NO: 15-5756

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2014

DANA E. TUOMI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Eleventh Circuit

REPLY BRIEF OF PETITIONER

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1. The residual clause of the Career Offender Guideline fails to give "fair warning" of its meaning.

Citing this Court's decision in Johnson v. United States, __U.S.__, 135 S.Ct. 2551 (2015), Tuomi's certiorari petition urged this Court to vacate his sentence, because the district court relied on the residual clause of the career offender Guideline, a clause that, in light of Johnson, was unconstitutionally vague. Tuomi urged this Court to reverse the ruling of the Eleventh Circuit, entered pre-Johnson, that had rejected Tuomi's argument that the career offender guideline residual clause is unconstitutionally vague. United States v. Tuomi, 605 Fed. Appx. 956, 957 (11th Cir. May 27, 2015) (unpublished).

In response to Tuomi's certiorari petition, the government filed a Memorandum recognizing that, in light of Johnson, "the appropriate disposition is to grant certiorari, vacate the judgment of the court of appeals, and remand the case for further consideration in light of Johnson." Post-Johnson, the government in other cases around the country has taken the same position as it did in its Memorandum in this case. For this Court's convenience, the Appendix to this Reply Brief contains the government's recent briefs in the First, Sixth, Seventh, Tenth and Eleventh Circuits, in which it concedes that Johnson applies to the residual clause of the Career Offender Guideline.

Tuomi was prepared to cheerfully accept the government's concession that this Court should grant certiorari, vacate the judgment below, and remand his case to the Eleventh Circuit "for further consideration." However, a few days after the government filed its Memorandum, the Eleventh Circuit ruled, as a matter of first impression, that notwithstanding the government's concession that Johnson applied to the residual clause of the Career Offender Guideline, the vagueness doctrine of

Due Process did not apply to the Sentencing Guidelines, and therefore did not apply to the residual clause of the Career Offender Guideline. United States v. Matchett, __F.3d __, 2015 WL 55155439 (11th Cir. September 21, 2015). For this Court's convenience, a copy of the Matchett slip opinion is included in the Appendix to this Reply Brief Appendix, at A- 95. The Matchett decision makes the Eleventh Circuit a markedly inhospitable tribunal to which to be remanded; a panel of the Eleventh Circuit previously rejected Tuomi's challenge to the constitutionality of the residual clause of the Career Offender Guideline,[1] and Matchett indicates that the Eleventh Circuit is not inclined to revisit this holding.

The Eleventh Circuit's failure in Matchett to apply Johnson to the residual clause of the Career Offender Guideline is incorrect in light of Peugh v. United States, __U.S. __, 133 S.Ct. 2072 (2013) – as the government itself has noted:

> The Due Process Clause inquiry in Johnson, while distinct from the ex post facto inquiry in Peugh, similarly depends on principles of fair notice, as well as avoiding arbitrary enforcement of sentencing provisions. . . . Thus, the United States concedes that the career offender guideline's residual clause is unconstitutionally vague.

Gov't Br. in United States v. Madrid, No. 14-2159 (10th Cir. Aug. 20, 2015), A-54, page 10.

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[1] In its decision ruling against Tuomi, the Eleventh Circuit noted that his challenge to the residual clause of the Career Offender Guideline was being reviewed for "plain error." 605 Fed. Appx. at 956. However, post-Johnson, the Government has expressly "waive[d] any reliance on the plain-error standard of review." Reply Brief Appendix A-27, Government Supplemental Brief in Pagan-Soto, at p. 10. See also Reply Brief Appendix A-44, Government Letter Brief in Lee, at p. 6 (conceding that "that the error is plain"); Reply Brief Appendix A-54, Appellee's Supplemental Brief in Madrid, at p. 11 ("the United States concedes that Madrid can establish that the district court committed reversible plain error by relying on the career offender residual clause to enhance his sentence"); Reply Brief Appendix A-77, Supplemental Brief for Plaintiff-Appellee United States in Grayer), at p. 9 (conceding plain error). Cf. United States v. Encarnacion-Ruiz, 787 F.3d 581, 586-87 (1st Cir. 2015) (agreeing with the Sixth, Seventh, Ninth and D.C. Circuits that when the government does not argue that an appellate court should apply plain error review, it has waived this point); United States v. Mix, 791 F.3d 603, 613 (5th Cir. 2015) (same).

In Matchett, the Eleventh Circuit recognized that Peugh held that the Ex Post Facto Clause applies to the Guidelines, but nonetheless "reject[ed] Matchett's argument that because the Ex Post Facto Clause applies to the advisory guidelines, the vagueness doctrine also applies." Slip op. at 17. Matchett asserted that this Court has "articulated different tests" to determine when Ex Post Facto and Due Process principles apply, and, therefore, "[w]hether the Ex Post Facto Clause applies to the advisory guidelines in no way informs our analysis." Slip op. at 17. This is incorrect.

Peugh discussed at length, and relied on, a prior Ex Post Facto case: Miller v. Florida, 482 U.S. 423 (1987), abrogated on other grounds, California Dept. of Corrections v. Morales, 514 U.S. 499, 506-07 n. 3 (1995). See Peugh, 133 S.Ct. at 2082-2086. Miller stated that the Ex Post Facto Clause is aimed at ensuring that legislative enactments "give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." Miller, 482 U.S. at 430 (citing Weaver v. Graham, 450 U.S. 24, 28-29 (1981)). This principle is as well-entrenched as it is uniformly accepted. See Peugh, 133 S.Ct. at 2095 (Thomas, J., dissenting) (at common law, "the goals of notice and fair warning [were the] rationales for the prohibition against ex post facto laws") (citing Blackstone). Peugh held that a retroactive change in a Guideline violated the Ex Post Facto Clause, because it created a "significant risk" of a higher sentence. 133 S.Ct. at 2088 (quoting Garner v. Jones, 529 U.S. 244, 251 (2000)). The "significant risk" existed because, under Guidelines that took effect after Peugh committed his offense – that is, after being given notice of the punishment for the offense – Peugh stood to receive a higher base offense level for his crime. 133 S.Ct. at 2078-79.

Language that is unconstitutionally vague cannot provide the "fair warning" that permits individuals to "rely on [its] meaning," as required by the Ex Post Facto Clause. F.C.C. v. Fox

Television Stations, Inc., __U.S. __, 132 S.Ct. 2307, 2317 (2012) stated that "laws which regulate persons or entities must give fair notice of conduct that is forbidden," and added that a "requirement of clarity in regulation is essential to the protections provided by the Due Process Clause." This principle "requires the invalidation of laws that are impermissibly vague." Id.

The language of the residual clause of the career offender Guideline is identical to the language of the Armed Career Criminal Act that this Court found to be unconstitutionally vague in Johnson. Compare 18 U.S.C. § 924(e)(2)(B)(ii) (a violent felony . . . "is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another"), with U.S.S.G. § 4B1.2(a)(2) (the term "crime of violence" . . . "is burglary of a dwelling, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another").

Matchett concluded that the vagueness doctrine "does not apply to advisory guidelines," because this Court in Irizarry v. United States, 553 U.S. 708, 713 (2008) stated: "[a]ny expectation subject to due process protection . . . that a criminal defendant would receive a sentence within the presumptively applicable guideline range did not survive [the] decision in United States v. Booker, [543 U.S. 220 (2005)]." Slip op. at 15. But Irizarry is inapposite. Irizarry addressed the required notice that a district judge must give a convicted offender regarding a sentencing variance that the judge contemplated imposing at sentencing. 553 U.S. at 709-10. Johnson and Peugh addressed the required notice that a criminal statute, or a Sentencing Guideline, must give in order for all persons to have fair warning of the punishment attached to crimes.

Matchett stated that "[n]o circuit has held in a published opinion that advisory guidelines can be unconstitutionally vague." Slip op. at 19. But the cases from other circuits cited in Matchett

predated Peugh. All of these cases, therefore, are out of date, as the government has recently recognized in its submissions conceding that the residual clause of the Career Offender Guideline is unconstitutionally vague. See, e.g., Reply Brief Appendix, A-4 (Brief of Plaintiff-Appellee in Gillespie), at p. 13 (noting that Peugh and Johnson "fatally undermined" Seventh Circuit precedent).

Tuomi is aware that there is no circuit conflict on the issue presented here, and that a circuit conflict is a frequent prerequisite for certiorari review. See Sup. Ct. R. 10(a). The Eleventh Circuit's holding in Matchett, however, conflicts with the position of the Executive Branch of the United States government. See Greenlaw v. United States, 554 U.S. 237 (2010) (discretion to seek an increased sentence is vested in the Executive Branch, not appellate courts).

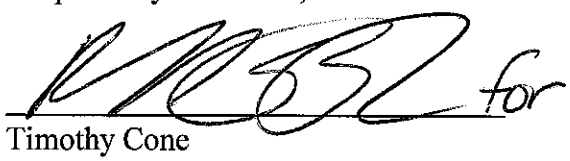
Moreover, the efficient administration of justice requires prompt resolution of an issue that affects many inmates. See U.S.S.C., Offenders Receiving Career Offender/Armed Career Criminal Adjustments in Each Primary Offense Category, Eleventh Circuit, 2013 (available at: http://isb.ussc.gov/content/pentaho-cdf/RenderXCDF?solution=Sourcebook&path=&action=table_xx.xcdf&template=mantle&table_num=Table22) (in 2013, 267 offenders were sentenced as career offenders in the Eleventh Circuit).

No doubt in recognition of the urgency of the matter, the Matchett panel, after supplemental briefing, resolved the vagueness issue, post-Johnson, without hearing oral argument. The Eleventh Circuit's sense of urgency might have been well-advised; its resolution on the merits, however, was not well-advised – it should be expeditiously reversed. "Application of a vague Guideline conflicts with the proper role of the Guidelines in providing a uniform baseline for sentencing." Reply Brief Appendix A-27 (Supplemental Brief for the United States in Pagan-Soto), at p. 8.

CONCLUSION

Based upon the foregoing, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that on this 24th day of September 2015, in accordance with SUP. CT. R. 29, copies of the foregoing Reply Brief of Petitioner were served via Fedex upon the Solicitor General of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue, N.W., Washington, D.C. 20530-0001.

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