of the others. Unbelievably, Agent Watkins testified: "The other people, if a check was written to them and I seen [sic] it, it wasn't taken as anything because I didn't actually interview those people." Id. She further admitted that hundreds of thousands of dollars were being paid by Appellant to other people, but she did no investigation into why this was occurring as it did not help the Government's case.

Further, a dilution to the significance of her testimony stemmed from the fact that she was aware that Christopher Manuel had testified that Appellant's EFIN number was used in eight locations. She did nothing to investigate the five other locations and undisclosed preparers therein other than the three that were electronically filing from the 2101 Vista Parkway address. Id. @ 166.

For the defense, two character witnesses were called. Paul Underhay is a pastor of the Church of the Nazarene. He testified that he had known Appellant for three years as an occasional congregant of his parish, and that Appellant had later become a formal member in January of 2018. He testified that he knew Appellant

to be of honest character, and that he deemed Appellant trustworthy. He indicated that it was his intention to invite Appellant to be a member of the church board, which was, inter alia, responsible for administering the finances for the parish. Jeri Frye testified that he had known Appellant for 19 years. He explained that they had both met while working for Liberty National Life Insurance, at a time when Appellant was an insurance agent. They worked there together for two years, but he had continued to socialize with Appellant and to share some work together after that time period. He testified he knew Appellant to be an honest and law-abiding person, who he deemed trustworthy.

Finally, through an offer of proof and through defense's unopposed assertion of judicial notice, counsel for Appellant introduced Appellant's license to write insurance in the state of Florida with Liberty National Life Insurance Company, along with the endorsements and licensures for Appellant from 1999-2019, combined with business connections to other varying insurance companies selling financial service products within the State of Florida.

ARGUMENT

I. THE VERDICT OF GUILT IS NOT SUPPORTED BY SUFFCIENT EVIDENCE TO SUSTAIN A CONVICTION, AND THE EVIDENCE, VIEWED IN A LIGHT MOST FAVORABLE TO THE GOVERNMENT, WITH ALL REASONBLE INFERENCES AND CREDIBILITY CHOICES IN FAVOR OF THE JURY'S VERDICT, WAS INSUFFICIENT SUCH THAT ANY RATIONAL TRIER OF FACT COULD NOT HAVE FOUND THAT THE ESSENTIAL EVIDENCE REQUIRED FOR THE GOVERNMENT TO PROVE CONSPIRACY TO DEFAUD THE UNITED STATES, AIDING AND ASSISTING THE PREPARATION OF FALSE TAX RETURNS, AND MAKING AND SUBSCRIBING FALSE RETURNS.

Appellant properly preserved his challenge to the sufficiency of evidence at the close of the trial court level when he moved for a Motion for a Judgment of Acquittal pursuant to F.R.Cr. P. 29 at the close of the Government's case and again at the close of the defense. Once raised in a Motion for Judgment of Acquittal, the sufficiency of evidence challenge is properly preserved for the

Appellate Court as annunciated in U.S. vs. Williams, 144 F.3d 1397 (11th Cir. 1998).

Where a claim is made challenging the sufficiency of evidence following the verdict of guilt, the reviewing court must study the sufficiency of the evidence de novo. During the course of this review, the reviewing court must sustain the evidence in a light most favorable to the government, drawing all reasonable inferences and credibility choices in favor of the jury's verdict. U.S. vs. Trujillo, 146 F.3d 838 (11th Cir. 1998). See also, U.S. vs. Lumley, 135 F.3d 758 (11th Cir. 1998); U.S. vs. Chirinos, 112 F.3d 1089 (11th Cir. 1997); U.S. vs. Farris, 77 F.3d 391 (11th Cir. 1996).

1. Counts I & II-IX: Conspiracy to Defraud the United States and Aiding and Assisting the Preparation of False Tax Returns

The evidence did not support a finding of guilt in that there was insufficient evidence that Appellant committed the offenses Conspiracy to Defraud the United States, Aiding and Assisting in the Preparation of False Tax Returns and Making and Subscribing a False Tax Return.

The Government conceded during a sidebar, seeking to introduce manually highlighted materials encompassing tax reductions

rules and strategies that had been seized from the Crescent Business Park where Glory Marketing was located:

> "Well, it's not cumulative, Your Honor, because **this is the first evidence that I have, and I don't have a whole lot**, but it's certainly not cumulative to show that Mr. Maurival had access to books that contained the relevant type of information." (D.E. 143:120) (emphasis added).

Even assuming these facts are true, they are insufficient to establish conspiracy, as a necessary element of conspiracy is knowledge of such conspiracy and an agreement to knowingly and willingly participate in it. *United States v. Tyson*, 653 F.3d 192, 206 (3rd Cir. 2011); *United States v. Chandler*, 388 F.3d 796, 805- 06 (11th Cir. 2014); *United States v. Martinez*, 83 F.3d 371, 374 (11th Cir. 1996).

There is no evidence of an agreement between Appellant and David Brutus, Vitey Maurival, Paula Pognon or Amos Regusme or that Appellant actually knew of or joined the conspiracy. See, e.g., *United States v. Willner*, 795 F.3d 1297,1309 (11th Cir. 2015); *United States v. Ganji*, 888 F.3d 760 (5th Cir. 2018). None of these individuals testified. The Government used 17 witnesses at trial. Not one witnesses testified that he or she told Appellant about the conspiracy, or contrarily, that he told them of the "common scheme or

plan", nor was there a witness that said they witnessed other co-conspirators watching the acts essential to the conspiracy being carried out. See, *Willner,* supra, @ 1310. All the overt acts alleged in the Indictment were performed individually by separate people. No witness testified that if a conspiracy existed, that Appellant knowingly joined in the agreement, nor that he was the originator of such a plan or scheme. The Government's attempt at trial to taint the Appellant by suggesting that he took no steps to audit or review returns filed by his agents is, at best, an element of negligence that would be the subject of a civil complaint. "Evidence of a mistake in judgment, an error in management, or carelessness can't establish fraudulent intent." Id. @ 1309.

The elephant in the room is that no co-conspirator testified as to any agreement to break the law during the Government's case-in-chief. Furthermore, auspiciously missing in the evidence, are facts showing that there existed a motive or resultant pecuniary gain suggesting why errant and fraudulent information was deliberately introduced into tax returns. As stated in the Good-Faith Defense to Willfulness Jury Instruction given by the trial court (D.E. 95):

> "Intent and motive must not be confused. "Motive is what prompts a person to act. It is why the person acts." Id.

Said another way, the sine qua non of fraud is the necessity of the existence of some degree of avarice that drives conspirators to break the law with resultant pecuniary gain. No evidence was introduced showing that there was a greater monetary impetus to break the law by intentionally introducing falsified claims of deductions or tax credits. The tax preparers, including Appellant, did not receive more money if they obtained more of a refund for their clientele, nor were there fees or ancillary deductions increase based upon greater amounts refunded to the taxpayer by the IRS. In fact, most taxpayer witnesses stated they chose Appellant's entity to perform their returns because they were under a time crunch due to procrastination in the filing of their returns. One witness, Mr. Gillis and his spouse, needed an immediate return to support a short-sale on their house. Others were referred to Glory Marketing by friends, business associates or family. None of the employees or independent contractors were paid based upon how much refund was provided by the returns they prepared. Thus, there existed no direct incentive, and certainly no evidence, to support the corroborative notion that they would knowingly enter into a scheme to defraud the United States when there was no reward for their risk, or to fraudulently inflate

refunds so as to secure greater lucre in the amounts they would be paid for their criminal misdeeds Likewise, the amount taken out for fees in preparation of the returns by Appellant and/or Glory Marketing, was never contingent on a percentage-based portion of a larger refund. Finally, there is no evidence before the Court that the mere intent was to create so many refunds, for so many clientele, that the reputation of Glory Marketing or its agents would increase, and itself, generate the necessary pecuniary motive to commit the offense by "bringing more people in the door." In conclusion, no motive was demonstrated to substantiate the intended state of mind with which the act was done by Appellant. This factor was pivotal to this Court overturning the conviction in *Willner, supra,* since there was no evidence that the defendant willfully joined and participated in a conspiracy or that the defendant gained anything from it (other than a promised salary). This is congruous with the static money paid for preparation fees in the instant matter. Appellant gained nothing from the alleged fraud, other than the same tax fee he was charging to do the ministerial task of preparing a tax return. Whether constituting a salary, as in *Willner,* or a static fee as with Glory Marketing and Svc., no one, particularly Appellant, gained anything from it. In fact, the

taxpayers often barely received a benefit from the errant returns when compared to their tax liability had the standard deduction been used.

The Government may prove conspiracy by circumstantial evidence, but that does not obviate the need for actual evidence that there was an agreement and knowing and willful participation in that criminal conspiracy. This is clearly established in multiple cases overturning jury verdicts and finding that negligence, poor administration, lax practices, and even improper billing do not provide a basis for attributing agreement and willful participation in a fraud conspiracy. See, e.g., *United States v. Willner*, 795 F.3d 1297,1309 (11th Cir. 2015); *United States v. Ganji*, 888 F.3d 760 (5th Cir. 2018).

The Government's argument, through their direct testimony of witnesses, particularly, Kendrick Devon Calix, suggested that the Appellant's behavior evidenced an intent to break the law because he failed to use the mechanisms built into the software to monitor the returns being produced by his agents that worked for Glory, by the use of, inter alia, screen shots to verify the accuracy of what was being produced. These things may well be relevant as to whether Appellant was a bad businessman or sloppy administrator, but they do not and cannot establish that Appellant agreed with any other persons to

knowingly and willfully enter into a conspiracy to defraud the United States. No one, whether Appellant or his agents, were demonstrated to possess heightened knowledge of the tax laws, i.e. those holding accounting degrees or certified C.P.A.'s. In fact in some instances, the naivete of the preparers, particularly the Appellant, in their knowledge of the Tax Code was poignantly obvious. S/A Linda pointed out that for Mr. & Mrs. Gillis, the return in 2012 would actually have been preferable and more advantageous for them if their preparer had taken the standardized deduction rather than the itemized deduction. (D.E. 145:8). This is suggestive of a fundamental lack of knowledge of the Tax Code and either carelessness or negligence, but was not indicative of an intent to defraud the U.S. Government.[7] Other calculations by S/A Linda suggested a difference for Taxpayer Spikes of $244[8] had the standardized deductions have been used by the preparer. (D.E. 145:15)

Also missing in the Government's case is even a scintilla of evidence to demonstrate that the use of fraudulent deductions or tax credits was part of the scheme. Nowhere is there a showing that tax

[7] The sum total that the erroneously claimed itemized deductions amounted to a difference between the refund requested of $6,500, reduced by what would have been permitted under the standard deductions by $3,578. Hardly a windfall for the taxpayer. (D.E. 145:11)

[8] I.e. the difference between $1,524 claimed vs. $1,280 with the standardized deduction.

preparers were educated as part of their training and initiation into the alleged conspiracy as to how to produce a tax return using the TaxWise software in a fraudulent fashion. Similarly, during the execution of a search warrant in the three suites of 2101 Vista Parkway, where 9 banker's boxes of materials were removed, there were no documents tending to show how this scheme would be carried out, or Appellant's direction to his agents, or what sections of the Tax Code would be used as a vehicle to perpetuate the fraud. Interestingly, according to Mr. Calix, the software would allow preparers to look back at prior year returns. This fact, alone, would substantiate why particular deductions and credits were used repetitively, and erroneously, year after year by those preparers that had little or no experience with a complicated Tax Code. The Government also failed to show what, if any experience, any of the preparers had prior to their tenure at Glory Marketing.

The Government's case was predicated on calling taxpayer after taxpayer to elicit that information contained in tax returns were never related by them to the preparers, and thereby arguing that the similarity of conduct was an indicia of the agreement by the parties. This is insufficient. In *Ganji,* supra, the court held that "mere

similarity of conduct among various persons and the fact that they have associated with or are related to each other is insufficient to prove an agreement," and that "proof [of] an agreement to enter into a conspiracy is not to be lightly inferred." Id. at 767-68 (internal quotations omitted). The Ganji court found that the Government's "concerted action" evidence fell well short of that necessary to sustain the conviction where no one testified that they worked in concert with the defendant to achieve a criminal goal. Id. at 770. This is exactly the situation before this Court in the case of Appellant.

Furthermore, several of the witnesses were unable to remember the actual conversations with their preparer since it had been 5-7 before they testified. In other instances, like Mr. Gillis, many of the itemized deductions were accurate. Some of these included those generalized deductions the Government sought to elicit as a pattern of wrongdoing by the preparers. (D.E. 143:197 et seq.). Witnesses like Melanie Steet testified that: "I don't recall him [Appellant] reviewing specifics with me" despite her testimony that her preparer had the numbers "up on the screen" for comparison to previous years while she sat in the office. She stated:

> Uhm, I knew that he asked me about them but not that he was recording them and what their amounts were. Because he asked

me, do you ever do donations to charity, do you ever – everything was very vague." Id. @ 156.

Others, like Claudia Fuentes, didn't remember if mileage was ever discussed with Appellant despite its appearance on her completed returns.

(D.E. 144:64)
Q: Does that mean you don't recall either way if he asked you?
A: Yes, I don't remember what was asked, what was answered, what's --

IV. Counts XV & XVI: Making & Subscribing a False Return

Appellant re-asserts and re-avers those facts set forth hereinabove that support the following arguments that a prima facie case was not proven against Appellant for the violations alleged in Counts XV and XVI of the Indictment.

Government's witness Meshawn Jean-Louis, a records custodian for Tax Products Group testified that her company was the third-party processor for distribution of tax refunds being electronically returned. Although records showed that $329,285 was sent to the particular EFIN # associated with Appellant, she agreed, it was not specific as to a particular PTIN number. She admitted on cross examination that the exhibits she produced under subpoena, and which were introduced by the Government, did not designate income to Appellant, but rather

showed payments made with their financial product through the EFIN associated with Appellant. (D.E. 144:1-19). She also clarified that there could well have been multiple tax preparers or ERO's using a single EFIN. Id. @ 15.

Special Agent Alisa Watkins provided testimony that was of particular concern. While producing summaries of bank accounts attributable to Appellant she totaled all sums that came through two of the three third party processing companies that handled refunds for taxpayers as a paid intermediary for distribution back to the EFIN holder. On cross-examination she admitted that she saw evidence of checks being written to various preparers, aside from Mr. Brutus, Vitey Maurival, Paula Pognon and Jaezy Diaz. Many of these the Agent chose not to interview. Id. @ 146-47. By her own admission, she stated that she would not make the assumption that they were being paid for filing tax returns under Appellant's EFIN. Id. Candidly, this is a profound lapse in investigation. No fewer than twenty individuals were mentioned by defense counsel, although not all of them were identified by name. These represented either agents working under Appellant's EFIN number or constituted re-purchasers for the TaxWise software of which he had been identified as a re-seller for the product.

Counsel for Appellant asked if during her review of the bank records she noticed checks made out to preparers named: Licece Clark, Magolle Manuel, Robert Bowman, Orpha Maurival, Stephanie Maxis, Jean Jewels, Ivana Castro, Ivinis Gevelus. With the exception of Orpha Maurival and Ms. Castro, she denied familiarity with any of the named preparers. Only after being pressed by defense counsel did she admit that the reason these names were unfamiliar was that she had not reviewed all of the bank records, but rather what another unidentified IRS employee had identified for her in a spreadsheet. Id. @ 150. The only amounts included in the summaries prepared by her for the jury were those that had been selected arbitrarily by another IRS employee(s) who had prepared the spreadsheets. The decision by Agent Watkins was then made to go out and speak to four of these preparers, but none of the others. Unbelievably, Agent Watkins testified: "The other people, if a check was written to them and I seen [sic] it, it wasn't taken as anything because I didn't actually interview those people." Id. She further admitted that hundreds of thousands of dollars were being paid by Appellant to other people, but she did no investigation into why this was occurring as it did not help the Government's case.

The Government may argue that the Indictment charged Appellant in Counts XV and XVI with a material misstatement made concerning gross receipts or sales from the operation of his business in 2012 and 2013 (Counts XV and XVI respectively). Problematically for the Government, there is no testimony about the total number of deductions and amounts paid to other preparers. Unfortunately, cross examination did not touch on the total reductions after the "hundreds of thousands of dollars that were paid out by Appellant" to these independent tax preparers. Id. @ 151. It is fair to suggest that the statement on the returns for Appellant in 2012 and 2013 were not a material misstatement of fact. needed to be proven by the Government, if in fact, Appellant's net profit, after such expenses were deducted, equaled the amounts stated on the return, albeit inaccurately booked as a reduced gross receipts. Stated another way, if the number on the returns, i.e. $26,500 and $35,000, respectively stated for 2012 & 2013, equaled that realized by Maurival after the deduction of normal business expenses (i.e. after deducting all of the hundreds of thousands of dollars paid to preparers), his tax liability would have been the same as if he had accurately stated the gross receipts, then itemized expenses paid to preparers that constituted independent contractors. This is evidence that is inapposite to the

concept of guilt since the total tax liability would not have changed, even taking into account the scrivener's error in failing to book the total gross receipts. If the tax liability would have been the same, the evidence is wanting to show a prima facie case that he acted with intent to violate the law as required under 26 U.S.C. Sec. 7206(1).

This Court should find that no reasonable juror would have found Appellant guilty beyond a reasonable doubt where the case agent, S/A Watkins chose to ignore other known sources that she knew partook in the preparer fees that were paid to Appellant from the third-party processors, thus reducing his net profits that would have been the subject of the taxes that were due to the U.S. Government as gains. The case agent specifically stone-walled counsel by saying:

> Q: I misspoke. I received a spreadsheet of the bank records that I received. So I wasn't given specific, like, identifications of various checks. Somebody else spread the account and I was able to look at the preparers that I interviewed and summarize those preparers. So what you see as the check payments are for those particular preparers that I actually interviewed. The other people, if a check was written to them and I seen it, it wasn't taken as anything because I didn't actually interview those people, I didn't know if they worked there, I don't know who they were. They could have been family members… I didn't do an actual summary of payments out of the account. (D.E. 145: 150-51).

In other words, as to Counts XV and XVI, the jury was asked to convict Appellant on no evidence of what the total amount of tax may have been had the agent actually reduced Appellant's total tax liability

by these expenditures. Had the actual net income equaled what he mistakenly stated as his gross receipts, the statements made were not material and not evidence of the specific intent needed to be demonstrated for the offenses.

II.

THE COURT COMMITTED REVERSIBLE ERROR BY ALLOWING A WITNESSES TO TESTIFY AS TO HEARSAY IN VIOLATION OF F.R.E. 801(d)(2)E WHEN THE STATEMENT, OFFERED AND ACCEPTED OVER OBJECTION, WAS MADE BY AN UNINDICTED CO-CONSPIRATOR AT A TIME CLEARLY OUTSIDE OF THE CHARGED CONSPIRACY AND NOT MADE IN FURTHERANCE OF THE CONSPIRACY, AND ADDUCED SOLELY TO IDENTIFY APPELLANT IN CONNECTION WITH THE CONSPIRACY. FURTHER, THE STATEMENT'S INTRODUCTION WAS VIOLATIVE UNDER *CRAWFORD* AND U.S. CONST. AMEND. VI.

Over defense counsel's objection, taxpayer Freymuth was allowed to provide hearsay statements that were violative of F.R.E. 801(d)(2)(E) in that the statements were not made within the scope of the conspiracy and were not in furtherance of the conspiracy. Following notice of an audit by IRS, and a back-

assessment of $7360, occurring in June of 2016, relating to mileage-based deductions, Freymuth contacted Diaz.[9] This discussion occurred almost one year after the conclusion of the conspiracy charged in Count I of the Indictment (D.E. 1).[10] Freymuch testified that after she had requested to speak with Diaz' supervisor, Diaz then directed her to Olry Maurival. She describes speaking with someone telephonically who identified himself with that name. Ironically, she never broaches the topic that what she believes is Diaz' boss that inaccurate and false deductions were claimed on the return. Freymuth simply asks for Diaz' boss to intercede and obtain a refund for the tax preparation fees. There is no circumstantial evidence to corroborate the assertion that Appellant was the supervisor for Diaz. In fact the evidence supports a contradictory conclusion. Appellant tells Freymuth that he does not have the authority to refund monies paid to Diaz for preparer fees.

Defense counsel objected to the statements, citing hearsay.[11] Specifically, that there was no evidence that Freymuth's tax preparer, Jaezy Diaz[12], had established a conspiracy between her and Appellant. Defense also objects that the statements were not made in furtherance of the conspiracy, and that their

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[9] The letter from the IRS was received in June of 2016. Id. @ 46

[10] The charged conduct from Count I of the Indictment spanned January 2012 to July 2015.

[11] D.E. 144:34

[12] Diaz was never charged criminally.

timing, as outlined above, post-dated the end of the charged conspiracy by almost one year.

Pursuant to F.R.E. 801(d)(2)(E), a statement is not hearsay if the statement is offered against an opposing party and was made by the party's co-conspirator during and in furtherance of the conspiracy. This Rule was amended in 2014 to include the following language:

> "The statement must be considered but does not by itself establish the declarant's authority under ©; the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E)"

Prior to its amendment, the seminal case interpreting this non-hearsay rule was *Bourjaily v. U.S.*, 483 U.S. 171 (1987). The Supreme Court stated:

> "Before admitting a co-conspirator's statement over an objection that it does not qualify under Rule 801(d)(2)(E), a court must be satisfied that the statement actually falls within the definition of the Rule. There must be evidence that there was a conspiracy involving the declarant and the nonoffering party, and that the statement was made "during the course and in furtherance of the conspiracy." *Id* @ 175.

The district court failed in each of these levels of preventative inquiry. The statement was made at a time when no evidence suggested that a conspiracy existed. More exactly, Ms. Diaz was not shown to have entered into the conspiracy as argued, supra. No one testified that an agreement between any of the charged or uncharged individuals had occurred setting forth their scheme or plan to defraud the U.S. Government. The Government solely sought to suggest

that Ms. Diaz employed inaccurate claims for deductions and tax credits that mimicked those employed by others that were connected with Appellant. The statements made by Diaz to Freymuth were not made during the time charged in the conspiracy nor were they made in furtherance of the scheme to defraud. The statements only served to allow the Government to identify Appellant as Diaz' boss – a fact which could and did prejudice the jury against Appellant. Prior to this testimony, no one had identified Appellant as occupying any position of authority over anyone else. The evidence only showed that these individuals were paid from funds controlled by Appellant for their service as tax preparers.

The introduction of these statements were otherwise hearsay. They were made out of court and offered to prove the truth of the matter asserted, i.e. that Olry Maurival was Ms. Diaz' boss. The purpose of the communication by Freymuth to the voice identifying himself as Olry Maurival was simply to get him to intercede and obtain a refund of the tax preparation fee charged by Diaz. Freymuth did not testify that she either went over the deductions, nor the fact that they were unsupported by data she had provided to Diaz, nor did the taxpayer tell Maurival that she believed fraud was behind the erroneous return. Had she done so, and had Appellant responded to either suggest a manner of concealment or some ruse to excuse its occurrence, the Government's argument that the statement was given to conceal the

conspiracy would have been tenable. However, no such conversation occurred, and thus, the statements made by Diaz were not in furtherance of the conspiracy and should not have been introduced.

Further, the introduction of the statement was in violation of *Crawford v. Washington*, 541 U.S. 36 (2004) as well as a violation of Appellant's protections under U.S. Const. Amend. VI. The original declarant of the statement introduced by Freymuth was Diaz. Neither Diaz nor any indicted or unindicted co-conspirator ever testified at Appellant's jury trial. As such, Appellant and his counsel had no opportunity to confront Diaz through cross examination – a direct violation of Appellant's U.S. Const. VI Amendment right to confrontation. The Supreme Court has said:

> "Admitting statements deemed reliable by a judge is fundamentally at odds with the right of confrontation. To be sure, the Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination." *Id.* @ 41

The evidentiary errors in this case, whether viewed singly or in combination, necessitate reversal. These errors were not harmless and deprived Maurvial of a fair trial. See, e.g., *United States v. Hands*, 184 F.3d 1322, 1329, 1334 (11th Cir. 1999) (combined prejudicial impact of evidentiary and other trial errors required reversal).

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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CERTIFICATION

As required by Supreme Court Rule33.1(h), I certify that the document contains 9,779 words, excluding the parts of the document that are exempted by Supreme Court Rule33.1(d). I declare under penalty of perjury that the foregoing is true and correct.

Executed this 19th day of October, 2021.

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