No. 16-603

In the Supreme Court of the United States

DAVID CONRAD, 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 holding of *Peugh* v. *United States*, 133 S. Ct. 2072 (2013)—that the Ex Post Facto Clause prohibits a district court from sentencing a defendant based on a higher advisory Sentencing Guidelines range than applied at the time of the offense—applies retroactively to cases on collateral review.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8), as amended (Pet. App. 9-10), is reported at 815 F.3d 324. The order of the district court denying petitioner's motion under 28 U.S.C. 2255 is not published but is available at 2014 WL 4783049. A prior opinion of the court of appeals is reported at 673 F.3d 728.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 2016. A petition for rehearing was denied on June 9, 2016. On September 12, 2016, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 6, 2016, and the petition for a writ of certiorari was filed on November 1, 2016. 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 two counts of advertising child pornography, in violation of 18 U.S.C. 2251(c)(1)(A) and (d) (2000); two counts of receiving and distributing child pornography, in violation of 18 U.S.C. 2252A(a)(2)(A) and (b)(1) (2000 & Supp. II 2002); two counts of transporting and shipping child pornography, in violation of 18 U.S.C. 2252A(a)(1) and (b)(1) (2000 & Supp. II 2002); and two counts of possessing child pornography, in violation of 18 U.S.C. 2252A(a)(5)(B) and (b)(2) (2000). 05-cr-931 Judgment 1-2. He was sentenced to 198 months of imprisonment, to be followed by three years of supervised release. *Id.* at 3-4. The court of appeals affirmed, 673 F.3d 728, and this Court denied certiorari, 133 S. Ct. 881. Petitioner subsequently filed a motion under 28 U.S.C. 2255 to vacate his conviction and sentence, which the district court denied. 2014 WL 4783049. The court of appeals affirmed. Pet. App. 1-10.

1. In 2002, a local police officer traced the IP address of an internet user sharing child-pornography videos to a business owned by petitioner's father. 10-2001 Gov't C.A. Br. 2-3. Federal agents followed up and spoke with petitioner, who admitted to distributing child pornography. *Id.* at 8-10. The agents also found evidence of child pornography on petitioner's computers. *Id.* at 10. In 2010, a jury found petitioner guilty on eight counts of violating federal child-pornography laws. 05-cr-931 Judgment 1-2.

In April 2010, the district court held its sentencing hearing. 10-2001 Gov't C.A. Br. 15. Pursuant to 18 U.S.C. 3553(a), a sentencing court's "overarching duty"

at sentencing 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 must consider, among other factors, the Sentencing Guidelines promulgated by the United States Sentencing Commission. *Id.* at 1241; see 18 U.S.C. 3553(a)(4)(A). Since *United States* v. *Booker*, 543 U.S. 220 (2005), those 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)).

In calculating petitioner's advisory sentencing range for purposes of 18 U.S.C. 3553(a)(4)(A), the presentence investigation report (PSR) used the 2009 edition of the Sentencing Guidelines Manual, the version in effect at the time of sentencing. PSR 8. Under that version of the Guidelines, petitioner's total offense level was 42 and his criminal history category was I, producing an advisory Guidelines range of 360 months to life imprisonment. PSR 8-16. Petitioner objected to the PSR on the ground, *inter alia*, that the Ex Post Facto Clause instead required use of the 2001 Guidelines in effect at the time of his offense. 05-cr-931 Docket entry No. 316, at 7-9 (Apr. 2, 2010). Under the 2001 Guidelines, petitioner's advisory sentencing range was 121 to 151 months. Pet. App. 2.

The district court rejected petitioner's ex post facto argument as foreclosed by circuit precedent and "adopt[ed] the Guidelines as set forth in the Presen-

tence Investigation Report." 4/12/10 Sent. Tr. 84-85. The court stated, however, that it viewed the disparity between the advisory range under the 2009 Guidelines and the advisory range under the 2001 Guidelines as a "significant factor" that it would take into account for purposes of its overarching determination of the appropriate sentence under Section 3553. *Id.* at 108; see *id.* at 84. After considering that disparity along with various other relevant factors, the court ultimately sentenced petitioner to 198 months of imprisonment. *Id.* at 105-109.

The court of appeals affirmed. 673 F.3d 728. As relevant here, the court adhered to circuit precedent holding that the Ex Post Facto Clause does not apply to the advisory Sentencing Guidelines. *Id.* at 732, 736-737 (citing *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007)). This Court denied certiorari. 133 S. Ct. 881.

2. After petitioner's convictions and sentence became final, this Court decided *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), which found "an *ex post facto* violation when a defendant is sentenced under Guidelines promulgated after he committed his criminal acts and the new version provides a higher applicable Guidelines sentencing range than the version in place at the time of the offense." *Id.* at 2078; see Pet. App. 2. Petitioner subsequently filed a motion under 28 U.S.C. 2255 requesting that his sentence be vacated in light of *Peugh*. Pet. App. 1. The district court denied the motion, concluding that the rule announced in *Peugh* was not retroactive on collateral review. 2014 WL 4783049, at *3-*5.

3. The court of appeals affirmed. Pet. App. 1-10. The court rejected petitioner's argument that *Peugh*

announced a "substantive" rule that would apply retroactively. *Id.* at 10. The court explained that this Court "has reserved the label 'substantive' (meaning therefore retroactive) for rules that change the sentence that a judge can lawfully impose." *Ibid.* (citing *Schriro* v. *Summerlin*, 542 U.S. 348, 352 (2004)). "A change in the guidelines," the court of appeals reasoned, "affects the sentence that a judge is *likely* to impose but does not alter the range of sentences that he *can* lawfully impose." *Ibid.* Because petitioner's sentence was "a sentence that the judge was constitutionally permitted to give both before and after *Peugh*," the court held, "considerations of finality" precluded retroactive application of *Peugh*. *Id.* at 8.

ARGUMENT

Petitioner contends (Pet. 3-10) that this Court's holding in *Peugh* v. *United States*, 133 S. Ct. 2072 (2013), applies retroactively to cases on collateral review. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or of another court of appeals. The petition for a writ of certiorari should therefore be denied. In the alternative, the Court may wish to hold the petition pending its decision in *Beckles* v. *United States*, No. 15-8544 (argued Nov. 28, 2016), which also involves a question of retroactivity in the context of the advisory Sentencing Guidelines, and then dispose of the petition as appropriate in light of that decision.

1. a. Under the approach set forth in the plurality opinion in *Teague* v. *Lane*, 489 U.S. 288 (1989), which has since been adopted by the full Court, see, *e.g.*, *Welch* v. *United States*, 136 S. Ct. 1257, 1264 (2016), "new constitutional rules of criminal procedure" gen-

erally "will not be applicable to those cases which have become final before the new rules are announced," *ibid.* (quoting *Teague*, 489 U.S. at 310 (plurality opinion)). The Court has "recognize[d]" only "two categories of decisions that fall outside this general bar." *Ibid.* One is for "watershed" procedural rules "implicating the fundamental fairness and accuracy of the criminal proceeding." *Ibid.* (quoting *Saffle* v. *Parks*, 494 U.S. 484, 495 (1990)). The other is for "new *substantive* rules," which "generally apply retroactively." *Ibid.* (brackets omitted) (quoting *Schriro* v. *Summerlin*, 542 U.S. 348, 351 (2004)); see also *Schriro*, 542 U.S. at 352 n.4 (noting that it is more accurate to characterize substantive rules "as * * * not subject to the bar").

The *Teague* framework recognizes that "[a]pplication of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system." 489 U.S. at 309 (plurality opinion). Collateral review has never been a "substitute for direct review." *Id.* at 306 (citation omitted). Rather, its principal purposes are to deter state and federal courts from violating then-governing procedural law, see *ibid.*, and to provide a remedy when a defendant is imprisoned for conduct that is not criminal, *Bousley* v. *United States*, 523 U.S. 614, 620-621 (1998), or is subject to a sentencing range greater than what the law authorizes, see *Welch*, 136 S. Ct. at 1265. Where those purposes are not implicated, the overriding "interests of comity and finality" generally preclude relief. *Teague*, 489 U.S. at 308 (plurality opinion); see *Mackey* v. *United States*, 401 U.S. 667, 691 (1971) (Harlan, J., concurring in the judgments in

part and dissenting in part) ("[a] rule of law that fails to take account of * * * finality interests would do more than subvert the criminal process itself"; "[i]t would also seriously distort the very limited resources society has allocated to the criminal process").

b. Petitioner does not dispute that the *Teague* framework applies in federal collateral review under Section 2255, and indeed he relies on it. Pet. 4-6; see *Welch*, 136 S. Ct. at 1264 (in light of the parties' positions, the Court "proceed[s] on th[e] assumption" that the "*Teague* framework applies in a federal collateral challenge to a federal conviction"). Petitioner, however, is not entitled to relief under that framework. Petitioner does not contend that *Peugh* announced a watershed rule of criminal procedure. See Pet. App. 3. And the court of appeals correctly rejected petitioner's contention that *Peugh* announced a "substantive" rule, as opposed to a "procedural" one.

As this Court has explained repeatedly since it rendered the Guidelines advisory in *United States* v. *Booker*, 543 U.S. 220 (2005), the Guidelines have an important, but ultimately procedural, role in a district court's determination of a lawful sentence. "The sentencing judge, *as a matter of process*, will normally begin by considering the presentence report and its interpretation of the Guidelines," *Rita* v. *United States*, 551 U.S. 338, 351 (2007) (emphasis added), and then "correctly calculating the applicable Guidelines range," *Gall* v. *United States*, 552 U.S. 38, 49 (2007). A failure to calculate the advisory Guidelines range, or a miscalculation of that range, constitutes "significant *procedural* error." *Id.* at 51 (emphasis added).

Because of the procedural nature of an advisory Guidelines error, the ex post facto rule announced in

Peugh is a procedural rule, not a substantive rule, within the meaning of this Court's retroactivity precedents. *Peugh* lowers the advisory Guidelines range that the district court must consider. Correcting a violation of *Peugh* would affect the process of determining a sentence by changing the starting benchmark. But it would not "alte[r] the range of conduct or the class of persons that the law punishes," *Welch*, 136 S. Ct. at 1267 (brackets in original) (quoting *Summerlin*, 542 U.S. at 353), the hallmark of a substantive rule for retroactivity purposes.

If petitioner were resentenced in accordance with *Peugh*, he would still be subject to the same statutory range of punishment, and the district court would be authorized to impose a sentence within that range on remand without finding any additional facts about petitioner's history or offense. Cf. *Montgomery* v. *Louisiana*, 136 S. Ct. 718, 734 (2016) (holding retroactive a rule requiring lesser sentence than life without the possibility of parole unless court finds that juvenile defendant's homicide offense "reflect[s] irreparable corruption"). A rule that alters the considerations that a court must take into account in deciding an appropriate sentence is procedural because it governs the manner of arriving at a decision, not the substantive bounds of a permissible sentence.

This Court has already held that similar rules—that is, rules governing the appropriate considerations for a judge or jury for purposes of sentencing—are procedural and therefore nonretroactive under *Teague*. See, *e.g.*, *Beard* v. *Banks*, 542 U.S. 406, 408, 417 (2004) (constitutional rule that capital-sentencing juries cannot be required to disregard mitigating factors when not found unanimously is not retroactive);

O'Dell v. *Netherland*, 521 U.S. 151, 153, 167 (1997) (constitutional rule that capital defendant may inform jury of his parole ineligibility to rebut argument about future dangerousness is not retroactive); *Lambrix* v. *Singletary*, 520 U.S. 518, 539 (1997) (constitutional rule that a sentencing court may not consider an advisory jury's constitutionally flawed recommendation of a death sentence is not retroactive); *Sawyer* v. *Smith*, 497 U.S. 227, 229, 233, 244-245 (1990) (constitutional rule that capital sentence may not be imposed when the jury is falsely led to believe that responsibility for determining appropriateness of death penalty lies elsewhere is not retroactive). As in those cases, *Peugh*'s holding that the district court must consider the lower advisory Guidelines range in effect at the time of the offense under 18 U.S.C. 3553(a)(4) is a procedural rule because it concerns the manner in which the sentencer arrives at a sentence, not whether the defendant is legally eligible for a particular sentencing range.

2. Petitioner's contrary arguments do not demonstrate that *Peugh* announced a substantive rule within the meaning of *Teague*.

a. Petitioner errs in focusing (Pet. 4) on a statement in *Peugh* describing the constitutional error in that case as having "alter[ed] the substantive 'formula' used to calculate the applicable sentencing range." 133 S. Ct. at 2088 (quoting *California Dep't of Corrs.* v. *Morales*, 514 U.S. 499, 505 (1995)). Consistent with its other Guidelines-related decisions, the Court in *Peugh* repeatedly described the statutory requirement to calculate the advisory Guidelines range as "procedural" or as a "procedure." See *id.* at 2080 (referring to "the role that the Guidelines play in sentencing procedures"); *ibid.* (referring to "[f]ailure

to calculate the correct Guidelines range," or "treating the Guidelines as mandatory," as "procedural error"); *id.* at 2083 (similar); *id.* at 2084 (referring to "the federal system's procedural rules" that "steer district courts to more within-Guidelines sentences").

b. Petitioner also errs in focusing (Pet. 5-6, 8) on the possibility that application of *Peugh*'s ex post facto rule will have a significant effect on the advisory Guidelines range and on the sentence actually imposed. This Court has classified as procedural under *Teague* many constitutional rules that undoubtedly exert a significant effect not only on the length of a term of imprisonment, but also on whether the defendant is found guilty at all (or pleads guilty) and whether he is sentenced to death. See pp. 8-9, *supra* (citing capital-sentencing cases).

c. Finally, petitioner errs in suggesting (Pet. 7-8) that *Montgomery* v. *Louisiana*, *supra*, supports his contention that an advisory Guidelines error should be viewed as substantive under *Teague*. *Montgomery* held that the rule of *Miller* v. *Alabama*, 132 S. Ct. 2455 (2012)—which "rendered life without parole an unconstitutional penalty for * * * juvenile offenders whose [homicide] crimes reflect the transient immaturity of youth"—was substantive and thus retroactive. *Montgomery*, 136 S. Ct. at 734. Although *Miller*'s rule included a "procedural component," in that a court would have to determine whether a particular defendant's youth and characteristics could justify a sentence of life without parole, the rule was substantive because its ultimate effect was to eliminate that penalty altogether "for a class of defendants because of their status." *Id.* at 732, 734 (citation and internal quotation marks omitted). The rule in *Peugh*, in con-

trast, does not eliminate any particular penalty for any class of defendants. It instead affects only a single nonbinding consideration for the district court, which remains free to impose any sentence within the statutory range. See 18 U.S.C. 3553(a).*

3. The decision below does not warrant plenary review in this Court. Petitioner does not contend that the decision conflicts with the decision of any other court of appeals, and the government is not aware of any such conflict. The only other circuit to consider the question presented in a published opinion denied a prisoner's application to file a second or successive Section 2255 motion on the ground that *Peugh* did not announce a rule that would apply retroactively on collateral review. *Herrera-Gomez* v. *United States*, 755 F.3d 142, 146-147 (2d Cir. 2014) (per curiam); see *Talik* v. *Warden Lewisburg USP*, 621 Fed. Appx. 94, 96 (3d Cir. 2015) (per curiam) (affirming dismissal of habeas petition and stating that *Peugh* "does not apply retroactively to cases on collateral review"), cert. denied, 136 S. Ct. 515 (2015); *Rogers* v. *United States*, 561 Fed. Appx. 440, 443-444 (6th Cir.) (affirming denial of Section 2255 motion and stating that "*Peugh* [is] not applicable on collateral review of [the defendant's] sentence"), cert. denied, 135 S. Ct. 500 (2014).

The question presented is also of limited practical importance. The question whether *Peugh* applies retroactively is implicated only in cases in which a defendant's advisory Guidelines range increased between the time of the offense and the time of sentencing; the district court applied the higher range under

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* Petitioner's criticism (Pet. 6) of the panel's reasoning provides no basis for review. Whether or not the panel's reasoning accorded with *Teague*, its result correctly applies that decision.

18 U.S.C. 3553(a)(4)(A); the sentence was not overturned on appeal; the sentence became final before this Court's decision in *Peugh*; and the defendant filed a motion under 28 U.S.C. 2255 within a year of that decision. See 28 U.S.C. 2255(f)(3). That set of cases is fixed and presumably small. Even before this Court's decision in *Peugh*, only the Seventh Circuit had adopted a rule that the Ex Post Facto Clause did not apply to amendments to the advisory Guidelines. The other courts of appeals that had considered the question had held, consistent with this Court's eventual conclusion in *Peugh*, that the Ex Post Facto Clause is applicable to advisory Guidelines. See *Peugh*, 133 S. Ct. at 2079 & n.1 (noting conflict between Seventh Circuit and the Second, Fourth, Sixth, Eleventh, and D.C. Circuits); see also, *e.g.*, *United States* v. *Forrester*, 616 F.3d 929, 946-948 (9th Cir. 2010) (holding that the Ex Post Facto Clause bars "application of the Guidelines version in existence at sentencing" if that version "would impose a harsher punishment than would the version in effect when the offense was committed"); *United States* v. *Wood*, 486 F.3d 781, 789-791 (3d Cir.) (same), cert. denied, 552 U.S. 855 (2007). Given the limited number of affected cases, the question presented does not require consideration in this Court, particularly in the absence of any circuit conflict.

4. Although plenary review is unwarranted, and the Court could deny the petition outright, in the alternative, the Court may wish to hold the petition in this case pending its decision in *Beckles*, *supra* (No. 15-8544). One of the questions presented in that case is whether a ruling that the residual clause of the former version of Sentencing Guidelines § 4B1.2(a)(2)

is unconstitutionally vague would be a substantive rule that is retroactively applicable in a motion under Section 2255. Because the decision in *Beckles* could contain an analysis of retroactivity that could bear on the proper disposition of this case, the Court could choose to dispose of the petition in this case as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be denied. In the alternative, the Court may wish to hold the petition pending its decision in *Beckles* v. *United States*, No. 15-8544 (argued Nov. 28, 2016), and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

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