No.

IN THE
Supreme Court of the United States

NOVA MONTGOMERY,
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

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PETITION FOR A WRIT OF CERTIORARI

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April 7, 2016

QUESTION PRESENTED

In *Cheek v. United States*, 498 U.S. 192 (1991), this Court addressed the intent element for criminal tax prosecutions in the context of jury instructions. In explaining this decision's rationale, this Court observed that excluding evidence regarding a defendant's intent that "might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." Following this sound advice, the exclusion of such evidence regarding a defendant's intent resulted in reversals in both *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991) and *United States v. Gaumer*, 972 F.2d 723 (6th Cir. 1992). However, the Eleventh Circuit held otherwise in Montgomery's case, and concluded that it is permissible to exclude evidence regarding her good faith intent.

The Question Presented is whether the exclusion of evidence regarding Montgomery's intent during her prosecution for tax crimes violated the Sixth Amendment's jury trial provision, a question unresolved by *Cheek*.

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES
(continued)

CASES *Page(s)*

TABLE OF AUTHORITIES
(continued)

CASES *Page(s)*

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES
(continued)

RULES *Page(s)*

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nova Montgomery ("Montgomery") respectfully petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The opinion of the court of appeals is unreported and appears in the Appendix at page A1. It is unofficially reported via Lexis at 2015 U.S.App. LEXIS 19299.

JURISDICTION

The judgment of the court of appeals was entered on November 5, 2015. (Appendix at page A1). A timely petition for rehearing was filed, but denied on January 14, 2016. (Appendix at page A5). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AMENDMENT, STATUTES, AND EVIDENCE RULES INVOLVED

The **Sixth Amendment** of the United States Constitution provides:

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

26 U.S.C. 7201 provides:

> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $100,000 ($500,000 in the case of a corporation), or imprisoned not more than 5 years, or both, together with the costs of prosecution.

26 U.S.C. 7203 provides:

> Any person required under this title to pay any estimated tax or tax, or required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to pay such estimated tax or tax, make such

return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $25,000 ($100,000 in the case of a corporation), or imprisoned not more than 1 year, or both, together with the costs of prosecution. In the case of any person with respect to whom there is a failure to pay any estimated tax, this section shall not apply to such person with respect to such failure if there is no addition to tax under section 6654 or 6655 with respect to such failure. In the case of a willful violation of any provision of section 6050I, the first sentence of this section shall be applied by substituting "felony" for "misdemeanor" and "5 years" for "1 year."

Rule 401, Federal Rules of Evidence, provides:

Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

Rule 402, Federal Rules of Evidence, provides:

Relevant evidence is admissible unless any of the following provides otherwise:
- the United States Constitution;

- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

Rule 403, Federal Rules of Evidence, provides:

> The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

INTRODUCTION

This petition presents a crucial question affecting not only the federal government but also the American public. In 2013, 3,865 parties were criminally charged with the commission of federal tax crimes, resulting in 3,311 convictions. In 2014, there were 3,272 such charges brought by the Internal Revenue Service, and 3,110 convictions. In 2015, 3,208 criminal tax cases were prosecuted in our federal courts, resulting in 2,879 convictions.[1] Clearly, there is a significant number of criminal tax cases prosecuted every year under Chapter 75 of the

[1] See IRS Statistical Data for Three Fiscal Years, posted on the internet at the following URL (visited March 23, 2016): https://www.irs.gov/uac/Statistical-Data-for-Three-Fiscal-Years-Criminal-Investigation-%28CI%29

Internal Revenue Code. Typically, the intent element for the tax crimes set forth in Chapter 75 is "willfulness."

In *Cheek v. United States*, 498 U.S. 192 (1991), this Court addressed the validity of a jury instruction defining this intent element given in a case prosecuted in Chicago. Acting in good faith is a defense to a crime having the element of "willfulness," and the district court had instructed Cheek's jury that such a belief had to be objectively reasonable. On appeal, the Seventh Circuit found no error in such an instruction.

This Court disagreed, however, and reversed Cheek's conviction, essentially holding that a "good faith belief" forming the basis of a defense against willfulness, as asserted in criminal tax cases, need not be reasonable, and need only be sincerely held. In reaching this conclusion, this Court observed that "forbidding the jury to consider evidence that might negate willfulness would raise a serious question under the Sixth Amendment's jury trial provision." *Id*., at 203.

Within 18 months of this decision, both the Ninth and Sixth Circuits were confronted with convictions in tax cases where "good faith" defense evidence had been excluded at trial. In both *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991), and *United States v. Gaumer*, 972 F.2d 723 (6th Cir. 1992), those courts, following this Court's above admonition, reversed convictions where this type of defense evidence had been excluded at trial.

Here, Montgomery's "good faith" defense evidence, offered to support her trial testimony, was excluded, as was her relevant testimony concerning

that evidence, and the Eleventh Circuit upheld such exclusion, in sharp contrast with its own precedent and the decisions of the Ninth and Sixth Circuits. Plainly, there is a split in the circuits regarding this specific and important issue. This Court's acceptance of the instant petition will provide needed supervision and resolve this conflict.

STATEMENT OF THE CASE

1. Factual Background and Proceedings in District Court.

Montgomery was indicted for income tax crimes by a federal grand jury sitting in Tampa, Florida on April 10, 2013.[2] On July 22, 2014, a few months before trial, a superseding indictment was returned charging that Montgomery had willfully evaded income tax as proscribed by 26 U.S.C. § 7201, and had willfully failed to file federal income tax returns in violation of 26 U.S.C. § 7203. The first five counts of the superseding indictment charged Montgomery with committing income tax evasion on February 12, 2009, by filing income tax returns for the years 2002 through 2006 and reporting her income as "0" when in reality she had substantial income for those years. Counts six through ten charged Montgomery with willfully failing to file income tax returns for 2008 through 2012, despite sufficient income to require such filings. Montgomery pled not guilty to these

[2] Jurisdiction of the district court for this criminal action was obtained via 18 U.S.C. §3231.

charges.

Trial was eventually set for October 6, 2014. In preparation, Montgomery served a copy of her proposed exhibit list and exhibits on the prosecution the Friday before trial, identifying 61 exhibits to be offered. On the morning of trial, the prosecution moved *in limine* to exclude Montgomery's proposed exhibits and the district court granted the motion after an offer of proof and argument by the parties. Undeterred, on the evening of the first day of trial, Montgomery moved the district court to revisit its order *in limine*, and the brief submitted in support of that motion directly quoted from *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991), and *United States v. Gaumer*, 972 F.2d 723 (6th Cir. 1992), arguing that Montgomery's proposed exhibits were admissible as demonstrations of what she had relied upon to form her beliefs regarding the applicability of the federal income tax laws to her.

During trial, the prosecution introduced evidence to show that for all years relevant to this case, Montgomery had worked as an independent marketing agent for a company named Market America and had earned substantial amounts. It also introduced evidence to show that on February 12, 2009, Montgomery filed income tax returns for the years 2002 through 2006, reporting her income for those years as "0," an indicator of tax evasion. Finally, it also provided evidence that Montgomery did not file income tax returns for the years 2008 through 2012, despite earning large sums through her work with Market America.

Montgomery was the only defense witness, and her sole defense was that she had not acted

"willfully," but rather in good-faith reliance upon the various legal authorities she had studied to reach her beliefs regarding the applicability of the federal income tax laws to her. She testified that she attended a meeting in her community some years before, where two men discussed the requirement to file federal income tax returns. She was shown at this meeting a number of Internal Revenue Service documents stating that compliance with the federal income tax laws was "voluntary." The meeting presenters also reviewed a number of court decisions related to the income tax, several of which were decisions of this Court. Finally, they reviewed a number of Internal Revenue Code provisions with the attendees. In conclusion, they informed those in attendance at the meeting that the requirement to file federal income tax returns was "voluntary."

Seeking to confirm the accuracy of these presenters' contentions with respect to the federal income tax, Montgomery obtained from them a number of the IRS documents they had discussed, as well as a list of relevant cases and a copy of the Internal Revenue Code. Thereafter, over the next six or more months, she studied this material, and even acquired and studied copies of court cases available at the local law school library. After a detailed study, she concluded that she was not required to file federal income tax returns, and ceased doing so.

Montgomery's exhibit list contained many of the documents she had studied and relied upon to reach this "good-faith belief" that the federal income tax laws did not apply to her. Many of her proposed exhibits were IRS documents, and some were various court decisions, including cases from this Court, such

as *Pollock v. Farmers' Loan & Trust Company*, 157 U.S. 429 (1895). As Montgomery attempted to testify to her trial jury about what she learned by reading *Pollock* (in which this Court found the 1894 federal income tax unconstitutional), the prosecution invoked the order *in limine* to register its objection:

> [MS. MONTGOMERY] A: Pollock vs. Farmers Loan & Trust.
> [MR. BECRAFT] Q: What was your understanding about this case, why did you study it?
> A: My understanding about this case was that it's very foundational and important because — am I allowed to tell what it was?
> Q: I want you to relate what you understood it to be, what your belief was.
> A: My belief about the case was that this was the first time the Supreme Court struck down the income tax as being unconstitutional. They said that — the Supreme Court — I believe that the Supreme Court —
> MR. BINI: Objection, Your Honor.
> THE COURT: The objection is sustained. Let's move on, please. The jury will disregard that last comment.
>
> * * *
>
> BY MR. BECRAFT:
> Q: After you read this case —
> THE COURT: Let me make sure the jury understands.

> MR. BECRAFT: Sure, Judge.
> THE COURT: Whatever case it is that the witness is describing is something she read, relied on in forming a belief. You should not consider her statement as a correct or incorrect statement of what the case held. We don't know what the case held and it's not relevant to this case. But it's something she relied on and formed opinions about and that's something you can consider on the issue of willfulness."
>
> * * *
>
> THE COURT: I think I've given the jury sufficient instructions. You should disregard any opinions about the law or what the law is from this witness. And that includes case law. Go ahead, Mr. Becraft.

Attempts by Montgomery to at least minimally reference other cases such as *Brushaber v. Union Pacific Railroad Company*, 240 U.S. 1 (1916), *Stanton v. Baltic Mining Company*, 240 U.S. 103 (1916), *Peck & Company v. Lowe*, 247 U.S. 165 (1918), and *Eisner v. Macomber*, 252 U.S. 189 (1920), were similarly rebuffed, and she was prevented from testifying to her jury what she learned by studying these legal authorities.

The order *in limine* was also invoked to exclude both the introduction of other exhibits and any testimony about what Montgomery believed she learned from reading them. For example, Montgomery attempted to offer and testify about an

exhibit she had listed as the "1943 Congressional Record," only to have both the introduction of this exhibit and any testimony related thereto excluded:

> [MR. BECRAFT]: Well, what did you learn by reading this?
> THE COURT: No, no, not what did you learn; what belief do you have about your right or responsibility to do certain things, that's the question. We don't want to know what's in the Congressional Record; it's irrelevant.
>
> * * *
>
> THE COURT: All right, Mr. Becraft, these exhibits are not in evidence, they will not be commented upon any longer unless they're admitted.
> MR. BECRAFT: Your Honor, move for the admission of proposed Exhibit 38.
> MR. BINI: Your Honor, the government objects on Rule 403 grounds, the rules and the reasons stated in the motion *in limine*.
> THE COURT: The objection is sustained.
> MR. BECRAFT: Well, this work right here is —
> THE COURT: It's sustained. We will not talk about this work any longer. It's not in evidence.
> MR. BECRAFT: Your Honor, I move for the admission of 2, 39 through 46.
> THE COURT: What were, just for the record, the numbers again?

> MR. BECRAFT: I'll tell you one at a time. Two, Your Honor.
> THE COURT: Two. And then 39 through 46?
> MR. BECRAFT: And then I flip to 39 through 46.
> THE COURT: What says the government?
> MR. BINI: Your Honor, the government objects to the admission of these documents. The first document is from 1953 and these other —
> THE COURT: What are legal grounds?
> MR. BINI: 403, relevance; 403, the motion *in limine*.
> THE COURT: The objection to number 2 is sustained. The objection to 39 is sustained. Number 40, Mr. Becraft, is 1984; is that right?
> MR. BECRAFT: Yes, extracts from the 1040 instruction booklets for '84 and the next one is '71, Your Honor, just single-page documents, I believe.
> THE COURT: The objection to 40 is sustained. The objection to 41 is sustained. The objection to 42 is sustained. Likewise 43 and 44, 45, and 46, under 403 and for the reasons that we've been discussing, *Cheek vs. United States* and the authority of that decision.

Of the final 62 exhibits listed on Montgomery's exhibit list, only four were admitted. The jury found her guilty on all counts.

Prior to sentencing, Montgomery filed a motion

for bond on appeal, arguing that trial error occurred as the result of the district court's exclusion of most of Montgomery's proposed exhibits and her related testimony, which motion the district court granted. At sentencing, the district court imposed a 36-month sentence on Montgomery. Presently, she is at liberty on bond.

2. The Eleventh Circuit's Decision.

On appeal to the Eleventh Circuit, Montgomery argued that the district court erred by excluding most of her tendered trial exhibits as well as her testimony related thereto. It was noted that this issue was one of first impression in the Eleventh Circuit, but Montgomery argued that in cases where specific intent is at issue, the Eleventh Circuit has repeatedly held that exclusion of evidence critical to establishing defendant's intent constitutes reversible error. Montgomery also asserted that, based on the Ninth Circuit authority of *United States v. Powell*, 955 F.2d 1206, 1214 (9th Cir. 1991), and the Sixth Circuit authority of *United States v. Gaumer*, 972 F.2d 723 (6th Cir. 1992), reversal of her convictions is required due to the erroneous exclusion of critical defense evidence.

The Eleventh Circuit disagreed and affirmed Montgomery's convictions in a manner that adroitly avoided not only its own decisional authority, but also the authority of this Court. To dispose of Montgomery's argument, the Eleventh Circuit cited and relied upon *United States v. Brown*, 53 F.3d 312 (11th Cir. 1995), a completely irrelevant case. *Brown* was prosecuted for money laundering, and on appeal

from his conviction, he argued that the trial evidence was insufficient, not that evidence had been erroneously excluded.

REASONS FOR GRANTING THE WRIT

1. Supervisory action is needed to preserve due process in tax cases

In determining whether certiorari should be granted, one factor considered is whether the decision below has sanctioned a departure so far from the usual course of judicial proceedings that this Court's supervision is required in order to preserve due process. Such departure is present here.

As noted above, the issue Montgomery raised on appeal was the *erroneous exclusion* of defense evidence, an issue entirely distinct from the issue of insufficiency of the evidence. Nonetheless, the Eleventh Circuit decided Montgomery's appeal as if she had challenged the sufficiency of the evidence. In doing so, the Eleventh Circuit disregarded its own usual course.

The Eleventh circuit agrees with the proposition that a criminal defendant asserting a defense of innocent intent should be permitted to offer evidence to show the basis for that innocent intent. In *United States v. Juan*, 776 F.2d 256 (11th Cir. 1985), the defendant appealed the exclusion of defense material, through which he sought to show that he believed he was in cooperation with the government, and thereby lacked criminal intent. The court found that the exclusion was error, stating:

> Appellant's contention of innocent intent in this case would strain the credulity of reasonable jurors unless it could be made to appear that, as incredulous as it might seem, the belief may have rested upon a real and genuine basis. Evidence of the basis is material, whether or not it might ultimately be persuasive. Clearly, the mere fact that appellant had, in the past, engaged in the activity he seeks to prove does not insulate him from criminal responsibility for unlawful acts thereafter. His claim of innocent intent may well remain unbelievable even though supported by his historical evidence. Yet, the past events tend to make more plausible that which, absent proof of those events, would be implausible. Appellant should be allowed, subject to the discussion below, to establish the premise for his claim.

United States v. Juan, 776 F.2d 256, 258 (11th Cir. 1985). [emphasis added]

Similarly, the Eleventh Circuit has concluded numerous times that the exclusion of evidence regarding a defendant's innocent intent is reversible error when such is critical to establishing a defense. See *United States v. Kelly*, 888 F.2d 732, 743 (11th Cir. 1989) ("The proffered testimony was thus crucial to Kelly's defense, and its exclusion substantially hindered him from articulating this defense."); *United States v. Lankford*, 955 F.2d 1545, 1550 (11th Cir. 1992) (it was an abuse of discretion to exclude expert evidence of good faith defense to crime requiring specific intent); *United States v. Gaskell*,

985 F.2d 1056, 1063 (11th Cir. 1993) ("Because the excluded testimony related to the determinative issue of intent, we cannot say that the error was harmless."); *United States v. Veltmann*, 6 F.3d 1483, 1493 (11th Cir. 1993) ("The deposition was admissible under the state of mind exception, and while conceivably cumulative, its import was such that exclusion violated defendants' right to put on a defense. This abuse of discretion requires reversal."); *United States v. Thompson*, 25 F.3d 1558, 1563 (11th Cir. 1994) (district court erred when it granted the government's motion *in limine* and effectively prohibited Thompson from presenting his theory of defense); and *United States v. Todd*, 108 F.3d 1329, 1334 (11th Cir. 1997) ("In our case, the excluded evidence goes directly to Todd's criminal intent. * * * We cannot conclude that the exclusion of the disputed evidence was harmless beyond a reasonable doubt.")

The Eleventh Circuit's reliance on *Brown*, which simply states that defense evidence can be used and relied upon in an insufficiency of evidence challenge to a conviction, is misplaced. *Brown* cannot serve as decisional authority to affirm Montgomery's convictions, as they were obtained by *denying* such defense evidence altogether. By relying on *Brown,* the Eleventh Circuit has avoided its own precedents, as well as the authority of the Ninth and Sixth Circuits in *Powell* and *Gaumer,* which are soundly based on this Court's decision in *Cheek*.

2. For the first time, there exists a conflict in the circuits on admissibility of defense evidence in tax cases

In determining whether certiorari should be granted, one of the most important factors is the existence of a split among the federal courts of appeals, and such exists here. This Court should grant review, as this case presents an especially suitable opportunity to resolve the circuit conflict on the critical issue of whether case law and official publications upon which a defendant claims to have relied, in forming her good-faith belief, are admissible to disprove the element of willfulness, and whether the defendant's testimony is admissible to lay a proper foundation which demonstrates such reliance.

"Where intent of the accused is an ingredient of the crime charged, its existence is a question of fact which must be submitted to the jury." *Morissette v. United States*, 342 U.S. 246, 274 (1952). Facts, especially disputed facts, are proven to a jury in court by testimony of witnesses and relevant documents. A defendant's innocent intent is typically proven by his or her testimony, but that testimony can be buttressed by other admissible proof. Such a defendant may "introduce evidence consistent with such a good faith defense," and a "trial court err[s] in excluding it." *United States v. Martin-Trigona*, 684 F.2d 485, 492 (7th Cir. 1982).

Here, Montgomery sought to testify about cases that she had read, studied and relied upon, but that testimony was excluded, even though some of these cases were decisions of this Court. In *United States v.*

Bishop, 412 U.S. 346, 361 (1973), this Court held that the "requirement of an offense committed 'willfully' is not met, therefore, if a taxpayer has relied in good faith on a prior decision of this Court." Montgomery did rely upon decisions of this Court, as this Court held that she could, but the Eleventh circuit disagrees, and even barred her from testifying about her perception concerning this Court's prior decisions or the manner in which she relied upon them in forming her beliefs.

Montgomery also read and studied a variety of Internal Revenue Service publications, and sought during trial not only to testify about those documents, but to also offer them into evidence so the jury had a basis upon which to evaluate whether Montgomery's reliance upon them was in good faith. An American can rely upon the statements and representations of public officials. See *Raley v. Ohio*, 360 U.S. 423, 79 S.Ct. 1257 (1959); and *Cox v. Louisiana*, 379 U.S. 559, 85 S.Ct. 476 (1965). But the Eleventh Circuit declares, contrary to authority from this Court, that a defendant cannot testify about official statements a party has relied upon, at least in tax prosecutions.

The Eleventh Circuit also disagrees with the decisional authorities in two other circuits. In *United States v. Powell*, 955 F.2d 1206 (9th Cir. 1991), reversing a tax conviction because the evidence offered by defendant regarding his intent was erroneously excluded, the court stated:

> The Supreme Court in *Cheek* held that 'forbidding the jury to consider evidence that might negate willfulness would raise a

> serious question under the Sixth Amendment's jury trial provision.' *Cheek*, 111 S.Ct. at 611. Although a district court may exclude evidence of what the law is or should be, see *United States v. Poschwatta*, 829 F.2d 1477, 1483 (9th Cir. 1987), cert. denied, 484 U.S. 1064, 108 S.Ct. 1024, 98 L.Ed.2d 989 (1988), it ordinarily cannot exclude evidence relevant to the jury's determination of what a defendant thought the law was in § 7203 cases because willfulness is an element of the offense. In § 7203 prosecutions, statutes or case law upon which the defendant claims to have actually relied are admissible to disprove that element if the defendant lays a proper foundation which demonstrates such reliance. See *United States v. Harris*, 942, F.2d 1125, 1132 n. 6 (7th Cir. 1991); *United States v. Willie*, 941 F.2d 1384, 1391-99 (10th Cir. 1991). Legal materials upon which the defendant does not claim to have relied, however, can be excluded as irrelevant and unnecessarily confusing because only the defendant's subjective belief is at issue: the court remains the jury's sole source of the law. In addition, the court may instruct the jury that the legal material admitted at trial is relevant only to the defendant's state of mind and not to the requirements of the law, and may give other proper cautionary and limiting instructions as well.

United States v. Powell, 955 F.2d 1206, 1214 (9th Cir. 1991). [emphasis added]

The Sixth Circuit has followed *Powell* and likewise reversed a conviction where similar evidence was excluded. See *United States v. Gaumer*, 972 F.2d 723 (6th Cir. 1992). Incidentally, several of the exhibits erroneously excluded in *Gaumer* were exhibits that Montgomery also attempted to offer.

Not only does the Eleventh Circuit disagree with both *Powell and Gaumer*, it also apparently disagrees with this Court's decision in *Cheek v. United States*, 498 U.S. 192 (1991). In *Cheek*, this Court noted the permissible scope of cross-examination by a prosecutor of a defendant charged with tax crimes:

> Of course, in deciding whether to credit Cheek's good-faith belief claim, the jury would be free to consider any admissible evidence from any source showing that Cheek was aware of his duty to file a return and to treat wages as income, including evidence showing his awareness of the relevant provisions of the Code or regulations, of court decisions rejecting his interpretation of the tax law, of authoritative rulings of the Internal Revenue Service, or of any contents of the personal income tax return forms and accompanying instructions that made it plain that wages should be returned as income.

Cheek v. United States, 498 U.S. 192, 202 (1991).

If this Court permits a prosecutor to cross-examine a defendant in the manner noted above, then a defendant should similarly be permitted to rebut on

re-direct with similar evidence.

A defendant's testimony regarding that party's reliance upon the printed words of this Court as well as various publications of government agencies is clearly relevant in cases of this kind. To support that testimony, those documents are also plainly relevant pursuant to Fed. R. Evid. 401, and thus admissible via Fed. R. Evid. 402. Excluding them via Fed. R. Evid. 403, when a limiting instruction to a jury clearly suffices, results in the abridgement of a defendant's rights under the Sixth Amendment.

In short, the Eleventh Circuit's opinion affirming Montgomery's convictions conflicts not only with authority in other circuits, but also with this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10370
Non-Argument Calendar

D.C. Docket No. 8:13-cr-00178-JDW-AEP-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NOVA A. MONTGOMERY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(November 5, 2015)

Before MARCUS, JULIE CARNES and FAY, Circuit Judges.

PER CURIAM:

Nova Montgomery appeals her convictions for five counts of tax evasion, in violation of 26 U.S.C. § 7201, and five counts of failing to file a tax return, in violation of 26 U.S.C. § 7203. On appeal, Montgomery argues that: (1) the district court abused its discretion in excluding her testimony about certain pro-

posed defense exhibits and in excluding the admission of several of those exhibits; and (2) the district court erred in its instruction to the jury on reasonable doubt. After careful review, we affirm.

We review a district court's decision to admit or exclude evidence for abuse of discretion. *United States v. Reeves*, 742 F.3d 487, 501 (11th Cir. 2014). We apply the harmless error standard to erroneous evidentiary rulings. *United States v. Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005). An error is harmless unless it had a substantial influence on the case's outcome or leaves a grave doubt as to whether the error affected the outcome. *Id.* We review jury instructions properly challenged below *de novo* to determine whether the given instructions misstated the law or misled the jury to the prejudice of the objecting party. *United States v. Felts*, 579 F.3d 1341, 1342 (11th Cir. 2009). We will reverse because of an erroneous instruction only if we are "left with a substantial and ineradicable doubt as to whether the jury was properly guided in its deliberations." *Id.* at 1342-43 (quotation omitted).

First, we are unpersuaded by Montgomery's claim that the district court abused its discretion in excluding certain testimony and exhibits. In *Cheek v. United States*, the defendant was charged with tax evasion and failing to file a tax return. 498 U.S. 192, 194 (1991). The Supreme Court held that "a defendant's views about the validity of the tax statutes are irrelevant to the issue of willfulness and need not be heard by the jury." *Id.* at 206. However, if someone simply fails to understand that he has a duty to pay income taxes under the Internal Revenue Code, he cannot be guilty of "willfully" evading those

taxes. *Id.* at 201-02. Thus, the Supreme Court held that Cheek was entitled to have the jury instructed about his asserted beliefs that wages were not income and that he was not a taxpayer within the meaning of the Internal Revenue Code. *Id*. at 206-07.

When a defendant testifies at trial, any of the defendant's statements that are disbelieved by the jury may be considered as substantive evidence of the defendant's guilt, and the jury may therefore conclude that the opposite of the defendant's testimony is true. *United States v. Brown*, 53 F.3d 312, 314 (11th Cir. 1995). "This rule applies with special force" where the elements to be proven are highly subjective, such as intent or knowledge. *Id*. at 315.

Here, Montgomery claims that the district court abused its discretion by excluding from evidence the substance of cases, government publications, and other materials that allegedly supported Montgomery's good-faith belief that she had no duty to pay income taxes or file returns. Yet, even if the district court erred by excluding this evidence, that error would have been harmless. As the record reveals, the district court permitted Montgomery to testify, in great detail, about her beliefs on income taxes, based on specific cases that she had read. This testimony spanned over 100 pages, and she was often allowed to go through the cases by name, one-by-one. The court also admitted a seven-page statement of her beliefs into evidence. Moreover, Montgomery chose to testify at trial, so any statements that the jury disbelieved could be considered as substantive evidence of her guilt, especially when the element to be proven was willfulness. See *Brown*, 53 F.3d at 314–15. In short, because the jury did not believe

Montgomery's testimony, the admission of the exhibits at issue and of her testimony about the substance of several of those exhibits would not have had a substantial influence on the case's outcome. Accordingly, the error, if any, was harmless.

We also find no merit to Montgomery's claim that the district court erred when it instructed the jury on reasonable doubt by equating reasonable doubt to proof that jurors would rely on in the most important of their own affairs. We've upheld jury instructions defining reasonable doubt, in which the instruction equated the proof to that which a juror would be willing to rely or act upon without hesitation in the most important of their affairs. See *United States v. Hansen*, 262 F.3d 1217, 1249 (11th Cir. 2001). Further, we have "repeatedly approved of the definition of reasonable doubt provided in the Eleventh Circuit Pattern Jury Instructions." *United States v. James*, 642 F.3d 1333, 1337 (11th Cir. 2011).

In this case, the district court did not misstate the law or mislead the jury to the prejudice of Montgomery by giving the Eleventh Circuit Pattern Jury Instruction, in which proof beyond a reasonable doubt was equated to that which a juror would be willing to rely and act upon without hesitation in their important affairs. That definition of reasonable doubt is supported by our precedent. *See Hansen*, 262 F.3d at 1249. We are bound by our prior precedent until it is overruled by the Supreme Court or our Court sitting en banc. *United States v. Lawson*, 686 F.3d 1317, 1319 (11th Cir. 2012). Accordingly, the district court did not err by instructing the jury in this way.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 15-10370-E

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

NOVA A. MONTGOMERY,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: MARCUS, JULIE CARNES, and FAY, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

s/Stanley Marcus
UNITED STATES CIRCUIT JUDGE

[Date Filed: 01/14/2016]