No. _____

In The

Supreme Court of the United States

DARREN COMMANDER,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

PETITION FOR A WRIT OF CERTIORARI

DARREN COMMANDER, Pro Se
5 Cornell Parkway
Springfield, NJ 07081
dcommander@mwoodwork.com
917-807-4858

QUESTIONS PRESENTED

1. Was the Third Circuit's standard for willfulness under 26 U.S.C. § 6672(a) too lax for situations that at best are mere negligence in conflict with the standard articulated by the Second and Sixth Circuits?

2. Was summary judgment inappropriate in light of the record of evidence demonstrating a clear dispute of facts as to the question of the willfulness of the Petitioner?

PARTIES TO THE PROCEEDING

The petitioner is Darren Commander.

Respondent is the United States of America.

All other parties were dismissed prior to entry of judgment in the District Court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

Petitioner, **Darren Commander**, respectfully asks that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, filed on **May 25, 2018**.

OPINION BELOW

The opinion of the court of appeals, which was unpublished, was issued on May 25, 2018, and is attached as Appendix A. The District Court's opinion was issued on April 3, 2017 is unpublished and is attached as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the court of appeals was entered on May 25, 2018. This petition is filed within 90 days of the court of appeals' judgment.

CONSTITUTIONAL PROVISIONS INVOLVED

Pertinent provisions of the Internal Revenue Code, specifically 26 U.S.C. § 6672.

STATEMENT OF THE CASE

This action was commenced on February 22, 2013 by the United States against Darren Commander and Kenneth Skerianz for the enforcement of a Trust Fund Recovery Penalty imposed on them as "responsible parties" for Darken Architectural Woodwork Installation, LLC ("Darken"), a company they jointly owned from its formation in 2003 through its demise in early 2010. The United States commenced this action in Federal Court against Mr. Skerianz and Mr. Commander. Mr. Skerianz died during the pendency of this case, and he and his entire estate were dismissed by the United States as a defendant. Docket Entry #54. Mr. Commander disputed that he was a responsible person under the applicable legal standard, as his duties at Darken did not involve any aspects of handling the payroll, the hiring or firing of employees, preparation of federal 941 tax forms or payroll tax deductions or payments.

At the conclusion of discovery, both remaining parties brought motions for summary judgment. The Government claimed that Mr. Commander was a "responsible party" under the statute and had both the authority to make the relevant payments and either had the knowledge that they were not paid or that he was reckless in failing to determine that they were paid. The Court of Appeals upheld the District Court determination that Mr. Commander was willful and that he either had actual knowledge or should have had knowledge of the fact that the payments were not being made. The Court relied on one disputed line in

Mr. Commander's deposition, and more significantly on the fact that Mr. Commander should have known about the failure to make the payments.

The Court of Appeals relied on prior decisions of the Third Circuit as to the definition of willfulness. Citing *Greenberg v. United States*, 46 F.3d 239, 244 (3d Cir. 1994), the court of appeals held that "Willfulness need not be in bad faith, nor does it require actual knowledge of the tax delinquency." The Court further relied on the fact that "he was in a position to know for certain that they were not" being paid. *Greenberg*, 46 F.3d at 244.

This standard simply is at odds with both the statutory text requiring willfulness and the interpretation of both the Second and Sixth Circuits which make exceptions for business owners who credibly set forth a basis to believe that they had no knowledge or reason to suspect that the taxes were not being paid.

REASONS FOR GRANTING THE PETITION

POINT ONE

This case presents an important issue over which the circuit courts across the country are divided. The Third Circuit's approach in this case and its line of cases on willfulness arising from recklessness actually impose liability for simple negligence. The approaches of the Second and Sixth Circuits, which grant an exception where a party can demonstrate that he was

misled or otherwise justified in his or her lack of inquiry into the status of payments accords better with the statutory text calling for the actions to be willful.

As will be shown below, the outcome of this case would have been different had the Third Circuit adopted the approach of the other circuits, especially in the procedural posture of this case, which was decided on summary judgment.

The Third Circuit's caselaw on this issue is summarized in *Greenberg v. United States*, supra. The *Greenberg* court was confronted with a corporate treasurer who was generally aware the taxes were not being paid. 46 F.3d at 243. He was a responsible person due to the fact that he had authority over the company bank accounts and regularly wrote checks for its expenses. *Ibid.* Greenberg was found to be willful despite the fact that he was not authorized by his employer to write the checks to the IRS, and despite the promises made to him by his boss that the payments would be made. 46 F. 3d at 244. The Third Circuit has also stated the standard for recklessness under 6672(a)'s willfulness analysis as follows: "the taxpayer '(1) clearly ought to have known that (2) there was a grave risk that withholding taxes were not being paid and if (3) he was in a position to find out for certain very easily.'" *United States v. Vespe*, 868 F.2d 1328, 1335 (3d Cir. 1989) quoting *Wright v. United States*, 809 F.2d 425, 427 (7th Cir. 1987).

The Ninth Circuit has adopted a test that has been described as gross negligence, also citing the Seventh

Circuit in *Wright v. United States. Phillips v. United States IRS*, 73 F.3d 939, 943 (9th Cir. 1996). This gross negligence test is the same as the test applied in the instant case. Gross negligence is taken to mean the same standard quoted above from *United States v. Vespe*. This standard allows a court to determine that an individual is liable because he should have taken steps to find out if the taxes are being paid.

This standard is not adopted by all other circuits, which have a higher standard for what is considered reckless when it comes to liability under 6672(a). The Sixth Circuit analyzed this issue in *Byrne v. United States*, 857 F.3d 319 (6th Cir. 2017). In that action, the Court explicitly disagreed with the Seventh Circuit in *Wright v. United States*, supra. The Sixth Circuit adopted the reasoning of the Second Circuit in allowing an exception when an individual "'believed that the taxes were in fact being paid, so long as that belief was, in the circumstances, a reasonable one.'" *Byrne v. United States*, 857 F.3d at 328 quoting *Winter v. United States*, 196 F.3d 339, 345 (2d Cir. 1999). Similarly, the Fifth Circuit has held "However, evidence that the taxpayer acted with reasonable cause can sometimes defeat a finding of willfulness." *Conway v. United States*, 647 F.3d 228, 234 (5th Cir. 2011) citing *Howard v. United States*, 711 F.2d 729, 736 (5th Cir. 1983).

The Petitioner, Mr. Commander maintains that he was not aware of the failure of his partner to make the payments. Even if one accepts the contested reading of Mr. Commander's deposition that was utilized by the courts below, Mr. Commander only testified to his

knowledge sometime between 2007 and 2009, and there is no evidence other than that line of his actual knowledge. As such, the Court had to rely on the recklessness analysis, as it does at the conclusion of the opinion, stating that the fact that there is a large time difference between 2007 and 2009 is irrelevant as Mr. Commander should have known of the potential liability.

It is here that the lower court's analysis, relying on the gross negligence analysis that the Third Circuit has adopted, must fail. The evidence presented below on summary judgment was only that Mr. Commander became aware at some point prior to the end of 2009. While Mr. Commander also demonstrated that this was a misstatement or misreading of his testimony, even if accepted to be true, it only reflects that he knew by the end of 2009, toward the very end of the period for which the government assessed the penalty at issue.

Mr. Commander argued that he had a longstanding division of labor with his ex-partner, Skerianz and that he had no responsibility for payroll or payroll taxes, even if his name was stamped on checks by the staff. He further noted that Skerianz and the company accountant, Frank Dragotto failed to file any payroll tax returns for years, and he was unaware of this fact. Furthermore, upon learning of these facts, he immediately directed Dragotto to file the returns in early 2010 and they were in fact filed. At that time, he also testified to making attempts to work with the IRS on a payment plan to repay the amounts at issue.

It was at this time, when he was attempting to save Darken and work out a repayment plan with the IRS that Skerianz abandoned the company (along with a former CFO of the Company) and went to form a competing entity that stole much of the business. Commander spent years attempting to bring Skerianz and his partners to justice, but was unable to recover much, due to Skerianz' bankruptcy.

At the state of summary judgment, the Government certainly has not met the higher standard set forth by the Second, Fifth and Sixth Circuits for recklessness under 6672(a). Those circuits are also correct as to the reading of the statute. Applying a gross negligence standard simply disregards the language of the statute. Numerous federal statutes and cases in this court distinguish between willfulness and gross negligence. *See, e.g.*, 33 U.S.C. § 2704; *Smith v. Wade*, 461 U.S. 30, 60 n.3, 103 S. Ct. 1625, 1642 (1983) (Rehnquist, J., dissenting); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493, 128 S. Ct. 2605, 2621 (2008) quoting *Day v. Woodworth*, 54 U.S. 363, 371 (1852); *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 58, 127 S. Ct. 2201, 2209 (2007).

POINT TWO

The arguments made below remain correct and an additional reason for this Court to grant certiorari. The Courts below selected one line out of over two hundred pages that appeared to support the Government's case, but ignored not only the affidavits of Petitioner

explaining what he meant, but also the balance of the transcript that made it clear that the statement was not meant as the Government asserted.

CONCLUSION

For the foregoing reasons, I respectfully submit that the petition for writ of certiorari be granted.

Respectfully submitted,

DARREN COMMANDER, Pro Se
5 Cornell Parkway
Springfield, NJ 07081
917-807-4858