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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF

In *Garner v. Jones*, this Court defined the test for a violation of the Ex Post Facto Clause as whether an amended law, "in its operation, created *a significant risk* of increased punishment for [the defendant]." 529 U.S. 244, 257 (2000) (emphasis added). This Court had applied the same test as the "controlling inquiry" in *California Department of Corrections v. Morales*, 514 U.S. 499, 509 (1995). *Garner*, 529 U.S. at 250. But even though "significant risk" is the controlling standard under this Court's precedents, that term does not even appear in the argument section of the Government's brief until page 44 – and then only as Petitioner's creation. *See* U.S. Br. 44 ("Petitioner appears to contend that" it violates the Ex Post Facto Clause if the amended Guidelines "create a 'significant risk' that the judge will decide to impose a higher sentence"); *see also* U.S. Br. 12 (summarizing this argument).

The Government effectively asks this Court to eviscerate (if not abandon) the *Garner/Morales* significant-risk standard. The Government would recast the significant-risk test as applying only to "a binding legal provision that effectively divests a sentencing court of a significant portion of its sentencing discretion." U.S. Br. 47. But neither *Garner* nor *Morales* dealt with a law curtailing discretion; to the contrary, the claim in each case was that the *exercise* of discretion under the new law significantly increased the risk of lengthening the defendant's incarceration. The Government attempts to rewrite the significant-risk standard because it cannot meet it. As every court to employ this standard has ruled, retroactive application of harsher

Sentencing Guidelines produces a significant risk of increased punishment, and therefore violates the Ex Post Facto Clause. Pet'r. Br. 32-33 & n.11.

Not only does the Government disregard the controlling standard, but it improperly discounts the Guidelines as mere "advice," U.S. Br. 9, 11, 12, 24, 28, 29, 33, 35, 40, 46, 47, 51, or no different in legal effect from "an academic study or policy paper," or inapplicable versions of the Guidelines from other years, that a sentencing court may consult of its own volition. *Id.* at 27. To the contrary, after *United States v. Booker*, 543 U.S. 220 (2005), the Sentencing Reform Act continues to "constrain sentencing courts' discretion" by making the Guidelines sentencing range a mandatory consideration in sentencing, *see Pepper v. United States*, 131 S. Ct. 1229, 1241 (2011), even if that range is no longer binding in the imposition of a sentence. Federal district courts must apply the Guidelines methodologies, calculate the Guidelines range, evaluate that range as the initial benchmark, and consider it throughout the sentencing process. *Gall v. United States*, 552 U.S. 38, 49-50 & n.6 (2007). For any variance from the Guidelines range, a district court must also supply a justification that is sufficiently compelling to support its degree. *Id.* at 50. Appellate courts in turn review the sentence for substantive reasonableness and may presume that within-Guidelines sentences are reasonable. *Id.* at 51. "This sentencing framework," *Pepper*, 131 S. Ct. at 1241, is designed to achieve the Act's purpose of promoting sentencing uniformity within the strictures of the Sixth Amendment. *Booker*, 543 U.S. at 264-65 (Breyer, J., remedial majority opinion); *Rita v. United States*, 551 U.S. 338, 354 (2007) (acknowledging prediction that the

appellate presumption of reasonableness "will encourage sentencing judges to impose Guidelines sentences" but finding that outcome consistent with the Act's goals of reducing sentencing disparities).

As five Justices of this Court have recognized, under this framework, "the Guidelines are in a real sense a basis for the sentence" regardless of whether the sentence is imposed within the Guidelines range, or whether "the judge uses the sentencing range as the beginning point to explain the decision to deviate from it." *Freeman v. United States*, 131 S. Ct. 2685, 2692 (2011) (plurality); *accord id.* at 2695 (Sotomayor, J., concurring in the judgment) (agreeing except for plea agreements under Federal Rule of Criminal Procedure 11(c)(1)(C)). In practical operation, when the Commission increases the applicable Guidelines range that is the very basis for a sentence, it creates a significant risk that the defendant will receive increased punishment in violation of the Ex Post Facto Clause.

The assessment of significant risk is not a "subjective inquiry" into the minds of sentencing judges, as the Government contends (U.S. Br. 12), any more than this Court conducted a subjective inquiry into the minds of parole officials in *Garner* and *Morales*. Rather, the Ex Post Facto Clause calls for an objective risk assessment based upon the amendment's practical operation. *Garner*, 529 U.S. at 255; *Lynce v. Mathis*, 519 U.S. 433, 442-43 (1997). The Sentencing Commission has recently confirmed that when amendments increase the Guidelines minimum, average sentences increase. UNITED STATES SENTENCING COMM'N, REPORT ON THE CONTINUING IMPACT OF *UNITED STATES V. BOOKER* ON

FEDERAL SENTENCING 60 (2012) (the "USSC *Booker* Report"). Here, Peugh has shown not merely a significant objective risk of increased punishment from the retroactive application of harsher Guidelines generally, but a virtual certainty in his own case. In sentencing Peugh, the district court expressly deferred to the 2009 Guidelines, imposing a 70-month sentence that was at the bottom of the 2009 Guidelines range but 24 months higher than the *maximum* under the 1998 Guidelines in effect at the time of his offense. J.A. 96. The retroactive application of the harsher 2009 Guidelines to Peugh violated the Ex Post Facto Clause.

I. RETROACTIVE APPLICATION OF A LAW CREATING A SIGNIFICANT RISK OF INCREASED PUNISHMENT VIOLATES THE EX POST FACTO CLAUSE.

1. Unhappy with the *Garner/Morales* significant-risk standard, the Government scrambles to propose different formulations. First, the Government claims that the Ex Post Facto Clause only applies to "a binding change in the governing legal framework," such as a law that (1) "expressly authorized something that had not been authorized before," or (2) "eliminated or limited something that had previously been available," or (3) "did a combination of the two." U.S. Br. 17-18. At another point, the Government alternatively suggests that "a punishment-related provision violates the Ex Post Facto Clause only if it makes a binding legal change that alters the conditions under which a more lenient punishment is available." U.S. Br. 20. It is unclear what this latter phrase means, except that the Government believes that only presumptive

guidelines of the kind invalidated in *Miller v. Florida*, 482 U.S. 423 (1987), can give rise to a violation. U.S. Br. 20. Regardless, the Government's proposed tests are irreconcilable with this Court's precedents.

2. This Court rejected the Government's narrow construction of the Ex Post Facto Clause in *Morales*. *Morales* concerned a 1981 amendment to a state parole law. The amendment afforded the parole board discretion to hold parole hearings every three years rather than annually if the prisoner had been convicted of multiple homicides and there was no reasonable expectation that parole would be granted. The Court found that the amendment did not authorize a different maximum term of punishment as in *Lindsey v. Washington*, 301 U.S. 397 (1937), or change the punishment formula as in *Miller v. Florida*, 482 U.S. 423 (1987), or *Weaver v. Graham*, 450 U.S. 24 (1981). *See Morales*, 514 U.S. at 505-08.

If the Government's proposed test were the law, that determination should have ended the inquiry. But the question under the Ex Post Facto Clause is always whether "objectively" the change in law "had the *effect* of lengthening petitioner's period of incarceration." *Lynce*, 519 U.S. at 442-43 (emphasis added). Even though the 1981 amendment changed neither the term nor formula of punishment, the *Morales* Court declared that "what legislative adjustments 'will be held to be of sufficient moment to transgress the constitutional prohibition' *must* be a matter of 'degree.'" *Morales*, 514 U.S. at 509 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)). Accordingly, "[i]n evaluating the constitutionality of the 1981 amendment, *we must determine* whether it produces *a sufficient risk* of increasing the measure of

punishment attached to the covered crimes." *Id.* (emphases added).[1]

The *Morales* Court elaborated that "[t]he *ex post facto* standard we apply today … looks to whether a given legislative change has the prohibited effect of … increasing punishments," and "considers a number of factors." *Id.* at 509 n.7. In analyzing the risk that the Board would exercise its discretion under the new law to increase the sentence served, the Court found that (1) "the amendment applie[d] only to a class of prisoners for whom the likelihood of release on parole is quite remote"; (2) the amendment did not affect initial hearings but only subsequent hearings for prisoners unlikely to receive parole; and (3) "the Board retain[ed] the authority to tailor the frequency of subsequent suitability hearings to the particular circumstances of the individual prisoner." *Id.* at 510-12. Even on the off chance that changed circumstances would alter parole prospects for persons convicted of multiple homicides, the Board would have the discretion to expedite both the hearing and release date, and so "a prisoner's ultimate date of release would be entirely unaffected by the change in the timing of suitability hearings." *Id.* at 512-13. Thus, *Morales* turned not on whether the retroactive law prescribed binding limits on punishment discretion. Rather, the Court found no *ex post facto* violation because the law in practical operation yielded "only the most speculative and

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[1] The Government cites the *Morales* formulation that the new law must "'increase[] the penalty by which a crime is punishable,'" U.S. Br. 19 (quoting *Morales*, 514 U.S. at 506 n.3), but this Court has stated that this is the same test as the sufficient-risk standard. *Lynce*, 519 U.S. at 443 n.14.

attenuated risk of increasing the measure of punishment attached to the covered crimes." *Id.* at 514.

3. Recognizing the significant-risk test as the "controlling inquiry" in *Morales*, this Court in *Garner* applied the same test to a broader regulation of the Georgia Board of Parole that changed the maximum interval between parole reconsideration hearings for all inmates serving life sentences from three to eight years. 529 U.S. at 247-48, 250. *Garner* likewise rejected the idea that the amendment must prescribe a change in punishment or remove discretion; the Court declared that "[t]he presence of discretion does not displace the protections of the *Ex Post Facto* Clause." *Id.* at 253. The key inquiry is the effect of the amended law on the *exercise* of discretion: "When the rule does not by its own terms show a significant risk, the respondent must demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with *exercising discretion*, that its retroactive application will result in a longer period of incarceration than under the earlier rule." *Id.* at 255 (emphasis added).

In *Garner*, the respondent claimed that the retroactively applied regulation caused the Board not to exercise its discretion to set parole hearings as frequently, and thereby created a significant risk of prolonging his incarceration. *Id.* at 254. Examining "the operation of the amendment to Rule 475-3-.05(2) within the whole context of Georgia's parole system," the Court declared that "[o]n the record in this case, we cannot conclude the change in Georgia law lengthened respondent's time of actual imprisonment." *Id.* at 252, 256. The Court reasoned

that even under the new regulation the Board retained "discretion as to how often to set an inmate's date for reconsideration," and its written policy was to expedite hearings based on changed circumstances and new information. *Id.* at 254. Deferring to the Board's policy statement, the Court presumed that "the Board *exercises its discretion* in accordance with its assessment of each inmate's likelihood of release between reconsideration dates." *Id.* at 256 (emphasis added). Accordingly, "the Board's Rule changes are designed for the better exercise of the discretion it had from the outset," and there was no evidence of a significant risk that the respondent would have been released earlier but for the new hearing-interval regulation. *Id.* at 255, 256-57. Nonetheless, the Court left open the possibility that the respondent could prove significant risk if granted discovery. *Id.*

4. The Government attempts to recast the significant-risk test as merely a rule that the *elimination* of significant discretion may violate the Ex Post Facto Clause. U.S. Br. 47. The contention is unfounded; neither *Morales* nor *Garner* involved the elimination or curtailment of discretion.[2] Rather, the

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[2] The Government relies on a passage in *Garner* in which the Court says a defendant has no entitlement under the Ex Post Facto Clause to notice of how his penalty will be affected by discretionary decisions to grant or deny parole, because discretion adapts to new data on offense predictions and recidivism. *Garner*, 529 U.S. at 253 (*quoted in* U.S. Br. 46). The *Garner* Court quickly noted, however, the discretion *to grant or deny parole* was not the gravamen of respondent's claim: "The essence of respondent's case, as we see it, is not that discretion has been changed in its exercise but that, in the period between parole reviews, it will not be exercised at all." *Id.*

parole board in each case had been granted *additional* discretion to hold parole hearings less frequently, and the question was whether the *exercise* of such discretion under the new law had created a significant risk of prolonging respondent's incarceration. This Court deemed that an empirical question dependent upon the practical implementation of the rule by the agency with discretion. *Garner*, 529 U.S. at 255.

That is exactly the test that this Court must apply here in dealing with a law that affects the district court's exercise of sentencing discretion. The question is whether promulgation of harsher Guidelines after the offense creates a significant risk that a district court exercising sentencing discretion will impose a more severe sentence. The answer is yes. Pet'r Br. 20-41.

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at 254. The Government misreads that passage to mean that the exercise of discretion never violates the Ex Post Facto Clause. U.S. Br. 46. To the contrary, that passage means only that respondent had complained that the exercise of discretion under the new regulation to deny him a hearing would deprive him of the exercise of substantive discretion to grant parole and release him early. *See Garner*, 529 U.S. at 259 (Scalia, J., concurring in the judgment) ("In essence, respondent complains that by *exercising* its discretion (as to the frequency of review), the Board has *deprived* him of the exercise of its discretion (as to the question of his release).")

II. Sentencing Guidelines Have The Force And Effect Of Law Even If They Do Not Establish Binding Sentencing Ranges.

1. Throughout its brief, the Government conflates two separate issues: whether the Sentencing Guidelines have the force and effect of law (and thus are subject to the Ex Post Facto Clause) and whether they establish binding sentencing ranges to which a district court must adhere. *See* U.S. Br. 23-24. *Booker* removed the latter trait of the Guidelines when it excised the statutory provisions making the Guidelines sentencing range mandatory. 543 U.S. at 245 (Breyer, J., remedial majority opinion) (severing 18 U.S.C. §§ 3553(b)(1), 3742(e)). But nothing in *Booker* deprives the Guidelines of all prescriptive force. To the contrary, the Guidelines continue to prescribe the "framework" for the exercise of discretion by sentencing courts, *Freeman*, 131 S. Ct. at 2692 (plurality), and are laws within the meaning of the Ex Post Facto Clause.

In arguing that the Guidelines lack the force and effect of law, the Government steadfastly denies that the Guidelines are "constraints on a sentencing court's discretion." U.S. Br. 12. This Court has recognized the contrary. In *Pepper*, the Court identified two "important respects" in which the Sentencing Reform Act "did constrain sentencing courts' discretion": (1) by making the Guidelines range mandatory under § 3553(b)(1), and (2) "by specifying various factors that courts must consider in exercising their discretion, see § 3553(a)." *Pepper*, 131 S. Ct. at 1241. Among the latter constraints is the requirement 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." 18 U.S.C. § 3553(a)(4)(A)(i) (2012) (emphasis added). Even in removing the first constraint, *Booker* specifically left the second constraint intact: "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).

The post-*Booker* Guidelines thus prescribe the Guidelines range that serves as the mandatory benchmark and initial starting point for sentencing, even though the district court is not bound to sentence within that range. The Guidelines prescribe the methodology that judges must follow to calculate the substantive Guidelines range accurately. Pet'r. Br. 20-22; *Gall*, 552 U.S. at 49-50. District courts are subject to reversal for failure to apply the Guidelines or calculate the Guidelines ranges correctly. Pet'r Br. 20-21 & n.7. Because the Sentencing Guidelines prescribe with the force and effect of law a substantive standard that the district court must consider as an initial benchmark, and from which any variance must be justified, they are subject to the prohibitions of the Ex Post Facto Clause.[3]

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[3] *See Stinson v. United States*, 508 U.S. 36, 45 (1993) (noting that Guidelines "are the equivalent of legislative rules adopted by federal agencies"); *Garner*, 529 U.S. at 247 (analyzing a regulation). The Government concedes that the parole regulation in *Garner* had the force and effect of law because the Georgia legislature had delegated

The Government thus errs when it repeatedly characterizes the Guidelines as nothing more than a source of information from which sentencing courts may "seek advice." U.S. Br. 28; *accord id.* at 9 (Guidelines are "the Sentencing Commission's most up-to-date, non-binding advice about best practices in federal sentencing"), 11, 12, 24, 29, 33, 35, 40, 46, 47, 51. According to the Government, the Guidelines have no legal effect different from "an academic study or policy paper," *id.* at 27, "the policy-related reasoning in sentencing opinions," *id.*, versions of Guidelines from different years, *id.*, or any "survey of sentences imposed on similar defendants," *id.* at 28. The Government belittles the benchmark requirement as simply "reflect[ing] the nature of the Guidelines as a distillation of a vast array of information (*e.g.*, the sentences imposed by other courts) that bears directly on the Section 3553(a) factors and that would be infeasible for the district court to gather on its own." U.S. Br. 35-36.

The Government misconceives the function of the Guidelines in the post-*Booker* scheme. As five Justices agreed in *Freeman* (and none disagreed), the Guidelines provide the framework for any exercise of discretion by sentencing judges:

> The Guidelines *provide a framework or starting point—a basis, in the commonsense meaning of the term—for the judge's exercise of discretion. E.g.*, 1 Oxford English Dictionary 977 (2d ed.

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statutory authority to the Board, U.S. Br. 18, but Congress has likewise delegated statutory authority to the Commission. Pet'r Br. 4-5.

> 1989). …. In the usual sentencing, whether following trial or plea, the judge's reliance on the Guidelines will be apparent, for the judge will use the Guidelines range as the starting point in the analysis and impose a sentence within the range. Even where the judge varies from the recommended range, if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, then the Guidelines are in a real sense a basis for the sentence.

131 S. Ct. at 2692 (emphasis added; citations omitted); *id.* at 2695 (Sotomayor, J., concurring in the judgment) ("As the plurality explains, in the normal course the district judge's calculation of the Guidelines range applicable to the charged offenses will serve as the basis for the term of imprisonment imposed.").[4] The Government cannot reasonably contend that advisory Guidelines that define the framework and substantive basis for the district court's exercise of sentencing discretion lack the force and effect of law.

Because the Government confuses the distinct questions of whether the advisory Guidelines are laws, and whether they bind the district court to sentence within a precise range, it caricatures Peugh's arguments. In asserting that the advisory Guidelines have the force and effect of law, Peugh does not contend that "the requirement to *consider*

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[4] The dissenting justices did not address this point in *Freeman*.

the now-advisory Guidelines is the functional equivalent of a legal directive to *follow* the Guidelines in any significant respect," U.S. Br. 34-35, that the post-*Booker* framework "require[s] sentencing courts to give the Guidelines any sort of substantive deference," *id.* at 35, or that the *Gall* explanation requirement places a "legal constraint on the reasoning that the sentencing court may adopt," *id.* at 37. Nor does Peugh deny that the district court has ultimate discretion to sentence anywhere within the statutory range, *Cunningham v. California*, 549 U.S. 270, 292 (2007), and to deviate from the Guidelines range for any policy or fact-specific reason, *Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

The argument is simply this: An amendment to the Sentencing Guidelines that increases the applicable Guidelines range, to use the Government's phrasing (U.S. Br. 19), alters the legal framework within which the district court exercises sentencing discretion. It violates the Ex Post Facto Clause when the amended Guideline "in its operation, create[s] a significant risk of increased punishment for [the defendant]." *Garner*, 529 U.S. at 257. The constitutional inquiry is the significance of the risk of increased punishment, not whether the retroactive amendment displaces the sentencing court's discretion.

2. In this respect, the Government's reliance on *Miller v. Florida* is misplaced. The Government is correct that the advisory Guidelines "do not limit the discretion of sentencing courts in the manner that the presumptive sentencing ranges at issue in *Miller* did." U.S. Br. 23. But again it is the risk of increased

punishment, not the deprivation of discretion, that determines whether a retroactive law violates the Ex Post Facto Clause. In *Miller*, this Court—applying the now discarded operate-to-the-defendant's-disadvantage test, *see* 482 U.S. at 431-33[5]—found that amended presumptive state guidelines "directly and adversely affect[ed] the sentence petitioner receive[d]." *Id.* at 435. Even though *Miller* did not apply the significant-risk test, there is no doubt that the application of more punitive presumptive guidelines would violate the Ex Post Facto Clause under that test. Pet'r Br. 37. But *Miller* does not foreclose that the advisory Guidelines may as well.

The Government makes much of the fact that the respondent in *Miller*, the State of Florida, unsuccessfully analogized its presumptive sentencing guidelines to the U.S. Parole Guidelines, which had withstood *ex post facto* challenges in the courts of appeals on various grounds. U.S. Br. 22-23. But this Court in *Miller* never passed on the constitutionality of any U.S. Parole Guidelines amendment, nor endorsed the reasoning of any of those cases (which, like *Miller* itself, would have been decided under a now-discarded standard). The Court merely "f[ou]nd the federal parole guidelines cases inapposite" because "[n]one of the reasons given in the federal parole cases even arguably applies here." *Miller*, 482 U.S. at 434-35.

There is thus no reason to accept the Government's invitation to assess the

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[5] The Government appears to resurrect the test abandoned by this Court. *See* U.S. Br. 18-19; *Morales*, 514 U.S. at 506 n.3.

constitutionality of amendments to the now-defunct federal parole guidelines or to compare them to the advisory Sentencing Guidelines. Regardless, those guidelines are not on all fours with the post-*Booker* Guidelines system, which requires mandatory benchmarking; requires explanation justifying variances from Guidelines (and their degree); requires appellate review for substantive reasonableness; and authorizes a presumption of reasonableness on review of within-Guidelines sentences.[6] Indeed, many factors may mitigate the

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[6] For example, of the courts of appeals who addressed the issue of reviewability of parole decisions, the majority took the position that substantive federal parole decisions granting or denying parole are unreviewable, even under an abuse of discretion standard. *See Jones v. U.S. Bureau of Prisons*, 903 F.2d 1178, 1183 (8th Cir. 1990); *Wallace v. Christensen*, 802 F.2d 1539, 1545 (9th Cir. 1986) (en banc); *Farkas v. United States*, 744 F.2d 37, 38-39 (6th Cir. 1984); *Garafola v. Wilkinson*, 721 F.2d 420, 423-24 (3d Cir. 1983); *Garcia v. Neagle*, 660 F.2d 983, 988 (4th Cir. 1981). These circuits limited substantive review to whether the Parole Commission "has acted outside its statutory limits," including "that the Commission exceeded the scope of its discretion, violated the Constitution, or reached decisions so arbitrary and capricious as to amount to a violation of due process." *See, e.g.*, *Jones*, 903 F.2d at 1183-84. The few circuits that did review substantive parole decisions have stated that their review is limited and deferential. *See, e.g., Boling v. Mundt*, 261 F. App'x 133, 137 (10th Cir. 2008) (review only for whether there is a "rational basis" for a parole decision); *Moreno-Morales v. United States Parole Comm'n*, No. 96-2358, 1998 WL 124718, at *3 (1st Cir. Jan. 20, 1998) (per curiam) (review whether a decision is "irrational, arbitrary or capricious"); *Simpson v. Ortiz*, 995 F.2d 606, 608 (5th Cir. 1993) (review with "extreme

risk of increased punishment in the parole context that are not present in the sentencing context. The task at hand is not to compare the parole and sentencing guidelines, but to determine whether retroactive application of harsher advisory Guidelines creates a significant risk of increased punishment. *Garner*, 529 U.S. at 255, 257; *Lynce*, 519 U.S. at 443 n.14.[7] On this point, the Government has no substantial answer.

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deference"); *Hanahan v. Luther*, 693 F.2d 629, 632 (7th Cir. 1982) (review for a "rational basis"). Even the minority circuits do not recognize a rule parallel to the permissible appellate presumption of reasonableness for within-Guidelines sentences. *See* Pet'r Br. 25-26.

[7] It is not Peugh's approach, but the Government's proposed categorical exemption from the Ex Post Facto Clause of all discretionary sentencing systems, that is inconsistent with the purposes of the Ex Post Facto Clause. In committing his offense in 1999-2000, when the mandatory Guidelines were in effect and the applicable guidelines range was 36-47 months, Peugh had no actual or constructive notice that he could be sentenced to 70-87 months' imprisonment (and would likely receive a sentence within that range). Moreover, the Ex Post Facto Clause also serves the purpose of preventing potential arbitrariness, vindictiveness, or unfairness when the lawmaking body does not abide by the rules that exist at the time of offense. Pet'r Br. 18–19. Here, the Sentencing Commission made the legislative choice after Peugh's crime to increase offense levels significantly in fraud cases where the loss is substantial. Pet. App. 64a-67a. Peugh cannot be punished more severely for shifts in legislative policy occurring after his offense.

III. Retroactive Application Of Harsher Guidelines Creates A Significant Risk That Peugh Will Receive Increased Punishment.

The Government attacks another straw man in claiming that Peugh's significant-risk analysis entails "a subjective inquiry into the susceptibility of judges to influence from advice." U.S. Br. 12. To the contrary, Peugh relies "entirely on objective considerations" in assessing the significance of risk of increased punishment. *See Lynce*, 519 U.S. at 443 (discussing *Morales*). In the context of the sentencing system as a whole, a defendant may demonstrate such risk by showing that (1) the amendment by "its own terms show[s] a significant risk" or (2) that the amendment, as applied to the defendant's sentence, in practical operation demonstrates such a risk. *Garner*, 529 U.S. at 252, 255.

A Guidelines amendment that raises the Guidelines sentencing range inherently creates a significant risk of increased punishment, in the context of the advisory Guidelines system as a whole. That risk inheres in the structural characteristics of the Guidelines framework in which the district court exercises sentencing discretion: namely, that the district court must consider the Guidelines range as a benchmark at the beginning and throughout the process, and "must consider the extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance." *Gall*, 532 U.S. at 50.[8] Moreover, the

[8] In regard to this requirement, the Government accuses Peugh of overreading *Gall* and "reintroducing" a

sentence and justifications must be able to withstand appellate review for substantive reasonableness, and may be protected by a presumption of reasonableness only if within the Guidelines range. *Id.* at 51.

Thus, even though the district court renders an individualized sentence and is free to deviate from the Guidelines range, it is not surprising that "*[i]n the usual sentencing*, … *the judge will* use the Guidelines range as the starting point in the analysis and *impose a sentence within the range*." *Freeman,* 131 S. Ct. at 2692 (plurality) (emphasis added). Indeed, it was common ground among the majority and the dissenters in *Rita* that appellate review for substantive reasonableness may tend to promote sentences within the Guidelines range. *Rita*, 552 U.S. at 354; Pet'r Br. 26 n.8. In a system where the Guidelines form the basis and benchmark for sentencing, and structural features of the system promote within-Guidelines sentences, amendments that raise the Guidelines sentencing range inherently create a significant risk that a defendant will receive a harsher sentence than if sentenced under the more lenient Guidelines applicable at the time of his offense.

Even aside from that inherent risk, the practical implementation of the rule demonstrates "that as applied to his own sentence the law created a

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proportionality approach rejected earlier in that opinion. U.S. Br. 36-37. But the requirements that the Court had earlier rejected—which limited variances either to "extraordinary circumstances" or those justified by "the use of a rigid mathematical formula," *Gall*, 552 U.S. at 47—were quite different. Peugh has merely quoted this Court's language on the *Gall* justification requirement.

significant risk of increasing his punishment." *Garner*, 529 U.S. at 255. A defendant is not bound to show direct effect upon his own punishment, and may generally rely on the evidence of effect on the class of offenders affected by the rule. *Id.* at 255; *id.* at 260 n.1 (Souter, J., dissenting) (discussing cases); *Weaver v. Graham*, 450 U.S. 24, 33 (1981). But here Peugh has direct and definitive evidence that he suffered greater punishment from retroactive application of the 2009 Guidelines.[9]

As the Government concedes, the 1998 Guidelines in effect at the time of Peugh's offense prescribed a range of 37-46 months. Pet'r Br. 10; U.S. Br. 5. The 2009 Guidelines ratcheted up the Guidelines range to 70-87 months. Pet'r Br. 10-11; U.S. Br. 5. The district court expressly deferred to the harsher 2009 Guidelines in sentencing Peugh. Expressing a disinclination to substitute its own penal philosophy for the Commission's, and agreeing "with the policy of imposing a stricter punishment on defendants that cause significant amounts of loss," the district court resolved to "*give the amount of loss calculations and the resulting advisory guidelines range the appropriate amount of deference in this case*." J.A. 94-96 (emphasis added). The court proceeded to impose a 70-month sentence at the bottom of the 2009 Guidelines range upon Peugh. It defies belief to suppose that the district court would have granted a

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[9] *Cf. Lynce*, 519 U.S. at 446-47 ("In this case, unlike in *Morales*, the actual course of events makes it unnecessary to speculate about what might have happened. The 1992 statute has unquestionably disadvantaged petitioner because it resulted in his rearrest and prolonged his imprisonment.").

more than 50% upward departure to impose the same prison term if the 1998 Guidelines were operative. The 1998 Guidelines embodied the same policy as the 2009 Guidelines of imposing greater sentences for greater losses; they differed only in the severity of the Guidelines offense levels. Pet'r Br. 40-41. Peugh has shown at a minimum a significant risk that retroactive application of the 2009 Guidelines increased his punishment.[10]

In addition, "[t]he general operation of the [Guidelines system] may produce relevant evidence and inform further analysis on the point." *Garner*, 529 U.S. at 255. Peugh and its amicus marshaled ample evidence of significant risk based on the practical operation of sentencing under the advisory Guidelines generally and in Illinois, as to all offenses and fraud in particular. Pet'r Br. 27-30; Ill. Ass'n of Criminal Defense Lawyers Amicus Br. 8-12. Even though "[d]uring the *Gall* period 80.7 percent of sentences were either within range or below range pursuant to a government motion," USSC *Booker* Report at 60, the Government remarkably asserts that the Guidelines have no causal effect, as if the courts would impose the same sentences in their absence. U.S. Br. 39. Moreover, assessing sentencing statistics does not disregard the individualized nature of sentencing, any more than examining parole-hearing statistics in *Morales* and

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[10] The Government points out that the district court considered a variety of factors and found that the nature of Peugh's conduct did not warrant a downward departure. *See* J.A. 88-93; U.S. Br. 5-8. But that does not alter the fact that the district court expressly deferred to the 2009 Guidelines range in sentencing Peugh.

Garner disregards the individualized nature of parole determinations. *See* U.S. Br. 45. A defendant need only prove a significant risk, not a mathematical certainty, that he will receive a greater sentence as a result of the amended law. Finally, the Government speculates that in the future courts may cease to impose sentences within the Guidelines ranges. U.S. Br. 50. But Peugh does not seek a rule for all time and all persons; he simply shows that, as applied to his sentence, applying harsher Guidelines significantly increased his risk of punishment. *Garner*, 529 U.S. at 255.[11]

Indeed, a recent Sentencing Commission publication confirms the significant risk posed by retroactive application of harsher Guidelines. The USSC *Booker* Report states that "[t]he sentencing guidelines have remained the essential starting point in all federal sentences and have continued to exert

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[11] Ignoring that significant risk is assessed as applied to the defendant's sentence, the Government advances irrelevant evidence of a few different offense types and jurisdictions where the proportions of within-Guidelines sentences are below the norm. U.S. Br. 49-50. This Court need not decide what threshold constitutes significant risk for all cases, but should note that application of a harsher Guidelines may produce a significant risk of increased punishment even where the ultimate sentence is below the Guidelines range (particularly in the common circumstance where the court grants a Government-sponsored departure from the Guidelines). *See* USSC *Booker* Report at 60. Moreover, any retroactive increase in the quantum of punishment would violate the Ex Post Facto Clause. *Cf. Glover v. United States*, 531 U.S. 198, 203 (2001) ("any amount of actual jail time has Sixth Amendment significance").

significant influence on federal sentencing trends over time." USSC *Booker* Report at 3. The Report noted that, post-*Rita*, average sentences have continued to parallel Guidelines minimums. *Id.* at 60. The Commission concludes from its study of the data that "when the average minimum of the applicable guideline range has increased (*due to guideline amendments, increases in offense seriousness, or increases in the criminal history of the offenders*) the average sentence also has tended to increase, as evidenced by the close tracking." *Id.* (emphasis added). In the post-*Booker* period, average sentences for fraud offenses have increased as Guidelines minimums have increased, although not as rapidly. *Id.* at 67 (chart). Indeed, the average fraud sentence nearly doubled between 1998 and 2009 as Guideline minimums escalated. *Id.*

The advisory Guidelines after *Booker* shifted from a mandatory-range to a mandatory-benchmarking system, with other structural characteristics that fostered discretionary within-Guidelines sentencing. Because the Ex Post Facto Clause turns on the effect of a retroactive law on punishment, and the effect under both advisory and mandatory Guidelines is that sentences increase when Guidelines minimums are increased, the result should be the same here as in *Miller*. The retroactive application of the harsher 2009 Guidelines in Peugh's sentencing violated the Ex Post Facto Clause.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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