No. 09-480

In the Supreme Court of the United States

MATTHEW HENSLEY,

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 PETITIONER

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The government acknowledges the conflict among the lower courts regarding the question presented, which subjects similarly-situated defendants to sentencing based on different versions of the Sentencing Guidelines depending solely on the place in which a case arises. And the government does not dispute that the issue is important and arises with great frequency, or that without a definitive ruling by this Court, lower courts must continue to devote scarce resources to questions regarding the status of the Sentencing Guidelines under the Ex Post Facto Clause.

According to the government, certiorari nonetheless should be denied because it is possible that the defendant here might have received the same sentence under the Guideline in effect at the time of the offense and because the D.C. Circuit might someday reconsider its conflicting ruling. Both of these contentions rest on factual errors, however. The government mistakenly attributes to the sentencing judge a statement *made by the prosecutor* concerning the appropriateness of an above-minimum sentence. And the government misstates the information before the D.C. Circuit at the time that it rendered its decision.

The government's argument with respect to the merits fares no better. Indeed, it does not even cite, let alone discuss, this Court's controlling decision in *Garner* v. *Jones*, 529 U.S. 244 (2000), which found an Ex Post Facto violation in circumstances very similar to the present case.

Review by this Court is plainly warranted.

A. This Case Presents An Appropriate Vehicle To Address The Relationship Between The Post-*Booker* Sentencing Guidelines And The Ex Post Facto Clause.

The government speculates that petitioner would have received the "same sentence" under the 2006 Guidelines as he did under the 2007 Guidelines, and argues that its speculation is grounds for denying review. Br. in Opp. 7. That argument is both factually wrong and legally irrelevant.

1. The sentencing judge here *twice* stated that he believed "a guideline sentence" was appropriate. Pet. App. 24a ("I do think that a guideline sentence in this case is altogether appropriate."); Pet. App. 27a ("And so, I do think that a guideline sentence is appropriate."). In other words, the judge decided that the facts and circumstances surrounding petitioner's case warranted a *within-Guidelines* punishment. Under the 2006 Guidelines, a 125-month sentence would have fallen well *outside* of the Guidelines range, something the judge specifically indicated he did not think was appropriate in petitioner's case. Reference to the 2006 Guidelines accordingly would almost certainly have led the judge to impose the minimum possible sentence—rather than the longer sentence that the court did impose.

The government's claim that the judge intended to impose a sentence above the mandatory minimum, no matter which Guidelines applied, rests on a factual error. The government statess that the judge "expressly conclud[ed] that 'something certainly above the mandatory minimum sentence is appropriate here.'" Br. in Opp. 8 (quoting Sentencing Transcript at 47, reprinted at App., *infra*, 1a).

But the government misattributes the source of the embedded quotation. Those words—"something certainly above the mandatory minimum sentence is appropriate here"—were spoken by the *prosecutor*, *not* by the sentencing judge. See App., *infra*, 1a ("So, what [sic] we are not asking for the Court to go up five levels, but I do believe that something certainly above the mandatory minimum sentence is appropriate here * * *.").

Indeed, as the government concedes, the judge condemned the applicable 120-month mandatory minimum as "really high," "out of wack," "just flat * * * wrong," "just [not] * * * appropriate," and "too high." Pet. App. 26a, 27a. Although the judge did remark at one point that a mandatory minimum sentence might not be appropriate, he did so only *after* indicating his desire to issue a sentence within the applicable Guidelines, which he believed were the 2007 Guidelines. See Pet. App. 25a.[1]

This is therefore a case in which the record leaves little doubt that the judge would have imposed a lower sentence if he had looked to the time-of-offense Guideline.

2. Even if the government's speculation had some factual basis, it would remain mere speculation. Interestingly, the government has made the very same argument in opposing review in other cases raising

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[1] Moreover, judges impose above-Guidelines sentences in less than two percent of cases. See U.S. Sentencing Commission, *Preliminary Quarterly Data Report* 1 tbl. 1 (2009); U.S. Sentencing Commission, *Post*-Kimbrough/Gall *Data Report* 1 tbl. 1 (2008). Given this practice, it is extremely unlikely that the sentencing judge below would have rendered an above-Guidelines sentence had he utilized the 2006 Guidelines.

this question. See Br. in Opp. 6-7, *Lumsden* v. *United States*, No. 09-5374 (Oct. 19, 2009); Br. in Opp. 5-6, *Vincent* v. *United States*, No. 08-9391 (May 26, 2009); US. Br. 9-11, *Mower* v. *United States*, No. 07-1539 (Sept. 23, 2008). The government apparently has not seen a case in which the use of a later, more onerous Guidelines standard could have resulted in a different sentence—notwithstanding the rarity of above-Guidelines sentences. See note 1, *supra*.[2]

The government's speculation is not just suspiciously convenient, it is also legally irrelevant. Under

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[2] The government also relied on other factors present in these cases—but absent here—in arguing against review. Thus, in *Lumsden*, the sentencing judge expressly stated that, even if he had applied the time-of-offense Guidelines, and even if those Guidelines did call for fewer enhancements, he would have imposed the same sentence because he would have applied an upward variance for the defendant's criminal history which he did not apply when calculating the time-of-sentencing Guidelines recommendation. See Br. in Opp. 6, *Lumsden*, No. 09-5374.

In *Vincent*, the defendant had already been released from prison by the time this Court reviewed the petition and a ruling by this Court accordingly would not have affected the length of the defendant's term of imprisonment. See Br. in Opp. 5, *Vincent*, No. 08-9391.

Finally, in *Mower*, the defendant was convicted of conspiracy and tax evasion over a period of years. All of her offenses had continued beyond 2001, and so the judge appropriately sentenced the defendant under the 2001 Guidelines. The government correctly pointed out that the Ex Post Facto Clause "does not bar the application of a revised version of the Guidelines to a conspiracy offense that began before the revision but continued after the revision's effective date." Br. in Opp. 8, *Mower*, No. 07-1539. In any event, the defendant had failed to preserve her Ex Post Facto claim in the district court, see *ibid.*, and it appears that use of the earlier version of the Guidelines would not have altered her sentence. See *id.* at 10.

this Court's Ex Post Facto jurisprudence, a defendant need only show that the court's application of the 2007 Guidelines sufficiently *risked* increasing his sentence, *Garner*, 529 U.S. at 251, not that it definitely did so, *Miller* v. *Florida*, 482 U.S. 423, 432 (1987). Petitioner amply satisfies this standard. Pet. 27-30. This case is therefore an excellent vehicle for addressing the question presented.

B. The Clear, Acknowledged Conflict Among The Lower Courts Necessitates This Court's Intervention Now.

The government attempts to minimize the clear disagreement between the Seventh and D.C. Circuits. It claims that *United States* v. *Turner*, 548 F.3d 1094 (D.C. Cir. 2008), was an uninformed decision because it (i) "rejected the Seventh Circuit's ex post facto holding * * * without analyzing *Kimbrough* [v. *United States*, 552 U.S. 85 (2007)]," Br. in Opp. 14, and (ii) "was briefed and argued before the government adopted its current position on the ex post facto question." *Id.* at 14-15. Both points are wrong.

1. At the time the D.C. Circuit decided *Turner*, this Court's decisions in *Rita* v. *United States*, 551 U.S. 338 (2007), *Kimbrough* and *Gall* v. *United States*, 552 U.S. 38 (2007), and *Irizarry* v. *United States*, 128 S. Ct. 2198 (2008), had been extant for eighteen months, one year, and six months respectively. It is particularly difficult, then, to understand how the government can claim that the D.C. Circuit decided *Turner* without "analyzing *Kimbrough*." Br. in Opp. 14. Indeed, by the time the oral argument in *Turner* took place on September 12, 2008, the *Kimbrough* opinion was *nine months* old. The only major case in the relevant line of post-*Booker* cases not decided prior to *Turner* was *Spears* v. *United States*,

129 S. Ct. 840 (2009)—and *Spears* merely clarified *Kimbrough*'s holding, something the D.C. Circuit had already demonstrated it understood.

2. The argument that *Turner* was an uninformed decision because it was briefed and argued before the United States announced its current position on the question presented is similarly flawed. To begin with, as the government concedes, it *did* make the D.C. Circuit aware of its new position in August of 2008 in a post-briefing letter—filed over three months before issuance of the *Turner* decision, and well in advance of the oral argument. Br. in Opp. 15. And if the court of appeals had asked the government to elaborate its new position, the government simply would have advanced the arguments Judge Posner made in his opinion in *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006)—the precise arguments the *Turner* court confronted and rejected, almost line by line, in its opinion. The claim that the D.C. Circuit made its decision without the benefit of "a full exposition of the government's revised views," Br. in Opp. 15, is simply wrong.

3. The government fails to acknowledge that the disagreement among the courts of appeals is not limited to the Seventh and D.C. Circuits. While no other court of appeals has squarely decided whether the Ex Post Facto Clause applies to retroactive application of the now-advisory Guidelines, it is likely that the existing conflict will be expanded. See Pet. 10-20.

Most important, judicial resources continue to be consumed by an issue that only this Court can resolve definitively. In *United States* v. *Lewis*, 603 F. Supp. 2d 874 (E.D. Va. 2009), for example, the district court held that "application of the 2008 Guidelines in this case violates the Ex Post Facto Clause of

the U.S. Constitution" and "therefore utilize[d] the 2005 Guidelines in effect at the time the offense of conviction occurred." *Id.* at 879. At the defendant's sentencing hearing, Judge Hudson encouraged the United States to appeal the sentence:

> I hope your office does take this to the Fourth Circuit. This is a good case to go to the Fourth Circuit to clarify this point, because if I'm wrong, let's get it straight * * *. *The law is a bit fragmented right now, and it would be good to have a clear guidance on how to handle these things in the future.*

Br. in Opp. at 9, *United States* v. *Lewis*, Nos. 09-4343 (L) & 09-4474, 2009 WL 2599739 (4th Cir. August 24, 2009) (quoting the sentencing transcript) (emphasis added).

This statement, directly from a district court judge who implements the Guidelines on a daily basis, speaks volumes: The law with respect to the ex post facto status of the Guidelines is "fragmented"; courts are in need of "clear guidance" on how to handle the very situation presented in petitioner's case. This Court should provide the needed guidance by granting the petition.

C. The Government Misunderstands Sentencing Law Post-*Booker* And Misapplies This Court's Ex Post Facto Analysis.

The government's argument on the merits falls far short of rebutting petitioner's showing that the use of the 2007 Guidelines violated the Ex Post Facto Clause. The government mischaracterizes sentencing law post-*Booker* and fails even to cite this Court's controlling decision in *Garner* in evaluating the

status of the Guidelines under the Ex Post Facto Clause.

1. The government mischaracterizes sentencing law post-*Booker*, most significantly by failing to recognize *Gall*'s determination that the Guidelines represent "the starting point and the initial benchmark" in sentencing. *Gall*, 552 U.S. at 49. That the Guidelines are just "one factor among several" that "courts must consider in determining an appropriate sentence," Br. in Opp. 13 (quoting *Kimbrough*, 552 U.S. at 90), and that defendants no longer have "'[a]ny expectation subject to due process protection' that they will receive a sentence within the Guidelines range," Br. in Opp. 13 (quoting *Irizarry*, 128 S. Ct. at 2202), does not mean that the sentencing process is a free-for-all in which the judge may consult any authority he or she wants in any order he or she chooses.

Gall clearly requires as a first step that the court calculate the preliminary range based on *one* set of Sentencing Guidelines. See *Gall*, 552 U.S. at 49-50. It therefore remains incumbent on district court judges to *correctly* calculate the Guidelines' prescribed sentencing range and consider any relevant policy statements produced by the Sentencing Commission. See 18 U.S.C. § 3553(a)(4)-(5). "[F]ailing to calculate (or improperly calculating) the Guidelines range," in fact, constitutes a "significant procedural error." *Gall*, 552 U.S. at 51. After calculating the *correct* Guidelines range, the judge may *depart* from the range. But the initial calculation remains a uniform and critical part of the process.

2. Furthermore, the government fails to apply—in fact, omits even to mention—this Court's governing Ex Post Facto jurisprudence as articulated in

Garner. Under *Garner*, any measure—whether binding or advisory in nature—that poses more than a "speculative" risk of increasing the length of incarceration triggers the Ex Post Facto Clause. See *Garner*, 529 U.S. at 251 (quoting *Cal. Dep't of Corrs.* v. *Morales*, 514 U.S. 499, 509 (1995)). Thus, Ex Post Facto analysis is concerned with "the *effect*, not the *form*, of the law * * *." *Weaver* v. *Graham*, 450 U.S. 24, 21 (1981) (emphasis added).

Here, the formal and empirical analyses required by *Garner* reveal that the application of the harsher 2007 Guidelines violated the Ex Post Facto Clause. See Pet. 24-32. Given the empirical analysis required under *Garner*, it is surprising that the government makes absolutely no attempt to respond to the statistical reality that the Guidelines exert tremendous force in the sentencing process. And in a system where the Guidelines exert such force, the judge's choice of *which* Guidelines to apply makes a profound difference in the sentence imposed.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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