No. 12-62

In the Supreme Court of the United States

MARVIN PEUGH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Ex Post Facto Clause required the district court to consult the version of the advisory Sentencing Guidelines in effect at the time of petitioner's offenses, rather than the version in effect at the time of his sentencing, in determining the appropriate sentence under 18 U.S.C. 3553(a).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 675 F.3d 736.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2012. On June 13, 2012, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including August 10, 2012, and the petition was filed on July 16, 2012. 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 Northern District of Illinois, petitioner was convicted on five counts of bank fraud, in violation of 18 U.S.C. 1344. Pet. App. 15a. The district court sentenced petitioner to 70 months of imprisonment, to be

followed by three years of supervised release. *Id.* at 17a-18a. The court of appeals affirmed. *Id.* at 1a-13a.

1. Petitioner was the co-owner, along with his cousin, of two farming-related businesses in Illinois. Pet. App. 2a-3a. In 1999 and 2000, after one of the businesses began to suffer cash-flow problems, the cousins engaged in multiple fraudulent schemes to obtain access to additional capital. *Ibid.* They secured a series of bank loans, worth over $2.5 million, from the State Bank of Davis by falsifying the existence of valuable contracts between their two businesses. *Id.* at 3a. And they also wrote a series of bad checks between their personal and business accounts, allowing them to overdraw an account with Savanna Bank by nearly $500,000. *Ibid.*

In 2009, a grand jury in the Northern District of Illinois charged petitioner in a superseding indictment with nine counts of bank fraud, in violation of 18 U.S.C. 1344. Presentence Investigation Report (PSR) 3-5. After a trial, a jury convicted petitioner on five of those counts. *Id.* at 5.

2. Petitioner was sentenced in May 2010. Pet. App. 14a. Pursuant to 18 U.S.C. 3553(a), a sentencing court's "overarching duty" is to impose a "'sentence sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper* v. *United States*, 131 S. Ct. 1229, 1242 (2011) (quoting 18 U.S.C. 3553(a)). In carrying out that responsibility, the court is to consult a variety of factors, including the Guidelines promulgated by the Sentencing Commission. *Id.* at 1241. Since *United States* v. *Booker*, 543 U.S. 220 (2005), the Sentencing Guidelines have been advisory, not mandatory: "although a sentencing court must 'give respectful consideration to the Guidelines, *Booker* permits the court to tailor the sentence in

light of other statutory concerns as well.'" *Pepper*, 131 S. Ct. at 1241 (quoting *Kimbrough* v. *United States*, 552 U.S. 85, 101 (2007)).

Federal law generally requires courts to consult the advisory Guidelines "in effect on the date the defendant is sentenced." 18 U.S.C. 3553(a)(4)(A)(ii). Congress adopted that approach so that sentencing courts would have the benefit of the Commission's up-to-date views on the appropriate sentencing ranges. See S. Rep. No. 225, 98th Cong., 2d Sess. 77 (1983). In a pre-*Booker* provision adopted when the Guidelines were mandatory, the Commission has specified that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." Sentencing Guidelines § 1B1.11(b)(1) (2009).

Consistent with Section 3553(a)(4)(A)(ii), the district court in petitioner's case consulted the 2009 Guidelines in effect when he was sentenced. Pet. App. 28a. It rejected petitioner's contention that, because the version of the Guidelines in effect when he committed his offenses recommended a lower advisory sentencing range, the Ex Post Facto Clause required the court to substitute them for the 2009 Guidelines. *Ibid.* [1] The district

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[1] The presentence report stated, as does the petition, that the 1998 version of the Guidelines was in effect when petitioner committed his offenses. PSR 8; Pet 4 n.2. In actuality, however, the 1999 version of the Guidelines (which became effective on Nov. 1, 1999) would apply, because all of the offenses for which petitioner was convicted occurred in 2000. See PSR 3-5. Petitioner's objection in district court, the district court's ruling on that objection, and the court of appeals' opinion all reference the 1999 Guidelines. See 08-CR-50014 Docket entry No. 156, at 1 (N.D. Ill. Apr. 2, 2010); Pet. App. 5a, 8a, 28a. In

court observed that, under governing circuit precedent, "a post-offense change in an advisory guidelines range does not create an ex post facto violation." *Ibid.* (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)).

The district court calculated that petitioner had an offense level of 27 under the 2009 Guidelines, applying an 18-level enhancement for loss in excess of $2.5 million and a 2-level enhancement for perjury on top of the base offense level of 7. 5/4/10 Sent. Tr. 28-42. The resulting advisory sentencing range was 70-87 months of imprisonment. *Id.* at 42. The presentence report advised the court that the Guidelines in effect at the time of the offenses would have produced a range of 30-37 months. PSR 20. After considering all of the sentencing factors under 18 U.S.C. 3553(a), and rejecting petitioner's requests for a departure or variance on various grounds, the court concluded that "a sentence within the guideline range is the most appropriate sentence in this case." Pet. App. 40a. The court emphasized, among other things, the "great and urgent need for the sentence in this case to be a general deterrence to other people that might be in a position to or consider doing these kinds of offenses." *Id.* at 31a; see *id.* at 38a ("[T]he need for general deterrence * * * is high in a case such as this one."). The court imposed a sentence of 70 months of imprisonment on each count, to run concurrently. *Id.* at 40a-41a.

3. The court of appeals affirmed the conviction and sentence. Pet. App. 1a-13a. As relevant here, the court adhered to its prior holding that "the advisory nature of

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all respects relevant to this case, the 1999 version of the Guidelines is the same as the 1998 version.

the guidelines vitiates any ex post facto problem" that might otherwise arise from consulting the Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense. *Id.* at 8a (citing, *inter alia*, *Demaree*, 459 F.3d at 795).

ARGUMENT

Petitioner contends (Pet. 7-21) that the district court violated the Ex Post Facto Clause by using the 2009 version of the Sentencing Guidelines to calculate his advisory sentencing range. The court of appeals correctly rejected that contention, and no further review is warranted.

1. As the government has explained in response to other recent petitions for writs of certiorari raising the question, the Sentencing Guidelines do not present any ex post facto concerns because they are advisory only. See, *e.g.*, Br. in Opp. at 9-14, *Hensley* v. *United States*, 130 S. Ct. 1284 (2010) (No. 09-480). In *Miller* v. *Florida*, 482 U.S. 423 (1987), this Court held that the Ex Post Facto Clause barred the retroactive application of revised state sentencing guidelines that increased a defendant's presumptive sentencing range compared to the guidelines in effect at the time that the defendant committed the offense. The Court reasoned that the new guidelines, which "ha[d] the force and effect of law," "substantially disadvantaged" the defendant, because the state system created a "high hurdle that must be cleared before discretion [could] be exercised" to impose a non-guidelines sentence. *Id.* at 432, 435. The Court distinguished the Florida guidelines system from the United States Parole Commission's guidelines, noting that the federal parole guidelines "simply provide flexible 'guideposts' for use in the exercise of discretion." *Id.* at 435.

Before *United States* v. *Booker*, 543 U.S. 220 (2005), the federal Sentencing Guidelines (unlike the former parole guidelines) were mandatory. Thus, like the Florida guidelines at issue in *Miller*, the federal Sentencing Guidelines "ha[d] the force and effect of laws," *id.* at 234, and significantly constrained sentencing courts' discretion to impose sentences outside of the Guidelines range. See 18 U.S.C. 3553(b)(1). Courts of appeals had therefore uniformly held that, under *Miller*, the Ex Post Facto Clause precluded sentencing a defendant under revised Guidelines that provided for a more severe sentence than was authorized by the Guidelines in effect when the defendant committed the offense. See, *e.g.*, *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994).

This Court's recent decisions explaining the role of the Guidelines in post-*Booker* sentencing, however, have made clear that the Guidelines are now only advisory and do not limit the discretion of sentencing courts in the manner that the guidelines at issue in *Miller* did. In *Rita* v. *United States*, 551 U.S. 338, 351-355 (2007), the Court held that sentencing courts cannot presume that a sentence within the advisory Guidelines range is reasonable or that a sentence outside the range is unreasonable. And while a court of appeals may apply a presumption that a within-range sentence is reasonable, that presumption has no "independent legal effect." *Id.* at 350. In *Gall* v. *United States*, 552 U.S. 38, 47 (2007), the Court held that a court of appeals cannot apply "a rigid mathematical formula" that would demand an increasingly strong justification the farther a sentence varies from the advisory Guidelines range. *Gall* emphasized that no "heightened standard of review" applies to sentences outside the Guidelines range; rather, "the abuse-

of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range." *Id.* at 49.

In subsequent decisions, the Court has made clear that sentencing courts may vary from the advisory range "based solely on policy considerations, including disagreements with the Guidelines," and that the Guidelines are just "one factor among several" that "courts must consider in determining an appropriate sentence." *Kimbrough* v. *United States*, 552 U.S. 85, 90, 101 (2007) (citation omitted); see *Pepper* v. *United States*, 131 S. Ct. 1229, 1247 (2011) ("[A] district court may in appropriate cases impose a non-Guidelines sentence based on a disagreement with the Commission's views."); *Spears* v. *United States*, 555 U.S. 261, 265 (2009) (per curiam). The Court has also held that no notice is required when a court sentences outside the advisory range based on the sentencing factors in 18 U.S.C. 3553(a), because defendants no longer have "[a]ny expectation subject to due process protection" that they will receive a sentence within the Guidelines range. *Irizarry* v. *United States*, 553 U.S. 708, 713 (2008). And the Court has underscored that the Guidelines are just one of the factors to be considered under Section 3553(a); the sentencing court's "overarching duty," after considering *all* of the factors, is to select a sentence that is "'sufficient, but not greater than necessary' to comply with the sentencing purposes set forth in [18 U.S.C.] 3553(a)(2)." *Pepper*, 131 S. Ct. at 1242 (quoting 18 U.S.C. 3553(a)).[2]

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[2] Those purposes are:

the need for the sentence imposed—

2. Consistent with the views elaborated in this Court's decisions addressing the Guidelines after *Booker*, the Seventh Circuit held in *United States* v. *Demaree*, 459 F.3d 791 (2006), cert. denied, 551 U.S. 1167 (2007), that the Ex Post Facto Clause does not bar a district court from considering the version of the advisory Guidelines in effect at the time of sentencing, even when the version of the Guidelines in effect at the time of the offense provided for a lower advisory sentencing range. See *id.* at 794-795. Among other things, the Seventh Circuit pointed out that the Sentencing Guidelines are "advisory"; that the court is obligated to "consider" the applicable range, but may not "'presume'" that it is reasonable; that the selection of an appropriate sentence is "discretionary and subject therefore to only light appellate review"; and that a sentencing court is always permitted to consider a new guideline in sentencing:

> For when the Sentencing Commission changes a guideline, it does so for a reason; and since it is a body expert in criminal punishments, its reason is entitled to the serious consideration of the sentencing judge. A judge who said he was persuaded by the in-

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(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. 3553(a)(2).

> sight that informed the new guideline to give a sentence within the range established by it could not be thought to be acting unreasonably.

Ibid.

As petitioner notes (Pet. 8-9), the Second, Fourth, Sixth, Eleventh, and D.C. Circuits have disagreed, concluding that the Guidelines continue to implicate the Ex Post Facto Clause even though they are now advisory only. See, *e.g.*, *United States* v. *Wetherald*, 636 F.3d 1315, 1320-1324 (11th Cir.), cert. denied, 132 S. Ct. 360 (2011); *United States* v. *Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); *United States* v. *Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011); *United States* v. *Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States* v. *Turner*, 548 F.3d 1094, 1098-1100 (D.C. Cir. 2008). Several other circuits have stated or held, without analysis, that the Ex Post Facto Clause continues to apply to changes in the advisory Guidelines. See, *e.g.*, *United States* v. *Forrester*, 616 F.3d 929, 946-948 (9th Cir. 2010); *United States* v. *Wood*, 486 F.3d 781, 789-791 (3d Cir.), cert. denied, 552 U.S. 855 (2007). And a few courts of appeals have not resolved the issue. See, *e.g.*, *United States* v. *Murray*, 648 F.3d 251, 253-254 (5th Cir. 2011), cert. denied, 132 S. Ct. 1065 (2012); *United States* v. *Deegan*, 605 F.3d 625, 632 (8th Cir. 2010), cert. denied, 131 S. Ct. 2094 (2011).

3. Despite the disagreement, the applicability of the Ex Post Facto Clause to changes in the advisory Guidelines does not warrant this Court's review. First, the issue arises only in a limited number of cases. The question presented is relevant only when a defendant's advisory Guidelines range has been revised upwards between the time of his offense and the time of his sentenc-

ing. While the Commission does review the work of the courts and make alterations to the Guidelines as it deems appropriate, *Booker*, 543 U.S. at 263, as well as respond to congressional directives, *e.g.*, *Dorsey* v. *United States*, 132 S. Ct. 2321, 2329 (2012), it does not appear that the number or percentage of defendants whose range is increased between the time of the offense and sentencing is great, petitioner's speculation (Pet. 19) notwithstanding.[3]

Second, even in cases where the advisory Guidelines range has increased, that range does not control the ultimate sentence. While the Guidelines range is "the starting point and the initial benchmark, * * * [t]he Guidelines are not the only consideration." *Gall*, 552 U.S. at 49. Rather, the range is one of several factors that 18 U.S.C. 3553(a) requires a sentencing court to consider in determining the appropriate sentence. The court may not treat the range either as binding or as presumptively reasonable. See, *e.g.*, *Gall*, 552 U.S. at 46-50; *Rita*, 551 U.S. at 351-355. The sentencing court

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[3] While the federal courts of appeals decided over 18,000 criminal appeals in fiscal years (FY) 2010 and 2011 combined, a Westlaw search reveals that only 114 circuit decisions (published or unpublished) during that period—well under one percent—even mention "ex post facto" and "guideline[s]" in the same paragraph. See U.S. Sentencing Comm'n, *2010 Sourcebook of Federal Sentencing Statistics* 135-137 tbl. 55; U.S. Sentencing Comm'n, *Types of Appeal in Each Circuit and District, Fiscal Year 2011*, http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/ Table55.pdf. Similarly, while the Seventh Circuit has decided nearly 550 criminal appeals in each of those fiscal years, see *ibid.*, only ten Seventh Circuit decisions (published or unpublished) over the past 12 months have cited *Demaree*. And while the Fifth Circuit has decided the most criminal appeals of any circuit during those fiscal years—over 3000 in all, see *ibid.*—it has done so without ever definitively resolving the question presented, see p. 9, *supra*.

must give "both parties an opportunity to argue for whatever sentence they deem appropriate" and "must make an individualized assessment based on the facts presented." *Gall*, 552 U.S. at 49-50. And the sentencing court may decide as a matter of policy that the recommended range fails to suggest a sentence that is sufficient, but not greater than necessary, to achieve the statutory purposes of sentencing. See, *e.g.*, *Pepper*, 131 S. Ct. at 1247; *Rita*, 551 U.S. at 351 (parties may present argument that "the Guidelines sentence itself fails properly to reflect § 3553(a) considerations, or perhaps * * * the case warrants a different sentence regardless"). As a result, sentencing courts may, and often do, conclude that a particular defendant should receive a sentence different from what the advisory Guidelines recommend. See, *e.g.*, Pet. 15 (noting that courts impose sentences below the advisory range 25% of the time); Ill. Ass'n of Criminal Defense Lawyers Amicus Br. 8 (reporting that approximately 44% of sentences in Illinois were below the Guidelines range, including 29.1% that did not involve a government motion).

In a case where the Guidelines have been amended between the time of the offense and the time of sentencing, a court may—and likely should—take counsel from both the former and the current Guidelines (as well as the reasons for the amendment) in the course of considering what sentence would be most consistent with the Section 3553(a) factors. See *United States* v. *Rodriguez*, 630 F.3d 39, 42 (1st Cir. 2010); *Deegan*, 605 F.3d at 631-632; see also *United States* v. *Gilmore*, 599 F.3d 160, 165-166 (2d Cir. 2010). In those circumstances, a judge's consideration of a new and increased Guidelines range does not defeat any expectation that the defendant may have had when he committed the offense of receiving a

lower, within-range sentence. See *Irizzary*, 553 U.S. at 713 (post-*Booker*, a defendant has no due-process-protected expectation that he will receive a sentence with the presumptively applicable guideline range). And a Seventh Circuit defendant whose Guidelines range has increased can urge the sentencing court to look to the earlier and lower range as reflecting a sounder balance of sentencing policies, with no presumption that the current Guidelines range is reasonable. Given the district court's discretion to consider both ranges, the Seventh Circuit's minority position on the ex post facto issue is not a sufficiently pressing question of federal law as to warrant this Court's intervention.[4]

To the extent petitioner suggests (Pet. 15-16) that the district court in this particular case was overly deferential to the Sentencing Guidelines, he was free to raise that circumstance-specific objection on appeal. See *Nelson* v. *United States*, 555 U.S. 350, 352 (2009) (per curiam) (summarily reversing when district court applied a presumption of reasonableness to the Guidelines range). Review is not warranted, however, on the question of which non-binding set of advisory guidelines the district court was required to consult.

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[4] Petitioner briefly suggests (Pet. 13) that the question presented will influence plea decisions. But the question presented will have no special impact on the sentencing of defendants who plead guilty. A sentencing court typically has the same sentencing discretion following a plea as it does following a trial. And a defendant who wants greater certainty may, with the court's agreement, enter a plea that requires the court to impose a specific sentence. Fed. R. Crim. P. 11(c)(1)(C).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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