

No. 12-62

IN THE
Supreme Court of the United States

MARVIN PEUGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON 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 PETITIONER MARVIN PEUGH**

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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 the 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 or the date of sentencing, and that they are sentenced in compliance with the Ex Post Facto Clause.¹

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

1. No counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amicus curiae*, its members, and its counsel, made any monetary contribution towards the preparation and submission of this brief. The parties have consented to filing of this brief and such consents are being submitted herewith.

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 correctly, even though the final Guidelines range is not binding, so district courts continue to give the Guidelines great weight. Second, the Guidelines range has a demonstrable gravitational pull on sentences imposed, which means the current circuit split creates a real risk of unwarranted sentencing disparities solely because of their geography.

To resolve the different treatment received by defendants based on geography, the Court should adopt the reasoning of all of the other Circuit Courts. The Court should not adopt the reasoning of the Seventh Circuit. Adopting the reasoning of the Seventh Circuit would simply replace one category of unwarranted sentencing disparities with another. Following the Seventh Circuit's reasoning would mean defendants are at risk of higher sentences if, for reasons out of the defendants' control, their sentencing hearings take place at a later date than hearings for similar defendants.

Amicus, as the representative of criminal defense lawyers whose clients are uniquely affected by the Seventh Circuit's singular view on this issue, urge this Court to reject the Seventh Circuit's reasoning in *Demaree* and instead adopt the reasoning of all other circuit courts who have addressed this issue.

ARGUMENT

- I. **There Is a “Significant Risk” of an Increased Sentence for Defendants Like Mr. Peugh Because the Guidelines Range Is the Mandatory Starting Point 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.

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 that courts of appeals “will, of course, take into account ... the extent of any variance from the Guidelines range,” *id.* at 51.

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), but even when a guideline is unsound, it still “must [be] treat[ed] . . . as the ‘starting point and the initial benchmark.’”² 552 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

2. Indeed, the amendments that raised the guideline range in Peugh’s case from 37-46 months to 70-87 months have been criticized as unsound. *See, e.g.*, Frank O. Bowman, III, *Pour Encourager Les Autres?*, 1 Ohio State J. Crim. L. 373, 404, 411-34 (2004); Frank O. Bowman, III, *Sentencing High-Loss Corporate Insider Frauds After Booker*, 20 FED. SENT’G REP. 167, 169-70 (2008); Alan Ellis, John R. Steer, Mark Allenbaugh, *At a “Loss” for Justice: Federal Sentencing for Economic Offenses*, 25 Crim. Just. 34, 37 (2011); *United States v. Parris*, 573 F. Supp. 2d 744 (E.D.N.Y. 2008); *United States v. Adelson*, 441 F. Supp. 2d 506 (S.D.N.Y. 2006).

Circuit has adopted this 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, and the Guidelines range in fact exerts a gravitational pull. These circumstances “create 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 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 fact that calculation and consideration of the Guidelines is required, the Seventh Circuit alone has held that the Guidelines are no longer subject to 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).

In addition, much of the rationale set forth in *Demaree* is no longer consistent with the law and fails to consider the current role of the Guidelines in sentencing. For example, according to *Demaree*, sentencing courts do not have to explain its reasons for rejecting the Guidelines range. *See id.* at 794-95. However, after *Demaree*, this Court held to the contrary in *Rita* and *Gall*. *See Rita*, 551 U.S. at 50; *Gall*, 552 U.S. at 50; *see also* Brief of Marvin Peugh, Petitioner, *United States v. Peugh*, No. 12-62, at 33-34 (Sup. Ct. Dec. 26, 2012).

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

Following this Court’s instruction, district courts begin the sentencing process by calculating the Guidelines range. 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 provides a safe harbor for the sentencing judge. A sentence within or near the Guidelines range generally avoids reversal on appeal, as it is cloaked in the presumption of reasonableness.

The Guidelines range also has an anchoring effect on sentences. It “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) (remarks of Judge Gerald Lynch). As Judge Posner conceded in *Demaree*, “[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 were within the Guidelines. Only 17.4% were below the Guidelines range without a government motion, and 1.8% were above the Guidelines range. See U.S. Sent’g Comm’n, *2011 Sourcebook of Federal*

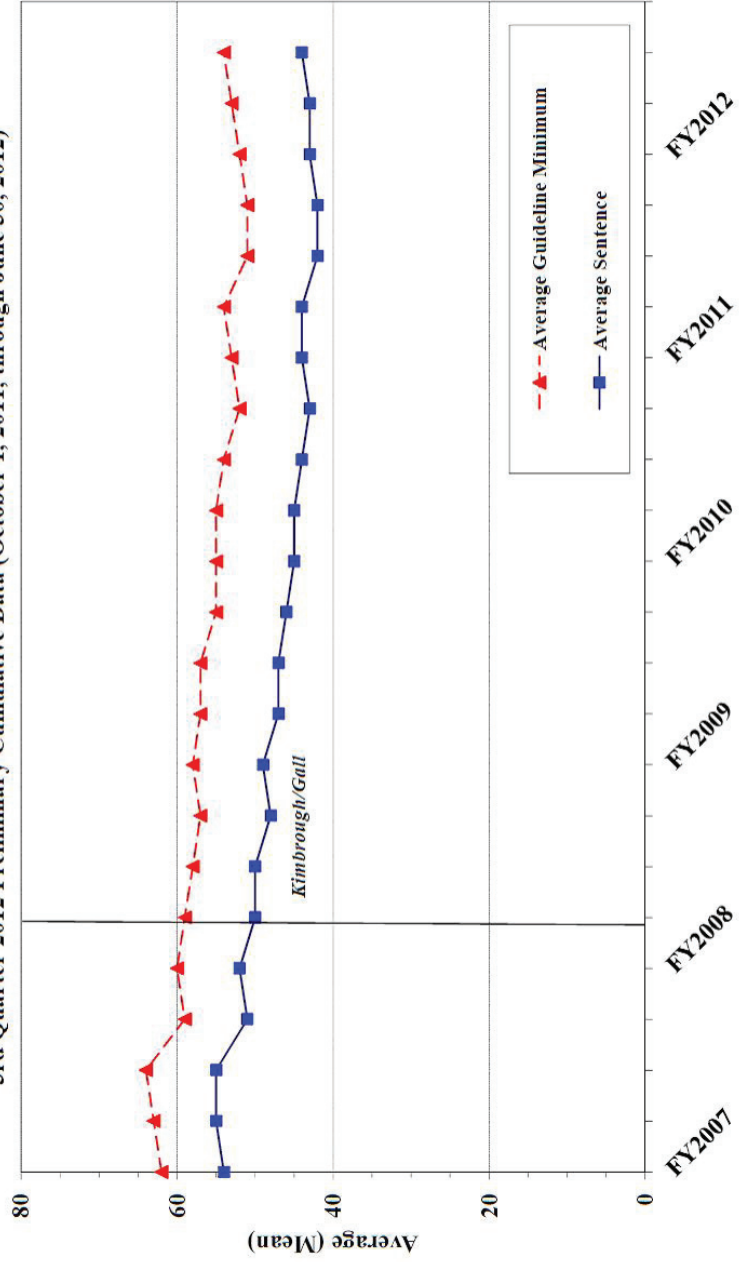
Sentencing Statistics, National Comparison of Sentence Imposed and Position Relative to the Guideline Range, tbl. N, available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2011/TableN.pdf.

Not only do judges sentence within the Guidelines range most of the time, but departures and variances from the range mimic pre-*Booker* departures—the median decrease is still about twelve months. 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 influence. 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 below, 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.

Figure C

AVERAGE SENTENCE LENGTH AND AVERAGE GUIDELINE MINIMUM
QUARTERLY DATA FOR ALL CASES¹

Fiscal Years 2007 - 2011,
3rd Quarter 2012 Preliminary Cumulative Data (October 1, 2011, through June 30, 2012)



U.S. Sent’g Comm’n, *U.S. Sentencing Commission Preliminary Quarterly Data Report*, 3d Quarter Release (2012), Fig. C, available at http://www.usc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2012_3rd_Quarter_Report.pdf (based on “U.S. Sentencing Commission, 2007-2011 Datafiles, USSCFY07-USSCFY11, and Preliminary Data from USSCFY12 (October 1, 2011, through June 30, 2012)”³).

Therefore, according to the statistics and attested judicial practice, Illinois defendants face much more than “a significant risk” of increased punishment 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 more than likely to receive an increased punishment. And if the *Demaree* reasoning is adopted by this Court, this “significant risk” would be extended to all defendants with a Guidelines range in effect at sentencing

3. The U.S. Sentencing Commission notes that for this chart, “[c]ases 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.” *Id.*

that has increased the recommended punishment above the range in place at the time of the offense. The Ex Post Facto Clause does not permit this result.

II. The Current Seventh Circuit Approach to Sentencing Should Be Rejected in Order to Prevent Unwarranted Sentencing Disparities.

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

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 and . . . these 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) (emphases 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 federal defendants in the Seventh Circuit.

Persons sentenced in the Seventh Circuit are sentenced differently on the basis of their geographical location alone—a disparity irrelevant to the circumstances of the offense, the characteristics of the person sentenced, or the purposes of sentencing. 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), available at <http://isb.usc.gov/>. Most of these are not the subject of written opinions that are available in electronic reporters.

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 Pet'r Br. at 3 (Sup. Ct. Dec. 26, 2012). Mr. Peugh was sentenced under the 2009 Guidelines, under which amendments to the fraud guideline subjected him to a range of 70-87 months for the same crime—roughly twice the length of time provided under the 1998 Guidelines. See *id.* There was not only a “substantial risk” but also a substantial reality of a longer sentence because of Mr. Peugh's geography alone.

In short, *Demaree* has created real unwarranted disparity among sentences to the detriment of Illinois defendants and others sentenced within the Seventh Circuit. Therefore, the Court should address this issue in a way that does not create any further unwarranted disparities.

III. Endorsing the Approach of the Majority of Circuit Courts Is Necessary to Prevent Unwarranted Sentencing Disparities Based Solely on the Date of Sentencing.

The Court should not replace the unwarranted disparities based on geography under the current circuit split with unwarranted disparities based on the timing of the sentencing process under a nationwide application of the *Demaree* court's reasoning. Under *Demaree*, a defendant could receive a substantially higher sentence if, for reasons out of the defendant's control, the date of their sentencing hearing is later than sentencing hearings for similar defendants.

In the absence of an Ex Post Facto Clause violation, the district court must consider the version of the Guidelines in effect on the date of the sentencing hearing. *See* 18 U.S.C. § 3553(a)(4)(A)(ii); U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b) (2011). The Sentencing Commission has issued more than 750 amendments to the Guidelines since they took effect in 1987, and routinely amends the Guidelines in a manner that increases Guidelines ranges. *See* U.S. Sent'g Comm'n, 2011 Federal Sentencing Guidelines Manual, App. C, vols. I-III, available at http://www.usc.gov/Guidelines/2011_Guidelines/index.cfm. Any criminal case that extends into a new year would therefore put the defendant at risk of Guideline amendments that increase sentencing ranges for existing crimes.⁴ Although district

4. As an 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 Federal Sentencing Guidelines Manual, § 2B1.4, available at <http://www.usc.gov/>

courts “must impose sentence[s] without unnecessary delay,” *see* Fed. R. Crim. P. 32(b)(1), the precise timing of that sentencing hearing still varies depending on the court, the attorneys involved, the timing of related criminal cases (including where the defendant may be a cooperating witness), or other factors unrelated to the circumstances of the offense, the characteristics of the defendant, or the purposes of sentencing. Defendants could also face the possibility, for example, of having to choose between collecting evidence to present at a sentencing hearing, *see* Fed. R. Crim. P. 32(i)(2), or accepting an earlier hearing date in advance of new Guideline amendments taking effect.

Defendants should not face increased punishment after having to wait longer for sentencing hearings than

Guidelines/2011_Guidelines/Manual_HTML/2b1_4.htm, *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. Under this amendment, assuming a criminal history category of I and a gain of \$5,500, a person 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, if the Court adopts the reasoning of *Demaree*, a person convicted of insider trading that took place prior to this amendment but who is sentenced after this amendment takes effect would likely be sentenced to a year or more in prison. Yet persons convicted of the exact same crime at the same time, but sentenced before those amendments took effect, would likely avoid prison altogether.

similar defendants. The Guidelines seek to avoid this type of “unwarranted disparity.” *See* 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).

Therefore, applying the Seventh Circuit’s reasoning in *Demaree* nationwide would be at odds with both the Guidelines’ purposes and one of the core ideas of the Ex Post Facto Clause – preventing the legislature from making punishment “more burdensome” for acts after they are committed. *Beazell v. Ohio*, 269 U.S. 167, 169-70 (1925). The Court should not put more defendants at risk of unwarranted sentencing disparities.

CONCLUSION

For the foregoing reasons, *amicus curiae* urges the Court to reverse the decision of the U.S. Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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