No. 16-929

In the Supreme Court of the United States

EDGAR SHAKBAZYAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the "one-book rule" in Sentencing Guidelines § 1B1.11(b)(3), which requires that the revised edition of the Guidelines be used to calculate a defendant's advisory sentencing range when the defendant's offenses occurred both before and after the revised Guidelines took effect, violates the Ex Post Facto Clause as applied to related pre-revision offenses that are considered as a group under the advisory Guidelines.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 841 F.3d 286.

JURISDICTION

The judgment of the court of appeals was entered on October 26, 2016. The petition for a writ of certiorari was filed on January 24, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit health-care fraud, in violation of 18 U.S.C. 1349; 19 counts of health-care fraud, in violation of 18 U.S.C. 1347; and one count of conspiracy to violate the Medicare antikickback statute (42 U.S.C. 1320a-7b(b)(2)), in violation of 18 U.S.C. 371. Gov't C.A. Br.

2; see C.A. ROA 28. He was sentenced to 97 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. Br. 2. The court of appeals affirmed. Pet. App. 1a-11a.

1. Petitioner was the leader, organizer, and day-to-day manager of a sham medical clinic that submitted millions of dollars' worth of fraudulent Medicare claims to the federal government. Gov't C.A. Br. 3. Petitioner hired, as his key co-conspirators, the clinic's medical director, who never saw a patient, and an unlicensed "physician's assistant," who posed as a doctor during all patient visits. Presentence Investigation Report (PSR) ¶¶ 13-14, 16. Petitioner also paid kickbacks to the clinic's "patients," as well as the "marketers" who procured them. PSR ¶ 17.

For 39 days in June and July of 2009, the clinic received a daily busload of "'patients,'" whose Medicare information was collected and used to generate Medicare bills for "thousands of procedures that were either unnecessary or never performed." Pet. App. 1a-2a; see Gov't C.A. Br. 5-6. All told, the clinic "claimed to treat 429 Medicare 'beneficiaries,' submitted approximately 9,300 [in] claims to Medicare, and billed Medicare for $2.1 million." Pet. App. 1a. The conspiracy continued until February 2010, when a final payment was made to the medical director whom petitioner had hired. *Id.* at 3a; Gov't C.A. Br. 7-8.

2. In December 2013, a federal grand jury returned a superseding indictment charging petitioner, the medical director, and the physician's assistant with one count of conspiracy to commit health-care fraud, in violation of 18 U.S.C. 1349, and 19 counts of health-care fraud, in violation of 18 U.S.C. 1347. C.A. ROA 18-27. The indictment also charged petitioner with

one count of conspiracy to violate the Medicare anti-kickback statute (42 U.S.C. 1320a-7b(b)(2)), in violation of 18 U.S.C. 371. C.A. ROA 27-30. On the first day of trial, petitioner pleaded guilty, without a plea agreement, to all counts. Gov't C.A. Br. 8.

The Sentencing Guidelines require that "[a]ll counts involving substantially the same harm shall be grouped together" for purposes of computing an advisory sentencing range. Sentencing Guidelines § 3D1.2. The Guidelines additionally require, under the so-called "one-book rule," that the same version of the Guidelines be used for all offenses of conviction. *Id.* § 1B1.11(b)(2). The appropriate version of the Guidelines is the one in effect "on the date that the defendant is sentenced," unless using that one "would violate the ex post facto clause," in which case "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." *Id.* § 1B1.11(a) and (b)(1) (emphasis omitted). The Guidelines also address the situation in which the defendant is convicted of an offense before, and an offense after, a revision to the Guidelines takes effect, providing that "the revised edition of the Guidelines Manual is to be applied to both offenses." *Id.* § 1B1.11(b)(3).

The Probation Office, in preparing its sentencing recommendation for the district court, grouped all 21 of petitioner's offenses together under the Guidelines. C.A. ROA 541; see PSR ¶ 40. Although petitioner was sentenced in 2015, the Probation Office calculated an advisory sentencing range under an earlier version of the Guidelines, because the offense level for health-care-fraud offenses had been increased in 2011, after the relevant offense conduct had concluded. See Sentencing Guidelines, App. C, Amend. 749 (Nov. 1, 2011)

(adding current Sentencing Guidelines § 2B1.1(b)(7)); see PSR ¶ 41. Specifically, the Probation Office used the 2009 version of the Guidelines, which became effective on November 1, 2009, and was in effect at the time of the final payment (in February 2010) made in furtherance of the health-care-fraud conspiracy charged in the first count of the indictment. Pet. App. 3a-4a. The Probation Office calculated a total offense level of 30 and a criminal history category of I, which yielded an advisory sentencing range of 97 to 121 months of imprisonment. *Id.* at 4a.

Petitioner objected to the calculation of that range. See C.A. ROA 519-521. In his view, the district court should have applied the 2008 version, rather than the 2009 version, of the Guidelines to his substantive health-care-fraud offenses, which were completed before November 1, 2009. The 2008 version was more favorable to petitioner, because the 2009 version included an amendment under which the individual Medicare beneficiaries whose identifying information was used in petitioner's fraudulent billing scheme would be considered victims of the crime for purposes of calculating the total offense level, while under the 2008 version they would not, absent actual loss. See Pet. App. 3a. Without the six-level enhancement that resulted from that amendment, petitioner's advisory Guidelines range would have been 51 to 63 months of imprisonment. *Id.* at 4a. Petitioner acknowledged, however, that the amendment could validly be applied to the health-care-fraud-conspiracy offense, which was based on conduct that continued until February 2010, see C.A. ROA 520-521, 527-528, and did not contest the grouping of that offense with his other convictions.

The district court overruled petitioner's objection and adopted the Probation Office's Guidelines calculations. C.A. ROA 538, 540-541. The court then sentenced petitioner to concurrent terms of 97 months on imprisonment on all counts of conviction, to be followed by a three-year term of supervised release. *Id.* at 308-309, 544-545.

3. The court of appeals affirmed. Pet. App. 1a-11a. On appeal, petitioner again acknowledged that the 2009 version of the Sentencing Guidelines "can technically be applied to" the health-care-fraud-conspiracy count, "which allege[d] conduct that occurred post November of 2009" that could be imputed to him. *Id.* at 6a. Petitioner also continued to accept that all the counts were correctly grouped together under the Guidelines and that the one-book rule required the same version of the Guidelines to be applied to all grouped counts. *Ibid.*

The court of appeals rejected petitioner's contention that application of the 2009 Guidelines to the grouped offenses violated the Ex Post Facto Clause. Pet. App. 5a-9a. The court observed that, in accord with "eight other circuits," its precedent "plainly foreclose[d]" an Ex Post Facto challenge "where a sentencing court groups offenses committed before a change in the sentencing guidelines with offenses after the amendment, and then applies the amended guideline in determining a defendant's appropriate sentence." *Id.* at 7a (quoting *United States* v. *Kimler*, 167 F.3d 889, 893 (5th Cir. 1999)); see *id.* at 7a n.2 (noting cases collected in *United States* v. *Pagán-Ferrer*, 736 F.3d 573, 598 (1st Cir. 2013), cert. denied, 134 S. Ct. 2839 (2014); and *United States* v. *Kumar*,

617 F.3d 612, 626-627 (2d Cir. 2010), cert. denied, 563 U.S. 1028 (2011)).

The court of appeals observed that the "motivating concern" of the Ex Post Facto Clause in this context "'is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.'" Pet. App. 5a-6a (quoting *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981)). And the court explained that "[g]iven the Guidelines' one-book rule and grouping rules, 'a defendant has notice that the version of the sentencing guidelines in effect at the time he committed the last of a series of grouped offenses will apply to the entire group.'" *Id.* at 7a (quoting *Kimler*, 167 F.3d at 895). Thus, "a defendant who decides to 'continue his illegal activities . . . after the revisions in the sentencing guidelines' does so at his own peril." *Ibid.* (quoting *Kimler*, 167 F.3d at 893). On the particular facts of this case, the relevant conspiracy "continued well after November 1, 2009." *Ibid.* "During that period, the Guidelines gave [petitioner] adequate notice that his pre-November 1, 2009 offenses would be grouped with * * * [that] conspiracy offense, and therefore that the 2009 Guidelines would apply." *Id.* at 7a-8a.

The court of appeals also recognized "clear factual and legal distinctions" between this case and *Peugh* v. *United States*, 133 S. Ct. 2072 (2013). Pet. App. 8a. In *Peugh*, this Court "found an *Ex Post Facto* Clause violation where 'a defendant [was] sentenced under Guidelines promulgated after he committed his criminal acts and the new version provide[d] a higher applicable Guidelines sentencing range than the version in

place at the time of the offense.'" *Ibid.* (brackets in original) (quoting *Peugh*, 133 S. Ct. at 2078). The court of appeals observed that in contrast to "the defendant in *Peugh*," who "committed *all* of his alleged crimes in 1999 and 2000, before the promulgation of the 2009 Guidelines under which he was sentenced," petitioner "concedes that one of the crimes to which he pled guilty extended past the effective date of the 2009 Guidelines." *Ibid.* And while the defendant in *Peugh* "had no notice of Guidelines enhancements that would be promulgated a decade after he committed his crimes," petitioner "was on notice of the Guidelines' one-book and grouping rules that would apply one version of the Guidelines to his pre- and post-amendment criminal conduct." *Id.* at 8a-9a.

ARGUMENT

Petitioner contends (Pet. 12-18) that application of the one-book rule to his grouped offenses violated the Ex Post Facto Clause. The court of appeals correctly rejected that contention. This Court has previously denied certiorari in several cases involving that issue. See *Vidal-Maldonado* v. *United States*, 134 S. Ct. 2839 (2014) (No. 13-8744); *Gabayzadeh* v. *United States*, 133 S. Ct. 26 (2012) (No. 11-1034); *Johnson* v. *United States*, 566 U.S. 940 (2012) (No. 11-7857); *Kumar* v. *United States*, 563 U.S. 1028 (2011) (No. 10-961); *Custable* v. *United States*, 563 U.S. 917 (2011) (No. 10-631). It should follow the same course here.

1. The Ex Post Facto Clause "ensures that individuals have fair warning of applicable laws and guards against vindictive legislative action." *Peugh* v. *United States*, 133 S. Ct. 2072, 2085 (2013) (plurality opinion). Accordingly, "central to the *ex post facto* prohibition is a concern for 'the lack of fair notice and

governmental restraint when the legislature increases punishment beyond what was prescribed'" at the time of the acts that triggered that punishment. *Miller* v. *Florida*, 482 U.S. 423, 430 (1987) (quoting *Weaver* v. *Graham*, 450 U.S. 24, 30 (1981)).

That concern is not implicated by application of the one-book rule to offenses that are grouped to determine an advisory Guidelines range. As the court of appeals explained, a defendant in that circumstance has fair notice of the consequences of his criminal conduct before it is completed. Pet. App. 6a-7a. The one-book rule puts the defendant on notice that, if he commits a series of offenses and is prosecuted for those offenses in a single proceeding, the version of the Guidelines in effect during the commission of the last offense will be used to sentence him for the entire group of offenses. *Id.* at 7a; see Sentencing Guidelines § 1B1.11, comment. (n.2) (2009) ("[T]he last date of the offense of conviction is the controlling date for *ex post facto* purposes.").

In addition, application of the one-book rule to grouped offenses does not permit the government to increase the defendant's Guidelines range beyond what was prescribed at the time of the last in the series of acts that triggered that range. The Guidelines range is determined for the offenses as a group, and the group includes a course of offense conduct that was not completed until after the new version of the Guidelines took effect. Thus, application of the one-book rule to multiple grouped offenses is similar to application of the most recent version of the Guidelines to a single continuing offense that began under one version of the Guidelines but was not completed until a later version had taken effect. See, *e.g.*, *United States*

v. *Zimmer*, 299 F.3d 710, 717-718 (8th Cir. 2002), cert. denied, 537 U.S. 1146 (2003) ("[A]s a general rule, where a defendant's offense conduct straddles an enactment, the enactment can be applied to the defendant without violating the Ex Post Facto Clause.").

2. As the court of appeals recognized (Pet. App. 8a-9a), and the petition does not dispute, the situation in this case is distinct from the situation in *Peugh* v. *United States*, *supra*, in which this Court held that the Ex Post Facto Clause precludes retroactive application of a higher advisory Guidelines range that was not in effect when the offense conduct occurred. In *Peugh*, the Court addressed an ex post facto challenge by a defendant who had completed his criminal conduct in 2000, but whose advisory Guidelines range was calculated under the 2009 version of the Sentencing Guidelines in effect at the time of his sentencing. 133 S. Ct. at 2078-2079. In accord with every circuit but one to have addressed a similar issue, the Court concluded that use of the later Guidelines, which recommended a higher sentencing range for the defendant's offenses, violated the Ex Post Facto Clause. *Ibid.*; see *id.* at 2079 n.1, 2088.

Unlike in *Peugh*, the district court here did not employ a version of the Sentencing Guidelines that completely postdated petitioner's course of criminal conduct. Petitioner acknowledges (Pet. 9), as he did in the lower courts, that "[t]he 2009 version of the Guidelines could technically be applied to" the health-care-fraud-conspiracy count because it "alleges conduct that occurred post November of 2009." See Pet. App. 6a; C.A. ROA 520-521, 527-528. In addition, petitioner does not dispute that his offenses were correctly grouped for purposes of determining a single offense

level under the Guidelines; that the final act in the course of his health-care-fraud conspiracy was committed in February 2010; or that the district court correctly calculated the Guidelines range applicable at the time of that act. See Pet. App. 6a.

To the extent that petitioner attempts (Pet. 8-10) to downplay his own role in the final steps of the conspiracy, that case-specific contention does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."). Petitioner did not dispute below "that the post-November 1, 2009 conspiratorial conduct" could "be imputed to him." Pet. App. 6a. And petitioner could have avoided any heightened punishment imposed on the basis of the one-book rule by withdrawing from the health-care-fraud conspiracy before November 2009. *Id.* at 7a-8a; see *id.* at 6a n.1 (explaining that conspiracy is a continuing offense). By "deci[ding] to 'continue his illegal activities * * * after the revisions in the sentencing guidelines,'" *id.* at 8a (citation omitted), petitioner acted "at his own peril," *id.* at 7a.

3. Petitioner does not identify any circuit conflict on the question presented that would warrant this Court's review in this case.

a. As petitioner recognizes (Pet. 14-17), the court of appeals' approach in this case is consistent with the approaches of the First, Second, Fourth, Sixth, Seventh, Eighth, and Eleventh Circuits. See *United States* v. *Pagán-Ferrer*, 736 F.3d 573, 598 (1st Cir. 2013), cert. denied, 134 S. Ct. 2839 (2014); *United States* v. *Kumar*, 617 F.3d 612, 626-628 (2d Cir. 2010), cert. denied, 563 U.S. 1028 (2011); *United States* v. *Lewis*, 235 F.3d 215, 218 (4th Cir. 2000), cert. denied, 534 U.S.

814 (2001); *United States* v. *Duane*, 533 F.3d 441, 449 (6th Cir. 2008) (same); *United States* v. *Fletcher*, 763 F.3d 711, 714-717 (7th Cir. 2014); *United States* v. *Anderson*, 570 F.3d 1025, 1033 (8th Cir. 2009); *United States* v. *Bailey*, 123 F.3d 1381, 1404-1407 (11th Cir. 1997). The court of appeals' approach likewise accords with the Tenth Circuit's. See *United States* v. *Weiss*, 630 F.3d 1263, 1278 (10th Cir. 2010).

Those circuits have held that application of the one-book rule in a case like this does not violate the Ex Post Facto Clause even though nearly all of them have long held—even before this Court's decision in *Peugh*—that the Ex Post Facto Clause applies to the advisory Sentencing Guidelines as a general matter. See, *e.g.*, *Peugh*, 133 S. Ct. at 2079 n.1 (discussing previous circuit law). And the ones that have expressly addressed *Peugh* have recognized that it does not foreclose application of the one-book rule to grouped offenses. See *United States* v. *Hallahan*, 756 F.3d 962, 977-979 (7th Cir.), cert. denied, 135 S. Ct. 498 (2014); *Pagán-Ferrer*, 736 F.3d at 598; Pet. App. 8a-9a.

b. Petitioner errs in suggesting (Pet. 12-13) that the Third Circuit's decision in *United States* v. *Bertoli*, 40 F.3d 1384, 1404 (1994), cert. denied, 517 U.S. 1137 (1996), would lead that court to find an Ex Post Facto Clause violation in this case. Although the Third Circuit stated in *Bertoli* that "[t]he fact that various counts of an indictment are grouped cannot override *ex post facto* concerns," *ibid.*, it has subsequently clarified that its application of the Ex Post Facto Clause in that case turned on the unusual nature of the offense grouping at issue, which "involved discrete, unconnected acts" that the district court had nevertheless combined for purposes of calculating

the Guidelines range. See *United States* v. *Siddons*, 660 F.3d 699, 707 (3d Cir. 2011). In contrast to that situation, the Third Circuit has "agree[d] with those Courts of Appeals that have found no *ex post facto* violation when a court groups continuing, related conduct and applies the Guidelines Manual in effect during the latest-concluded conduct," *ibid.*, as is the case here. Like the court of appeals in this case, the Third Circuit has explained that no ex post facto violation occurs in that circumstance "because the grouping provisions, combined with the one-book rule, place a defendant on notice that a court will sentence him or her under the Guidelines Manual in effect during the commission of his or her last offense in a series of continuous, related offenses." *Ibid.*; see Pet. App. 7a-8a.

c. The Ninth Circuit has taken a different approach to the Ex Post Facto Clause, under which it has "applied more than one Guidelines manual to multiple counts involving offenses completed at different times." *United States* v. *Ortland*, 109 F.3d 539, 546-547, cert. denied, 522 U.S. 851 (1997). This Court's intervention, however, is unwarranted. The overwhelming weight of circuit authority on this issue may lead the Ninth Circuit to revisit its outlier rule in the future. And this case would be an unsuitable vehicle for considering that rule, because its application is unlikely to be outcome-determinative here. Petitioner recognizes that the 2009 Guidelines can permissibly be applied to his health-care-fraud-conspiracy offense, even if they cannot be applied to his other offenses. See Pet. 9; see also Pet. App. 6a; C.A. ROA 520-521, 527-528. As a result, even if the district court were to lower the terms of imprisonment imposed for his other offenses in light of the 2008 Guidelines, it would have no simi-

lar reason to lower the concurrent term of imprisonment for his health-care-fraud-conspiracy offense. The aggregate term of imprisonment of 97 months, which the district court necessarily found to be "sufficient, but not greater than necessary" to effectuate the purposes of federal sentencing law, 18 U.S.C. 3553(a), would therefore likely remain in place.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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