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

BRIEF OF AMICUS CURIAE THE ILLINOIS ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Seventh Circuit's holding in *United States v. Demaree*, 459 F.3d 791 (7th Cir. 2006), violate the Ex Post Facto Clause of the Constitution by allowing retroactive application of the U.S. Sentencing Guidelines when the Guidelines in effect at the time of sentencing create a significant risk of a harsher sentence than would have been imposed under the Guidelines in effect at the time of the crime?

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INTEREST OF THE AMICUS CURIAE

The Illinois Association of Criminal Defense Lawyers (IACDL) is a not-for-profit organization dedicated to defending the rights of all persons as guaranteed by the U.S. Constitution. Its membership consists of private criminal defense lawyers, public defenders, investigators, and law professors throughout the State of Illinois. The mission of IACDL is to preserve the adversary system of justice; to maintain and foster independent and able criminal defense lawyers; and to ensure due process for persons accused of crimes.

The members of IACDL, an organization that consistently advocates for the fair and efficient administration of criminal justice, have a keen interest in assuring that their clients do not receive sentences that are greater because of the defendant's geographical location, and that they are sentenced in compliance with the Ex Post Facto Clause.[1]

[1] Amicus notified the parties of the intention to file this brief ten days prior to the brief's due date. The parties have consented to the filing of this brief.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

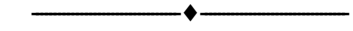
SUMMARY OF ARGUMENT

This case presents this Court with an opportunity to clarify – in agreement with all circuit courts but one – that district courts should rely on the version of the U.S. Sentencing Guidelines in effect at the time of the offense if the version in effect at the time of sentencing would result in a higher Guidelines range. The Seventh Circuit has erroneously held that calculating the Guidelines range based on a later, more severe version of the Guidelines does not violate the Ex Post Facto Clause of the U.S. Constitution because the Guidelines are advisory.

The Seventh Circuit's holding ignores two critical points. First, the Seventh Circuit ignores that the Guidelines retain a mandatory character insofar as the Guidelines range must be calculated, even though the final Guidelines range is not binding, so courts continue to give the Guidelines great weight. Second, because the Guidelines range has a demonstrable gravitational pull on sentences imposed, the Seventh Circuit's rule places Illinois (and Wisconsin and Indiana) defendants at near-certain risk of a higher sentence because only the Seventh Circuit uses the later, harsher Guidelines as a benchmark in a case like Mr. Peugh's. Illinois defendants are therefore punished more harshly solely because of their geography.

Amicus, as the representative of criminal defense lawyers whose clients are uniquely affected by the

Seventh Circuit's minority view on this issue, urges this Court to review this case.



ARGUMENT

I. The Guidelines Range Is the Mandatory Starting Point and Benchmark for All Sentences Imposed.

A. District courts must correctly calculate the Guidelines range and use it as the starting point and initial benchmark.

A district court is not free to ignore the U.S. Sentencing Guidelines. The Court's direction to district courts is unambiguous – the Guidelines must be considered first. "As a matter of administration and to secure nationwide consistency, the Guidelines should be **the starting point and the initial benchmark**." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added); *see also Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) ("The Guidelines provide a framework or starting point – a basis, in the commonsense meaning of the term – for the judge's exercise of discretion.").

Consideration of the Guidelines range is so important that failure to correctly calculate it is reversible error. *See Gall*, 552 U.S. at 51 (holding that in reviewing a sentence, the appellate court "must first ensure that the district court committed no significant procedural error, such as failing to calculate (or improperly calculating) the Guidelines range"). District

courts must also justify any deviation from the sentencing range recommended by the Guidelines:

> A district judge **must give** serious consideration to the extent of any departure from the Guidelines and must explain his conclusion that an unusually lenient or an unusually harsh sentence is appropriate in a particular case with sufficient justifications. For even though the Guidelines are advisory rather than mandatory, they are, as we pointed out in *Rita*, the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions.

Id. at 46 (emphasis added). This Court has instructed district courts that they "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance," *id*. at 50, and has instructed courts of appeals that they will "take into account . . . the extent of any variance from the Guidelines range," *id*. at 51.

While this Court has recognized that not every guideline is the product of careful study, *id*. at 46 n.2, *Kimbrough v. United States*, 552 U.S. 85, 96 (2007), even when a guideline is unsound, it still "must [be] treat[ed] . . . as the 'starting point and the initial benchmark.'" 552 U.S. at 108 (quoting *Gall*, 552 U.S. at 49). Moreover, once a court correctly calculates the Guidelines range and sentences the defendant within that range, the sentence may be presumed reasonable. *Rita v. United States*, 551 U.S. 338, 351 (2007). The

Seventh Circuit has adopted a presumption of reasonableness. *See United States v. Vizcarra*, 668 F.3d 516, 527 (7th Cir. 2012) ("A sentence within a properly calculated guidelines range is presumed to be reasonable; it is the defendant's burden to overcome the appellate presumption."); *United States v. Jackson*, 547 F.3d 786, 792 (7th Cir. 2008).

Therefore, even though district courts have the authority to vary from the Guidelines range, district courts **must begin** with the Guidelines. It is this required starting point that "create[s] a significant risk of increasing [the defendant's] punishment" and thereby violates the Ex Post Facto Clause when the Guidelines in effect at the time of sentencing call for a harsher punishment than the Guidelines in effect at the time of the crime. *Garner v. Jones*, 529 U.S. 244, 255 (2000).

Because of this practical reality, the majority of circuits have concluded that defendants must have the opportunity to show on an as-applied basis that use of the newer version of the Guidelines creates a "substantial risk" of a harsher sentence. *See United States v. Turner*, 548 F.3d 1094, 1099-100 (D.C. Cir. 2008); *United States v. Ortiz*, 621 F.3d 82, 85-88 (2d Cir. 2010); *United States v. Lewis*, 606 F.3d 193, 198-203 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 889-90 (6th Cir. 2010); *United States v. Wetherald*, 636 F.3d 1315, 1320-22 (11th Cir. 2011).

Only the Seventh Circuit precludes its district courts from any Ex Post Facto Clause analysis in

cases like Mr. Peugh's. *See United States v. Peugh*, 675 F.3d 736, 741 (7th Cir. 2012) ("We, however, stand by *Demaree*'s reasoning – the advisory nature of the guidelines vitiates any ex post facto problem – and again decline the invitation to overrule it.") (citing *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006)). Ignoring the mandatory role of the Guidelines in calculating sentences, the Seventh Circuit has unilaterally held that the Guidelines no longer are constrained by the Ex Post Facto Clause. *Id.* In so doing, the Seventh Circuit acknowledged yet declined to follow this Court's standard for determining an Ex Post Facto Clause violation – *Garner*'s "significant risk" standard – in order to reach its unconstitutional conclusion. *Demaree*, 459 F.3d at 794 (stating that the Supreme Court's test for determining Ex Post Facto Clause violations "interpreted literally, would encompass a change in even voluntary sentencing guidelines" but declining to so interpret the law).

B. In practice, district courts sentence within the Guidelines range most of the time and use it as an anchor when varying from it.

Not surprisingly, district courts follow this Court's instruction and begin with the Guidelines. The Guidelines have a strong gravitational pull because they are the only 18 U.S.C. § 3553(a) factor with a numerical value. This number has an anchoring effect, and a sentence within or near the Guidelines range will likely avoid reversal on appeal.

The Guidelines range "serves as a psychological 'anchor,' which appears to simplify or obviate the daunting task of evaluating the seriousness of the offense, the dangerousness of the offender, and other considerations relevant to the statutory purposes." Paul J. Hofer, *Beyond the "Heartland": Sentencing Under the Advisory Federal Guidelines*, 49 Duq. L. Rev. 675, 689 (2011). As the Honorable Nancy Gertner has explained,

> Anchoring is a strategy used to simplify complex tasks, in which numeric judgments are assimilated to a previously considered standard. When asked to make a judgment, decision-makers take an initial starting value (*i.e.*, the anchor) and then adjust it up or down. Studies underscore the significance of that initial anchor; judgments tend to be strongly biased in its direction.

Hon. Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 Yale L.J. Pocket Part 127 (2006), http://yalelawjournal.org/the-yale-law-journal-pocket-part/criminal-law-and-sentencing/what-yogi-berra-teaches-about-post%11booker-sentencing/ (quotation marks omitted). "Whether [judges] like that number or not, even if they are angry about that number, does not matter; they will still be influenced by that number. That is the psychological fact." Panel Discussion, *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 Fordham L. Rev. 1, 17-18 (2006). Even Judge Posner conceded in *Demaree* that "[m]ost federal sentences

. . . continue after *Booker* to be within the guidelines' sentencing ranges." 459 F.3d at 794.

Academic research and sentencing statistics bear out these observations from the bench. One scholar recently noted that:

> [A]n empirical analysis of the Sentencing Guidelines' practical effects on sentencing in actual cases [ ] demonstrates . . . that **the Guidelines continue to be applied as the default benchmark for sentencing in all federal criminal cases**. . . . [A] review of post-*Booker* sentencing statistics and reversal rates throughout the federal court system presents a clear picture of the central role that the Sentencing Guidelines continue to play as the de facto arbiter of "reasonableness."

James R. Dillon, *Doubting* Demaree: *The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After* United States v. Booker, 110 W. Va. L. Rev. 1033, 1089 (2008) (emphasis added).

In 2011, more than half of sentences (54.5%) in federal cases in Illinois were within the Guidelines. Only 15.6% were below the Guidelines range pursuant to a government motion, 29.1% were below the Guidelines range without a government motion, and 1.6% were above the Guidelines range. *See* U.S. Sent'g Comm'n, *Statistical Information Packet, Fiscal Year 2011, State of Illinois*, at 11, tbl. 8, available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/State_District_Circuit/2011/il11.pdf.

Not only do judges sentence within the Guidelines range most of the time, but departures from the range mimic pre-*Booker* departures – the median decrease is still about twelve months.[2] *See* Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. Penn. L. Rev. 1631, 1677 & n.252 (2012) (analyzing Commission data on extent of non-government sponsored departures and variances from 2003 through 2012). Thus, the advisory Guidelines have nearly the same pull that the mandatory Guidelines had before *Booker*. As Chief Judge McKee of the Third Circuit recently testified, "[t]he average sentence length has closely tracked the guideline minimum for a long period of time." Theodore McKee, Chief U.S. Circuit Judge, U.S. Court of Appeals for the Third Circuit, Statement Before the U.S. Sentencing Commission 19 (Feb. 16, 2012), http://www.ussc.gov/Legislative_and_Public_Affairs/Public_Hearings_and_Meetings/20120215-16/Testimony_16_McKee.pdf. Indeed, as illustrated in the Figure at App. 1, the average sentence imposed since 2007 has been approximately ten months below the average Guidelines minimum. The Guidelines anchor sentencing decisions even when the ultimate sentence departs from the Guidelines.

Therefore, according to the statistics and attested judicial practice, Illinois defendants face much more than "a significant risk" of increased punishment

[2] The Commission does not provide data regarding the extent of variances and departures for individual districts.

when the Guidelines range in effect at sentencing has increased the recommended punishment above the range in place at the time of the offense. *Garner*, 529 U.S. at 255. Because district courts sentence within the Guidelines range more than half the time and vary from the range only moderately, Illinois defendants caught in the *Demaree* bind are almost guaranteed to receive an increased punishment. The Ex Post Facto Clause does not permit this result.

II. The Current Seventh Circuit Approach to Sentencing Causes Disparities Based Solely on a Defendant's Geographical Location.

A. A purpose of the Guidelines is to avoid unwarranted sentencing disparity.

When this Court severed and excised those provisions of the Sentencing Reform Act that made the Guidelines mandatory to remedy the Sixth Amendment problem, it noted that the advisory Guidelines system would "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *United States v. Booker*, 543 U.S. 220, 264-65 (2005). This Court has held that district courts must "consider the need to avoid **unwarranted disparities** – along with other § 3553(a) factors – when imposing sentences," and in doing so, must "take account of sentencing practices in other courts. . . . [T]hese

disparities must be weighed against the other § 3553(a) factors and any unwarranted disparity created by [the Guidelines range] itself." *Kimbrough*, 552 U.S. at 108 (emphasis added).

Thus, while lockstep uniformity in sentences among individual defendants or among districts is no longer the goal of the sentencing system, avoiding **unwarranted** disparities remains an important goal even post-*Booker*. As the Sentencing Commission has described it, "[u]nwarranted disparity is defined as different treatment of *individual* offenders who are similar in relevant ways, or similar treatment of *individual* offenders who differ in characteristics that are relevant to the purposes of sentencing." U.S. Sent'g Comm'n, *Fifteen Years of Guideline Sentencing: An Assessment of How Well the Federal Criminal Justice System Is Achieving the Goals of Sentencing Reform* 113 (2004) (emphasis in original). When a sentencing disparity is not relevant to or justified by differences among the circumstances of the offense, the characteristics of the defendant, or the purposes of sentencing, the disparity is unwarranted.

B. *Demaree* causes unwarranted harsher sentences for Illinois' defendants.

Defendants in the Seventh Circuit are sentenced differently on the basis of their geographical location alone – a disparity irrelevant to the circumstances of

the offense or the characteristics of the defendant. In *Demaree*, the Seventh Circuit held that the Ex Post Facto Clause applies "only to laws and regulations that bind rather than advise" and therefore that the clause does not apply to the Guidelines now that they are advisory. 459 F.3d at 795. So the Seventh Circuit, unlike other circuits, permits district courts to calculate the Guidelines range based on a more severe version of the Guidelines than was in effect at the time of the offense. The district courts within the Seventh Circuit then use that higher range as the still-required starting point and initial benchmark. This practice creates a geographic disparity in the applicable Guidelines range itself. *Kimbrough*, 552 U.S. at 108.

Demaree's impact is not isolated. A review of electronically published case law shows that district courts have cited *Demaree* more than 60 times since 2006. And the effect of *Demaree* is likely broader. Nearly 10,000 Illinois defendants were sentenced under the Guidelines between 2006 and 2011. *See* U.S. Sent'g Comm'n, Interactive Sourcebook, Circuit and District Statistics, Table 2 (Guideline Offenders in Each Circuit and District), http://isb.ussc.gov/USSC?userid=USSC_Guest&password=USSC_Guest. Many of these sentences will not show up in electronic reporters. Meanwhile, the U.S. Sentencing Commission has issued more than 700 amendments to the Guidelines since they took effect in 1987, and the Commission routinely amends the Guidelines in a manner that increases Guidelines ranges. *See* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines

Manual, Appendix C, vols. I-III, available at http://www.ussc.gov/Guidelines/2011_Guidelines/index.cfm.

The *Demaree* disparity is therefore both real and far-reaching, as illustrated by Mr. Peugh's sentencing. Under the 1998 Guidelines in effect at the time Mr. Peugh committed his crime, his Guidelines range was 37 to 46 months. *See* Brief of Marvin Peugh, Petitioner, *United States v. Peugh*, No. 12-62, at 5 (Sup. Ct. July 2012). Mr. Peugh was sentenced under the 2009 Guidelines, under which an amendment to the fraud guideline subjected him to a range of 70-87 months for the same crime – roughly twice the length of time contemplated under the 1998 Guidelines. *Id*. at 6. *See also United States v. Butera*, Nos. 09 C 5305, 06 CR 613-1, 2009 WL 3561588, at *2 (N.D. Ill. Oct. 30, 2009) ("Application of the guidelines manual in effect at the time of sentencing rather than the one in force at the time of the defendant's crime does not violate the Ex Post Facto Clause, even if the later manual suggests a harsher sentence.") (citing *Demaree*, 459 F.3d at 795); *United States v. Groos*, No. 06 CR 420, 2008 WL 5387852, at *3 n.2 (N.D. Ill. Dec. 16, 2008) ("[*Demaree* held] that changes to Sentencing Guidelines can apply retroactively without running afoul of the *ex post facto* clause because the guidelines are advisory, not binding[ ].") (citation omitted).

As another example, in April 2012 the Commission issued an amendment to the insider trading guideline, raising the base offense level for that crime from 8 to 14. *Compare* U.S. Sent'g Comm'n, 2011

Guidelines Manual, § 2B1.4, *with* U.S. Sent'g Comm'n, Amendments to the Sentencing Guidelines, at 2 (April 30, 2012) (unofficial text), available at http://www.ussc.gov/Legal/Amendments/Reader-Friendly/20120430_RF_Amendments.pdf.[3] Under this amendment, assuming a criminal history category of I and a gain of $5,500, a defendant sentenced under the insider trading guideline would go from a range of 6-12 months in a zone not requiring a term of imprisonment to a range of 21-27 months in a zone requiring straight imprisonment. *See* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines Manual, § 5C1.1(c), (f); *id*., ch. 5, pt. A, Sentencing Table, available at http://www.ussc.gov/Guidelines/2011_Guidelines/Manual_HTML/5a_SenTab.htm. Therefore, under *Demaree*, an Illinois defendant convicted of insider trading

[3] Several other 2012 amendments also increase sentencing ranges for existing crimes. For example, the Commission amended § 3A1.5 to include an upward adjustment for defendants convicted of a serious human rights offense and § 2L2.2 to include a 2-level increase in the base offense level for defendants convicted of immigration fraud related to a serious human rights offense. *See* U.S. Sent'g Comm'n, 2012 Amendments to the Sentencing Guidelines, at 30-31. The Commission amended § 4A1.2, Application Note 5, to clarify that prior convictions for driving while intoxicated and similar offenses are always counted towards a defendant's criminal history score, regardless of whether the offenses are classified as felonies, misdemeanors, or petty offenses. *See id.* at 35. And the Commission amended the Commentary to § 5G1.2 (Sentencing on Multiple Counts of Conviction) to clarify that when any count involves a mandatory minimum that restricts the defendant's Guidelines range, the guideline range is restricted as to all counts, not just the count involving the mandatory minimum. *Id.* at 38.

that took place prior to this amendment but who is sentenced after this amendment takes effect would almost certainly be sentenced to a year or more in prison. Yet defendants convicted of the exact same crime and sentenced at the same time outside the Seventh Circuit would likely avoid prison altogether. The only reason for the difference is the geography of the defendants. In short, *Demaree* creates unwarranted disparity among sentences to the unique detriment of Illinois defendants and others sentenced within the Seventh Circuit.

CONCLUSION

For the foregoing reasons, amicus curiae urges the Court to grant Mr. Peugh's petition for a writ of certiorari and to reverse the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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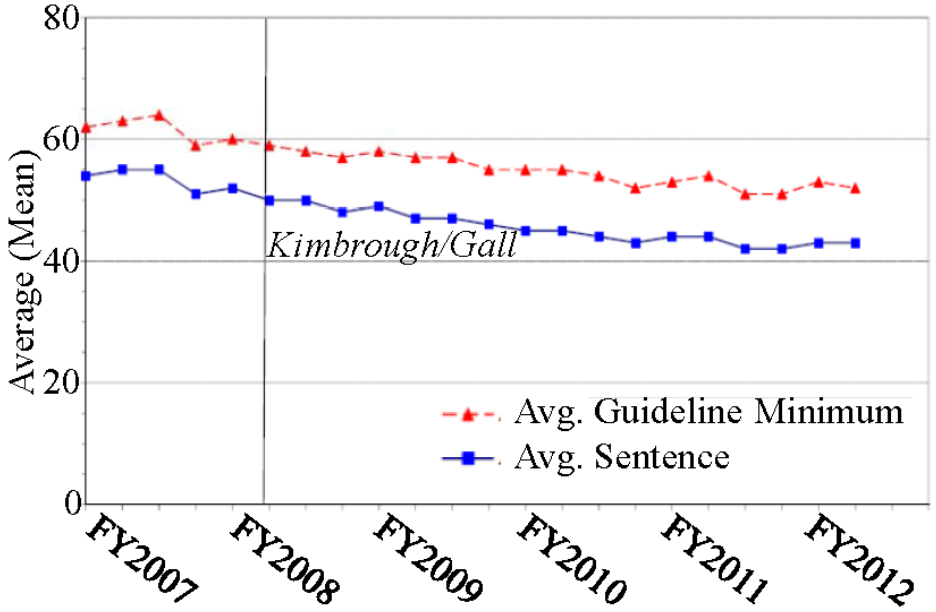
Dated: August 16, 2012

AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM QUARTERLY DATA FOR ALL CASES[1]

Fiscal Years 2007-2011, 1st Quarter 2012 Preliminary Cumulative Data (October 1, 2011, through December 31, 2011)



[1] Cases with guideline minimums of life or probation were included in the guideline minimum average computations as 470 months and zero months, respectively. In turn, cases with sentences of 470 months or greater (including life) or probation were included in the sentence average computations as 470 months and zero months, respectively. In addition, the information presented in this table includes time of confinement as described in USSG §5C1.1. Guideline minimums account for applicable statutory mandatory penalties. Descriptions of variables used in this figure are provided in Appendix A.

SOURCE: U.S. Sentencing Commission, 2007-2011 Datafiles, USSCFY07-USSCFY11, and Preliminary Data from USSCFY12 (October 1, 2011, through December 31, 2011). Figure originally printed in U.S. Sent'g Comm'n, Preliminary Quarterly Data Report 32 (2012).