No. 12-62

IN THE
Supreme Court of the United States

MARVIN PEUGH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF FOR THE PETITIONER

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
CANDICE CASTANEDA
Paul Hastings LLP
875 15th Street, N.W.
Washington, DC 20005
stephenkinnaird@paulhastings.com
(202) 551-1700

ERIKA L. LEONARD
AMY E. JENSEN
Paul Hastings LLP
1170 Peachtree, N.E., Suite 100
Atlanta, GA 30309
(404) 815-2400

STEPHANOS BIBAS
University of Pennsylvania Law
School Supreme Court Clinic
3501 Sansom Street
Philadelphia, PA 19104
(215) 746-2297

ALLAN A. ACKERMAN
39 South LaSalle Street
Suite 1218
Chicago, IL 60603
(312) 332-2891

Counsel for Petitioners

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REPLY BRIEF

The Government's mild opposition underscores the need for this Court's review. The Government does not contest the circuit conflict; it acknowledges that at least seven circuits apply the Ex Post Facto Clause to forbid retroactive application of Sentencing Guidelines enhancements, with a number of those courts expressly rejecting the position of the Seventh Circuit below. Opp. 9; Pet. 8-11. The Government does not deny that the circuit conflict is intractable; indeed, the Seventh Circuit has repeatedly reaffirmed its precedent and has declined to rehear the issue en banc, entrenching the circuit split. Pet. 11; Opp. 8-9. Finally, the Government does not deny that this case is an ideal vehicle for resolving the conflict. Pet. 20-21.

Instead, the Government devotes much of its brief to arguing the merits. Opp. 5-7; *see also id.* at 10-12. But it nowhere addresses or justifies the Seventh Circuit's express refusal to apply this Court's "significant risk" test under the Ex Post Facto Clause. *Compare Garner* v. *Jones*, 529 U.S. 244, 255 (2000), *with United States* v. *Demaree*, 459 F.3d 791, 794-95 (7th Cir. 2006). If, on the other hand, the Government were right that most circuits are applying an erroneous standard, the prevalence of that error would itself warrant this Court's review.

The Government's only other objection is to the issue's importance. Despite having twice conceded

that this "circuit conflict may warrant this Court's review in an appropriate case,"[1] the Government now backtracks, claiming that the issue is insignificant and arises infrequently. Opp. 9-10 & n.3. This is far from the case. The issue has already arisen at least hundreds of times and promises to keep recurring, particularly because the Sentencing Commission regularly revises Guideline sentences upward. As a result, in the Seventh Circuit, federal criminal defendants face higher sentences than those in the rest of the country, tempting prosecutors to forum-shop. Only this Court can resolve this entrenched, recurring disagreement about the application of the U.S. Constitution and bring uniformity to criminal sentencing across the country.

1. The Ex Post Facto Clause is violated wherever there is a "significant risk" that retroactive application of new sentence enhancements will raise a defendant's punishment. *See Garner*, 529 U.S. at 255. The Seventh Circuit has admitted that this formula, "interpreted literally, would encompass a change in even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges' sentencing decisions." *Demaree*,

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[1] Brief for the United States at 10-11, *Sandoval* v. *United States*, No. 11-9492 (S. Ct. May 2012); Brief for the United States at 16-17, *Gabayzadeh* v. *United States*, No. 11-1034 (S. Ct. May 2012).

459 F.3d at 794. Nevertheless, *Demaree* held that this Court could not have meant what it said in *Garner*. *Id.* The Seventh Circuit proclaimed "that the ex post facto clause should apply only to laws and regulations that bind rather than advise," and that the Guidelines post-*Booker* fall into the latter category. *Id.* at 795. The Government never defends the Seventh Circuit's rejection of this Court's precedents, or explains why the "significant risk" standard governs discretionary parole decisions but not discretionary sentencing.

The Seventh Circuit's rule conflicts not only with this Court's "significant-risk" standard under the Ex Post Facto Clause, but also with the "presumption of reasonableness" that sentences within Sentencing Guideline ranges may carry. *Rita* v. *United States*, 551 U.S. 338, 347 (2007); Pet. 12-14. While the Guidelines are no longer binding, Opp. 6-7, 10-11, they remain "the starting point and the initial benchmark" for sentencing. *Gall* v. *United States*, 552 U.S. 38, 49 (2007). In practice, they carry significant weight and thus are very likely to influence sentences. IACDL Amicus Br. 6-10. As the Government acknowledges, judges typically sentence within the federal Guidelines, and accordingly higher Guidelines increase the punishment imposed. Pet. 15; Opp. 11; IACDL Amicus Br. 8.

The Government claims that ex post facto problems arise only if the defendant is sentenced

under mandatory guidelines, as in *Miller v. Florida*, 482 U.S. 423 (1987). Opp. 5. But nothing in *Miller* contravenes the "significant risk" standard that this Court subsequently announced in *California Department of Corrections v. Morales*, 514 U.S. 499 (1995), and reaffirmed in *Garner*. While application of mandatory rather than advisory guidelines may heighten the risk of increased punishment, in every case the Ex Post Facto Clause demands a "rigorous analysis of the level of risk created by the change in law." *Garner*, 529 U.S. at 255. Here, a substantial change in the sentencing range that a district court must use as the starting point certainly creates a significant risk of increased punishment. Mr. Peugh's sentence is case in point; the amendment of the Guidelines increased his sentencing range to 70-87 months, and the district court's express decision to sentence him within that range resulted in a sentence of 70 months. The amendment thus directly resulted in a higher sentence than the court would have imposed if it had applied the 37-46 month sentencing range called for by the 1998 Guidelines in effect at the time Mr. Peugh committed his offense. Pet. 5-7.

The Government responds by equating a defendant's ex post facto right not to face higher sentences with a mere hope for notice of sentence increases, which is not guaranteed as a matter of due process. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008); Opp. 7, 12. *Irizarry* stands for the proposition

that post-Booker defendants have no due process right to notice because, after *Booker*, "parties are inherently on notice that the sentencing guidelines range is advisory." *Irizarry*, 553 U.S. at 712 (internal quotation marks omitted); *id.* at 713-14 ("Any expectation subject to due process protection … did not survive our decision in [*Booker*] … [because] neither the Government nor the defendant may place the same degree of reliance on the type of 'expectancy' that gave rise to a special need for notice [pre-*Booker*]."). But the Ex Post Facto Clause requires more than just notice. *See Miller*, 482 U.S. at 431 ("The constitutional prohibition against ex post facto laws cannot be avoided merely by adding to a law notice that it might be changed."). It "also restricts governmental power by restraining arbitrary and potentially vindictive legislation," *Weaver v. Graham*, 450 U.S. 24, 29 (1981), including laws creating a "significant risk" of a heavier punishment, even within the authorized range. *Garner*, 529 U.S. at 255. Notice questions aside, the Ex Post Facto Clause prohibits laws creating a significant risk that Mr. Peugh would suffer greater punishment than he would have received at the time of his offense.

2. This constitutional issue is intrinsically important. It results in systematically higher sentences any time the Guidelines are revised upwards. The persistence of the split allows different federal districts to continue to impose

different punishments for the very same crimes. Criminal defendants in the Seventh Circuit are treated differently than similarly situated defendants in at least seven other circuits. In addition, federal prosecutors at Main Justice have some choice of venue in multi-jurisdictional cases. In those cases, *Demaree* could tempt them to file cases in the Seventh Circuit, in order to use its heavier penalties as leverage in plea-bargaining. *See* Pet. 13.

3. The Government's claim that the issue arises too infrequently to warrant review is unconvincing. Contrary to the Government's analysis, the 114 circuit court decisions discussing the Ex Post Facto Clause in relation to Guidelines in just the past two years, and the ten Seventh Circuit decisions citing *Demaree* in just the past year, demonstrate (if anything) that the issue recurs frequently. *See* Opp. 10 n.3. Furthermore, in focusing on the number of federal appellate decisions in the last year or two, the Government misses the much larger universe of district court sentences that may not result in appellate opinions. *Demaree*'s holding has been cited in hundreds of cases, briefs, and motions and dozens of treatises and law review articles.[2] Even these numbers understate the

[2] A Westlaw search for citations to the *Demaree* headnote regarding whether the Ex Post Facto Clause applied to amendments to the Sentencing Guidelines found 131 cases, 342 court documents, 13

frequency with which the issue arises. Confronted with page limitations on appeals and a Seventh Circuit that has repeatedly refused to re-examine its position, many defendants likely forego altogether raising an argument that will be of little avail. Notably, the Illinois Association of Criminal Defense Lawyers thought this issue important enough to warrant filing an amicus brief. IACDL Amicus Br. 11-15. Conversely, thousands of defendants in other circuits currently benefit from entrenched precedents adopting the contrary rule without having to litigate it further.

The more pertinent measure of importance is that in the common circumstance when the U.S. Sentencing Commission increases Guideline ranges, this issue will arise *every time* as to any defendant who committed the offense before the effective date of the amendment. The U.S. Sentencing Commission has raised offense levels for more than 100 offenses over the past ten years.[3] For example, in response to

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treatises and encyclopedias, and 17 law review and journal articles on the subject.

[3] A review of the amendments to the Sentencing Guidelines between 2003 and the present revealed nearly 100 enhancements of two or more levels, with increases of as many as ten levels. U.S. SENTENCING GUIDELINES MANUAL app. C, vol. II at 285 to vol. III at 422 (2011).

the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204 (2002), the Commission promulgated new Guidelines in 2003 that increased recommended sentences for, among other things, defendants convicted of larceny, embezzlement, and other property crimes. *See* U.S. SENTENCING GUIDELINES MANUAL § 2B1.1 (2003). The revisions included providing for a higher base offense level, adding new enhancements for offenses resulting in a very large loss, and enhancements for offenses harming many victims.[4] Penalties under § 2B1.1 are important: from 2006 through 2011, 11.3% of offenders sentenced under the Guidelines nationally were sentenced under § 2B1.1, including 3,233 offenders in the Seventh Circuit. U.S. SENTENCING COMMISSION, INTERACTIVE SOURCEBOOK, tbl.17, *available at* http://isb.ussc.gov/USSC?userid=USSC_Guest&password=USSC_Guest.

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[4] U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 653 (2011) (increasing the base offense level of § 2B1.1(a)(1) from 6 to 7 where defendant was convicted of a 2B1.1 offense and where the statutory maximum is 20 years of imprisonment); *id.* at amend. 647 (increasing the maximum enhancement in § 2B1.1(b)(1)(O)-(P) for causing large financial loss from 26 to 30 and increasing the maximum enhancement in § 2B1.1(2)(C) for harming many victims from 4 to 6 levels).

Additionally, pursuant to the Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today Act (PROTECT Act), Pub.L. No. 108-21, 117 Stat. 650 (2003), the 2004 Guidelines contain a number of enhancements for crimes involving child pornography. Between 2006 and 2011, 505 individuals were sentenced in the Seventh Circuit under these Guidelines. *Id.* As part of the enhancements, the base level offense was increased from 17 for possession and receipt to 18 for possession and 22 for receipt, and new enhancements were added for the number of pictures involved. U.S. SENTENCING GUIDELINES MANUAL app. C, amend. 664 (amending § 2G2.2(a), (b)(7)). In fiscal year 2011, 1,608 (96%) of offenders sentenced nationally under § 2G2.2 received an enhancement for the number of pictures, with 1,188 (70.9%) receiving a 5-level enhancement for trafficking in more than 600 images. U.S. SENTENCING COMMISSION, USE OF GUIDELINES AND SPECIFIC OFFENSE CHARACTERISTICS 42 (2011).

4. Furthermore, the federal policy of uniformity in sentencing and basic principles of fairness in our criminal justice system require resolution of the question before this Court. It undermines faith in federal justice when the U.S. Constitution has different application to criminal sentences in different federal courts, or when a defendant like Mr. Peugh faces a sentencing range of 70-87 months for commission of a federal crime in

Illinois, but would have faced only a 37-46 month range if he committed the exact same federal crime in an adjoining state (Kentucky). *See United States v. Lanham*, 617 F.3d 873, 889–90 (6th Cir. 2010) (rejecting *Demaree*), *cert. denied*, 131 S. Ct. 2443 (2011). *See* Pet. 5-7. While Mr. Peugh's case is a particularly stark instance of injustice, any effect on actual criminal punishment is constitutionally significant. *See Glover* v. *United States*, 531 U.S. 198, 203 (2001) (holding, in the Sixth Amendment context, that even additional days of incarceration are not *de minimis).*

Only this Court can resolve this significant division among the circuits, settling the application of the Ex Post Facto Clause of the U.S. Constitution. Further review is warranted.

CONCLUSION

For the foregoing reasons, as well as for the reasons stated in the petition, this Court should grant the petition.

Respectfully submitted,

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
CANDICE CASTANEDA
Paul Hastings LLP
875 15th Street, N.W.
Washington, DC 20005
stephenkinnaird@paulhastings.com
(202) 551-1700

ERIKA L. LEONARD
AMY E. JENSEN
Paul Hastings LLP
1170 Peachtree, N.E., Suite 100
Atlanta, GA 30309
(404) 815-2400

STEPHANOS BIBAS
University of Pennsylvania Law
School Supreme Court Clinic
3501 Sansom Street
Philadelphia, PA 19104
(215) 746-2297

ALLAN A. ACKERMAN
39 South Lasalle Street
Suite 1218
Chicago, IL 60603
(312) 332-2891

Counsel for Petitioner

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