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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 PETITIONER

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QUESTION PRESENTED

The U.S. Sentencing Guidelines Manual directs a court to "use the Guidelines Manual in effect on the date that the defendant is sentenced" unless "the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution." Eight courts of appeals have held that the Ex Post Facto Clause is violated where retroactive application of the Sentencing Guidelines creates a significant risk of a higher sentence. In the decision below, however, the Seventh Circuit held that the Ex Post Facto Clause is never violated by retroactive application of the Sentencing Guidelines because the Guidelines are advisory, not mandatory.

The question presented is:

Does a sentencing court violate the Ex Post Facto Clause by using the U.S. Sentencing Guidelines in effect at the time of sentencing rather than the Guidelines in effect at the time of the offense, if the newer Guidelines create a significant risk that the defendant will receive a longer sentence?

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BRIEF FOR RESPONDENT

Petitioner Marvin Peugh respectfully asks this Court to reverse the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The judgment of the United States District Court for the Northern District of Illinois is unreported but reprinted at Pet. App. 14a-25a, and the oral ruling of the district court is reproduced at Pet. App. 28a. The Seventh Circuit's opinion and order, affirming the judgment of the district court, is reported at 675 F.3d 736 and reprinted at Pet. App. 1a-13a.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2012. Pet. App. 1a-13a. A timely petition for certiorari was filed on July 16, docketed on July 17, and granted on November 9, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND GUIDELINES INVOLVED

The Ex Post Facto Clause of the U.S. Constitution provides, "No . . . ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. The relevant provisions of the 1998 U.S. SENTENCING GUIDELINES MANUAL

(§§ 2F1.1, 3C1.1, and 5A) and the 2009 U.S. SENTENCING GUIDELINES MANUAL (§§ 1B1.11, 2B1.1, 3C1.1, 5A, and Appendix C, Vol. II, Amendments 617 and 653) are reproduced at Pet. App. 44a-68a.

INTRODUCTION

In *Garner v. Jones*, this Court held that the Ex Post Facto Clause forbids retroactive application of a law that "creates a significant risk of prolonging [the defendant's] incarceration." 529 U.S. 244, 251 (2000). The current U.S. Sentencing Guidelines pose exactly that risk. Even though district courts are no longer bound to sentence defendants within Guidelines ranges after *United States v. Booker*, 543 U.S. 220 (2005), the practical effect of the *Booker* remedy is to promote sentencing at or near the Guidelines range. Under *Booker* and its progeny, federal district courts must correctly calculate and consider Guidelines ranges, and must ensure that a justification for a variance is sufficiently compelling to support its degree. Appellate courts must in turn review the sentence for substantive reasonableness and may presume that within-Guidelines sentences are reasonable. Thus, setting aside cases in which the government sponsors downward departures or variances, roughly three-quarters of federal sentences fall within the advisory Guidelines ranges. Upward departures are rare, and when judges do deviate from Guidelines ranges, those deviations are typically modest. In other words, federal sentences converge upon Guidelines ranges. Thus, when the U.S. Sentencing Commission increases sentencing ranges, as it did in 2001 and 2003 for economic crimes,

retroactively applying the amended Guidelines creates a significant risk of increasing a defendant's sentence. Every court of appeals to reach the question has so held, save for the court below.

Mr. Peugh's sentencing is a case in point. The 1998 Guidelines in effect at the time of his offense called for a sentence of 37 to 46 months. But the retroactively applied 2009 Guidelines nearly doubled his Guidelines sentencing range to 70 to 87 months. The district court expressly declared that it would defer to the 2009 Guidelines and imposed a 70-month sentence. That sentence was at the very bottom of the 2009 Guidelines range, but 24 months greater than the *maximum* of the 1998 Guidelines sentencing range. That retroactive application of the 2009 Guidelines indisputably increased the risk that Mr. Peugh would receive increased punishment, and thus violated the Ex Post Facto Clause. The court of appeals erred in permitting the 2009 Guidelines to be applied retroactively to Mr. Peugh. Thus, the judgment below should be reversed.

STATEMENT OF THE CASE

A. Legal Background

Before the Sentencing Reform Act of 1984 ("SRA"), "the Federal Government employed in criminal cases a system of indeterminate sentencing." *Mistretta v. United States*, 488 U.S. 361, 363 (1989). Congress established broad ranges of potential penalties for federal crimes and "delegated almost unfettered discretion to the sentencing judge to determine what the sentence should be within the

customarily wide range so selected." *Id.* at 364. But indeterminate sentencing often generated arbitrary punishment. "Under this system, each federal district judge was free to implement his or her individual sentencing philosophy, and therefore the sentence imposed in a particular case often depended heavily on the spin of the wheel that determined the judge to whom the case was assigned." *Pepper v. United States*, 131 S. Ct. 1229, 1257 (2011) (Alito, J., concurring in part, concurring in the judgment in part, and dissenting in part).

After a century of experience with indeterminate sentencing, Congress determined that "[t]he shameful disparity in criminal sentences is a major flaw in the existing criminal justice system," S. Rep. No. 98–223, p. 62 (1983), and passed the SRA to reshape federal sentencing. The SRA established the Sentencing Commission "as an independent commission in the judicial branch." 28 U.S.C. § 991(a). Congress directed the Commission to, among other things, "provide certainty and fairness in meeting the purposes of sentencing, avoiding unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar criminal conduct while maintaining sufficient flexibility to permit individualized sentences when warranted by mitigating or aggravating factors." *Id.* § 991(b)(1)(B).

To achieve greater uniformity in sentencing, Congress charged the Commission with developing Sentencing Guidelines that would be applied across the federal courts. "More particularly, Congress directed the Commission to develop a system of 'sentencing ranges' applicable 'for each category of

offense involving each category of defendant.'" *Mistretta*, 488 U.S. at 374 (quoting 28 U.S.C. § 994(b)). Congress required the Commission to formulate Guidelines that were consistent with Title 18. And it specified that any term of imprisonment authorized by the Guidelines "shall not exceed the minimum of that range by more than the greater of 25 percent or 6 months, except that, if the minimum term of the range is 30 years or more, the maximum may be life imprisonment." 28 U.S.C. § 994(b)(2). Congress further prescribed the offense and offender characteristics that the Commission should consider in promulgating guidelines. *Id.* § 994(c)–(n). This Court held in *Mistretta* that the SRA was a lawful delegation of Congress's lawmaking power, and that the mandatory Guidelines had the force and effect of law. 488 U.S. at 391; *see also Stinson v. United States*, 508 U.S. 36, 45 (1993) (noting that Guidelines, which are promulgated by notice-and-comment informal rulemaking, 28 U.S.C. § 994(x), "are the equivalent of legislative rules adopted by federal agencies").

A central feature of the Act as originally conceived was that the Guidelines would bind district courts in imposing individual sentences. Subsection 3553(a) of Title 18 requires the district court to consider the Guidelines sentencing ranges when imposing a sentence. *Id.* § 3553(a)(4). Subsection 3553(b)(1) further directed that the court "shall impose a sentence of the kind, and within the range" established by the Guidelines, subject to departures when the Commission failed adequately to take into account a pertinent aggravating or mitigating circumstance. *Id.* § 3553(b)(1) (2006). The district court must provide a specific statement of reasons

explaining any departure from the guidelines. *Id.* § 3553(c)(2). And the statute, as amended, specified that appellate courts should review district courts' application of the Guidelines deferentially, while reviewing any grounds for departure *de novo*. *See id.* § 3742(e) (2006).

In *Booker*, this Court ruled that the SRA ran afoul of the Sixth Amendment because the Guidelines imposed binding maximum sentences (and thus increased the sentence that could be imposed) based on facts that were tried to the sentencing judge and not the jury, subject only to departures that were rarely applied. 543 U.S. at 230–34 (Stevens, J., merits majority opinion). To remedy the constitutional defect, this Court severed two provisions: § 3553(b)(1), which made the Guidelines ranges mandatory, and § 3742(e), which directed appellate courts to review departures from the Guidelines *de novo*. *Id.* at 245 (Breyer, J., remedial majority opinion); *see also Pepper*, 131 S. Ct. at 1243–45 (severing 18 U.S.C. § 3742(g), which prohibited resentencing outside the Guidelines range, as inconsistent with the Sixth Amendment).

Although the Guidelines are advisory in that they no longer fix binding limits on an individual's sentence, they still carry prescriptive force. The Guidelines dictate the methodology and necessary factual findings for calculating sentencing ranges. That is a mandatory first step in federal sentencing. District courts, as well as probation officers in formulating presentence reports, must first follow this methodology and make these findings. Under the advisory Guidelines, a sentencing judge must "(1) find[] the applicable offense level and offender

category and then (2) consult[] a table that lists proportionate sentencing ranges . . . at the intersections of rows (marking offense levels) and columns (marking offender categories)." *Dorsey v. United States*, 132 S. Ct. 2321, 2326–27 (2012). "The Guidelines, after telling the judge how to determine the applicable offense level and offender category, instruct the judge to apply the intersection's range in an ordinary case, but they leave the judge free to depart from that range in an unusual case." *Id.* at 2327.

The Guidelines range is first calculated by the probation officer in the presentence report. "The presentence report must" identify applicable Guidelines, calculate offense levels and criminal history categories, "state the resulting sentencing range and kinds of sentences available," identify appropriate sentencing factors, and identify any basis for departing from the sentencing range. FED. R. CRIM. P. 32(d)(1). The parties may object to the "applicable sentencing range" in the presentence report, and the district court must rule on any unresolved objections at sentencing. FED. R. CRIM. P. 32(f) & (i). A district court must give controlling weight to the Commission's official commentary in interpreting and applying the Guidelines. *Stinson*, 508 U.S. at 38.

This obligatory first phase of sentencing results in a substantive standard: the Guidelines sentencing range. Even though the Court is not bound to sentence within the range, the district court must consider that range in fixing a sentence. In defining the seven mandatory considerations in any federal sentencing, the Act expressly declares that "[t]he

court, in determining the particular sentence to be imposed, *shall consider* … the kinds of sentence and the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines … issued by the Sentencing Commission," including any congressional amendment. 18 U.S.C. § 3553(a)(4)(A)(i) (emphasis added). "The district courts, while not bound to apply the Guidelines, *must consult* those Guidelines and take them into account when sentencing," and "[t]he courts of appeals review sentencing decisions for unreasonableness." *Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion) (emphasis added). This Court severed the constitutionally offensive provisions, rather than striking down the Act or changing its system of judge-based sentencing, because the severed Act continued to serve Congress's fundamental purpose of promoting uniformity. "These features of the remaining system, while not the system Congress enacted, nonetheless continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Id.* at 264–65.

The SRA directs that the district court shall consider the Guidelines "in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii). This case raises the question of whether the Ex Post Facto Clause requires courts to apply the Guidelines in effect on the date of the offense of conviction, when the Guidelines in effect at the time of sentencing call for a higher sentence. *See also* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b) (2011) (implementing section 3553(a)(4)(A)(ii) with the

proviso that "[i]f the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the Ex Post Facto Clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.").

B. Facts And Proceedings Below

1. District Court

In 2010, Petitioner Marvin Peugh was convicted of five counts of bank fraud under 18 U.S.C. § 1344 for acts performed between 1999 and 2000 in connection with loans received for farming businesses Mr. Peugh ran with his cousin.[1] Pet. App. 2a, 3a, 5a. Mr. Peugh is currently serving a 70-month prison term for these offenses. *See id.* at 6a. Mr. Peugh's cousin, Steven Hollewell, received a 12-month sentence as a result of a negotiated plea of guilty to one count; the other counts were dropped in exchange for Mr. Hollewell's agreement to testify for the United States. *Id.* at 6a.

The dispute in this case is whether the district court should have applied the 1998 or the 2009 Sentencing Guidelines. The former were in effect at the time of the offenses; the latter were in effect at

[1] One count pertained to allegedly fraudulent loan activity and four counts pertained to an alleged check-kiting scheme. Mr. Peugh was acquitted on fraudulent-loan counts 1 and 2, convicted of fraudulent-loan count 3, acquitted on check-kiting counts 6 and 7, and convicted of check-kiting counts 4, 5, 8 and 9. Pet. App. 3a, 5a.

the time of sentencing. As set forth in the presentence report, the applicable 1998 Guidelines for Mr. Peugh's fraud offenses set a base offense level of 6, and then added 13 levels for losses over $2.5 million.[2] Sealed J.A. 148; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2F1.1 (Nov. 1, 1998) (Pet. App. 44a–46a). Mr. Peugh's total offense level was thus 19. Sealed J.A. 148. Because Mr. Peugh was a first-time offender, he was assigned to the lowest criminal-history category, Category I. *Id.* at 126. The presentence report accordingly calculated Mr. Peugh's 1998 Guidelines sentencing range as 30 to 37 months. *Id.* at 148; U.S. SENTENCING GUIDELINES MANUAL § 5A (Nov. 1, 1998) (Pet. App. 48a).

The Government acknowledged these calculations, but argued that, if the 1998 Guidelines applied, there should be an additional two-level enhancement for obstruction of justice, bringing the total offense level to 21. Brief for the United States, Plaintiff-Appellee, at 11, *United States v. Peugh*, No. 10-2184 (7th Cir. July 5, 2011); *see* U.S. SENTENCING GUIDELINES MANUAL § 3C1.1 (Nov. 1, 1998) (Pet. App. 47a). Thus, according to the Government, Mr. Peugh's total offense level under the 1988 Guidelines would have been 21, with a concomitant sentencing range of 37 to 46 months. *Id.* § 5A (Pet. App. 48a).

After Mr. Peugh's offenses of conviction were complete in 2000, the Sentencing Commission amended the bank-fraud guidelines in significant

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[2] The fraud offenses were grouped together for purposes of Guidelines calculations because they involved the same course of conduct. Sealed J.A. 123.

respects. First, Amendment 617 in 2001 deleted the fraud-and-deceit Guideline § 2F1.1 and consolidated it with the general economic-crimes Guideline § 2B1.1. Amendment 617 to the Sentencing Guidelines, effective Nov. 1, 2001 (Pet. App. 64a–67a.). That same amendment raised the enhancement for losses of at least $2.5 million to 18 levels, an increase of 5 levels from the 1998 Guidelines. *Id.* Second, Amendment 653 in 2003 raised the base offense level for Mr. Peugh's offenses from 6 to 7. Amendment 653 to the Sentencing Guidelines, effective Nov. 1, 2003 (Pet. App. 68a).

Those amendments were still effective in the 2009 Guidelines. Thus, under those Guidelines, Mr. Peugh had a base offense level of 7 and an enhancement of 18 levels for a loss exceeding $2.5 million. Sealed J.A. 123–24; U.S. SENTENCING GUIDELINES MANUAL § 2B1.1(a)(1), 2B1.1(b)(1)(J) (Nov. 1, 2009) (Pet. App. 53a (mislabeled there as 2B1.1(c)(1), 2B1.1(d)(1)(J)). With a 2-level enhancement for obstruction of justice, Mr. Peugh's total offense level was 27. *Id.* § 3C1.1 (Pet. App. 59a). That offense level yielded a sentencing range of 70 to 87 months, which is 33 to 41 months higher than the 1998 Guidelines range. U.S. SENTENCING GUIDELINES MANUAL § 5A (Nov. 1, 2009) (Pet. App. 62a).

At sentencing, Mr. Peugh challenged the court's use of the 2009 Guidelines rather than the 1998 Guidelines in effect at the time of his offenses, [3]

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[3] The court of appeals referred throughout its opinion to the "1999 Guidelines." *See, e.g.*, Pet. App. 5a, 8a; *see also* Opp. 3 n.1 (referring to "the 1999 version of the Guidelines," but noting

(continued...)

asserting that application of the newer Guidelines violated the Ex Post Facto Clause because they resulted in a longer sentence not authorized at the time of the offense. *Id.* at 5a; *see also* Defendant's Objections to Presentence Investigation Report 1–2, *United States v. Peugh*, No. 08-CR-50014 (N.D. Ill. Apr. 2, 2010). The district court rejected Mr. Peugh's argument on the authority of *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006), which held that advisory Guidelines do not implicate *ex post facto* concerns. Pet. App. 28a ("The court is bound by the holding in *Demaree*, and, accordingly, the court overrules the defendant's objection to use of the 2009 guidelines manual."). Accordingly, the district court applied the 2009 Guidelines range of 70 to 87 months, but imposed the lowest sentence within that range

(...continued)

that "[i]n all respects relevant to this case" the 1998 and 1999 versions were identical). But the Guidelines in effect at the time of the offenses in 1999 and 2000 were actually published in November 1, 1998, so we refer to them as the "1998 Guidelines." According to the Sentencing Commission's Interim Director, "[b]ecause no new guideline amendments were promulgated in the 1999 amendment cycle, the Commission does not plan to publish a 1999 edition of the *Guidelines Manual* at this time." Letter from Timothy B. McGrath, Interim Staff Director, U.S. Sentencing Comm'n (Oct. 12, 1999), *reprinted in* U.S. SENTENCING GUIDELINES MANUAL (1999). That letter advised people to continue to use the 1998 edition until further notice. *Id.* The Presentence Report in this case identified the 1998 Guidelines as the ones in effect at the time of Mr. Peugh's offense. Sealed J.A. 148.

(70 months) on Mr. Peugh. Pet. App. 2a; Pet. App. 17a; J.A. 100-101.[4]

In sentencing Mr. Peugh, the district court made plain that it was hewing to the 2009 Guidelines, rather than following "its own penal philosophy," even though it acknowledged the freedom to do the latter. The district court noted the Seventh Circuit's direction to a sentencing judge to "think long and hard before substituting his personal penal philosophy for that of the Commission," in light of the Commission's experience and expertise. J.A 94. Section 2B1.1, the court noted, evinces a policy of increasing punishments based on increasing loss amounts, and the court was "not convinced that this general policy should be disregarded in this particular case." *Id.*

Because the district court did not disagree with that policy, it explicitly stated that it would "*give* the amount of loss calculations and *the resulting advisory guidelines* range the appropriate amount of *deference* in this case." J.A. 96 (emphases added). The district court expressed no opinion on the sentence it would have imposed had it applied the 1998 Guidelines.

2. Court Of Appeals

On appeal, Mr. Peugh again argued that his sentence violated the Ex Post Facto Clause, because the 2009 Guidelines called for a sentencing range

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[4] The presentence report did not find any grounds for upward departure, Sealed J.A. 148, and the Government did not seek one.

that was 33 to 41 months longer than the sentence that would have applied under the 1998 Guidelines. Pet. App. 5a, 8a–9a. Retroactive application of the 2009 Guidelines undeniably resulted in a harsher sentence: Mr. Peugh's 70-month sentence was at the very bottom of the 2009 Guidelines range, but was 24 months longer than the top of the 1998 Guidelines range. *See* Brief of Marvin Peugh, Defendant-Appellant at 30, *United States v. Peugh*, No. 10-2184 (7th Cir. April 21, 2011)[5]; *compare* Pet. App. 47a–51a and Pet. App. 59a–63a. The court of appeals, like the district court, relied on *Demaree* in rejecting Peugh's argument. Pet. App. 8a.

SUMMARY OF ARGUMENT

The Ex Post Facto Clause forbids applying retroactively laws that would increase, or create a significant risk of increasing, the punishment for an offense beyond the punishment annexed to the crime at the time of its commission. The Ex Post Facto Clause applies even where the decisionmaker exercises discretion in the imposition or administration of punishment. The question is determined by the practical operation and objective effect of the new law, in the context of the sentencing system as a whole.

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[5] The Seventh Circuit observed that as a result of application of the 2009 Guidelines, "Peugh's advisory range jumped by more than 20 months," Pet. App. 8a (*Peugh*, 675 F.3d at 741), but more precisely it increased the upper limit of the range by 41 months, resulting in a sentence 24 months above the top of the 1998 range.

Retroactive application of harsher Guidelines violates the Ex Post Facto Clause. The Guidelines are advisory because, in *Booker*, this Court excised the statutory provisions that required the district court to sentence within the Guidelines sentencing range, absent a basis for departure, and that subjected departures to *de novo* review. But the Guidelines retain prescriptive force. District courts must follow the methodology set forth in the Guidelines to calculate the Guidelines sentencing range, and then must consult and seriously consider that Guidelines range in determining the appropriate sentence. The district court must begin with the Guideline sentencing range as a starting point, and must consider it as a benchmark throughout the sentencing process. Furthermore, the district court must marshal sufficiently compelling reasons to justify deviations from the Guidelines sentencing range, with major deviations requiring greater justification than minor ones. Courts of appeals review sentences for substantive as well as procedural reasonableness, and may apply a presumption of reasonableness to any sentence that is within the Guidelines sentencing range.

The practical effect of the post-*Booker* Guidelines is that actual sentences, in the main, tend to be within or very near the Guidelines sentencing range. The Guidelines sentencing range in most cases serves as an anchor for the judge's determination of an appropriate term of imprisonment. Moreover, many judges believe in the goal of eliminating sentencing disparity and in following the Guidelines as a means of achieving that end. Appellate review of the substantive reasonableness of the sentence, and the presumption of reasonableness that appellate courts

may apply to within-Guidelines sentences, further give judges incentives to impose sentences within the Guidelines range.

Indeed, empirical data confirm the gravitational pull of the Guidelines on judges' sentences. Approximately three-quarters of sentences imposed after *Booker* are within the Guidelines range (or below that range because of a government-sponsored departure under the Guidelines). When courts do deviate from the Guidelines, the deviation is often minimal. Appeals of sentences for substantive reasonableness are common, and reversals of within-Guidelines cases for unreasonableness are rare. The Guidelines exert similar effects on plea bargains and sentencing agreements between prosecutors in defendants. Thus, the advisory Guidelines in practice cause judges to impose the vast majority of sentences within or near Guidelines ranges. Accordingly, retroactive application of harsher post-offense Guidelines creates a significant risk that the defendant will receive greater punishment than if he or she had been sentenced under more lenient Guidelines in effect at the time of offense.

The advisory Guidelines had just that effect on Mr. Peugh. Because of intervening Guidelines amendments that increased sentence ranges based on the amount of economic loss, the 2009 Sentencing Guidelines nearly doubled the sentencing range applicable to Mr. Peugh's offense vis-à-vis the 1998 Sentencing Guidelines in force at the time of his offense. The district court consciously and expressly followed the 2009 Sentencing Guidelines, accepting the policies embedded therein. The court chose a sentence (70 months) at the very bottom of the 2009

range, but that sentence would have been 24 months greater than the *maximum* allowed under the 1998 Guidelines. This is not just a significant risk of increased punishment. It is inconceivable that the same district court applying the 1998 Guidelines would have imposed a 70-month sentence, especially when there are no grounds for upward departure. The retroactive application of the Sentencing Guidelines as applied to Mr. Peugh violated the Ex Post Facto Clause.

ARGUMENT

A. *The Ex Post Facto Clause Forbids Laws That Create A Significant Risk Of Increased Punishment.*

Article 9 of the Constitution provides that "[n]o ex post facto Law shall be passed." U.S. CONST. art. I, § 9, cl. 3. This Court has identified four kinds of Ex Post Facto violations:

> 1st. Every law that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2nd. Every law that aggravates a crime, or makes it greater than it was, when committed. 3rd. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the

> time of the commission of the offence, in order to convict the offender.

Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798); *Collins v. Youngblood*, 497 U.S. 37, 41–42 (1990) (treating *Calder* as accurately stating the scope of the Ex Post Facto Clause). The third *Calder* category at issue here – the ban on increasing punishment for a crime after it was committed – is "[t]he heart of the Ex Post Facto Clause." *Johnson v. United States*, 529 U.S. 694, 699 (2000).

"The *Ex Post Facto* Clause raises to the constitutional level one of the most basic presumptions of our law: legislation, especially of the criminal sort, is not to be applied retroactively." *Id.* at 701. "[T]he nature or amount of the punishment imposed for [a crime's] commission, should not be altered by legislative enactment, after the fact, to the disadvantage of the accused." *Beazell v. Ohio*, 269 U.S. 167, 170 (1925). The Clause "assure[s] that legislative Acts give fair warning of their effect and permit[s] individuals to rely on their meaning until explicitly changed." *Weaver v. Graham*, 450 U.S. 24, 28–29 (1981). It "also restricts governmental power by restraining arbitrary and potentially vindictive legislation." *Id.* at 29. In addition, the Ex Post Facto Clause serves "a fundamental fairness interest, even apart from any claim of reliance or notice, in having the government abide by the rules of law it establishes to govern the circumstances under which it can deprive a person of his or her liberty or life." *Carmell v. Texas*, 529 U.S. 513, 533 (2000). Regulations, like statutes, are laws subject to the strictures of the Ex Post Facto Clause. *See Garner*,

529 U.S. at 247 (analyzing whether state parole board regulation violated the Ex Post Facto Clause).

In applying the Ex Post Facto Clause, this Court looks not to "the subjective motivation" of the lawmaker, but rather to whether "objectively" the change in law "had the effect of lengthening petitioner's period of incarceration." *Lynce v. Mathis*, 519 U.S. 433, 442–43 (1997); *Weaver*, 450 U.S. at 33. The Ex Post Facto Clause does not require showing an actual or necessary effect. Rather, this Court "must determine whether [the amendment] produces a sufficient risk of increasing the measure of punishment attached to the covered crimes." *California Dep't of Corrections v. Morales*, 514 U.S. 499, 509 (1995) (finding that decreasing the frequency of parole hearings in cases unlikely to qualify for parole did not violate the Ex Post Facto Clause because the risk of enhanced confinement was too speculative and attenuated). That question is necessarily "a matter of 'degree'," and this Court has never devised a "single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition." *Id.* (quoting *Beazell*, 269 U.S. at 171).

In *Garner*, another case involving changes to parole regulations, this Court further defined the *Morales* significant-risk standard. The *Garner* Court emphasized that "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." 529 U.S. at 253. The question is whether the retroactively applied rule "creates a significant risk of prolonging [the defendant's] incarceration," viewed in the context of the system as a whole. *Id.* at 251–52.

The assessment of risk depends upon whether the "practical implementation" of the rule may influence a decisionmaker's "exercis[e of] discretion" so as to lengthen incarceration. *Id.* at 255. The defendant must show that "as applied to his own sentence the law created a significant risk of increasing his punishment," drawing on evidence of "the general operation" of the system as a whole. *Id.*

B. *Amended Sentencing Guidelines That Increase The Applicable Sentencing Range Create A Significant Risk Of Increased Punishment.*

1. Advisory Guidelines Promote Sentencing Within Or Near Guidelines Ranges.

Even under the post-*Booker* "advisory" Guidelines regime, increases in Guideline sentencing ranges create a significant risk of increased incarceration. Retroactive application thus violates the Ex Post Facto Clause.

While the Guidelines no longer impose binding sentencing ranges, they continue to have the force and effect of law, albeit in a more limited fashion. As this Court has stated, "a district court should begin *all* sentencing proceedings by *correctly* calculating the applicable Guidelines range." *Gall v. United States*, 552 U.S. 38, 49 (2007) (emphasis added). The Guidelines define a mandatory methodology for generating a substantive standard (the Guidelines

sentencing range) for use in sentencing.[6] Errors in calculating the Guidelines are a basis for reversal on appeal. 18 U.S.C. § 3742(f); *Gall*, 552 U.S. at 51. Indeed, appellate courts commonly reverse sentences on that basis.[7]

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[6] The Guidelines, which "are the equivalent of legislative rules adopted by federal agencies," *Stinson*, 508 U.S. at 45, are in this respect analogous to regulations whereby one federal agency defines methods that others follow (even though the district court need not ultimately adhere to the Guidelines sentencing range). *See, e.g., Dep't of Transp. v. Pub. Citizen,* 541 U.S. 752, 757 (2004) ("The Council of Environmental Quality (CEQ), established by NEPA with authority to issue regulations interpreting it, has promulgated regulations to guide federal agencies in determining what actions are subject to that statutory requirement."); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 354 (1989) (requiring that federal agencies follow CEQ regulations). Furthermore, this Court has continued to find that the Commission's policy statements unaffected by *Booker* may be treated as mandatory. *Dillon v. United States*, 130 S. Ct. 2683, 2692 (2010) (after a decrease in the length of the applicable Guidelines, a court did not err in following the Commission's policy barring a reduction in sentence to a level lower than the new base amount).

[7] *See, e.g.*, *United States v. Love*, 680 F.3d 994, 998 (7th Cir. 2012) ("Even though Love received a sentence that was significantly below the guidelines range, the range on which his sentence was based was erroneously calculated. Such an error is not harmless because it is impossible to know whether the district court would have imposed the same sentence had it not committed this procedural error."); *United States v. Barrientos*, 670 F.3d 870, 873 (8th Cir. 2012); *United States v. Evans-Martinez*, 611 F.3d 635, 642 (9th Cir. 2010) ("Because the district court committed procedural error when it used 120 months' imprisonment as the Guidelines sentence for all three counts, we vacate and remand the sentences for sexual abuse of a child (Count 1) and witness tampering (Count 3) to allow the district court to impose sentences based on the correct

(continued...)

Once the district court has performed the mandatory calculation of the Guidelines sentencing range, "[t]he court, in determining the particular sentence to be imposed, *shall consider* … the kinds of sentence and the sentencing range established for … the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines … issued by the Sentencing Commission," including any congressional amendments. 18 U.S.C. § 3553(a)(4)(A)(i) (emphasis added). "The district courts, while not bound to apply the Guidelines, *must consult* those Guidelines and take them into account when sentencing." *Booker*, 543 U.S. at 264 (Breyer, J., remedial majority opinion) (emphasis added).

Accordingly, "[a]s a matter of administration and to secure nationwide consistency, the Guidelines should be the starting point and the initial benchmark." *Gall*, 552 U.S. at 49. "[D]istrict courts must begin their analysis with the Guidelines and remain cognizant of them throughout the sentencing process." *Id.* at 50 n.6. The judge must make an individualized assessment of the proper sentence considering all the § 3553(a) factors, and reasoned discretionary decisions to sentence outside the Guidelines range contribute to the "continuous evolution" of the Guidelines. *Rita v. United States*, 551 U.S. 338, 350 (2007). But if the district judge "decides that an outside-Guidelines sentence is warranted, he must consider the extent of the deviation and ensure that the justification is

(...continued)

Guidelines sentencing range of 30-37 months' imprisonment."), *cert. denied*, 131 S. Ct. 956 (2011).

sufficiently compelling to support the degree of the variance." *Gall*, 552 U.S. at 50. "[A] major departure should be supported by a more significant justification than a minor one." *Id.; see also id.* at 46 ("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").

In every case, then, the district court must seriously consider the Guidelines sentencing range, justify any deviation, and offer even more compelling justifications for major deviations. These requirements cause actual sentences, in the main, to converge upon the Guidelines ranges. Indeed, the *Booker* remedy sought to maintain this general convergence of sentences. Even if the scheme Congress enacted could not survive, this Court observed, the remediated statute will "continue to move sentencing in Congress' preferred direction, helping to avoid excessive sentencing disparities while maintaining flexibility sufficient to individualize sentences where necessary." *Booker*, 543 U.S. at 264–65 (Breyer, J., remedial majority opinion); *see also Kimbrough v. United States*, 552 U.S. 85, 107–08 (2007).

"Practically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences that judges impose." *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008); *see also* Birte Englich et al., *Playing Dice With Criminal Sentences: The Influence Of Irrelevant Anchors On Experts' Judicial Decision Making*, 32 PERSONALITY & SOC.

PSYCHOL. BULL. 188, 197 (2006) (confirming that "irrelevant anchor values that were obviously determined at random may influence sentencing decisions of legal professionals"). Moreover, many district courts still choose to sentence within the advisory Guidelines ranges because they believe in the policy of eliminating unwarranted sentencing disparities. *See* U.S. SENTENCING COMM'N, RESULTS OF SURVEY OF UNITED STATES DISTRICT JUDGES JANUARY 2010 THROUGH MARCH 2010 tbl.19 (2010) ("2010 JUDGES' SURVEY") (reporting that, when asked which system "best achieves the purposes of sentencing," 75% of district court judges favored the current advisory guidelines system, 8% favored no guidelines, 3% favored the pre-*Booker* mandatory Guidelines, and 14% favored mandatory guidelines with broader ranges, jury factfinding, and fewer mandatory minimums). These judges may be chary of relying on their own sentencing instincts, except in unusual circumstances. They may recognize that the Commission "has the capacity courts lack to base its determinations on empirical data and national experience, guided by a professional staff with appropriate expertise." *Kimbrough*, 552 U.S. at 109. Courts realize that "even though the Guidelines are advisory rather than mandatory," ordinarily "they are … the product of careful study based on extensive empirical evidence derived from the review of thousands of individual sentencing decisions." *Gall*, 552 U.S. at 46.

Still other courts, even if not disposed to favor Guidelines-based sentencing, respect that Congress has given that approach its imprimatur, and often promoted its sentencing policies through directives to the Commission to reflect them in the Guidelines.

See 28 U.S.C § 994(c)–(n). As the former chair of the Commission recently put it, the "guidelines have become accepted as part of the 'culture' of the federal criminal justice system" and continue to influence sentencing decisions. William K. Sessions III, *At The Crossroads Of The Three Branches: The U.S. Sentencing Commission's Attempts To Achieve Sentencing Reform In The Midst Of Inter-Branch Power Struggles*, 26 J.L. & POL. 305, 329 (2011).

A second post-*Booker* feature that promotes sentences within or near Guidelines ranges is the combination of substantive appellate review and deference to within-Guideline sentences. Appellate courts must review sentences for substantive reasonableness. *Booker*, 543 U.S. at 261 (Breyer, J., remedial majority opinion). And they "may apply a presumption of reasonableness to a district court sentence that reflects proper application of the Sentencing Guidelines." *Rita*, 551 U.S. at 347. This presumption, as a practical matter, encourages judges to sentence within the Guidelines range: "[J]udges are more likely to sentence within the Guidelines in order to avoid the increased scrutiny that is likely to result from imposing a sentence outside the Guidelines." *Turner*, 548 F.3d at 1099. Not only is a district court more likely to sentence in the Guidelines range, but such sentences are more likely to be upheld on appeal. An appellate court will reverse a sentence based on a correctly applied Guidelines range only when it is "definite[ly] and firm[ly] convi[nced] that the district court committed a clear error in judgment" and chose a sentence "outside the range of reasonable sentences" on the

facts. [8] *United States v. Wetherald*, 636 F.3d 1315, 1322 (11th Cir. 2010) (internal quotation marks omitted).

True to its purpose of promoting uniformity in sentencing, the post-*Booker* advisory Guidelines system operates "to cabin the potential sentence" that a judge may be willing to impose, absent special circumstances. *Wetherald*, 636 F.3d at 1321. Sentences under such a system tend to fall either within the Guidelines or not far from them. Guidelines amendments that increase sentencing ranges are thus likely to increase actual sentences; that is why the Commission and Congress raise ranges in the first place. Applying those increases retroactively creates a significant risk of increased

[8] The judges who dissented from the adoption of substantive-reasonableness review in *Booker* and *Rita* predicted that it would cause sentences to continue to converge upon Guidelines ranges. *See Booker*, 543 U.S. at 313 (Scalia, J., dissenting in part) (querying whether "appellate review for 'unreasonableness' [will] preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges"); *Rita*, 551 U.S. at 373 n.3 (Scalia, J., concurring in part and concurring in the judgment in part) ("The only way to assure district courts that they can deviate from the advisory Guidelines … is to prohibit appellate courts from reviewing the substantive sentencing choices made by district courts."); *id.* at 391 (Souter, J., dissenting) ("Without a powerful reason to risk reversal on the sentence, a district judge faced with evidence supporting a high subrange Guidelines sentence will do the appropriate factfinding in disparagement of the jury right and will sentence within the high subrange. . . . [A] trial judge will find it far easier to make the appropriate findings and sentence within the appropriate Guideline, than to go through the unorthodox factfinding necessary to justify a sentence outside the Guidelines range.").

punishment. *Turner*, 548 F.3d at 1099–1100. The Ex Post Facto Clause thus forbids applying them retroactively. *Garner*, 529 U.S. at 251.

2. Empirical Evidence Of How The Advisory Guidelines Operate In Practice Confirms The Risk Of Increased Punishment.

Where a system for administering punishment involves discretion, "evidence drawn from the rule's practical implementation" may demonstrate a significant risk of greater incarceration, and thus a violation of the Ex Post Facto Clause. *Garner*, 529 U.S. at 255. Here, experience with the advisory Guidelines system post-*Booker* clearly demonstrates that sentences converge upon the Guidelines sentencing ranges. Therefore, when Guidelines amendments increase the Guidelines sentencing range, they increase the risk of heavier punishments.

As this Court predicted, "some departures from uniformity were a necessary cost of the remedy" that converted mandatory Guidelines into advisory ones. *Kimbrough*, 552 U.S. at 107–08; *see also Booker*, 543 U.S. at 263–64 (Breyer, J., remedial majority opinion). In every year post-*Booker*, however, an overwhelming majority of sentences have either fallen within Guidelines sentencing ranges, or fallen below the Guidelines because of Government-sponsored departures sanctioned by the Guidelines. *See* UNITED STATES SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS, FISCAL YEAR 2011, fig. G ("2011 SOURCEBOOK"). Indeed, in 2011, at least 76 percent of defendants were sentenced within the Guidelines range (54.5%) or below the range only

because of a Government-sponsored substantial-assistance or fast-track downward departure (21.9%). *Id.* tbl. N.[9] Unsurprisingly, 78% of federal district judges surveyed agree that the Guidelines have reduced unwarranted sentencing disparities. 2010 JUDGES' SURVEY, *supra*, tbl. 17.

The principal change since *Booker* has been the increase in sentences below the range without Government sponsorship. Even that increase, however, has been modest. By fiscal year 2011, the rate of non-government-sponsored downward departures and variances had increased only to 17.4%, despite controversy over the severity of some Guidelines. Amy Baron-Evans & Kate Stith, Booker *Rules*, 160 U. PA. L. REV. 1631, 1677 (2012) (analyzing Commission data). "When judges do depart or vary, the median decrease remains, as it was before *Booker*, exceedingly modest—about twelve months." *Id.*

Moreover, average sentences (which were below Guidelines ranges even before *Booker*, presumably because of Government-sponsored departures) have barely decreased since *Booker*. They declined from 46 months in 2005 to 43 months in 2011, primarily because of changes in crack cocaine penalties and immigration prosecutions. Baron-Evans & Stith, *supra*, at 1677–78. "Average sentence length has remained the same or slightly increased for all other important categories of offenses, except that it has slightly decreased for marijuana offenses, and has substantially increased for fraud offenses and child

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[9] The Government sponsored other downward departures or variances in an additional 4.4% of cases. *Id.*

pornography offenses." *Id.* at 1678 (footnotes omitted); *see* U.S. SENTENCING COMM'N, THIRD QUARTER FY12 QUARTERLY SENTENCING UPDATE, fig. C (Nov. 1, 2012). Sentencing disparities are considerably lower than in pre-Guidelines days.[10] *Booker* and its progeny may have given district court judges greater power to sentence outside the guidelines, but judges have been "remarkably restrained in exercising their discretion." *Id.* at 1681.

Most importantly for Ex Post Facto Clause analysis, sentencing *above* the Guidelines range remains exceedingly rare. Overall, only 1.8% of all defendants sentenced in 2011, and only 2.3% of fraud defendants, were punished more harshly than the Guidelines suggest. 2011 SOURCEBOOK, *supra*, tbls. N & 27. Those departures did not exceed the Guidelines maximums by much: in 2011, the median increase above the Guidelines maximum was 12 months for all offenses and fraud offenses. *Id.* tbl. 32, 32A, 32B, 32C. Thus, absent an amendment to the applicable Guidelines, a defendant is highly likely to receive a sentence at or below the sentencing range provided by the Guidelines in effect at the time of the offense. He would rarely receive a sentence 24 months above that range, as Mr. Peugh did here. A Guidelines amendment that increases the sentencing

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[10] *Compare* James M. Anderson et al., *Measuring Interjudge Sentencing Disparity: Before And After The Federal Sentencing Guidelines*, 42 J.L. & ECON. 271, 271 (1999) ("the expected difference between two typical judges in the average sentence length was about 17 percent (or 4.9 months) in 1986–87 prior to the Guidelines") *with* Ryan W. Scott, *Inter-Judge Sentencing Disparity After Booker: A First Look*, 63 STAN. L. REV. 1, 10 (2010) (noting variance post-*Gall* of 8 to 13%).

range is highly likely to increase the defendant's ultimate punishment.

Finally, the appellate substantive reasonableness review mandated by *Booker* and *Rita* continues to exert pressure on district courts to sentence within the Guidelines range. Defendants appeal the reasonableness of a sentence frequently, in more than 40% of sentencing appeals. UNITED STATES SENTENCING COMM'N, 2011 ANNUAL REPORT, at 42 (2012). Because within-range sentences may be presumed reasonable, *Rita*, 551 U.S. at 347, and greater departures may face greater appellate scrutiny, *Gall*, 552 U.S. at 50, district judges have incentives to play it safe by sentencing within or close to Guidelines ranges. A database of post-*Gall* decisions confirms this deterrent effect: of 38 substantive-reasonableness reversals, only 5 were within the Guidelines range, with 23 falling below and 10 above the range. Sentencing Resource Counsel of Federal Public and Community Defenders, *Appellate Decisions After* Gall (Sept. 27, 2012), *available at* http://tinyurl.com/app-ct-decisions-list. In other words, even though the majority of sentences handed down by the district courts are within the Guidelines range, the available evidence indicates that only a small minority of substantive reversals identified were of sentences within the Guidelines range. This mismatch sends a message to the district court judge: he or she can minimize the chances of reversal by sentencing within the Guidelines range.

3. Advisory Guidelines Also Increase The Risk Of Increased Punishment By Influencing Plea Bargains.

Guidelines amendments that generate harsher Guidelines sentencing ranges increase the risk of increased punishment by a second mechanism: namely, their effect on plea bargains. Just as they do in sentencing, Guidelines sentencing ranges function as mental anchors that frame plea bargaining "by establishing clear baselines for likely sentences after trial." Stephanos Bibas, *Plea Bargaining Outside The Shadow Of Trial*, 117 HARV. L. REV. 2463, 2533 (2004). The retroactive application of harsher Guidelines affects not only the decision to plead guilty, but also the offenses and conduct to which the defendant will admit and the sentence that the prosecutor will recommend.

Here, application of the 1998 Guidelines could have affected the Government's strategy with regard to plea offers. It could also have influenced Mr. Peugh's decision to plead not guilty to all counts, nearly half of which eventually resulted in acquittals, even in the face of his co-defendant Mr. Hollewell's decision to plead guilty to one count and escape prosecution on the remaining counts. Pet. App. at 3a, 5a, 6a. Harsher Guidelines inexorably increase the risk that defendants will receive and serve greater sentences of imprisonment than they would have under more lenient Guidelines. *See Lynce*, 519 U.S. at 440 (noting that one of the purposes of the Ex Post Facto Clause is to protect "the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and a suitable punishment").

4. The Seventh Circuit's *Demaree* Decision Is An Aberration That Contradicts This Court's Ex Post Facto Clause Precedents.

Every court of appeals to apply the *Garner/Morales* significant-risk standard has found that post-offense increases to the post-*Booker* Guidelines violate the Ex Post Facto Clause.[11] The lone court to find to the contrary—the Seventh Circuit in *Demaree* and subsequent cases, including the decision below—did so only by declining to follow this Court's *Garner/Morales* standard. The *Demaree* court noted that "[t]he test of an *ex post facto* law has been variously stated by the Supreme Court" to include whether it "impos[es] a significant risk of enhanced punishment." 459 F.3d at 794. Such a standard, *Demaree* acknowledged, would be satisfied

[11] *See Turner*, 548 F.3d at 1098–1100 (citing *Miller v. Florida*, 482 U.S. 423, 424, 432, 435 (1987)); *United States v. Ortiz*, 621 F.3d 82, 86–87 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 1813 (2011); *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 889–90 (6th Cir. 2010), *cert. denied*, 131 S. Ct. 2443 (2011); *Wetherald*, 636 F.3d at 1322; *see also United States v. Wood*, 486 F.3d 781, 790 (3d Cir. 2007); *United States v. Forrester*, 616 F.3d 929, 946 (9th Cir. 2010). Other courts have expressed agreement with the majority rule in dicta. *See United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007); *United States v. Anderson*, 570 F.3d 1025, 1034 n.7 (8th Cir. 2009); *United States v. Thompson*, 518 F.3d 832, 869–70 (10th Cir. 2008). The First Circuit has avoided the constitutional question by devising a "commonsense protocol" that requires sentencing courts "to use the old version if the new one raises ex post facto concerns," thereby giving defendants the benefit of the more lenient Guidelines. *United States v. Rodriguez*, 630 F.3d 39, 42 (1st Cir. 2010).

by "even voluntary sentencing guidelines, for official guidelines even if purely advisory are bound to influence judges' sentencing decisions." *Id.*

Demaree offered three reasons for not applying *Garner* and *Morales*. First, it suggested that the significant-risk standard would throw open the floodgates to challenges to a series of hypothetical claims: Congress could pass resolutions exhorting judges to impose heavier sentences. The President could nominate and the Senate could confirm tough-on-crime judges. Or Congress could appropriate more money for federal prisons to reduce overcrowding and so encourage longer sentences. 459 F.3d at 794. The first two hypotheticals, however, do not involve any "Law . . . passed" by Congress. U.S. CONST. art. I, § 9, cl. 3. None of *Demaree*'s hypotheticals involves a substantive law governing crime and punishment, or even a criminal procedure. And none of these hypotheticals creates more than a "speculative, attenuated risk of affecting a prisoner's actual term of confinement." *Morales*, 514 U.S. at 508–09.

Second, the *Demaree* court held that sentences beyond the Guidelines range face no greater review than those within it. According to *Demaree*, sentencing courts need not give reasons for rejecting the Guidelines range. 459 F.3d at 794–95. A judge's "choice of sentence, whether inside or outside the guideline range, is discretionary and subject therefore to only light appellate review." *Id.* at 795 (citing Seventh and Eighth Circuit precedents). *Demaree*, decided in 2006, thus failed to predict this Court's 2007 decisions in *Rita* and *Gall*. The former case authorized appellate courts to presume that within-Guidelines sentences are reasonable, 551 U.S.

at 347; the latter required district courts to explain deviations and face more searching appellate review of larger deviations, 552 U.S. at 50. *See also Kimbrough*, 552 U.S. at 109 (suggesting "closer review" of variances based "solely on the judge's view" that the Guidelines sentencing range fails to satisfy § 3553(a)'s objectives). Those decisions undercut *Demaree*'s predicates that appellate review is "light" and that the Guidelines merely "nudg[e] [district judges] toward the sentencing range." 459 F.3d at 795.

Third, *Demaree* reasoned that applying the Ex Post Facto Clause "would have in the long run a purely semantic effect." 459 F.3d at 795. "Instead of purporting to apply the new guideline," district courts would cloak their true reasons, claiming that they were simply "tak[ing] advice from the Sentencing Commission." *Id.* But *Demaree*'s cynicism about judicial candor is at odds with the reason-giving requirement at the heart of the SRA and meaningful appellate review. 18 U.S.C. § 3553(c) (requiring statement of reasons for imposing a sentence); *Rita*, 551 U.S. at 350 ("The judges will set forth their reasons"); *Gall*, 552 U.S. at 50.

Rather than resolve the case on the significant-risk standard, as it was bound to do, the *Demaree* court focused instead on the discretion of the sentencing judge. "His choice of sentence, whether inside or outside the guideline range, is discretionary." 459 F.3d at 794. "The applicable guideline nudges him toward the sentencing range, but his freedom to impose a reasonable sentence

outside the range is unfettered." *Id.*[12] But, as this Court noted in *Garner*, "[t]he presence of discretion does not displace the protections of the Ex Post Facto Clause." *Garner*, 529 U.S. at 253. The Seventh Circuit's *Demaree* decision conflicts with this Court's precedents in *Garner* and *Morales* and carries no weight.

5. *Miller v. Florida* Supports Finding An Ex Post Facto Clause Violation Here.

This Court's only precedent analyzing sentencing guidelines under the Ex Post Facto Clause militates in favor of reversing the judgment below. In *Miller v. Florida*, this Court held that retroactive application of post-offense sentencing guidelines that result in a longer presumptive sentencing range violates the Ex Post Facto Clause. 482 U.S. at 435–36. Under the Florida sentencing guidelines system, a sentencing judge could depart from the presumptive guidelines

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[12] *Demaree* also involved very different facts. In that case, the district court had sentenced the defendant to 30 months, squarely within the 27 to 33 month Guidelines sentencing range in effect at the time of sentencing. It had stated on the record, however, that the defendant's sentence under the more lenient Guidelines in effect at the time of the offense (18 to 24 months) would have been an upward deviation to 27 months. 459 F.3d at 792–93. This case involves no comparable express determination by the sentencing court that, if the more lenient Guidelines range had applied, the defendant's sentence should have exceeded that range. Moreover, the minimal three-month difference between Ms. Demaree's sentence under the competing sets of Guidelines at issue limited the impact of the court's decision. In Mr. Peugh's case, the choice of which Guidelines to apply results in a sentencing differential of 33 to 41 months.

range upon giving clear and convincing reasons for doing so. *Id.* at 424–26. Florida argued that a sentencing judge's discretion to deviate from the Florida sentencing guidelines eliminated any Ex Post Facto Clause difficulties. *See* Br. for Respondent, *Miller v. Florida*, No. 86-5344, 1987 WL 880240, at *22–23 (U.S. Feb. 12, 1987) ("In light of the fact that the guidelines are discretionary . . . amendments to the guidelines and their application to the Petitioner was not violative of the ex post facto clause."). This Court unanimously rejected that argument. It found that the Florida sentencing guidelines "directly and adversely affect[ed] the sentence petitioner receives." 482 U.S. at 435. Even though sentencing judges could make appropriate findings and ultimately deviate from the guidelines range, they could not lightly disregard that range. *Id.* Thus, applying those sentencing guidelines retroactively violated the Ex Post Facto Clause. *Id.*[13]

[13] In opposing certiorari in this case, the government argued that the Sentencing Guidelines resemble the U.S. Parole Commission's guidelines, which *Miller* suggested "simply provide flexible 'guideposts' for use in the exercise of discretion." 482 U.S. at 435; Opp. 5. But the U.S. Parole Commission had "'unfettered discretion'" to follow these "flexible 'guideposts'" or not. 482 U.S. at 435 (first quotation from S. Rep. No. 98-225, at 38 (1983)). By contrast, the U.S. Sentencing Guidelines, like the Florida guidelines, "ha[ve] the force and effect of law." *Id.* They erect a "hurdle that must be cleared before discretion can be exercised," albeit not as "high" a hurdle as the Florida guidelines. *Id.* And the U.S. Sentencing Guidelines, like the Florida guidelines and unlike the parole guidelines, "directly and adversely affect the sentence [a defendant] receives." *Id.*; *supra* Section B.5.

Although *Miller* was decided under the disadvantage-to-the-defendant standard later abandoned in *Collins*, 497 U.S. at 41; *Morales*, 514 U.S. at 506 n.3, the analysis in *Miller* would have led to the same result under the *Garner/Morales* significant-risk standard. Applying harsher mandatory Guidelines that curtail a court's sentencing discretion unquestionably creates a significant risk of increased punishment.[14] But, as shown *infra* at Section C, the practical operation of the federal advisory Guidelines system creates similar risks. *Miller*'s holding that presumptive post-offense Guidelines violate the Ex Post Facto Clause

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[14] If the Sentencing Guidelines were still mandatory, *Miller* would be controlling authority and would compel reversal of the court of appeals. *See Kimbrough* 542 U.S. at 116 (Thomas, J., dissenting) (resolving "to apply the statute as written, including 18 U.S.C. § 3553(b), which makes the Guidelines mandatory"); *Gall* 552 U.S. at 61 (Thomas, J., dissenting). Indeed, addressing the mandatory Guidelines system before *Booker*, the federal courts of appeals uniformly held that the Ex Post Facto Clause prohibits application of harsher post-offense Guidelines amendments. *See United States v. Harotunian*, 920 F.2d 1040, 1041–42 (1st Cir. 1990); *United States v. Gonzalez*, 281 F.3d 38, 45 (2d Cir. 2002); *United States v. Lennon*, 372 F.3d 535, 539 (3d Cir. 2004); *United States v. Morrow,* 925 F.2d 779, 782–83 (4th Cir. 1991); *United States v. Suarez,* 911 F.2d 1016, 1021–22 (5th Cir. 1990); *United States v. Holmes*, 975 F.2d 275, 278 (6th Cir. 1992); *United States v. Coe*, 220 F.3d 573, 578 (7th Cir. 2000); *United States v. Frank*, 354 F.3d 910, 926 (8th Cir. 2004); *United States v. Garcia-Cruz*, 40 F.3d 986, 987 (9th Cir. 1994); *United States v. Mondaine*, 956 F.2d 939, 942-43 (10th Cir. 1992); *United States v. Yeager*, 331 F.3d 1216, 1224 n.2 (11th Cir. 2003); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 304 (D.C. Cir. 1991).

does not preclude the possibility that advisory Guidelines (as crafted by *Booker*) would as well.

Ex Post Facto Clause violations always turn on the objective effect of the amended law. *See Lynce*, 519 U.S. at 442–45 (discussing cases rejecting subjective evaluations). They are always necessarily "a matter of 'degree.'" *Morales*, 514 U.S. at 509. There is no "single 'formula' for identifying those legislative changes that have a sufficient effect on substantive crimes or punishments to fall within the constitutional prohibition." *Id.* (quoting *Beazell*, 269 U.S. at 171). Here, trial courts must calculate and consider Guidelines sentencing ranges and give substantial reasons for deviating from the ranges, particularly for significant deviations. Appellate courts review sentences for substantive reasonableness, and may presume that within-Guidelines sentences are reasonable. All of these legal rules create a significant risk that increased Guidelines will lead to increased punishment. While district courts have discretion to reject Guidelines sentencing ranges (provided they can advance justifications that will convince appellate courts of the reasonableness of their sentences), they do so infrequently. The constitutional question turns not on rare events but on "significant risk[s]."

C. *Application Of The 2009 Guidelines Greatly Increased Mr. Peugh's Sentence, In Violation Of The Ex Post Facto Clause.*

The foregoing analysis shows that the 2009 Guidelines, "as applied to [Mr. Peugh's] own sentence … created a significant risk of increasing his

punishment." *Garner*, 259 U.S. at 255. But here there is more than risk. The sentencing transcript reveals that the harsher 2009 Guidelines caused the district court to impose a sentence on Mr. Peugh that was much heavier than it would have been under the 1998 Guidelines. Here, the district court sentenced Mr. Peugh to 70 months' imprisonment, at the very bottom of the 2009 Guidelines range. That choice indicates that Mr. Peugh merited the lowest punishment typically imposed for this type of offense and offender.[15] While the district court had some discretion to deviate from the 2009 Guidelines, in fact the court explicitly relied upon them. Acknowledging that it was free to apply "its own penal philosophy," the district court stated:

> [T]he Seventh Circuit has cautioned that as a matter of prudence and in recognition of the Commission's knowledge, experience, and staff resources, an individual judge should think long and hard before substituting his personal penal philosophy for that of the Commission.
>
> Here the Court does not disagree with the policy implicit in Section 2B1.1 of imposing increasingly stricter punishments on defendants that cause

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[15] District courts sentence at the bottom of the applicable Guidelines range in a remarkable 50.7% of cases within the Guidelines ranges, *see* 2011 SOURCEBOOK, *supra*, tbl. 29. That is further evidence of how that range creates an anchor that influences sentencing.

> increasingly larger amounts of loss. . . . I am not convinced this general policy should be disregarded in this particular case.

J.A. 94. After rejecting Mr. Peugh's arguments for a downward variance, the district court further declared that it would defer to the 2009 Guidelines range:

> Here the loss amount exceeded $2.5 million, which resulted in an 18-level enhancement. However, when considering that the base offense level is only seven and considering the particular facts of this case, the court does not disagree with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss. Accordingly, the court will give the *amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case.*

J.A. 96 (emphasis added).

The same "general policy" of "imposing increasingly stricter punishments on defendants that cause increasingly larger amounts of loss" in § 2B1.1 of the 2009 Guidelines was also present in § 2F1.1 of the 1998 Guidelines. The only relevant intervening changes were the increase in the base offense levels and the increased enhancement levels for this particular amount of loss. The district court deferred to these changes without independent analysis. *See*

J.A. 96. In relying on the 2009 Guidelines, the district court imposed a longer sentence upon Mr. Peugh than it would have imposed under the 1998 Guidelines. The district court decided to impose a sentence at the lowest end of the 2009 Guidelines range. If the court had instead applied the 1998 Guidelines, it is highly unlikely that it would have found compelling justifications for imposing a sentence that would have been 50% higher (and two years greater) than the upper limit of the Guidelines range.

Mr. Peugh is thus serving a sentence of nearly six years, rather than a sentence of between three and four years, solely because the court applied the harsher 2009 Guidelines retroactively. Those retroactively applied Guidelines at a minimum created a significant risk that Mr. Peugh would receive a longer sentence. Applying those increases retroactively contravened the Ex Post Facto Clause.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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