No. 10-961

In the Supreme Court of the United States

SANJAY KUMAR, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the one-book rule in Sentencing Guidelines § 1B1.11(b)(3), which requires that the revised edition of the Guidelines be used to calculate a defendant's advisory sentencing range when the defendant's offenses occurred both before and after the revised Guidelines took effect, violates the Ex Post Facto Clause as applied to offenses that are considered as a group under the Guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-83a) is reported at 617 F.3d 612.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2010. A petition for rehearing was denied on October 25, 2010 (Pet. App. 84a-85a). The petition for a writ of certiorari was filed on January 24, 2011 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of New York, petitioner was convicted on multiple counts of conspiracy, securities fraud, wire fraud, obstruction of justice, and making

false statements. Pet. App. 2a. In particular, petitioner was convicted on one count of conspiracy to commit securities and wire fraud, in violation of 18 U.S.C. 371; one count of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff; three counts of making false statements to the Securities and Exchange Commission (SEC), in violation of 15 U.S.C. 78m(a) and 78ff; one count of conspiracy to obstruct justice, in violation of 18 U.S.C. 1512(k); one count of obstruction of justice, in violation of 18 U.S.C. 1512(c)(2); and one count of making false statements, in violation of 18 U.S.C. 1001(a)(1) and (2). Pet. C.A. Special App. SPA1-SPA2. He was sentenced to 144 months of imprisonment, to be followed by three years of supervised release. *Id.* at SPA3-SPA4. The court of appeals affirmed his sentence. Pet. App. 1a-83a.

1. In August 1987, petitioner joined Computer Associates International Inc., a publicly traded corporation. In 1994, he became President and Chief Operating Officer and, in August 2000, he was made Chief Executive Officer. Together with co-defendant Stephen Richards, the company's Executive Vice President of Sales, petitioner engaged in a scheme, which had begun in the 1980s under his predecessor, in which Computer Associates backdated license agreements to deceive investors into believing that the company had met quarterly earnings forecasts. The backdating scheme continued until the fall of 2000. After the scheme was uncovered, Computer Associates was required to restate approximately $2.2 billion in revenue into the correct quarters. Gov't C.A. Br. 4; Pet. App. 3a, 7a n.2; Pet. C.A. App. A448.

In 2002, the Federal Bureau of Investigation, the United States Attorney's Office for the Eastern District of New York, and the SEC began a joint investigation into the fraudulent scheme. The investigation continued

through the fall of 2004. In an effort to obstruct the investigation, petitioner lied to Computer Associates' outside counsel, instructed the company's general counsel to coach employees to lie to government investigators, authorized the general counsel to pay a $3.7 million bribe to secure the silence of a potential witness, and lied to FBI agents. Pet. App. 4a-5a; Presentence Investigation Report (PSR) ¶¶ 54-56, 70.

2. In a superseding indictment filed on June 28, 2005, petitioner and Richards were charged with numerous counts of conspiracy, securities fraud, wire fraud, obstruction of justice, and making false statements. Pet. C.A. App. A39-A84. In April 2006, petitioner pleaded guilty to the charges against him. Pet. App. 6a. As reflected in the judgment, petitioner's offenses of conspiracy, securities fraud, and making false statements to the SEC ended by October 31, 2000. Pet. C.A. Special App. SPA1-SPA2. In contrast, petitioner's obstruction offenses ended in April 2004. *Id.* at SPA2.

The PSR calculated petitioner's advisory sentencing range under the Sentencing Guidelines based on the 2005 version of the Guidelines, which was the same in all relevant respects as the version in effect when petitioner's obstruction offenses ended in April 2004. Pet. App. 6a; Pet. 4 n.4. The PSR first grouped together petitioner's convictions for conspiracy, securities fraud, and false statements to the SEC. See Guidelines § 3D1.2(d). In part based on enhancements for causing a loss of more than $400 million and for victimizing more than 250 people that were added to the Guidelines between 2001 and 2003, the PSR calculated that petitioner had an adjusted offense level of 53 for that group. PSR ¶¶ 120-127. The PSR also grouped together petitioner's convictions for conspiracy to obstruct justice, obstruction of

justice, and making false statements in violation of 18 U.S.C. 1001 and calculated an adjusted offense level of 21 for that group. PSR ¶¶ 128-133. The PSR further concluded that the two groups should themselves be grouped together under Guidelines § 3D.1.2(c) and that the adjusted offense level for all of the combined offenses was 53, since that was the highest offense level of the grouped counts. PSR ¶¶ 135-139; see Guidelines § 3D1.3(a). After awarding petitioner a two-level downward adjustment for acceptance of responsibility, the PSR calculated a total offense level of 51. PSR ¶¶ 140-141. That offense level, combined with petitioner's criminal history category of I, yielded an advisory Guidelines range of life imprisonment. PSR ¶ 181.

At sentencing on November 2, 2006, the district court noted that petitioner had raised "an ex post facto issue" based on the completion of his conspiracy and securities fraud offenses in October 31, 2000, when the applicable advisory Guidelines for fraud offenses were "less onerous" than the fraud Guidelines "in effect when the obstruction and false statement crimes were committed" in 2003 and 2004. Pet. C.A. App. A437-A438. The court rejected petitioner's ex post facto claim, explaining that although the Guidelines sometimes presented ex post facto issues when they were mandatory before *United States* v. *Booker*, 543 U.S. 220 (2005), "the ex post facto clause has no application to the advisory guidelines." Pet. C.A. App. A440. Later in the sentencing, the court also observed that "the conspiracy in a very real sense continued" after October 31, 2000. *Id.* at A449. In particular, the court pointed out that, "between 2002 and 2004," petitioner "lied to the FBI" about the backdating practices at Computer Associates and "conspired to ob-

struct and impede the government's investigation into that security fraud." *Ibid.*

The district court made a couple of adjustments to the PSR's Guidelines calculations (reducing the base offense level for the fraud group by one level, rejecting as duplicative the upward adjustment to the fraud offense level for obstruction of justice, and rejecting as unwarranted the downward adjustment for acceptance of responsibility), but those adjustments did not alter petitioner's advisory Guidelines range, which remained life imprisonment. Pet. C.A. Special App. SPA7; Pet. C.A. App. A446. Immediately after determining the advisory range, however, the court rejected the Guidelines recommendation, stating that imposing a sentence of life imprisonment "would shock the conscience of this Court." Pet. C.A. App. A446.

Consistent with *United States* v. *Booker*, 543 U.S. 220 (2005), the district court then engaged in an extensive analysis of the sentencing factors in 18 U.S.C. 3553(a). Pet. C.A. App. A447-A455. The court noted that petitioner's crimes were serious, that he could have stopped the fraud upon becoming President and Chief Operating Officer, and that by instead embracing the scheme he "did violence to the legitimate expectations" of "untold numbers of investors." *Id.* at A450; see *id.* at A448, A453. The court also stressed that petitioner had exacerbated his wrong-doing by obstructing justice. *Id.* at A449, A451. The court observed that it was not likely, however, that petitioner would commit crimes in the future, so imprisonment was not needed either to protect the public or for specific deterrence. *Id.* at A452-A453. The court also noted that petitioner had engaged in substantial public and private acts of charity, although that charity was made possible by the consider-

able wealth that he had amassed at Computer Associates. *Id.* at A449. Balancing all of those considerations, the court arrived at a total sentence of 144 months of imprisonment. *Id.* at A456. The court specified that its sentence was "sufficient, but not greater than necessary to comply with the purposes of [Section] 3553(a)." *Id.* at A452.

3. The court of appeals affirmed petitioner's sentence. Pet. App. 1a-83a. As relevant here, the court rejected petitioner's contention "that application of the 2005 Guidelines to [his] fraud offenses, which were completed in 2000, violated the *Ex Post Facto* clause." *Id.* at 21a. The court noted that the Guidelines one-book rule, which was in effect before petitioner committed any of his offenses, provides that "[i]f the defendant is convicted of two offenses, the first committed before, and the second after, a revised edition of the Guidelines Manual became effective, the revised edition of the Guidelines Manual is to be applied to both offenses." *Id.* at 22a (quoting Guidelines § 1B1.11(b)(3)). Although petitioner claimed that the advisory Guidelines range for his fraud offenses should have been calculated based on the 1998 Guidelines, which were in effect when he committed those offenses, the one-book rule called for application of the Guidelines in effect when petitioner committed his obstruction offenses, which were not completed until the fall of 2004.

The court of appeals stated that the central question before it was "whether the one-book rule violates the *Ex Post Facto* clause" when, as in this case, it results in a higher advisory Guidelines range than would have applied under the Guidelines in effect when the defendant committed the first of his offenses. Pet. App. 25a. The court noted the district court had "found that the one-

book rule did not raise an *ex post facto* issue," reasoning that, after *Booker*, "the *Ex Post Facto* clause does not apply to the previously mandatory, now advisory, Guidelines." *Id.* at 24a n.12. Because, however, the government had "disclaimed reliance on the district court's analysis," the court of appeals proceeded "on the assumption that the *Ex Post Facto* clause applies to the advisory Guidelines." *Ibid.*; see Gov't C.A. Br. 45 n.15.

The court of appeals concluded "that the one-book rule set forth in § 1B1.11(b)(3) does not violate the *Ex Post Facto* clause when applied to the sentencing of offenses committed both before and after the publication of a revised version of the Guidelines." Pet. App. 29a. The court noted that most courts of appeals have held that the one-book rule does not violate the Ex Post Facto Clause when, as here, the rule is applied to a series of grouped offenses. *Id.* at 25a. Those courts have reasoned that "the combination of the grouping rules and the one-book rule puts a defendant on notice that 'the version of the sentencing guidelines in effect at the time he committed the last of a series of grouped offenses will apply to the entire group.'" *Id.* at 25a-26a (quoting *United States* v. *Vivit*, 214 F.3d 908, 918 (7th Cir.), cert. denied, 531 U.S. 961 (2000) (citation omitted)). Although the court of appeals acknowledged that two circuits have reached a contrary conclusion, see *id.* at 26a-28a (citing *United States* v. *Ortland*, 109 F.3d 539, 547 (9th Cir.), cert. denied, 522 U.S. 851 (1997); *United States* v. *Bertoli*, 40 F.3d 1384, 1404 n.17 (3d Cir. 1994), cert. denied, 517 U.S. 1137 (1996)), it agreed with the majority of the circuits that application of the one-book rule in the circumstances of this case does not offend ex post facto principles.

The court of appeals noted that "[c]entral to the *ex post facto* prohibition is a concern for the 'lack of fair notice and governmental restraint when the legislature increases punishment beyond what is prescribed when the crime was consummated.'" Pet. App. 29a (quoting *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting, in turn, *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981))). The court reasoned that application of the one-book rule to petitioner offends neither of those fundamental concerns. *Id.* at 30a. Because the rule was adopted before petitioner committed his obstruction offense, the court observed, he had notice before committing that offense that the consequences of committing it would include application of the later Guidelines to all of his offenses. *Ibid.* Thus, the court explained, petitioner "could have altered [his] conduct so as to avoid any heightened punishment imposed on the basis of the one-book rule by choosing not to obstruct the government's investigation of [the] prior fraud." *Ibid.* "As to governmental restraint," the court reasoned, application of the one-book rule did not involve the imposition of "heightened punishment following the commission of the criminal conduct triggering that punishment," because application of the amended Guidelines was triggered by petitioner's commission of the obstruction offenses, which were committed after the revised Guidelines took effect. *Id.* at 30a-31a.

Judge Sack dissented in relevant part. Pet. App. 53a-83a. Like the majority, he decided the case on the "assum[ption] that the *ex post facto* doctrine applies to the Sentencing Guidelines after" *Booker*. *Id.* at 63a. Unlike the majority, however, Judge Sack would have concluded that application of the one-book rule to peti-

tioner violated the Ex Post Facto Clause. *Id*. at 65a-83a.

ARGUMENT

Petitioner contends (Pet. 7-14) that this Court's review is warranted because the court of appeals erred in holding that application of the Guidelines' one-book rule to his case did not violate the Ex Post Facto Clause. Contrary to petitioner's contention, the decision of the court of appeals is correct. Although the circuits are divided on the question whether the one-book rule violates the Ex Post Facto Clause when the rule results in a higher Guidelines range than would have applied under the Guidelines in effect at the time of the defendant's initial offense, that issue does not warrant this Court's review. The conflict among the circuits on that issue depends on the premise that application of the Guidelines can implicate the Ex Post Facto Clause, and that premise is no longer correct after *United States* v. *Booker*, 543 U.S. 220 (2005), which rendered the Guidelines advisory. Although the courts of appeals are also divided on the broader question whether the advisory Guidelines can ever raise ex post facto concerns, this case is not an appropriate vehicle to resolve that question. The court below did not decide the issue, and the petition for a writ of certiorari does not raise it. Accordingly, this Court should deny the petition.

1. The court of appeals correctly held that application of the one-book rule to petitioner did not violate the Ex Post Facto Clause.

a. Although the court of appeals decided the case "on the assumption" that the Clause applies to the advisory Guidelines, Pet. App. 24a n.12, in fact, as the district court recognized, Pet. C.A. App. A439-A440, and the government has explained in response to other recent

petitions for writs of certiorari, the Guidelines no longer present any ex post facto concerns now that they are advisory only. See, *e.g.*, *Sedrati* v. *United States*, U.S. Br. in Opp. 9-11 (No. 09-10911), 2010 WL 3713182, at *4-*5 (filed Sept. 7, 2010); *Hensley* v. *United States*, U.S. Br. in Opp. 9-14 (No. 09-480), 2010 WL 603304, at *6-*9 (filed Jan. 10, 2010).

In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court held that the Ex Post Facto Clause barred the retroactive application of revised state sentencing guidelines that increased a defendant's presumptive sentencing range compared to the guidelines in effect at the time that the defendant committed the offense. The Court reasoned that the new guidelines, which "ha[d] the force and effect of law," "substantially disadvantaged" the defendant, because the state system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. *Id*. at 432, 435. The Court distinguished the Florida guidelines system from the United States Parole Commission's guidelines, noting that the federal parole guidelines "simply provide flexible 'guideposts' for use in the exercise of discretion." *Id*. at 435.

Before *Booker*, the federal Sentencing Guidelines (unlike the former federal parole guidelines) were mandatory. Thus, like the Florida guidelines at issue in *Miller*, the federal Sentencing Guidelines both "ha[d] the force and effect of laws," *Booker*, 543 U.S. at 234, and significantly constrained district courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1). Courts of appeals had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded the application of revised Guidelines provisions that provided for a more severe sentenc-

ing range than authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing have, however, made clear that the Guidelines, far from having the force and effect of laws, are now only advisory and do not limit the discretion of sentencing courts in the manner that the guidelines at issue in *Miller* did. In *Rita* v. *United States*, 551 U.S. 338, 341, 350-354 (2007), the Court held that sentencing courts may not presume a sentence within the advisory Guidelines range to be reasonable and may not presume a sentence outside of the advisory range to be unreasonable. In *Gall* v. *United States*, 552 U.S. 38, 47 (2007), the Court held that a court of appeals cannot apply a "rigid mathematical formula" that would demand an increasingly strong justification for a sentence the farther the sentence varies from the advisory Guidelines range. And, in subsequent decisions, the Court made clear both that sentencing courts may vary from the advisory range "based solely on policy considerations, including disagreements with the Guidelines" and that the Guidelines are just "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough* v. *United States*, 552 U.S. 85, 90, 101 (2007) (citation omitted); see *Pepper* v. *United States*, 131 S. Ct. 1229, 1247 (2011) ("[O]ur post-*Booker* decisions make clear that a district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."); *Spears* v. *United States*, 129 S. Ct. 840, 843 (2009) (per curiam). Finally, the Court has held that no advance notice is required when a court sentences out-

side the advisory Guidelines range based on the sentencing factors in 18 U.S.C. 3553(a), because defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008).

b. The inapplicability of the Ex Post Facto Clause to the advisory Guidelines by itself dictates the conclusion that application of the one-book rule to petitioner did not violate the Clause. In any event, as the court of appeals recognized, even if the Clause applied to the advisory Guidelines, application of the one-book rule to petitioner would still not violate the Clause. Pet. App. 25a-37a. "[C]entral to the ex post facto prohibition is a concern for 'the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed'" when the defendant committed the acts that triggered that punishment. *Miller*, 482 U.S. at 430 (quoting *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981)). Those concerns are not implicated by applying the one-book rule to offenses that are grouped to determine the advisory Guidelines range.[1]

As the court of appeals explained, the defendant has fair notice of the consequences of his criminal conduct before he commits it. Pet. App. 30a. The one-book rule puts the defendant on notice that, if he commits a series of offenses and is prosecuted for those offenses in a sin-

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[1] The court of appeals appears to have endorsed the broader principle that application of the one-book rule does not violate the Ex Post Facto Clause regardless of whether the offenses are grouped under the Guidelines. See Pet. App. 29a; see also *id.* at 69a-71a (Sack, J., dissenting) (describing scope of the court's ruling). But because the offenses here were grouped, that broader issue is not directly presented by the facts of this case, as Judge Sack noted in dissent. *Id.* at 72a.

gle proceeding, the version of the Guidelines in effect when he commits the last offense will be used to sentence him for the entire group of offenses. *Ibid.*[2]

In addition, application of the one-book rule to grouped offenses does not permit the government to increase the defendant's punishment beyond what was prescribed when the defendant committed the series of acts that triggered that punishment. The Guidelines range is determined for the offenses as a group, and the group includes a course of offense conduct that was not completed until after the new version of the Guidelines took effect. Thus, application of the one-book rule to grouped offenses is similar to application of the most recent version of the Guidelines to a continuing offense than is begun under one version of the Guidelines but not completed until a later version has taken effect. As the courts of appeals that have addressed that scenario have recognized, it does not present ex post facto concerns. See, *e.g.*, *United States* v. *Cooper*, 35 F.3d 1248, 1251 (8th Cir. 1994) (citing cases).[3]

Moreover, the specific conduct that triggers application of the later version of the Guidelines to the group is

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[2] The one-book rule was in effect before petitioner committed any of the offenses for which he was punished. This case is thus unlike the hypothetical posed by petitioner (Pet. 9-10), in which, after a securities fraud has been completed, Congress enacts a statute increasing the punishment for securities fraud and makes that increased punishment retroactively applicable to frauds committed before the statute's enactment if the defendant obstructs the crime after the enactment.

[3] For similar reasons, petitioner's reliance (Pet. 11-12) on *Greenfield* v. *Scafati*, 277 F. Supp. 644 (D. Mass. 1967), aff'd, 390 U.S. 713 (1968), is misplaced. Unlike this case, *Greenfield* did not involve a continuing course of criminal conduct. The increased punishment in *Greenfield* was triggered by commission of a parole violation rather than a further criminal offense.

the commission of the last offense, and the later version of the Guidelines has already taken effect when the defendant commits that offense. Thus, as the court of appeals explained, in this case petitioner "could have altered [his] conduct so as to avoid any heightened punishment imposed on the basis of the one-book rule by choosing not to obstruct the government's investigation of [the] prior fraud." Pet. App. 30a.

2. Although petitioner does not argue that this Court's review is needed to resolve a conflict among the courts of appeals, the circuits are divided on the question whether the one-book rule violates the Ex Post Facto Clause when the rule results in a higher Guidelines range than would have applied under the Guidelines in effect at the time of the defendant's initial offense. Most of the courts of appeals have held that the one-book rule does not violate the Ex Post Facto Clause, at least when, as in this case, the rule is applied to a series of grouped offenses. See Pet. App. 25a-26a (citing decisions from the Fourth, Fifth, Seventh, Eighth, Tenth, and Eleventh Circuits). The Third and Ninth Circuits, however, have disagreed. See *id.* at 26a-28a (citing *United States* v. *Ortland*, 109 F.3d 539, 547 (9th Cir.), cert. denied, 522 U.S. 851 (1997); *United States* v. *Bertoli*, 40 F.3d 1384, 1404 n.17 (3d Cir. 1994), cert. denied, 517 U.S. 1137 (1996)).

That conflict does not warrant this Court's review. The cases giving rise to the conflict were decided when the Guidelines were mandatory, and the conflict is predicated on the premise that application of the Guidelines can raise ex post facto concerns. As explained above, however, that premise is no longer correct now that the Guidelines are advisory. The conflict is thus a vestige of the mandatory Guidelines era and would only have con-

tinuing significance if the Court were to hold that the Ex Post Facto Clause generally applies to the advisory Guidelines—a question that is not properly raised in this case. See pp. 17-18, *infra*.

Even assuming that this Court's resolution of the conflict on the one-book issue might be warranted in an appropriate case, this case is not a suitable one to resolve it. The sentencing record strongly suggests that petitioner would have received the same sentence even if the district court had not used the one-book rule to calculate his advisory range. The court rejected reliance on the advisory range (which was life imprisonment) almost as soon as the court had calculated it. Pet. C.A. App. A446. The court then engaged in a careful and detailed consideration of the remaining factors specified in Section 3553(a) before sentencing petitioner to 144 months in prison. *Id.* at A447-A455. Nothing in the record suggests that the court would have selected a lower prison term if the court had calculated the advisory range using the 1998 Guidelines rather than the 2005 Guidelines. Not only did the range play no part in the court's selection of the 144-month term, but that term would still be substantially below the advisory range even under the 1998 Guidelines.[4] And the court ex

[4] Although petitioner repeats (Pet. 5) the calculation of the court of appeals (Pet. App. 23a) that petitioner's advisory range under the 1998 Guidelines would have been 97 to 121 months of imprisonment, that calculation is incorrect. Correctly calculated, petitioner's total offense level for the fraud offenses under the 1998 Guidelines would have been 36. His base offense level would have been 6, Guidelines § 2F1.1(a); and that level would have been increased by 18 because he caused a loss of more than $80 million, *id.* § 2F1.1(b)(1)(S); by 2 because his offenses involved more than minimal planning, *id.* § 2F1.1(b)(2)(A); by 2 because the offenses were committed through mass marketing, *id.* § 2F1.1(b)(3); by 2 because the offenses involved sophisticated means, *id.*

pressly stated that a 144-month term was necessary to comply with the statutory command that the sentence be "sufficient, but not greater than necessary" to achieve the purposes of sentencing. *Id.* at A452.[5]

3. The courts of appeals are also divided on the broader question whether the Ex Post Facto Clause applies to the advisory Guidelines. Consistent with this Court's recent decisions, the Seventh Circuit held in *United States* v. *Demaree*, 459 F.3d 791, 794-795 (2006), cert. denied, 551 U.S. 1167 (2007), that the Ex Post Facto Clause does not bar a district court's consideration of the version of the advisory Guidelines in effect at the time of sentencing, even when the version of the Guidelines in effect at the time of the offense provided for a lower advisory sentencing range. Some other courts of appeals have disagreed, however, and have concluded that the Guidelines continue to implicate the Ex Post Facto Clause even though they "are now advisory" only. *Kimbrough*, 552 U.S. at 101 (citation omitted). See *United States* v. *Wetherald*, No. 09-11687, 2011 WL 1107208, at *4 (11th Cir. Mar. 28, 2011); *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010),

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§ 2F1.1(b)(5); by 4 because petitioner played a leadership role, *id.* § 3B1.1(a); and by 2 because petitioner abused a position of trust, *id.* § 3B1.3. The level for the fraud offenses would have been used for all of the offenses because it was the highest level in the group. Pet. App. 24a n.11; Guidelines § 3D1.3(a). Combined with petitioner's criminal history category of I, that offense level would have yielded an advisory Guidelines range of 188 to 235 months of imprisonment.

[5] The conclusion that the one-book rule did not affect petitioner's sentence is buttressed by the district court's statement that, despite the indictment's allegation that the fraud conspiracy terminated on October 31, 2000, the conspiracy "in a very real sense continued" after that date and embraced the conduct that was charged as obstruction of justice. Pet. C.A. App. A449.

cert. denied, 2001 WL 1225806 (Apr. 4, 2011); *United States* v. *Lewis*, 606 F.3d 193 (4th Cir. 2010); *United States* v. *Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010); *United States* v. *Turner*, 548 F.3d 1094, 1099-1100 (D.C. Cir. 2008).

Although this Court's resolution of the circuit conflict on the general application of the Ex Post Facto Clause to the now-advisory Guidelines may be warranted in an appropriate case, this is not such a case. The court below did not decide the question whether the Ex Post Facto Clause applies to the advisory Guidelines. Instead, the court considered the case "on the assumption" that the Clause applies. Pet. App. 24a n.12.[6] The court chose to assume an answer to the issue rather than decide it because the government had "disclaimed reliance" on the district court's ruling that the Clause does not apply to the advisory Guidelines. *Ibid.* But the rea-

[6] The court of appeals subsequently concluded that the Ex Post Facto Clause protects against post-offense changes in the advisory Guidelines range when the change "creates a significant risk of increasing the punishment." *Ortiz*, 621 F.3d at 87 (brackets and citation omitted). Under that test, however, petitioner would not prevail even apart from the court's conclusion that the one-book rule did not violate the Ex Post Facto Clause. In *Ortiz*, the court stated that its "standard does not invalidate every sentence imposed after a Guidelines range has been increased after the date of the offense," *ibid.*, and it rejected the defendant's ex post facto claim where the defendant received a non-Guidelines sentence of 120 months, 48 months below the bottom of the time-of-offense range. *Id.* at 88. The court of appeals found "no substantial risk, indeed, no risk at all," that the higher time-of-sentencing range increased the punishment, given the district court's "generous deviation" from that range. *Ibid.* The same is true here. See pp. 15-16 and note 4, *supra*. Moreover, for the same reasons, even assuming that an ex post facto error occurred in applying the higher Guidelines range, that error had no effect on the below-range sentence imposed and therefore was harmless.

sons for the court's failure to decide the issue do not change the fact that the court did not decide it and that this case is therefore not a suitable vehicle for this Court to resolve the issue. Indeed, the reliance by the decision below on an outdated view of the government's position only makes this an even more unsuitable case for this Court to address the question. In any event, petitioner has not sought the Court's review of the broader ex post facto issue. On the contrary, petitioner mentions the issue only in a footnote, and that footnote asserts that "the government's concession remove[d] that issue from this case." Pet. 8 n.6.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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