No. 00-1605

In the Supreme Court of the United States

VERNA M. LEWIS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court properly gave the jury a false exculpatory statement instruction, where the evidence supported its use.

2. Whether the district court properly refused to give petitioner's proffered good faith defense instruction.

3. Whether comments by the prosecutors in closing argument denied petitioner a fair trial.

4. Whether the Ex Post Facto Clause of the United States Constitution is violated when a revised edition of the Sentencing Guidelines is applied to a continuing series of related offenses that predate and postdate the revision.

5. Whether under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), the use of uncharged conduct to increase a defendant's Guidelines sentencing range, but not above the statutory maximum, violates the defendant's due process rights.

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OPINION BELOW

The decision of the court of appeals (Pet. App. 1-8) is reported at 235 F.3d 215.

JURISDICTION

The judgment of the court of appeals was entered on December 19, 2000. A petition for rehearing was denied on January 18, 2001 (Pet. App. 9). The petition for a writ of certiorari was filed on April 17, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Virginia, petitioner was convicted of one count of corruptly endeavoring to impede the administration of the internal revenue laws, in violation of 26 U.S.C. 7212(a); two counts of knowingly making or presenting false statements or documents to the United States, in violation of 18 U.S.C. 1001(a); one count of corruptly endeavoring to obstruct a federal grand jury, in violation of 18 U.S.C. 1503; and four counts of willfully making a false federal income tax return, in violation of 26 U.S.C. 7206(1). Gov't C.A. Br. 2. Petitioner was sentenced to 18 months' imprisonment, to be followed by a three-year term of supervised release. *Ibid.* The court of appeals affirmed. Pet. App. 1-8.

1. In 1988, petitioner, a physician specializing in physical medicine and rehabilitation, was recruited by Lewis-Gale Hospital in Salem, Virginia, to work in its rehabilitative medicine department. Gov't C.A. Br. 3. Petitioner was offered an income guarantee of $125,000, to be paid quarterly over one year, as part of the package under which she was recruited by Lewis-Gale. *Ibid.* Under the guarantee agreement, if petitioner's income exceeded the guaranteed amount, she would be liable to repay the money advanced to her. *Ibid.*

After petitioner received two quarterly payments under the agreement, totaling $39,909.75, she reached the income level specified in the agreement, and Lewis-Gale ceased making guaranteed income payments to her. Gov't C.A. Br. 3. Petitioner's accountant, William White, reported the guaranteed income payments as income on petitioner's 1988 and 1989 income tax returns. *Ibid.*

After White received a memorandum on Lewis-Gale letterhead stating that all payments made under the guarantee had to be repaid, White decided to back the payments previously reported as income out of petitioner's 1989 return, reducing petitioner's taxable income for that year by $39,909.75. Gov't C.A. Br. 4.

Although White's method of handling the repayment requirement was improper, it had the effect of making petitioner's actual repayments to Lewis-Gale, which occurred in later years, nondeductible on returns for those years. *Ibid.*

During 1990, petitioner made twelve monthly payments of $1000 each to Lewis-Gale. Gov't C.A. Br. 4. Initially, the tax return White prepared for petitioner for 1990 did not claim the payments as business expenses. *Ibid.* In a letter dated February 15, 1991, however, petitioner told White that the payments had initially been mischaracterized and were properly deductible as rental expenses. *Ibid.* Similarly, petitioner sent White a letter in 1992 informing him that $16,300 in payments to Lewis-Gale had been made out of personal funds in 1991 and that those payments were for business rent. *Ibid.* Based on petitioner's letters, White treated the 1990 and 1991 payments as deductible business rent. *Ibid.* In fact, however, until August 1, 1992, Lewis-Gale provided petitioner with office space at no charge. *Ibid.*

White prepared petitioner's 1990, 1991, and 1992 income tax returns, using information petitioner provided. Gov't C.A. Br. 5, 11. Although White advised petitioner that expenses had to be ordinary and necessary expenses for carrying on her medical practice in order to be deductible, petitioner deducted numerous personal expenses on her federal income tax returns. Gov't C.A. Br. 6-7, 9-11. To support one of those deductions, for payments made to a private vacation resort, petitioner presented an IRS auditor with three letters supposedly scheduling business meetings at the resort, and she falsely claimed during an interview with the auditor to have used the resort five or six times for business meetings and to have offered its use to her staff. Gov't C.A. Br. 6-7. The letters, however, were never sent; the addressees of the letter never attended any business meetings at the resort; and petitioner never invited her office manager to use the resort. Gov't C.A. Br. 7. Similarly, petitioner stated in response to a written question from the IRS auditor that payments to Oxford Finance Center were for student loans, when in fact they were for a timeshare in the Bahamas. She also claimed that payments to Ellen Teaford were for "cleaning and filing," when in fact, as petitioner knew, Teaford performed only house cleaning duties for petitioner. Gov't C.A. Br. 7, 14. Additionally, petitioner attempted to convince persons who had performed personal services for her to tell the IRS and a federal grand jury that the services had been performed on behalf of petitioner's medical practice. Gov't C.A. Br. 7-9. Petitioner also presented falsified documents to the IRS auditor to support deductions taken on her federal income tax returns. Gov't C.A. Br. 12-13.

In total, petitioner deducted nondeductible items in the amount of $8500 on her 1990 amended income tax return, $17,827.89 on her 1991 amended return, and $18,112 on her 1992 amended return. Gov't C.A. Br. 15. As a result of the improper deductions, petitioner's amended income tax returns understated her income for 1990, 1991, and 1992, with a total tax effect of approximately $18,000. *Ibid*.

2. After the close of the evidence, the district court instructed the jury that to convict petitioner of filing a false tax return, the jury was required to find that petitioner acted willfully. The court went on to instruct that "[t]he word 'willfully' * * * means that the act was committed voluntarily and purposefully with the specific intent to do something the law forbids, that is,

with bad purpose either to disobey or disregard the law." 4 C.A. App. 1549. Petitioner proposed a good-faith defense instruction, which the district court rejected. Pet. 13-14. The court did, however, instruct the jury that

> if you find that defendant, one, relied in good faith on a professional tax preparer; two, made complete, truthful disclosure of all relevant facts to the tax preparer; and, three, filed the return believing it to be factually correct and complete, then the defendant cannot be found guilty of th[e] respective counts [charging defendant with filing false tax returns].

4 C.A. App. 1554. Petitioner objected to a "false exculpatory statement" instruction, in which the district court instructed the jury that

> [w]hen a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show her innocence and this explanation or statement is later shown to be false, you may consider whether th[e] evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

4 C.A. App. 1556.

3. In closing arguments before the jury, a prosecutor asked the jury to "[c]onsider the fact that [petitioner is] also hoodooing Mr. Golston still, recently." 4 C.A. App. 1540. A different prosecutor made comments in closing characterizing petitioner as a liar, asking why she had waited until the last day of trial to tell her story, and observing that the evidence did not support a finding of

innocence and that petitioner had no defense. Gov't C.A. Br. 32.

4. At sentencing, the district court used the November 1998 version of the Sentencing Guidelines to determine petitioner's sentence. Gov't C.A. Br. 39. That version of the Guidelines included an amendment that had become effective November 1, 1993. Pet. App. 8 n.1. As applied to petitioner's case, the amendment increased the base offense level for filing a false tax return. Petitioner objected that because one of the offenses on which she was convicted had been committed before the 1993 amendment, use of the post-1993 version of the Guidelines violated the Ex Post Facto Clause of the United States Constitution. See Pet. App. 3-5. The district court used the post-1993 version of the Guidelines pursuant to Sentencing Guidelines § 1B1.11(b)(3), which had also been added as the result of an amendment on November 1, 1993. That provision states 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." The court imposed a sentence of 18 months' imprisonment on each count, to run concurrently. Gov't C.A. Br. 2.

5. On appeal, petitioner asserted that the district court erred in refusing a jury instruction that she had proffered on the defense of good faith and in giving the jury the false exculpatory statement instruction, which she contended incorrectly stated the law. Gov't C.A. Br. 23-29. Petitioner also alleged that plain error resulted from comments made by the prosecutors in closing argument. Gov't C.A. Br. 29-33. The court of appeals rejected those contentions without discussion, stating it had "carefully reviewed [petitioner's] argu-

ments related to her convictions and determined them to be without merit." Pet. App. 2-3.

Petitioner also claimed that the district court's use of the post-1993 Sentencing Guidelines violated the Ex Post Facto Clause. Pet. App. 3-5. The court of appeals rejected her claim, determining that Guidelines § 1B1.11(b)(3)—the provision requiring use of the post-1993 version of the Guidelines in this case—does not violate the Ex Post Facto Clause. Pet. App. 5. The Fourth Circuit noted that "Section 1B1.11(b)(3) was added to the guidelines on November 1, 1993," and that petitioner

> therefore had ample warning, when she committed the later acts of tax evasion, that those acts would cause her sentence for the earlier crime to be determined in accordance with the Guidelines Manual applicable to the later offenses, and thus that the intervening amendment to the tax table would apply.

Pet. App. 5. The court of appeals therefore concluded that "it was not § 1B1.11(b)(3) that disadvantaged [petitioner], but rather her decision to commit further acts of tax evasion after the effective date of the 1993 guidelines." *Ibid.*

In her reply brief filed with the court of appeals, petitioner for the first time added a claim that the sentence imposed by the district court violated *Apprendi* v. *New Jersey*, 530 U.S. 466, 491-493 (2000), because the tax loss on which her sentencing range was based under the Guidelines was not charged in the indictment and found by the jury beyond a reasonable doubt. Pet. App. 6. The court of appeals rejected petitioner's argument, finding that *Apprendi* was "by its terms, limited to facts that increase punishment beyond the prescribed statutory maximum." Pet. App. 7. The court concluded that because no fact found by the district court in determining petitioner's sentence resulted in a sentence greater than the statutory maximum, there was no violation of *Apprendi*. *Ibid.*

ARGUMENT

1. Petitioner argues (Pet. 12-13) that the "false exculpatory statement" instruction given by the district court was erroneous because it was not explicitly limited to pretrial statements and that the Fourth Circuit's decision permitting the instruction conflicts with the Eighth Circuit's opinion in *United States* v. *Clark*, 45 F.3d 1247 (1995). The instruction in question stated that

> [w]hen a defendant voluntarily and intentionally offers an explanation or makes some statement tending to show her innocence and this explanation or statement is later shown to be false, you may consider whether this evidence points to a consciousness of guilt. The significance to be attached to any such evidence is a matter for you to determine.

4 C.A. App. 1556. Petitioner argues that there was an insufficient evidentiary basis for the instruction because she "made no pre-trial false exculpatory statements." Pet. 12. She also argues that, because the instruction did not limit its application to pretrial false exculpatory evidence, it constituted an improper emphasis of and comment on her testimony.

a. There was ample evidence that petitioner made false exculpatory statements after the commencement of the IRS audit of her tax returns, and the prosecutors highlighted that evidence in closing argument. See Gov't C.A. Br. 26-27. In a case such as this, where specific exculpatory statements made by a defendant are contradicted by the evidence at trial, a false exculpatory statement instruction is proper. See *e.g. United States* v. *Strother*, 49 F.3d 869, 877 (2d Cir. 1995), cert. denied, 522 U.S. 1118 (1998); *United States* v. *Penn,* 974 F.2d 1026, 1029 (8th Cir. 1992); *United States* v. *McDougald*, 650 F.2d 532, 533 (4th Cir. 1981); *United States* v. *Ingram*, 600 F.2d 260, 262 (10th Cir. 1979). Contrary to petitioner's contention (Pet. 12-13), it is not a prerequisite to use of the instruction that the false pretrial exculpatory statements were made after the initiation of a criminal investigation. See, *e.g.*, *United States* v. *Zang*, 703 F.2d 1186, 1190-1191 (10th Cir. 1982) (false exculpatory statement instruction proper where statement was made in a letter dictated before the fraud was uncovered), cert. denied, 464 U.S. 828 (1983). The district court's decision to give a false exculpatory statement instruction was accordingly correct.

Petitioner contends (Pet. 12-13) that the court of appeals' decision permitting the instruction in this case conflicts with *United States* v. *Clark*, 45 F.3d 1247 (8th Cir. 1995). The court of appeals in this case did not discuss any question concerning the false exculpatory statement instruction, but merely stated that it had examined petitioner's "arguments related to her convictions and determined them to be without merit." Pet. App. 2-3. Accordingly, the court of appeals' decision cannot be said to have set circuit precedent on any legal question of continuing importance, and it therefore could not create a circuit conflict on any such question.

In any event, the Eighth Circuit's decision in *Clark* does not conflict with the court of appeals' decision in this case. The Eighth Circuit stated in *Clark* that it was "somewhat concerned" that the district court's false exculpatory statement instruction was not clearly limited to pretrial false exculpatory statements. 45 F.3d at 1251. But the court did not ultimately decide whether the instruction was erroneous, because it found that the defendant had not raised the issue and, because the trial court had also instructed the jury that the defendant's testimony should be evaluated in the same manner as all other witnesses' testimony, "there was *at most* harmless error." *Ibid.* (emphasis added). Thus, there is no circuit conflict on the question petitioner now asks this Court to resolve.

2. Petitioner argues (Pet. 13-15) that the affirmance of the district court's refusal to instruct the jury with petitioner's proffered good faith defense instruction conflicts with the decision of the Eleventh Circuit in *United States* v. *Morris*, 20 F.3d 1111 (1994). A defendant is not entitled to have the jury instructed in her particular words; it is sufficient if the instructions given adequately and correctly cover the substance of the requested instruction. See, *e.g.*, *United States* v. *Montañez*, 105 F.3d 36, 39 (1st Cir. 1997); *United States* v. *Lopez-Alvarez*, 970 F.2d 583, 597 (9th Cir.), cert. denied, 506 U.S. 989 (1992). The adequacy of the instructions must be evaluated in the context of the charge as a whole. See *Jones* v. *United States*, 527 U.S. 373, 391 (1999); *Estelle* v. *McGuire*, 502 U.S. 62, 72-73 (1991); *United States* v. *Park*, 421 U.S. 658, 674 (1975). Here, the district court's instructions on willfulness adequately covered a defense based on a claim of negligence, accident, or mistake.

In explaining the elements of the crime of filing false tax returns, the district court stated that the government had to prove, beyond a reasonable doubt, that defendant "acted willfully when she signed the false tax return or amended tax return." 4 C.A. App. 1554. In defining willfulness, the court stated:

> The word "willfully," as that term has been used or will be used from time to time in these instructions, means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids, that is, with bad purpose either to disobey or disregard the law.

4 C.A. App. 1549. That instruction correctly conveyed the law on willfulness: it informed the jury that a willful violation is a voluntary, intentional violation of a known legal duty that is engaged in with the purpose "to disobey or to disregard the law," see *United States* v. *Pomponio*, 429 U.S. 10, 11 (1976) (per curiam); *Cheek* v. *United States*, 498 U.S. 192, 200-201 (1991) (same). This Court has held that where, as here, the district court has correctly instructed the jury on willfulness, an additional instruction on good faith is unnecessary. See *Pomponio*, 429 U.S. at 13 ("The trial judge in the instant case adequately instructed the jury on willfulness. An additional instruction on good faith was unnecessary."); *Cheek*, 498 U.S. at 201 (reaffirming *Pomponio* holding). An instruction correctly defining willfulness precludes the jury from convicting the defendant on the basis of conduct resulting from mistake, accident, or negligence, since such conduct would not constitute a "voluntar[y]" and "purpose[ful]" violation of the law. Similarly, the filing of a false return because of an honest mistake as to the facts or law relating to the return cannot be found to be an intentional violation of a *known* legal duty or to have been done with "bad purpose either to disobey or to disregard the law." 429 U.S. at 11. Thus, the court of appeals correctly held

that there was no need for a separate instruction on negligence, accident, or mistake.

In *Morris*, the Eleventh Circuit held that the instructions given by the trial court, which were similar to the instructions given by the district court below, were insufficient to adequately convey the defendant's good-faith theory of defense.[1] The court acknowledged that the instruction that was given "was correct, as a matter of law in each individual element." 20 F.3d at 1117. But, the court held, under "the totality of the circumstances" in the particular case, the instruction "failed to adequately convey the properly asserted good-faith defense on which [the defendants] relied" in a manner that was "clear and unambiguous." *Ibid.* In this case, however, the court not only gave the "willfulness" instruction approved by this Court in *Pomponio* and *Cheek*, but also instructed the jury that "the defendant cannot be found guilty" if she "relied in good faith on a professional tax preparer," "made complete, truthful

[1] Before *Cheek*, the Tenth Circuit had concluded in *United States* v. *Harting*, 879 F.2d 765, 769-770 (1989), that a correct instruction on willfulness is not sufficient to convey a good-faith theory of defense. Even then, however, the Court recognized "the tension between th[e] language in *Pomponio* and [the Tenth Circuit's] requirement of a separate good-faith instruction." 879 F.2d at 769. The Tenth Circuit has not revisited the issue since this Court's reaffirmance in *Cheek* that a willfulness instruction is sufficient, and its current position is accordingly unclear. The other circuits that have addressed the issue have concluded that the willfulness instruction is sufficient to instruct the jury on a good-faith theory of defense. The decisions date both from before *Cheek*, see *United States* v. *Wilson*, 887 F.2d 69, 76-77 (5th Cir. 1989); *United States* v. *Sassak*, 881 F.2d 276, 280 (6th Cir. 1989); *United States* v. *Verkuilen*, 690 F.2d 648, 655-656 (7th Cir. 1982), and after *Cheek*, see *United States* v. *Sehnal*, 930 F.2d 1420, 1427 (9th Cir.), cert. denied, 502 U.S. 908 (1991).

disclosure of all relevant facts to the tax preparer," and "filed the return believing it to be factually correct and complete." 4 C.A. App. 1554. The court thus instructed the jury quite precisely on the specific good-faith defense applicable to this case. The Fourth Circuit's affirmance of defendant's conviction—and its implicit approval of the jury instructions in this case—accordingly does not conflict with *Morris*.

3. Petitioner claims (Pet. 15-21) that the court of appeals erred in declining to find that comments made by the prosecutors in closing argument violated the Due Process Clause. Petitioner raised her claim for the first time on direct appeal of her conviction and sentence. As petitioner acknowledges (Pet. 15), review is therefore only for plain error. See *United States* v. *Olano*, 507 U.S. 725, 734 (1993). The court of appeals' rejection of petitioner's claim was correct.

Petitioner asserts that two comments made by the prosecutor were improper. First, she claims (Pet. 15) that by stating in rebuttal closing argument that petitioner was "hoodooing" her current accountant, the prosecution improperly injected race into the trial. Viewed in context, however, the statement had nothing to do with race. The prosecutor was responding to petitioner's argument that her former CPA had been leading her astray. To show that the evidence belied that claim and revealed that it was petitioner doing the misleading, the prosecutor made the statement at issue and immediately continued: "Mr. Golston [the accountant] told her not to deduct Ellen Teaford's expenses for cleaning her house, not to pay them out of her journal, and she did it anyway. And Mr. Golston told you he would just be surprised if she was doing that. Well, you know she was doing it." 4 C.A. App. 1540. In context, the statement simply pointed out to the jury that petitioner was misleading her accountant. It had nothing to do with the practice of hoodoo or voodoo, it did not refer to the fact that petitioner is an African-American, and it did not suggest that she should be convicted because of her race. There is no reason to conclude that the comment was understood by anyone present to have a racial reference. See *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974) ("[A] court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations.").

Petitioner also claims (Pet. 18-20) that the prosecutor violated the Due Process Clause when he made comments in closing argument characterizing her as a liar, asking why she had waited until the last day of trial to tell her story, and observing that the evidence did not support a finding of innocence and that petitioner had no defense. A prosecutor's personal characterization of a defendant as a liar is inappropriate, if that characterization is based on the prosecutor's personal opinion. See, *e.g.*, *United States* v. *Shoff*, 151 F.3d 889, 893 (8th Cir. 1998); *United States* v. *Moore*, 11 F.3d 475, 480-481 (4th Cir. 1993), cert. denied, 511 U.S. 1096 (1994). Where the characterization is based on the evidence, however, and no objection has been raised to the comment, the courts of appeals have declined to find error. See, *e.g.*, *United States* v. *Dean*, 55 F.3d 640, 665 (D.C. Cir. 1995) (use of the word "lie" is permissible, depending on context and tone of summation, and as long as "the prosecutor sticks to the evidence and refrains from giving his personal opinion"), cert. denied, 516 U.S. 1184 (1996); *United States* v. *Velez,* 46 F.3d 688, 693 (7th Cir. 1995) (not improper for prosecutor to characterize defendant as liar, where the statement was an inference reasonably drawn from record); *United States* v. *Jacoby*, 955 F.2d 1527, 1540-1541 (11th Cir. 1992) (not improper to argue in closing statement that "[t]he inconsistencies . . . between [the defendant's] testimony and that of a number of Government witnesses is [sic] so glaring and so clear that it isn't just a mistake. Someone is committing perjury. . . . It is going to be for you to decide, who is that person or persons."), cert. denied, 507 U.S. 920 (1993).

Here, the prosecutor's question about timing was not a comment on exercise by petitioner of her right to remain silent, since she had made statements during the audit. The comments about petitioner's lack of a defense were merely argument that the evidence established guilt. Petitioner asserts (Pet. 21) that because the trial boiled down to a swearing contest between herself and her CPA, her credibility was crucial to her defense, and "the government's accusations that [petitioner] lied at trial clearly prejudiced [her]." The district court, however, made it clear in its instructions that credibility determinations were solely for the jury to make: "In deciding what the facts are, you may have to decide what testimony you believe and what testimony you do not believe. You may believe all of a witness has said, only part of it, or none of it." 4 C.A. App. 1547. The court also explained factors to be considered in assessing credibility, and the court instructed that "statements, arguments, * * * and comments by lawyers representing the parties in the case are not evidence." 4 C.A. App. 1546. The district court's instructions therefore ensured that the prosecutors' statements would not have a tendency to mislead the jury or prejudice petitioner.

4. Petitioner contends (Pet. 21-23) that the district court's use of a revised edition of the Sentencing Guidelines with respect to offenses that predated and postdated the revision violates the Ex Post Facto Clause, and that the Fourth Circuit's determination to the contrary conflicts with decisions of the Third, Ninth, and Tenth Circuits.

In April 1993, when petitioner committed the offense charged in Count 5—the first of the four counts of filing a false tax return on which she was convicted—the November 1992 version of the Guidelines manual was in effect. In November 1993, Guidelines amendments that significantly increased the punishment for tax crimes took effect. See Sentencing Guidelines App. C, amend. 491. The conduct underlying the three remaining false tax return counts, Counts 6 through 8, occurred after the effective date of the amendments. Pet. App. 3. Petitioner argues that use of the post-1993 version of the Guidelines violated the Ex Post Facto Clause of the Constitution, because it subjected her to harsher punishment than the 1992 version of the Guidelines.

The Fourth Circuit rejected petitioner's claim, finding that the lack of fair notice—the central concern of the ex post facto prohibition—was not implicated by the Guidelines amendment. Pet. App. 4-5. The Fourth Circuit held that, because the Guidelines had been amended effective November 1, 1993, to require that the revised provisions would apply, petitioner "had ample warning" when she committed the later tax crimes "that those acts would cause her sentence for the earlier crime to be determined in accordance with the Guidelines Manual applicable to the later offenses, and thus that the intervening amendment to the tax table would apply." Pet. App. 5. The court of appeals was correct.

The Ex Post Facto Clause prohibits the enactment of "any law 'which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed.'" *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981). (quoting *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277 (1866)). Not every change in the law that disadvantages a defendant violates the Ex Post Facto Clause. For example, habitual offender statutes that are enacted after the commission of earlier offenses and that enhance the punishment for a later offense based on the earlier crimes are not invalid ex post facto laws. See *Spencer* v. *Texas*, 385 U.S. 554, 560 (1967). Similarly, because conspiracy is a "continuing offense," if a conspiracy continues after a change in the law, the later version of the law may be applied to punish a defendant, even if it is more onerous than the earlier version. The courts of appeals have thus uniformly held that applying the Sentencing Guidelines to a conspiracy that straddles the Sentencing Guidelines' effective date does not violate the Ex Post Facto Clause. See, *e.g.*, *United States* v. *Meitinger*, 901 F.2d 27, 28 (4th Cir.), cert. denied, 498 U.S. 985 (1990); *United States* v. *Thomas*, 895 F.2d 51, 57 (1st Cir. 1990); *United States* v. *Tharp*, 892 F.2d 691, 693-695 (8th Cir. 1989); *United States* v. *White*, 869 F.2d 822, 826 (5th Cir.), cert. denied, 490 U.S. 1112 and 493 U.S. 1001 (1989).

The question whether the Ex Post Facto Clause is violated when a revised edition of the Guidelines is applied to non-conspiracy offenses that predate and postdate the revision has divided the circuits. Six circuits, including the Fourth Circuit in the present case, see Pet. App. 5, have held that no ex post facto violation results. See *United States* v. *Vivit*, 214 F.3d 908, 917-919 (7th Cir.), cert. denied, 121 S. Ct. 388 (2000); *United*

States v. *Kimler*, 167 F.3d 889, 893-895 (5th Cir. 1999); *United States* v. *Bailey*, 123 F.3d 1381, 1406-1407 (11th Cir. 1997); *United States* v. *Cooper*, 35 F.3d 1248, 1250-1253 (8th Cir. 1994), cert. granted and judgment vacated, 514 U.S. 1094 (1995), opinion reinstated, 63 F.3d 761, 763 (8th Cir. 1995) (per curiam), cert. denied, 517 U.S. 1158 (1996); *United States* v. *Regan*, 989 F.2d 44, 48 (1st Cir. 1993). Three circuits have reached the opposite conclusion. See *United States* v. *Sullivan*, 242 F.3d 1248, 1254 (10th Cir. 2001), petition for rehearing en banc filed (May 11, 2001); *United States* v. *Ortland*, 109 F.3d 539, 545-547 (9th Cir.), cert. denied, 522 U.S. 851 (1997); *United States* v. *Bertoli*, 40 F.3d 1384, 1402-1404 (3d Cir. 1994).

Resolution of the conflict is unnecessary in this case, however. First, *Bertoli* is distinguishable. Both before and after the 1993 amendment, petitioner's false return offenses were a continuing series of offenses that together constituted a common scheme or ongoing course of conduct. See Sentencing Guidelines § 2T1.3, comment. (n.3) (Nov. 1, 1992) ("In determining the total tax loss attributable to the offense (*see* §1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."); Sentencing Guidelines § 2T1.1, comment. (n.2) (Nov. 1, 1993) (same). Petitioner's series of offenses straddled the effective date of the Guidelines under which she was sentenced. *Bertoli*, however, did not involve or directly address such a series of crimes. 40 F.3d at 1403.[2]

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[2] In *Bertoli*, the Third Circuit rejected treatment of the conspiracy and substantive offense at issue there as "one course of conduct" and rejected the government's contention that it was pro-

In addition, while *Sullivan* and *Ortland* each involved such a series of crimes, the methodology for computing the sentence adopted by the courts in each of those cases would have no effect on petitioner's total sentence. In those cases, the Ninth and Tenth Circuits held that when a defendant has been convicted of offenses that predate and postdate a Guidelines revision that increases the applicable sentencing range, the district court must treat the pre- and post-revision offenses separately, with the pre-revision offenses sentenced under the pre-revision Guidelines provision and the post-revision offenses sentenced under the post-revision Guidelines provision. See *Sullivan*, 242 F.3d at 1254; *Ortland*, 109 F.3d at 546-547. Using that approach here, the sentence on Count 5 would be determined using the November 1992 version of the Guidelines, while the sentences for Counts 6 through 8 would be determined using the November 1998 version of the Guidelines. To determine the applicable sentencing range for Counts 6 through 8, the sentencing court would thus consider the tax loss attributable to the offenses of conviction plus tax loss from all relevant conduct. See Sentencing Guidelines §§ 2T1.1(a)(1) (base offense level is based on tax loss), 1B1.3(a) (with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, relevant conduct includes all acts and omissions committed by defendant that were part of the same course of conduct or common scheme or plan as the offense of conviction), 3D1.2(d) (grouping of tax offenses required).

In cases involving tax crimes, relevant conduct includes tax loss from similar types of conduct occurring

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per to "combin[e] different counts of the indictment when determining which Guidelines Manual applies." 40 F.3d at 1403.

outside the period charged in the indictment. See, *e.g.*, *United States* v. *Bove*, 155 F.3d 44, 47-48 (2d Cir. 1998); *United States* v. *Noske*, 117 F.3d 1053, 1060 (8th Cir. 1997), cert. denied, 522 U.S. 922, 959, 1119 (1998); *United States* v. *Pierce*, 17 F.3d 146, 150 (6th Cir. 1994); *United States* v. *Meek*, 998 F.2d 776, 781-782 (10th Cir. 1993); *United States* v. *Harvey*, 996 F.2d 919, 922 (7th Cir. 1993); see also Sentencing Guidelines § 2T1.1, comment. (n.2) ("In determining the total tax loss attributable to the offense (*see* § 1B1.3(a)(2)), all conduct violating the tax laws should be considered as part of the same course of conduct or common scheme or plan unless the evidence demonstrates that the conduct is clearly unrelated."); *id.* § 1B1.3, comment. (n.9(B)) ("[A] defendant's failure to file tax returns in three consecutive years appropriately would be considered as part of the same course of conduct."). In addition, the Guidelines contemplate that relevant conduct may include a crime for which a defendant has been convicted and has received a separate sentence. See *id.* § 5G1.3(b) & comment. (n.2).

Under the approach endorsed by the Ninth and Tenth Circuits, relevant conduct with respect to petitioner's post-revision offenses would therefore include the tax loss with respect to her pre-revision misconduct. Consequently, petitioner's offense level with respect to just the post-revision counts, determined under the post-1993 Guidelines Manual, would be the same as the offense level previously determined by the district court under that manual for all counts. Although petitioner's sentence under the pre-revision count would be altered, petitioner's sentence under the three post-revision counts would not be. Since the sentences on each of the counts were imposed to run concurrently, petitioner's total sentence of imprisonment would not be affected even if the Ninth or Tenth Circuit's methodology were applied to this case. Further review of this issue in this case is accordingly unwarranted.

5. Petitioner claims (Pet. 23-25) that the district court's use of uncharged conduct to increase her Guidelines sentencing range conflicts with this Court's decision in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000). In *Apprendi*, this Court held, as a matter of constitutional law, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 490.

This Court has upheld the use and operation of the Sentencing Guidelines, see *Mistretta* v. *United States*, 488 U.S. 361 (1989), and has made clear that so long as the statutory minimum and maximum sentences are observed, it is constitutionally permissible for the Guidelines to establish presumptive sentencing ranges on the basis of factual findings made by the sentencing court by a preponderance of the evidence. See *Edwards* v. *United States*, 523 U.S. 511, 513-514 (1998) (Guidelines "instruct *the judge* * * * to determine" type and quantity of drugs for which a defendant is accountable "and then to impose a sentence that varies depending upon amount and kind").

Apprendi did not hold otherwise. See *Apprendi*, 530 U.S. at 497 n.21 ("The Guidelines are, of course, not before the Court. We therefore express no view on the subject beyond what this Court has already held." (citing *Edwards* v. *United States*, 523 U.S. at 515)). The Guidelines merely "channel the sentencing discretion of the district courts and to make mandatory the consideration of factors" that courts have always had discretion to consider in imposing a sentence up to the statutory maximum. *Witte* v. *United States*, 515 U.S. 389, 400-404 (1995); see also *United States* v. *Watts*, 519 U.S. 148, 155-156 (1997) (per curiam). District courts have the power to "depart from the applicable Guideline range if 'the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described.'" *Koon* v. *United States*, 518 U.S. 81, 92 (1996) (quoting 18 U.S.C. 3553(b)). Because the Guidelines leave the sentencing court with significant discretion to impose a sentence within the statutory range, and because the sentence determined under the Sentencing Guidelines cannot increase the statutory maximum penalty for a criminal offense, *Apprendi* does not support a challenge to the constitutionality of the Guidelines. See Sentencing Guidelines § 5G1.1; *Edwards*, 523 U.S. at 515 ("a maximum sentence set by statute trumps a higher sentence set forth in the Guidelines").[3]

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[3] Every court of appeals has so held. See, *e.g.*, *In re Sealed Case*, 246 F.3d 696, 698-699 (D.C. Cir. 2001); *United States* v. *Garcia*, 240 F.3d 180, 184 (2d Cir. 2001), petition for cert. pending, No. 00-10197; *United States* v. *Heckard*, 238 F.3d 1222, 1235 (10th Cir.); *United States* v. *Baltas*, 236 F.3d 27 (1st Cir.), cert. denied, 121 S. Ct. 1982 (2001); *United States* v. *Williams*, 235 F.3d 858, 862-863 (3d Cir. 2000), petition for cert. pending, No. 00-1771; *United States* v. *Kinter*, 235 F.3d 192, 198-202 (4th Cir. 2000), cert. denied, 121 S. Ct. 1393 (2001); *United States* v. *Nealy*, 232 F.3d 825, 829 n.3 (11th Cir. 2000); *United States* v. *Doggett*, 230 F.3d 160, 166 (5th Cir. 2000), cert. denied, 121 S. Ct. 1152 (2001); *United States* v. *Chavez*, 230 F.3d 1089, 1090 (8th Cir. 2000); *United States* v. *Hernandez-Guardado*, 228 F.3d 1017, 1024-1027 (9th Cir. 2000); *United States* v. *Corrado*, 227 F.3d 528, 542 (6th Cir. 2000); *Hernandez* v. *United States*, 226 F.3d 839, 841-842 (7th Cir. 2000).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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