Record No. _____

In the Supreme Court of the United States

WILLIAM TODD COONTZ,
Petitioner,

v.

UNITED STATES,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Was it reversable error for the trial court to exclude the Petitioner's/ Coontz's key witness – the CPA expert – from testifying in a criminal tax prosecution on certain accounting and tax issues that related to the key defense in the case – willfulness – yet permit the government's witnesses to testify about the same principals, and allow the same government witnesses to testify about the Defendant's state of mind and alleged tax knowledge with no foundation?

Was it reversable error to submit to the jury a theory of false personal tax returns based on alleged personal expenditures by the company where there was no evidence the expenditures were personal and not business?

Was it reversible error for the trial court to sentence Mr. Coontz above the Sentencing Guidelines range with no prior notice?

PARTIES TO THE PROCEEDING

The caption of the case names all of the parties to the proceedings in the court below.

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William Todd Coontz asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fourth Circuit on April 17, 2020, which Petition for Rehearing was denied on July 28, 2020.

OPINION BELOW

The unpublished opinion of the court of appeals is attached to this petition as Appendix A. The order of the court denying the petition for rehearing or hearing *en banc* is attached as Appendix B.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The Opinion and Judgment of the Court of Appeals for the Fourth Circuit were entered on April 17, 2020. Fourth Cir. DKT 38. A Petition for Rehearing and Motion for Rehearing En Banc was timely filed. DKT 43. That Petition was denied on July 28, 2020. DKT 45. A petition is timely filed if it is filed within 90 days after the denial of the Petition for Rehearing. *See*, Sup. Ct. R. 13.1 and 13.3. In addition, pursuant to a Supreme Court Order issued March 19, 2020, the Court extended the deadline to file a petition to 150 days from the date of the denial of a timely petition for rehearing. Thus, Petitioner's filing is timely if made on or before December 25, 2020. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254 (1).

FEDERAL STATUTES AND RULES OF CRIMINAL PROCEDURE INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that: "No person shall… be deprived of life, liberty, or property, without due process of law…"

The Eighth Amendement to the United States Constitution provides in relevant part that: …"nor cruel and unusual punishments inflicted."

Federal Rule of Criminal Procedure 32 (h) provides that:

> "Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party's prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure. The notice must specify any ground on which the court is contemplating a departure."

STATEMENT OF THE CASE

While opinions on whether an issue is of exceptional importance may vary, in counsel's judgment as an experienced tax prosecutor and defense counsel, the issues raised in this Petition are of that importance, especially in the area of tax prosecutions.

Appellant highlights two issues for this Court's consideration in asking the Court to grant this Petition and issue a Writ.

First, the trial court permitted government witnesses to offer opinion testimony about the tax laws, about Appellant's alleged understanding of unspecified "tax rules and regulations," and yet excluded Appellant's key and only witness on this same issue, which was the primary issue in the case – willfulness.

Second, the government, which was represented by experienced tax counsel, and the district court permitted the jury to consider a theory of conviction – that expenses paid by Petitioner's company were personal and therefore income to him – even though the government admitted before the jury deliberated that there was no proof that the expenses were personal. The Fourth Circuit erred in upholding these rulings.

Petitioner's counsel was not trial counsel, and trial counsel moved to strike the case at the close of the government's case in chief, but trial counsel also should have moved to strike this theory at the close of all of the evidence before it was argued and submitted to the jury but did not. Even with that omission, given the admission by the government, the government and the court should have eliminated that theory of conviction. With a general verdict, there is no way to know the basis for the jury's finding of guilt.

The convictions on those counts should be vacated and remanded for a new trial on the sole theory for which there was evidence.

Last, upon remand, given the trial rulings, statements and sentencing decision by the district court, the case should be assigned to a different judge.

BACKGROUND

William Todd Coontz (Coontz) was found guilty on April 5, 2018 of certain tax charges. Joint Appendix (JA)[1] 7. He was sentenced on January 29, 2018. Judgment was entered on February 26, 2019. The notice of appeal was timely filed on March 11, 2019. On April 2, 2019, the Court of Appeals for the Fourth Circuit (Court of Appeals) granted Appellant's motion for bond pending appeal. Fourth Circuit (FC) Dkt. No. 11.

Coontz is an Evangelical Christian ordained minister. He has a ministry through television, other media, and in the community. He is also often a guest preacher at various churches and televised ministries for which he receives honoraria.[2] He also operates a for profit business that sells various merchandise related to his ministry.

Both the government and the district court made it clear that they hold disdain for and disapprove of the ministry. The district court observed at sentencing, without evidence, that he raised donations fraudulently from poor people because he did not

[1] The citation to JA is to the Joint Appendix to the appeal to the Fourth Circuit Court of Appeals in Case No. 19-4167.
[2] JA 169-170.

tell them about his lifestyle or that he was not allegedly paying all of his taxes. JA 807-08.

The government requested a sentence at the high end of the Sentencing Guidelines' (Guidelines) range, noted that the Defendant was being sentenced in the same courtroom as TV evangelists Jim Baker and Bishop Ginwright and that the government took "fraud by ministers very seriously…" JA 812.

Having not provided any evidence or allegations about, nor charged any wrongdoing with the regard to the ministry fundraising, the government pursued a criminal tax case against Coontz.

The government called nine witnesses; the defense called two. JA 146, 440. On the false return counts, the government alleged that Coontz underreported income by not reporting all the income he received and by not reporting income from alleged personal expenditures made from his company. JA 12-22.

The main issue in the case was whether Coontz's conduct was "willful." Willfulness in all criminal tax cases is defined as the "voluntary intentional violation of a known legal duty." *Cheek v. United States*, 498 U.S. 192, 111 S. Ct. 604, 609–11 (1991). Thus, for the Defendant, evidence of lack of willfulness was critical to his defense. Knowing that, the government moved *in limine* to exclude Coontz's CPA expert witness, which the trial court granted.

REASONS FOR GRANTING THE PETITION AND ISSUING THE WRIT

I.

IT WAS REVERSABLE ERROR FOR THE TRIAL COURT TO EXCLUDE THE DEFENDANT'S KEY WITNESS – THE CPA EXPERT – FROM TESTIFYING IN A CRIMINAL TAX PROSECUTION ON CERTAIN ACCOUNTING AND TAX ISSUES THAT RELATED TO THE KEY DEFENSE IN THE CASE – WILLFULNESS – AND YET PERMIT THE GOVERNMENT'S WITNESSES TO TESTIFY ABOUT THE SAME PRINCIPALS, AND ALLOW THE SAME GOVERNMENT WITNESSES TO TESTIFY ABOUT THE DEFENDANT'S STATE OF MIND AND ALLEGED TAX KNOWLEDGE WITH NO FOUNDATION

A. The government's second witness in the trial was Trent Arnold, Mr. Coontz's former tax return preparer for his personal returns and business returns. JA 207. Arnold did not provide services related to the ministry. JA 207. Lead counsel for the government, who was experienced counsel in criminal tax cases, asked Arnold, at the end of his direct testimony:

> Q. "Did you form an opinion as to his [Coontz] knowledge about taxes during that time period? [the period that he prepared returns]
>
> Mr. Foster: Objection; lack of foundation; irrelevant.
>
> The Court: Overruled.
>
> Q. What is your opinion?
>
> A. My opinion is that, in general he had better than average understanding of the tax rules and regulations." JA 257.

The record shows that government did not establish any foundation for the question. Arnold offered little in the way of any testimony about what Mr. Coontz actually said to him in their dealings. Indeed, the government, apparently knowing from its preparation of the witness pretrial, that Arnold had little if any recollection of actual conversations, couched its questions in the form of would information have been sent to or received from the client, or would you have discussed a matter with the client, as opposed to eliciting or establishing what if anything Mr. Coontz **actually** did or **actually** said. (E.g. JA 212-214, 219, 220, 223, 234, 243, 242, 252).

Arnold's opinion about Mr. Coont'z general understanding of tax rules and regulations was without foundation, was irrelevant, and highly prejudicial. There was no attempt to tie the tens of thousands of pages of extremely complex tax code and regulations and rules to something even remotely relevant to the issues in the case. It would be one thing if Arnold could point to specific things Mr. Coontz said about the IRS, or the tax code, or even generally whether he thought he owed taxes, or could receive a distribution as opposed to a salary. But there was none of that; Arnold simply made the bald-faced assertion that Mr. Coontz had a better than average understanding of the tax rules and regulations. A subjective "good-faith misunderstanding of the law or a good-faith belief that one is not violating the law" can negate the statutory willfulness requirement of criminal tax offenses. *Cheek v. United States*, 498 U.S. 192, 111 S. Ct. at 609–11.

The Court of Appeals erred in ruling that Coontz's prior return preparer's (Arnold) testimony about Coontz's alleged knowledge of "tax rules and regulations" was relevant and the value of the testimony went to weight, not admissibility. Court of Appeals Opinion (OP) at 3. The Court correctly observed that Arnold's interaction with Coontz over the years laid a foundation for the opportunity for personal knowledge. But Coontz does not challenge that testimony for lack of interaction. Rather, that interaction over the years still resulted in no foundation to opine about any knowledge Coontz may have about specific tax laws relevant to the case. An opinion that Coontz had a "better than average understanding of the tax rules and regulations" (JA 257) had no relevance to the case and was designed solely to prejudice the jury. This Court or undersigned counsel may have a better than average understanding of some tax laws and regulations and no understanding at all about the thousands of others.

Arnold provided no testimony that Coontz made any statements about the tax code let alone tax laws relevant to the case. The Court of Appeal's explanation that such testimony may have strengthened the testimony and went only to weight, is, respectfully, wrong. The proffered evidence must first make it through the gate and be relevant before one can make arguments about weight. This evidence prejudiced Coontz as it was designed to undercut his principal defense in the case – lack of willfulness.

B. The Court of Appeals erred when it concluded that allowing Arnold to testify that he documented his resignation to protect himself was harmless, without deciding if it was error. OP at 4. The cumulative effect of (1) allowing the former preparer to testify about his reasons to document his resignation; (2) the improper admission of his other opinion evidence (e.g. Coontz's alleged knowledge of unspecified tax rules and regulations), all designed to claim Coontz was willful; and (3) the exclusion of Coontz's CPA, discussed below, prejudiced the jury; it clearly undermined confidence in its verdict such that reversal is required. These cumulative errors had a "substantial and injurious effect or influence in determining the jury's verdict." *Tuggle v. Netherland,* 79 F.3d 1386 (4th Cir. 1996); and *United States v. Barnette*, 211 F.3d 803 (4th Cir. 2000).

C. One of the Court of Appeals' most injurious errors was its ruling that it was harmless to exclude Coontz's CPA witness from testifying altogether. OP at 4-6. The Court noted that opinion testimony that states a legal standard or draws a legal conclusion is generally unhelpful and cases involving complex legal or regulatory schemes must be handled through the court's instructions. OP at 5. But the district court and the Court of Appeals approved of exactly the same type of testimony from the government witness that they excluded from Coontz's key defense witness.

The Court of Appeals completely undercuts the importance of a defendant at trial and his counsel determining that the best way to present his defense is to use

their own witness to compete and contrast with the government witness. This is especially true when a defendant does not testify at trial and plans a strategy based on a competing CPA (Peter Bell). Bell would have provided substantial evidence in support of the Defendant's main defense – a lack of willfulness.

The Court of Appeals contends that Coontz's proposed CPA witness, Bell, would have impermissibly testified about "bare tax principles" that were more appropriate for the trial judge, yet the Panel characterized the government witnesses' permissible tax testimony as "regarding basic tax concepts" – even though the Court of Appeals admits that the testimony by the defense witness and the government witnesses about these tax concepts would have been "entirely consistent" with one exception. OP at 6. Yet the Court of Appeals goes on to characterize the defense witness's proffered testimony as "potentially confusing." OP at 5. Neither the government's witnesses nor Bell were lawyers and the testimony concerned concepts relevant to the preparation of tax returns, not pure legal testimony, and as such if the government's was admissible, so too was Bell's.

Respectfully, the Court of Appeals cannot have it both ways. The government witnesses were allowed to testify about these tax concepts. To then exclude the defendant's key witness from testifying about these same concepts is obviously unjustified and inconsistent. It improperly usurped the defendant's and his trial counsel's Constitutional right to pursue their trial strategy.

The Court of Appeals downplays the topic of Bell's proposed testimony that was in contrast to the government witness, Arnold. The government witness testified that Coontz was required to take a salary reportable on a W-2, a topic he advised Coontz on and about which he included in his letter of resignation, a letter he was impermissibly permitted to testify that he wrote to protect himself. Thus, the topic of whether Coontz had to take a salary from his company or could lawfully take a distribution was a huge part of the government's case, especially concerning willfulness. Bell would have testified that it was permissible for Coontz to take a distribution, in direct conflict with the government's key witness. The Court of Appeals brushes aside this conflict by simply noting it is harmless when viewing the evidence in totality. OP at 6. Respectfully, given the totality of the inadmissible evidence that was permitted to stand, and the improper exclusion of permissible defense evidence, there can be no reasonable confidence that these errors did not work a substantial and injurious effect on the jury's verdict. *See*, *Tuggle v. Netherland,* 79 F.3d 1386 (4th Cir. 1996); and, *United States v. Lankford*, 955 F.2d 1545, 1551-52 (11th Cir. 1992).

Arnold, a CPA, testified that he advised Coontz that he should be paid by salary instead of taking draws from his Sub-Chapter S Corporation. JA 211, 256. Arnold also testified about the nature of a sub-chapter S corporation and tax aspects of that kind of corporation. This testimony was related to distributions and payments

Coontz received from his companies that went into the government's income calculation.

Arnold testified about various expense categories on Coontz's company returns and the tax law and rules for such categories, including when automobile expenses are permissible, rules for meals and entertainment, and vehicle expenses including depreciation, JA 228-245.

Coontz's CPA witness, Bell, planned to rebut testimony from Arnold, the former return preparer and the government's last witness, IRS Revenue Agent Archie.

The defense proffered to the court that Bell would have testified, among other things, about the following (JA 618-621):

1. A sole owner of an S-corporation, which is Coontz's status, is not required to pay himself a salary and that it is acceptable to take distributions as long as they are reasonable and properly accounted for.

2. A sole owner of an S-corporation may pay personal expenses on the company credit card as long as it is properly accounted for.

3. S-corporations may purchase vehicles so long as the cost and use and expenses are properly accounted for.

4. The purchase of clothing could be deductible business expense.

5. The meals and entertainment are deductible if for a business purpose.

6. A business purpose would also involve whether it is ordinary and necessary.[3]

7. A form 1099 is issued to contractors who receive more than $600 in compensation in a year and that even if the person does not turn in his form 1099 to his accountant, it would be sent to the IRS and not hidden from the IRS.

8. It is not improper for a contractor who receives payment by check to simply cash the check.

9. A person who prepares returns and is compensated for that is considered a tax return preparer by the IRS and return preparers have a duty to obtain reasonable assurances.

The government objected, claiming in part it was confusing. JA 620.[4] The government admitted that there was no evidence of what attire was purchased or what the purposes of the meals were. JA 620. This was a significant admission because the government sought at trial to prove, and argued at sentencing that

[3] The government elicited this exact testimony from its IRS summary witness just moments before the court excluded the defense witness. JA 612. Q. [by the government] Are all business expenses subject to need to be ordinary and necessary in order to be taken? A. [by Teresa Archie, IRS Revenue Agent, SEP (Special Enforcement Program) Agent, CPA, a 13-year employee (JA 596)] They are.

[4] Contrast the objection by the government with the fact that it had elicited from Arnold, his opinion that Coontz had a better than average understanding of the tax rules and regulations. JA 257.

various attire, meals and entertainment, and automobile expenses were personal and should be included for criminal purposes.

The court excluded all of Bell's proffered testimony, deciding that it would be confusing to the jury and was not relevant. JA 622.

Respectfully, the Court of Appeal's decision upholding the exclusion of the defense's key witness was clearly wrong. The government's witnesses were allowed to testify about most if not all of these very items. *See United States v. Lankford*, 955 F.2d 1545, 1551–52 (11th Cir. 1992) (holding that it is an abuse of discretion to exclude the otherwise admissible opinion of the Defendant's expert on whether the Defendant reasonably believed money was income, while allowing the opinion of the government's expert, the Defendant's tax preparer, on the same issue).

In contrast to the court excluding Bell, the court permitted the government's CPA witness, Arnold, to testify about taking a distribution or a salary from a sub-S corporation that you own (proffer 1), about his recommendation that Coontz draw a salary instead of taking a distribution (proffer 1), and Arnold's feeling that it was important to document it to protect himself. JA 211. Arnold also testified about the concept of "reasonable compensation" and that "the IRS requires a shareholder to take wages from their company in the amount that would meet the requirement of reasonableness." JA 256.

The government's objection to, and the court's exclusion of Bell was especially damaging and prejudicial on this topic, and left Arnold's advice and worries (and inferences) unrebutted. Arnold was permitted to testify that Coontz had to report income on a W-2 and Coontz was not allowed to rebut that with his own witness. Respectfully, this error in upholding the exclusion was critical, not harmless.

Arnold testified about what a subchapter S corporate tax return is, how income and expense is reported, and how it flows through a K-1 to the owner. JA 228-234. The court's justification to exclude Bell on the basis that the court instructs on the law, or that Bell's testimony would be confusing, simply does not hold up when the government asked, and court allowed the same testimony.

Arnold testified that automobiles can be a business expense only if they are actually used for business (proffer 3). JA 237. IRS Agent Archie testified that one must determine if the vehicle is a proper business expense and proper records are kept and look at mileage and depreciation. JA 610-11. (proffer 3, 6). Archie's testimony came minutes before the judge excluded Bell's testimony about the very same topic. JA 622.

Archie was allowed to testify about the requirement that all business expenses are "subject to the need to be ordinary and necessary."[5] JA 612. (proffer 3, 6).

Contrary to the Court of Appeals' ruling, Bell's proposed testimony was not in the nature of legal testimony that would or could usurp the court's function to instruct the jury on the law but was testimony that concerned tax return preparation. *See United States v. Monus,* 128 F.3d 376, 386 (6th Cir. 1997) (holding that expert opinions on whether certain money triggers tax liability does not usurp the function of the jury).

As those who try cases know, it is one thing to cross-examine a hostile government agent who has worked the case, it is another to have a witness whom you have interviewed and prepared to call in your case. The damage to the defense's case is often incalculable if the defense is not permitted to have a witness to present its theory and evidence to the jury.

Evidence "is relevant if it has any tendency to make a material fact more or less probable than it would be otherwise." *United States* v. *Certified Env.Serv., Inc.*, 753 F.3d 72, 90 (2d Cir. 2014). Moreover, "[e]vidence need not be conclusive in order to be relevant [;] [a]n incremental effect is sufficient." *Id.* (internal quotation marks, citation, and ellipsis omitted). Under this standard, the district court's

[5] The government's testimony about what is necessary to constitute a business expense and what the government must prove, just highlights that the government knew what it must prove in a criminal case and that it did not do so.

evidentiary rulings, which dismissed as irrelevant crucial defense evidence on core disputed issues, constituted a clear abuse of discretion. *Cf. id.* (holding that the district court abused its discretion in excluding testimony that could bear on "the defendants' intent and good faith" because it "was a contested issue in this case, and the definition of relevance under Fed. R. Evid. 401 is very broad"). *A fortiori*, the district court's evidentiary rulings unquestionably prejudiced the Appellant.

II.

IT WAS REVERSABLE ERROR TO SUBMIT TO THE JURY A THEORY OF FALSE PERSONAL TAX RETURNS BASED ON ALLEGED PERSONAL EXPENDITURES BY THE COMPANY WHERE THERE WAS NO EVIDENCE THE EXPENDITURES WERE PERSONAL AND NOT BUSINESS

The Court of Appeals erred in affirming the convictions on the false return counts on the unusual facts of this case where there was no evidence that company expenditures were personal in nature. That theory – that these expenditures look like they are personal – did not comply with the Internal Revenue Code and the government's burden of proving its theory, and thus should have never been permitted to go to the jury. Under these facts, this error is not simply a sufficiency of the evidence.

The government's experienced tax prosecutor admitted that the government had not proved that the expenditures were personal. (JA 620). The trial judge should have recognized the import of this concession and not permitted that theory to go to

the jury. Defense counsel should have specifically moved to strike that part of the government's case and renewed his motion at the end of the case, not just at the close of the government's case.

One of the government's major theories of prosecution was that Coontz did not report company expenditures as personal income. The government vigorously pursued the theory that certain company expenditures were personal throughout the trial, including indictment, opening statement, the trial and closing argument. Arnold and government's IRS Revenue Agent/Summary Witness/Expert testified that expenditures to be deductible must have business as their primary purpose and must be ordinary and necessary. JA 610-11, 237.[6] The government even introduced lists of purported food and entertainment expenditures (which simply identified the name of the payee but not the actual nature of the expenditure). It pursued this same theory in closing argument that Coontz filed false personal returns by not including these alleged personal expenditures. The government argued this theory in their closing argument at least five times in three pages. JA 670-679.

The government's enthusiasm for this theory lacked the most important ingredient – evidence. Despite the lead prosecutor having worked at the Department of Justice Tax Division, Criminal Section, there was no testimony from any witness

[6] Even though the government objected to and the district court excluded the Defendant's CPA from testifying about the same matters.

as to the specifics of a particular expenditure such as meals or entertainment to show it was personal, and that its primary purpose was not business. Absent testimony from a participant in the meal or entertainment about its purpose, or admissions by Coontz (not present here), it is not possible to show the purpose was personal. The government completely failed to meet its burden to have that theory go to the jury.

For example, the government used the former return preparer, Arnold, to testify about how he prepared returns, and the kinds of information he would request from clients, but he did not provide any testimony about the purpose of any of the expenditures at issue. The government's tactic was clever, and the government, knowing it lacked evidence, should have withdrawn that theory.

The complete failure of the government's trial evidence, and its failure to meet its burden of proof was corroborated at sentencing when Coontz objected to the government's continued use of the expenditures as a tax loss item. This required the government to put on evidence to attempt to substantiate the loss. The IRS Revenue Agent who was the trial witness, admitted on cross-examination at sentencing that in a criminal case it was the government's burden to prove the expenditure was personal and not business. She admitted there was no evidence of the actual purpose of the expenditure:

> Q. And you certainly understand that in a criminal case the burden is on the government and the IRS to show the deduction, let's say – let's talk about deductions for a

second – that the deduction was not appropriate, that it shouldn't have been taken for business purposes, correct?

A. [By IRS revenue Agent Archie] Correct.

Q. And separate and apart from whether the deduction is appropriate, you also have to look at whether the defendant had the sufficient intent to purposely take a false deduction, right?

A. I understand. (JA 759)…

Q. …in order for that expense [meals and entertainment] to be deductible the primary purpose of the meal and entertainment would have to be business related?

A. Correct.

Q. If we are in a criminal case, whose burden would it be to prove that the particular meal was not business related or in fact personal?

A. It's the government's responsibility. (762)…

Q. In the items that the various meals, for example, that you attributed to Mr. Coontz, Pastor Coontz, for criminal purposes, can you point to any other evidence the government gathered either in the investigation or at trial to show that these expenses had no business purpose whatsoever?

A. They were subpoenaed and not provided.

Q. All right. So your basis for saying they're criminal is that the business didn't have contemporaneous records or didn't produce them?

A. That, and my experience as a revenue agent that the type of business would not ordinarily need these type of expenses – as a business. (JA 762).

Perhaps more significant than the admissions of the case agent at sentencing, are the admissions made by the government prosecutor at trial when the government sought to exclude the defense expert. [The prosecutor]: **There's been no evidence of what was purchased. I don't believe those records exist, same with meals. There's no records of any of what those meals were or the purpose**. (JA 620) (emphasis added).

It was thus improper for the government to pursue at closing argument and submit to the jury, the baseless theory of alleged personal expenses. Since there was only one potential valid basis for the alleged false personal returns – understated income, and there was no special verdict form to differentiate the basis for the jury's verdict, there is simply no way to know if the jury convicted on the false return counts based on the alleged personal expenditures. *See Yates v. United States*, 354 U.S. 298, 312 (1957) ("a verdict [is required] to be set aside in cases where the verdict is supportable on one ground, but not another, and it is impossible to tell which ground the jury selected"); *United States v. Head*, 641 F. 2d 174, 179 (4th Cir. 1981); *United States v. Foley*, 73 F.3d 484, 494 (2nd Cir.1996). There is no meaningful distinction between the facts here and those cases that reversed where the legal theory was deficient. Here, as there, the jury was allowed to convict on an improper basis.

Thus, the Petition should be granted and those convictions must be vacated and remanded for a new trial. And since the government's claim of alleged personal expenses was deficient and insufficient as a matter of law, the government does not get a second bite to attempt to prove that theory.

III.

THE DISTRICT COURT'S DECISION TO SENTENCE ABOVE THE GUIDELINES RANGE BY APPROXIMATELY 46 - 17% WITHOUT ANY PRIOR NOTICE WAS ERROR AND REQUIRES REMAND

Standard of Review

Failure to comply with the Federal Rules of Criminal Procedure is reviewed *de novo*.

Alleged Constitutional violations are reviewed de novo. *United States v. Hall*, 551 F.3d 257, 266 (4th Cir. 2004) ("We review *de novo* a properly preserved constitutional claim"); *United States v. Cobler*, 748 F.3d 570, 574 (4th Cir. 2014) (holding that whether a sentence is disproportionate to the severity of defendant's crimes is a question that is reviewed *de novo*).

Argument

The district court found that the applicable Sentencing Guidelines calculation to be a level 22. With Mr. Coontz's prior criminal history of I (no prior convictions at all), this resulted in a Guidelines Range of 41-51 months.[7] The government, noting that Coontz was being sentenced in the same courtroom at Jim Baker and Bishop Ginwright, requested a sentence of 51 months. The government's reference reinforced their motivations from the outset of this case, that they viewed Mr. Coontz's ministry with disdain and disapproval and saw it as a fraud. The government's view was indicative of the district court's motivation as reflected in its statement at sentencing.

To compound the seriousness and magnitude of the district court's unannounced departure, if one reads the Defendant's sentencing memoranda and the sentencing hearing transcript, it is clear that Defendant made compelling arguments that the tax loss was overstated, and that the Guidelines range should have been 33-41 months. The district court, without explanation, rejected the defense arguments and adopted without change, the government's calculations. The court departed/ varied to a sentence of 60 months. This represents a 19 month increase from the low end of the Guidelines range (41 months) and is greater than a 46% increase from the

[7] While the Appellant strongly disputes (for the reasons in our pleadings and arguments at sentencing) the Sentencing Guidelines findings on tax loss and obstruction found by the district court, he does not appeal this fact finding, which only requires a preponderance of the evidence and due deference standard.

number. A sentence of 60 months represents a 9 month increase from the 51 month range, which is a greater than 17% departure/variance/increase.

Had the Guidelines been 33-41 months, as they should have been at worst, then the court's 60 month sentence would have represented an even greater increase (82% to 46%).

While the court couched the increased sentence as a variance and not a departure, the impact of such a significant departure was the same whatever label it is given. Needless to say, Mr. Coontz and defense counsel were stunned by the increase, and the amount and had not prepared an additional argument to deal with this surprise. The government had not sought a departure or variance.[8]

The district court failed to give any notice of its intent – indeed, there was no mention that the court was entertaining such a possible sentence until it was announced. While a timely objection was made after the court announced the sentence, JA 821, there was still no opportunity to prepare a rebuttal or response, or make one since sentence had now been imposed.

Calling the increase a variance does not lessen the impact on Mr. Coontz's due process and sentencing rights under the 5th and 8th Amendments to the United States Constitution. Respectfully, Federal Rule of Criminal Procedure Rule 32 (h)

[8] The government did suggest a variance if the court agreed with defense counsel's arguments about the Guidelines calculations that would have reduced the Guidelines by two to four levels. JA 793.

requires prior notice of a possible departure and the same considerations should apply here. *But see*, *Irizarry v. United States*, 553 U.S. 708 (2008). ("The more appropriate response to such a problem is not to extend the reach of Rule 32(h)'s notice requirement categorically, but rather for a district judge to consider granting a continuance when a party has a legitimate basis for claiming that the surprise was prejudicial.").

If the Court grants the petition for writ of certiorari, Petitioner anticipates requesting that the Court remand for a new sentencing before a different judge to allow Mr. Coontz to prepare for and address the anticipated departure.[9]

CONCLUSION

Petitioner requests that the Court grant the writ of certiorari and review the judgment of the Court of Appeals.

Respectfully submitted,

[9] By way of contrast, a defendant who was sentenced by the same judge immediately prior to Mr. Coontz's sentencing was convicted of being a felon in possession of a loaded stolen firearm. The Defendant was stopped at 5:00 a.m. in a car with multiple occupants. He was in possession of the loaded stolen firearm and wearing a bullet-proof vest. He had a criminal history of III and the court noted his prior crimes of violence, including assaults, false bomb reports, and his convictions for selling narcotics. The Guidelines range was 37-46 months. The government recommended 44 months and the court imposed a sentence of 44 months. *United States v. White*, 3:18-cr-64, WDNC, Charlotte Div., Dkt. Nos. 28 (Judgment) and 30 (sentencing transcript, ordered by Appellant in this case, at 1-16).

/s/

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