

**THE EX POST FACTO CLAUSE AND THE
UNITED STATES SENTENCING GUIDELINES:
THE GUIDELINES REMAIN MANDATORY IN
DEFIANCE OF *BOOKER***

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I. INTRODUCTION

The Ex Post Facto Clause of the United States Constitution expressly prohibits Congress from passing any ex post facto law.¹ The Ex Post Facto Clause prohibits the application of any law that increases the punishment imposed on a defendant who committed a crime before the law prohibiting it came into effect.² Ex post facto laws were seen as such an assault on liberty that the Founding Fathers expressly included a prohibition against them in the Constitution.³

In 1984, Congress passed the Sentencing Reform Act, which created the United States Sentencing Commission (Commission).⁴ The Commission is charged with the responsibility of creating sentencing guidelines, which are to be considered by federal district courts in determining appropriate sentences for criminals.⁵ The Commission is also charged with the responsibility of recommending to Congress modifications in sentencing procedure, such as increasing or decreasing the

1. U.S. CONST. art. I, § 9, cl. 3.

2. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798).

3. See THE FEDERALIST NO. 84, at 511 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

4. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2017-18 (codified at 28 U.S.C. § 991 (1985)); U.S. SENTENCING COMM'N, AN OVERVIEW OF THE UNITED STATES SENTENCING COMMISSION 1 [hereinafter "OVERVIEW OF THE USSC"], available at http://www.ussc.gov/About_the_Commission/Overview_of_the_USSC/USSC_Overview.pdf.

5. See 28 U.S.C. § 991 (2006 & Supp. 2008); OVERVIEW OF THE USSC, *supra* note 4, at 1.

sentencing guidelines for a specific crime.⁶ As part of the Sentencing Reform Act of 1984, district courts were required to impose a sentence within the range promulgated by the Commission, known as the U.S. Sentencing Guidelines (Guidelines),⁷ but the Supreme Court in *United States v. Booker* held the Guidelines were no longer mandatory.⁸ In fact, the Seventh Circuit has described the Guidelines as “advisory” rather than mandatory.⁹

A serious constitutional problem arises between the Ex Post Facto Clause and the retrospective application of “advisory” amended Guidelines, as illustrated by the following example. Suppose a defendant *commits* a crime in 2000, when the Guidelines in force called for a sentencing range from eighteen to twenty-four months.¹⁰ The defendant is not *convicted*, until 2004, when the Guidelines range has been amended and the particular crime’s sentencing range is increased to twenty-seven to thirty-three months.¹¹ Does the Ex Post Facto Clause prohibit the application of the amended Guidelines if that version recommends a harsher penalty?

The Supreme Court has not decided this issue, but the Seventh Circuit held in *United States v. Demaree* that the Ex Post Facto Clause does not apply to the Guidelines because the clause does not control laws that are merely advisory.¹² Other circuits have held the exact opposite: the Ex Post Facto Clause does control the Guidelines.¹³ These circuits recognize that although the Guidelines are no longer mandatory, they still heavily influence a judge’s discretion in determining a sentence.¹⁴ Therefore, a court may not apply amended Guidelines that provide for a longer

6. See 28 U.S.C. § 991; OVERVIEW OF THE USSC, *supra* note 4, at 1.

7. 18 U.S.C. § 3553(b)(1) (2006), *invalidated by* *United States v. Booker*, 543 U.S. 220 (2005).

8. See *Booker*, 543 U.S. at 243–44.

9. *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006).

10. See, e.g., *id.* at 792.

11. See, e.g., *id.*

12. *Id.* at 795.

13. See, e.g., *United States v. Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010); *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 890 (6th Cir. 2010); *United States v. Thompson*, 518 F.3d 832, 870 (10th Cir. 2008); *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) (citing *Miller v. Florida*, 482 U.S. 423, 435 (1987)); *United States v. Wood*, 486 F.3d 781, 790–91 (3d Cir. 2007); *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (citing *United States v. Larrabee*, 436 F.3d 890, 894 (8th Cir. 2006)).

14. See, e.g., *Lanham*, 617 F.3d at 889–90.

sentence than the Guidelines in place at the time the crime was committed.¹⁵

This Note discusses the emerging conflict of whether the Ex Post Facto Clause should control the Guidelines after *Booker*. Part II of this Note analyzes the history of the ex post facto doctrine, including the Framers' intent and the Supreme Court's doctrinal interpretation of the Ex Post Facto Clause. Part III provides a history of the Guidelines including the origin of the Guidelines and how the Guidelines operate. Next, Part IV discusses the interpretations of Congress, the Commission, and the Supreme Court regarding whether the Ex Post Facto Clause applies to the Guidelines prior to *Booker*. Part V provides an analysis of the Supreme Court's decision in *Booker* and subsequent cases, which rule that the Guidelines are no longer mandatory. Next, Part VI discusses the circuit split as it relates to whether the Ex Post Facto Clause applies to the Guidelines after *Booker*. Part VII explores the competing scholarly arguments on the issue of whether the Ex Post Facto Clause applies to the federal guidelines post-*Booker*. Finally, Part VIII articulates the reason why the Ex Post Facto Clause should not apply to the Guidelines.

II. HISTORY OF THE EX POST FACTO DOCTRINE

A. *The Ex Post Facto Clause, the Constitution, and the Framers' Intent*

The United States Constitution expressly states both Congress¹⁶ and the states¹⁷ shall not pass any ex post facto laws. The Framers decided to include both ex post facto provisions in the Constitution because they wanted the provisions to be one of the "greater securities to liberty and republicanism" by protecting against retroactive application of penal laws.¹⁸ Alexander Hamilton referred to ex post facto laws as a "favourite and most formidable instrument[] of tyranny."¹⁹ For these reasons, the Framers found it necessary to expressly prohibit ex post facto laws.

B. *The Supreme Court Interprets the Ex Post Facto Clause*

The Constitution expressly prohibits ex post facto laws, but it is silent

15. *See id.*

16. U.S. CONST. art. I, § 9, cl. 3 ("No . . . ex post facto Law shall be passed.").

17. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . ex post facto law . . .").

18. *See* THE FEDERALIST NO. 84, *supra* note 3.

19. *Id.* at 512.

on what exactly constitutes an ex post facto law. Although the literal meaning of the Latin phrase encompasses any law passed “after the fact,”²⁰ the Supreme Court has limited the constitutional prohibition on ex post facto laws to apply only to penal statutes that disadvantage the offender affected by them.²¹ In *Calder v. Bull*, the Supreme Court held the Ex Post Facto Clause prohibits, *inter alia*, the application of any law that increases the punishment for a criminal defendant who commits an offense before the law increasing the punishment took effect.²² Justice Chase, in *Calder*, also explained that there are two purposes for the Ex Post Facto Clause.²³ First, the Ex Post Facto Clause prevents federal and state legislatures from enacting vindictive, malicious legislation.²⁴ Second, the Ex Post Facto Clause provides people with certainty.²⁵ It guarantees people will have fair notice of the laws until the legislature decides to change them.²⁶

With the understanding that the Constitution prohibits ex post facto laws primarily in the area of criminal law, the Court in *Weaver v. Graham* sought to elucidate the scope of the Ex Post Facto Clause in *Calder* by articulating a two-prong test to determine if a penal law is to be barred by the Ex Post Facto Clause.²⁷ In *Weaver*, the petitioner challenged Florida’s newly enacted law, which altered the opportunity for a prisoner to receive a reduced sentence as a result of good behavior in prison.²⁸ The petitioner argued that the new law was an unconstitutional ex post facto law as applied because the petitioner committed his crime before the new law was enacted.²⁹ The first prong of the two-prong test to determine if a criminal law is to be barred by the Ex Post Facto Clause is that the law “must apply

20. BLACK’S LAW DICTIONARY 620 (8th ed. 2004).

21. *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390–92 (1798) (opinion of Chase, J.); *id.* at 396 (opinion of Paterson, J.); *id.* at 400 (opinion of Iredell, J.); *see also* *Miller v. Florida*, 482 U.S. 423, 430–32 (1987).

22. *Calder*, 3 U.S. (3 Dall.) at 390 (opinion of Chase, J.) (stating ex post facto laws include any law that makes innocent action done before passing of a law criminal, any law that aggravates a crime or makes the crime greater than what it was when committed, and any law that changes the legal rules of evidence to make it easier to convict a defendant).

23. *See id.* at 388–89.

24. *See id.* at 389; *see also* *Miller*, 482 U.S. at 429.

25. *See Calder*, 3 U.S. (3 Dall.) at 388; *see also* *Miller*, 482 U.S. at 430.

26. *Miller*, 482 U.S. at 430 (citing *Weaver v. Graham*, 450 U.S. 24, 30 (1981)).

27. *Weaver*, 450 U.S. at 29.

28. *Id.* at 25.

29. *Id.*

to events occurring before [the law's] enactment."³⁰ The second prong is that the law "must disadvantage the offender affected by it."³¹ The Court held the two-prong test was fulfilled because the state used the new statute implemented on January 1, 1979, to calculate the amount of reduced sentence available to the petitioner who was convicted of a crime that occurred on January 31, 1976.³²

The Court in *California Department of Corrections v. Morales* further attempted to clarify the scope of the Ex Post Facto Clause defined in *Calder*.³³ In *Morales*, the defendant was found guilty of first-degree murder in 1971.³⁴ After being released on parole, the defendant pleaded *nolo contendere* to second-degree murder in 1980.³⁵ The defendant was eligible for parole in 1990, but the Board of Prison Terms denied parole in 1989.³⁶ Under the law in place at the time when the defendant committed second-degree murder, the defendant was entitled to parole hearings on an annual basis after his initial parole hearing.³⁷ However, in 1981, after the defendant committed second-degree murder, the California legislature amended the statute and authorized the Board of Prison Terms to defer parole "hearings for up to three years if the prisoner has been convicted of 'more than one offense which involves the taking of a life' and the Board 'finds that it is not reasonable to expect that parole would be granted at a hearing during the following years and states the bases for the finding.'"³⁸ The Board of Terms decided it was unreasonable that the defendant would be suitable for parole in the next two years and scheduled the defendant's next hearing three years later.³⁹ The defendant then challenged the amended California statute for violating the Ex Post Facto Clause.⁴⁰

The Court held the California statute, as amended, did not violate the Ex Post Facto Clause.⁴¹ The Court stated it would not follow the defendant's approach and "invalidate any of a number of minor . . .

30. *Id.* at 29 (citations omitted).

31. *Id.* (citations omitted).

32. *Id.* at 31.

33. *See* Cal. Dep't of Corrs. v. Morales, 514 U.S. 499 (1995).

34. *Id.* at 502.

35. *Id.*

36. *Id.* at 502-03.

37. *Id.* at 503 (citing 1997 Cal. Stat., ch. 165, § 46).

38. *Id.* (quoting CAL. PENAL CODE ANN. § 3041.5(b)(2) (West 1982)).

39. *Id.*

40. *Id.* at 504.

41. *Id.* at 514.

changes that might produce some remote risk of impact on a prisoner's expected term of confinement."⁴² In determining whether the amended statute violated the Ex Post Facto Clause, the Court stated the test is whether the statute "produces a sufficient risk of increasing the measure of punishment attached to the covered crimes."⁴³ The Court decided the California statute "creat[ed] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment for covered crimes."⁴⁴ This speculative and attenuated risk of increasing the measure of punishment under the California law was not a sufficient risk and thus was not in conflict with the Ex Post Facto Clause.⁴⁵

Decided in 2000, *Garner v. Jones* provides the most recent test for determining whether a law is in conflict with the Ex Post Facto Clause.⁴⁶ Like *Morales*, *Garner* involved a statute that considered the scheduling of parole hearings.⁴⁷ In *Garner*, the defendant was convicted of two separate murders.⁴⁸ At the time the defendant committed his second offense, the State's Board of Pardons and Paroles Rules (the Board) required reconsiderations of parole to take place every three years.⁴⁹ However, after the defendant began serving his second life sentence, the Board amended the rules to require that reconsideration of parole for life sentences would occur every eight years.⁵⁰ The Board held a parole hearing for the defendant in 1995, in which the Board denied defendant's parole,⁵¹ and in accordance with the Board's amended rules, scheduled the defendant's next parole hearing for 2003.⁵² The defendant brought suit, claiming the amended rule violated the Ex Post Facto Clause.⁵³

The Court stated a law is considered an ex post facto law if the law "by its own terms show[s] a significant risk" of increasing the penalty by which a crime is punishable.⁵⁴ The Court added that the general operation

42. *See id.* at 508.

43. *Id.* at 509.

44. *Id.*

45. *See id.*

46. *See Garner v. Jones*, 529 U.S. 244, 255 (2000).

47. *Id.* at 247 (citing GA. CODE ANN. § 42-9-45(b) (1982)).

48. *Id.*

49. *Id.* (citing GA. RULES & REGS, Rule 475-3-.05(2) (1979)).

50. *Id.* (citing GA. RULES & REGS, Rule 475-3-.05(2) (1985)).

51. *Id.*

52. *Id.* at 248.

53. *Id.*

54. *See id.* at 255.

of the state's parole system may produce relevant evidence pertinent to the first inquiry of the test.⁵⁵ If the law on its face does not show a significant risk of increased punishment, then the complainant "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."⁵⁶ The Court also utilized its holding in *Morales*, stating the controlling inquiry in Ex Post Facto Clause challenges is whether retroactive application of an amended "law created a 'sufficient risk of increasing the measure of punishment attached to the covered crimes.'"⁵⁷ Also, the Court emphasized a change in law that results in a speculative and ambiguous disadvantage for the offender would not be inconsistent with the Ex Post Facto Clause.⁵⁸ The Court found that the record did not sufficiently indicate the level of risk created by the amended rule.⁵⁹ Thus, the defendant's claim rested on mere speculation.⁶⁰ The Court also noted the court of appeals—which held that the amended rule violated the Ex Post Facto Clause—committed error in not considering the Board's internal policy statement.⁶¹ Review of the policy statement would give an insight into the manner in which the Board would have exercised its discretion.⁶² The Court reversed and remanded to the Eleventh Circuit to determine whether the amended rule "created a significant risk of increased punishment" for the defendant.⁶³

In both *Morales* and *Garner*, the U.S. Supreme Court considered whether the Ex Post Facto Clause applied to discretionary parole guidelines.⁶⁴ Unfortunately, the Court utilized open language in applying a very broad test.⁶⁵ Nonetheless, the Court provided a working legal

55. *See id.*

56. *Id.*

57. *Id.* at 250 (quoting *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 509 (1995)).

58. *See id.* at 255 (citing *Morales*, 514 U.S. at 509).

59. *Id.* at 256.

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.* at 257.

64. *See id.* at 246; *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 501–02 (1995).

65. *See Garner*, 529 U.S. at 255 (noting a law is considered an ex post facto law if the law "by its own terms show[s] a significant risk" of increasing the penalty by which a crime is punishable; if the law on its face does not show a significant risk of

framework, which this Note will employ in analyzing whether the Ex Post Facto Clause controls the Guidelines.

III. HISTORY OF THE U.S. SENTENCING GUIDELINES

A. *Origin of the U.S. Sentencing Guidelines*

From the late nineteenth century until approximately 1970, before the Guidelines were conceived, the federal criminal justice system's main objective in sentencing was rehabilitation instead of deterrence.⁶⁶ Rehabilitation was achieved by what is called the "medical" model, where criminal offenders were akin to patients in need of rehabilitative care, and sentencing judges were akin to doctors prescribing individualized sentences.⁶⁷ To achieve their institutional obligation to conduct an individualized prognosis and accompanying prescription for rehabilitation, district courts were given unfettered discretion to sentence offenders anywhere within the codified sentencing ranges set forth by Congress.⁶⁸ District courts would also frequently decide to provide defendants "indeterminate" sentences, meaning the district court would defer to the Board of Parole the responsibility of determining the actual amount of time the defendant would be incarcerated.⁶⁹

The medical model's ambitious goals of prisoner rehabilitation fell miserably short in practice, however.⁷⁰ The basic problem with the medical model was that there was no way to determine when a prisoner was rehabilitated.⁷¹ One study suggested the medical model had no discernible "impact on the probability of successful rehabilitation, the rate of recidivism or the likelihood of later parole success."⁷² Most notably, the

increased punishment, then the complainant "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").

66. James R. Dillon, *Doubting Demaree: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After United States v. Booker*, 110 W. VA. L. REV. 1033, 1038 (2008) (citing Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 389 (2006) (citation omitted)).

67. *Id.* (footnote omitted).

68. *Id.*

69. *Id.* at 1038–39 (footnotes omitted).

70. *Id.* at 1039.

71. See Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 827 (1975).

72. *Id.* (footnote omitted).

study suggested “time served in [a rehabilitative] institution appear[ed] to have . . . a slightly negative effect on the inmate’s chances for success once he or she is released.”⁷³ Critics of the medical model also took issue with the district courts’ unfettered discretion in sentencing that resulted in “significant disparities between the sentences of similarly situated offenders.”⁷⁴ Because of the medical model’s inability to attain its rehabilitative goals, judges and lawmakers alike called for “the adoption of tighter legislative controls over federal sentencing.”⁷⁵

Congress, with the inadequacies of the medical model revealed, responded in 1984 by enacting the Sentencing Reform Act.⁷⁶ In the Sentencing Reform Act, Congress established the United States Sentencing Commission, an independent agency of the judicial branch consisting of seven members who serve six-year terms, are appointed by the President, and confirmed by the Senate.⁷⁷ The stated purpose of the Commission included establishing sentencing policies to “assure the meeting of the purposes of sentencing as set forth in section 3553(a)(2) of title 18, United States Code.”⁷⁸ Those purposes consist of the (1) promotion of just punishment and respect for law, (2) deterrence of criminal conduct, (3) incapacitation of the offender, and (4) rehabilitation of the offender.⁷⁹ The Commission’s sentencing policies must also “provide certainty and fairness . . . [and] avoid[] unwarranted sentencing disparities among defendants with similar records who have been found guilty of similar conduct.”⁸⁰ In order to satisfy these purposes, the Commission must promulgate guidelines that the sentencing court must use in determining the proper sentencing to be imposed.⁸¹ Also, in promulgating these guidelines, the Commission must ensure that sentences based only on rehabilitative goals are not allowed.⁸² Most importantly, sentencing courts

73. *Id.* (footnote omitted).

74. Dillon, *supra* note 66, at 1039 (citing Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883–84 (1990)).

75. *Id.* at 1039–40 (citing Nagel, *supra* note 74).

76. Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified at 18 U.S.C. § 3551 (1985)).

77. 28 U.S.C. § 991(a) (2006 & Supp. 2008).

78. *Id.* § 991(b)(1)(A).

79. *See* 18 U.S.C. § 3553(a)(2)(A)–(D) (2006).

80. 28 U.S.C. § 991(b)(1)(B) (2006 & Supp. 2008).

81. *Id.* § 994(a)(1).

82. *See id.* § 994(k).

were required to impose a sentence within the range of the guidelines.⁸³ In compliance with the Sentencing Reform Act, the Commission authored the United States Sentencing Guidelines that first went into effect in 1987.⁸⁴

B. *Operation of the Guidelines*

The Guidelines contain a sentencing table that details a range of punishment based on a criminal's "criminal history category" and "offense level."⁸⁵ A criminal's criminal history category is based on the criminal's prior convictions and is numbered from I to VI on the horizontal axis of the table.⁸⁶ The offense level is numbered one to forty-three on the vertical axis of the table.⁸⁷ The determination of a criminal's base offense level is found in chapter two, in which the Commission lists all crimes and appropriate base offense levels for each crime respectively.⁸⁸ The appropriate offense level can be modified higher or lower by applying any aggravating or mitigating factors, which are outlined in chapters two and three of the Guidelines.⁸⁹ After the appropriate criminal history category and offense level are ascertained, then the corresponding sentencing range is found on the sentencing table by locating the intersection of the final offense level and the criminal history category.⁹⁰

IV. EX POST FACTO DOCTRINE APPLICATION TO U.S. SENTENCING GUIDELINES BEFORE *BOOKER*

When Congress passed the Sentencing Reform Act, it did not believe the Ex Post Facto Clause would apply to amended sentencing Guidelines which increased a defendant's sentencing range above the level that would have applied under the Guidelines in effect at the time the defendant's crime was committed.⁹¹ Along with Congress, the Commission does not believe the Ex Post Facto Clause applies to the Guidelines.⁹² The

83. 18 U.S.C. § 3553(b)(1) (2006), *invalidated by* United States v. Booker, 543 U.S. 220 (2005).

84. OVERVIEW OF THE USSC, *supra* note 4, at 2.

85. U.S. SENTENCING GUIDELINES MANUAL § 5A (2010).

86. *Id.*; *see also id.* § 4A1.1.

87. *Id.* § 5A.

88. *See id.* ch. 2; *see also id.* § 1B1.1(a)(2).

89. *Id.* § 1B1.1(a)(1)–(3); *see also id.* chs. 2–3.

90. *Id.* § 5A.

91. *Id.* § 1B1.11 cmt. background (citing S. REP. NO. 225, 98th Cong., 1st Sess. 77–78 (1983)); Dillon, *supra* note 66, at 1047.

92. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 cmt. background.

Commission, however, does recognize that courts “generally have held that the *ex post facto* clause does apply to sentencing guideline amendments that subject the defendant to increased punishment.”⁹³

In *Miller v. Florida*, the Supreme Court extensively questioned Congress’s interpretation of the inapplicability of the Ex Post Facto Clause to the Guidelines.⁹⁴ In *Miller*, the Court held Florida’s sentencing guidelines violated the Ex Post Facto Clause.⁹⁵ The state of Florida had enacted its own sentencing guidelines.⁹⁶ The defendant in *Miller* was convicted of sexual battery, burglary with an assault, and petty theft.⁹⁷ Florida amended the guidelines relevant to the defendant’s sentencing after the date the defendant committed his crimes.⁹⁸ As a result of the application of the amended guidelines, the defendant’s primary offense points were increased by twenty percent, resulting in a higher guideline sentencing range.⁹⁹

The Court applied the two-prong test from *Weaver*¹⁰⁰ and held the application of the amended guidelines resulted in a prohibited ex post facto law.¹⁰¹ First, the Court concluded the “application of the revised guidelines law in [defendant]’s case clearly satisfie[d]” the first prong of the *Weaver* test—that the law be retrospective.¹⁰² The Court also concluded the defendant had “been ‘substantially disadvantaged’ by the change in” the amended guidelines.¹⁰³ Under the old guidelines, the defendant’s sentencing range was from three-and-a-half to four-and-a-half years.¹⁰⁴ To depart from this range under the old guidelines and issue a seven-year sentence—the sentence imposed on the defendant—the sentencing judge

93. *Id.*

94. *See Miller v. Florida*, 482 U.S. 423 (1987).

95. *See id.* at 435–36 (finding the law “void as applied” to the defendant in the case). The Ex Post Facto Clause considered in this case is Article I, Section Ten, Clause One, which prohibits the states from enacting ex post facto laws. U.S. CONST. art. I, § 10, cl. 1. Article I, Section Nine, Clause Three prohibits the federal government from enacting ex post facto laws. U.S. CONST. art. I, § 9, cl. 3.

96. *See Miller*, 482 U.S. at 425–26 (summarizing the origin of Florida’s sentencing guidelines).

97. *Id.* at 426–27 (citations omitted).

98. *Id.* at 427.

99. *Id.*

100. *Id.* at 430 (citing *Weaver v. Graham*, 450 U.S. 24, 29 (1981)).

101. *See id.* at 435–36.

102. *Id.* at 430 (citing *Weaver*, 450 U.S. at 31).

103. *Id.* at 432.

104. *Id.*

would have had to issue in writing clear and convincing reasons for the departure based on facts proven beyond a reasonable doubt, and the sentence would have been reviewable on appeal.¹⁰⁵ But in applying the new guidelines, the seven-year sentence was in the presumptive sentencing range, and the sentencing judge was not required to issue in writing clear and convincing reasons for imposing the sentence.¹⁰⁶ Perhaps most importantly, the sentence was unreviewable on appeal.¹⁰⁷ Thus, the defendant “was ‘substantially disadvantaged’ by the retrospective application of the revised guidelines to his crime.”¹⁰⁸ Florida’s sentencing guidelines operated in a manner quite similar to the federal Guidelines.¹⁰⁹ As a result of the holding in *Miller*, the circuit courts agreed the Ex Post Facto Clause also barred retroactive application of the federal Guidelines if they increased the sentencing range of an offender’s sentence.¹¹⁰

As a result of the decision in *Miller*, and the subsequent circuit court decisions holding that the Ex Post Facto Clause applied to the retroactive application of the Guidelines, the Commission added section 1B1.11 to the Guidelines.¹¹¹ Section 1B1.11 states a sentencing court must use the Guidelines manual in effect at the time of the sentencing¹¹² unless the sentencing court determines the Ex Post Facto Clause would be violated.¹¹³ The Commission reiterated, however, both it and Congress did not believe the Guidelines violated the Ex Post Facto Clause.¹¹⁴ Although the commentary to section 1B1.11 states circuit courts have held the Guidelines are subject to the Ex Post Facto Clause, it does not necessarily state the Guidelines are definitively subject to the Ex Post Facto Clause either.¹¹⁵ Because of this inconsistency, it is still an open question as to whether the Ex Post Facto Clause controls the now nonmandatory Guidelines.

105. *Id.*

106. *Id.* at 432–33.

107. *See id.* at 433.

108. *Id.*

109. Daniel M. Levy, Note, *Defending Demaree: The Ex Post Facto Clause’s Lack of Control over the Federal Sentencing Guidelines After Booker*, 77 FORDHAM L. REV. 2623, 2634 (2009) (citing Dillon, *supra* note 66, at 1047).

110. Dillon, *supra* note 66, at 1048 (footnote omitted).

111. *Id.* (footnote omitted).

112. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(a) (2010).

113. *Id.* § 1B1.11(b)(1).

114. *Id.* § 1B1.11 cmt. background (citing S. REP. NO. 225, 98th Cong., 1st Sess. 77–78 (1983)).

115. *See id.*

V. THE U.S. SENTENCING GUIDELINES BECOME ADVISORY UNDER
BOOKER AND POST-*BOOKER* STANDARD OF REVIEW FOR SENTENCING

A. *Mandatory Application of U.S. Sentencing Guidelines Unconstitutional Under Booker*

When the U.S. Sentencing Guidelines were mandatory, all of the circuit courts found violations of the Ex Post Facto Clause when revised Guidelines imposed a higher sentencing range than the Guidelines range that was in effect at the time the defendant committed the crime.¹¹⁶ The Supreme Court's decision in *United States v. Booker* placed these circuit court decisions into serious doubt by holding the Guidelines' mandatory nature was unconstitutional under the Sixth Amendment.¹¹⁷

In *Booker*, the defendant "was charged with possession with intent to distribute at least 50 grams of cocaine" based on evidence that the defendant had 92.5 grams in his bag.¹¹⁸ The Guidelines range at that time for the particular crime was 210 to 262 months; however, the judge sentenced the defendant to 360 months.¹¹⁹ The judge justified this increased sentence on finding, by a preponderance of the evidence during a posttrial sentencing hearing, that the defendant possessed an additional 566 grams of cocaine.¹²⁰ Thus, the findings at the posttrial sentencing hearing increased the mandatory Guidelines range from 360 months to life imprisonment.¹²¹

116. See, e.g., *United States v. Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (citations omitted); *United States v. Young*, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); *United States v. Kopp*, 951 F.2d 521, 526 (3d Cir. 1991); *United States v. Morrow*, 925 F.2d 779, 782–83 (4th Cir. 1991); *United States v. Nagi*, 947 F.2d 211, 213 n.1 (6th Cir. 1991); *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991), *overruled on other grounds by* *United States v. Grisel*, 488 F.3d 844 (9th Cir. 2007); *United States v. Smith*, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); *United States v. Lam Kwong-Wah*, 924 F.2d 298, 304–05 (D.C. Cir. 1991); *United States v. Harotunian*, 920 F.2d 1040, 1042 (1st Cir. 1990); *United States v. Suarez*, 911 F.2d 1016, 1021–22 (5th Cir. 1990); *United States v. Swanger*, 919 F.2d 94, 95 (8th Cir. 1990); *United States v. Worthy*, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990).

117. See *United States v. Booker*, 543 U.S. 220, 232–35 (2005) (Stevens, J., opinion of the Court in part) (discussing the Sixth Amendment's implications on the issue of whether the Guidelines were mandatory).

118. *Id.* at 227.

119. *Id.* (discussing the sentence as being at the low end of the range available).

120. *Id.*

121. *Id.*

In the first opinion of the Court,¹²² Justice Stevens held that the mandatory nature of the Guidelines was unconstitutional.¹²³ Justice Stevens first noted that a judge has always had “broad discretion in imposing a sentence within a statutory range.”¹²⁴ However, the Guidelines mandatorily bound a judge to a range, allowing no discretion except in cases where the judge found aggravating or mitigating circumstances by a preponderance of the evidence.¹²⁵ Justice Stevens determined the defendant’s Sixth Amendment rights were violated because the defendant’s sentence was based on facts beyond those found by the jury, and the judge found these facts by a preponderance of the evidence instead of beyond a reasonable doubt.¹²⁶ Thus, within the mandatory scheme of the Guidelines, an appellate court should have reversed the judge’s sentence because the sentencing judge should have had no factual basis for the departure from the Guidelines.¹²⁷

Justice Breyer, in the second opinion of the Court, proposed two remedial options in light of Justice Stevens’ opinion. The first option proposed was that the Guidelines would be kept as written with the addition that the sentencing court would be barred “from increasing a sentence on the basis of a fact that the jury did not find.”¹²⁸ The second option proposed was to make the Guidelines advisory by excising the appropriate provisions of the sentencing statute.¹²⁹ One of the provisions at issue was 18 U.S.C. § 3553(b),¹³⁰ which “directs that the [sentencing] court ‘shall impose a sentence of the kind, and within the [guideline] range.’”¹³¹ The other provision was 18 U.S.C. § 3742(e), which sets forth de novo standards of review for departures from the Guidelines ranges.¹³²

The majority of the Court opted for excising these two provisions,

122. Justices Scalia, Souter, Thomas, and Ginsburg joined Justice Stevens’ opinion. *Id.* at 226. There were two opinions because Justice Ginsburg joined Justice Breyer’s remedial opinion with Chief Justice Rehnquist, Justice O’Connor, and Justice Kennedy. *Id.* at 244 n.* (Breyer, J., opinion of the Court in part).

123. *Id.* at 232–35 (Stevens, J., opinion of the Court in part).

124. *Id.* at 233 (citations omitted).

125. *Id.* at 233–34.

126. *See id.* at 235.

127. *Id.* at 234–35.

128. *Id.* at 246 (Breyer, J., opinion of the Court in part).

129. *See id.*

130. *Id.* at 259.

131. *Id.* at 234 (Stevens, J., opinion of the Court in part).

132. *Id.* at 259 (Breyer, J., opinion of the Court in part).

which rendered the Guidelines advisory rather than mandatory.¹³³ Thus, sentencing courts are required to consider the Guidelines ranges, but are permitted “to tailor the sentence in light of other statutory concerns.”¹³⁴ Also, the Court determined the appropriate standard of review for departures from the Guidelines is “review for ‘unreasonable[ness]’” instead of the de novo standard that existed in the original statute.¹³⁵ By holding the Guidelines advisory, the Guidelines range would not constrict the discretion of the sentencing judge any further than the statutory range.¹³⁶ Because a “defendant has no right to a jury determination of the facts that the judge deems relevant” in sentencing within the statutory range, the advisory Guidelines would not violate a defendant’s Sixth Amendment rights.¹³⁷

B. *Appellate Review of a Sentence Within the Guidelines: Rita v. United States*

After the Court’s decision to implement appellate review for unreasonableness in the context of criminal sentencing, the Court chose to first clarify this standard in *Rita v. United States*.¹³⁸ In *Rita*, the defendant was convicted of perjury, making false statements, and obstructing justice.¹³⁹ The Guidelines range for the convictions was thirty-three to forty-one months.¹⁴⁰ Also, both the judge and the probation officer, who prepared the presentence report, found no circumstances warranting a departure from the Guidelines range.¹⁴¹ The defendant appealed the sentence, claiming the sentence was unreasonable.¹⁴² The Fourth Circuit upheld the conviction, holding that a sentence within the Guidelines was “‘presumptively reasonable.’”¹⁴³

133. See *id.* at 245 (providing for this idea in the opinion of Justice Breyer joined by Chief Justice Rehnquist, Justice O’Connor, Justice Kennedy, and Justice Ginsburg).

134. *Id.* at 245–46.

135. *Id.* at 261 (citing 18 U.S.C. § 3742(e)(3) (1994)).

136. See *id.* at 233 (Stevens, J., opinion of the Court in part).

137. See *id.*

138. See *Rita v. United States*, 551 U.S. 338 (2007).

139. *Id.* at 342.

140. *Id.* at 344.

141. See *id.* at 342–45 (noting the recommendation was made based on the Guidelines).

142. *Id.* at 345.

143. *Id.* at 346 (quoting *United States v. Rita*, 177 F. App’x 357, 358 (4th Cir. 2006)).

The defendant challenged the presumptive reasonableness of a sentence within the Guidelines to the Supreme Court, which ultimately rejected the defendant's claim and held that a court may find a sentence within the Guidelines presumptively reasonable.¹⁴⁴ The Court justified this presumption by stating the sentencing judge and the Commission both reached the same conclusion as to the proper sentence in a particular case.¹⁴⁵ So, when the case reaches the appellate court, there will have already been a double determination by both the judge and the Commission, which "significantly increases the likelihood that the sentence is a reasonable one."¹⁴⁶ The Court emphasized the point that the presumption of reasonableness standard is an appellate court presumption, not a sentencing judge's presumption.¹⁴⁷ Also, the nonbinding appellate presumption does not require the sentencing judge to impose a Guidelines sentence.¹⁴⁸ The Court conceded the presumption may encourage sentencing judges to impose Guidelines sentences, but reasoned that even if judges were encouraged to impose Guidelines sentences, the presumption would still not be unconstitutional but would fulfill congressional goals of fairness through uniformity of sentences.¹⁴⁹

C. Appellate Review of a Sentence Outside the Guidelines: Gall v. United States and Kimbrough v. United States

In *Gall v. United States*, the defendant entered into a plea agreement admitting he was responsible for possessing at least 2,500 grams of ecstasy.¹⁵⁰ In exchange, the Government recognized the defendant had withdrawn from the conspiracy before law enforcement had become privy to the conspiracy.¹⁵¹ The probation officer's pre-sentence report recommended a sentencing range of thirty to thirty-seven months imprisonment.¹⁵² However, the judge sentenced the defendant to probation for thirty-six months.¹⁵³ The judge supported his departure from the Guidelines by citing factors such as the defendant's withdrawal from

144. *Id.* at 347.

145. *Id.*

146. *Id.*

147. *Id.* at 351.

148. *Id.*

149. *Id.* at 352–54.

150. *Gall v. United States*, 552 U.S. 38, 42 (2007).

151. *Id.* at 42–43.

152. *Id.* at 43.

153. *Id.*

the conspiracy, lack of criminal history, age at the time of the illegal conduct, and the defendant's postoffense beneficial behavior to society.¹⁵⁴

The Eighth Circuit reversed and remanded for resentencing.¹⁵⁵ The Eighth Circuit "held that a sentence outside of the Guidelines range must be supported by a justification ""that is proportional to the extent of the difference between the advisory range and the sentence imposed.""¹⁵⁶ The Eighth Circuit characterized the difference between the defendant's sentence and the bottom of the defendant's advisory range as ""a 100% downward variance,"" which required extraordinary circumstances to impose such a sentence.¹⁵⁷ The Eighth Circuit found no extraordinary circumstances to warrant such a staggering departure.¹⁵⁸

The Supreme Court reversed the Eighth Circuit decision.¹⁵⁹ The Court rejected the appellate rule that requires extraordinary circumstances to justify a sentence outside the Guidelines.¹⁶⁰ The Court also rejected the use of a mathematical approach that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.¹⁶¹ These two approaches, according to the Court, came ""too close to creating an impermissible presumption of unreasonableness for sentences outside the Guidelines range."¹⁶²

Next, the Court chose to clarify the sentencing and appellate review processes.¹⁶³ Regarding the sentencing procedure, the district court should begin by correctly calculating the applicable Guidelines range and then hearing arguments from both parties regarding the appropriate Guidelines range and all of the § 3553(a) factors.¹⁶⁴ The district court may not presume the Guidelines range is reasonable, but it must find sufficiently compelling reasons to depart from the Guidelines.¹⁶⁵ Finally, the district court needs to adequately explain the chosen sentence to allow for

154. *Id.* at 43–45.

155. *Id.* at 45.

156. *Id.* (citations omitted).

157. *Id.* (quoting *United States v. Gall*, 446 F.3d 884, 889 (8th Cir. 2006)).

158. *Id.*

159. *Id.* at 59–60.

160. *Id.* at 47.

161. *Id.*

162. *Id.* (citing *Rita v. United States*, 551 U.S. 338, 354–55 (2007)).

163. *Id.* at 49–53.

164. *Id.* at 49–50.

165. *Id.* at 50.

appellate review and to promote fair sentencing.¹⁶⁶

The Court then held that “regardless of whether the sentence imposed is inside or outside the Guidelines range, the appellate court must review the sentence under an abuse-of-discretion standard.”¹⁶⁷ An appellate court must apply the abuse-of-discretion standard both procedurally and substantively.¹⁶⁸ In applying the abuse-of-discretion standard procedurally, the appellate court must ensure the Guidelines range was calculated correctly, the Guidelines were not applied mandatorily, the district court appropriately considered the § 3553(a) factors, the district court did not select a sentence based on clearly erroneous facts, and the district court adequately explained the sentence.¹⁶⁹ When reviewing the sentence for substantive reasonableness, the appellate court should consider “the totality of the circumstances, including the extent of any variance from the Guidelines range.”¹⁷⁰ However, the appellate court “must give due deference to the district court’s decision that the § 3553(a) factors . . . justify the extent of the variance.”¹⁷¹ Even if an appellate court could reasonably conclude that a different sentence is warranted, that reasonable conclusion would not be enough to justify reversal of the sentence of the district court.¹⁷² The decision in *Gall* promotes an abuse-of-discretion standard of review, which gives great deference to district courts in imposing sentences.

In *Kimbrough v. United States*, the Supreme Court further supported the notion of giving deference to district courts in sentencing situations.¹⁷³ In *Kimbrough*, the defendant pleaded guilty to drug charges, including conspiracy to distribute powder and crack cocaine, possession with intent to distribute powder cocaine, and possession with intent to distribute more than fifty grams of crack cocaine.¹⁷⁴ The district court determined the defendant’s Guidelines range to be 228 to 270 months in prison.¹⁷⁵ The judge, however, departed from the Guidelines and imposed a sentence of

166. *Id.*

167. *Id.* at 51.

168. *Id.*

169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.*

173. *See Kimbrough v. United States*, 552 U.S. 85, 91 (2007).

174. *Id.* at 91–92.

175. *Id.* at 98.

only 180 months in prison, plus five years of supervised release.¹⁷⁶ The court reasoned a sentence in the range of the Guidelines “would have been ‘greater than necessary’ to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a).”¹⁷⁷ Most notably, the district court noted the Guidelines’ “disproportionate and unjust” sentencing differential between crack and powder cocaine offenses.¹⁷⁸ The district court compared the sentencing range for the equivalent amount of powder cocaine instead of crack, which would have resulted in a sentencing range of 97 to 106 months instead of 228 to 270 months.¹⁷⁹ After taking this into account with the other § 3553(a) factors, the district court sentenced the defendant to 180 months and five years of supervised release.¹⁸⁰ The Fourth Circuit vacated the sentence, holding “a sentence ‘outside the guidelines range is per se unreasonable when it is based on a disagreement with the sentencing disparity for crack and powder cocaine offenses.’”¹⁸¹

The Supreme Court reversed the Fourth Circuit, reasoning the district court did not abuse its discretion in imposing its sentence.¹⁸² The Court noted the district court appropriately took into account the § 3553(a) factors relevant to its departure from the Guidelines.¹⁸³ The Court also stated “‘courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.’”¹⁸⁴ Thus, the sentence imposed by the district court was reasonable.¹⁸⁵

The decisions in *Rita*, *Gall*, and *Kimbrough* are important in the debate of whether the Ex Post Facto Clause applies to the “advisory” Guidelines. The holdings from these decisions compose the bulk of the scholarly arguments for and against the Ex Post Facto Clause applying to the Guidelines.¹⁸⁶ But before addressing these arguments, it is essential to explore what arguments the circuit courts are debating in the ongoing circuit split on the issue of whether the Ex Post Facto Clause applies to the

176. *Id.* (citations omitted).

177. *Id.* at 110.

178. *Id.* at 98.

179. *Id.* (citation omitted).

180. *Id.*

181. *Id.* (citations omitted).

182. *Id.* at 110–12.

183. *Id.* at 110–11.

184. *Id.* at 101 (citations omitted).

185. *See id.* at 110–12.

186. *See, e.g.,* Dillon, *supra* note 66, at 1077–94; Levy, *supra* note 109, at 2658–66. These arguments are discussed later. *See infra* Part VII.

Guidelines.

VI. CIRCUIT COURTS SPLIT ON WHETHER THE EX POST FACTO CLAUSE APPLIES TO U.S. SENTENCING GUIDELINES AFTER *BOOKER*

A. *The Ex Post Facto Clause Does Not Apply to the U.S. Sentencing Guidelines*

1. *The Seventh Circuit's Interpretation*

The Seventh Circuit¹⁸⁷ is the only circuit to hold that the Ex Post Facto Clause does not apply to the retroactive application of the Guidelines to increase an offender's punishment.¹⁸⁸ In *United States v. Demaree*, the defendant was charged with wire fraud and tax offenses and pleaded guilty to these charges.¹⁸⁹ When the defendant committed the crimes, the applicable Guidelines range was eighteen to twenty-four months, but, at the time of the defendant's sentencing, the amended Guidelines sentencing range was twenty-seven to thirty-three months.¹⁹⁰ The sentencing judge applied the amended Guidelines range and sentenced the defendant to thirty months, noting that if he had utilized the old Guidelines sentencing range he would have sentenced the defendant to only twenty-seven months.¹⁹¹ The twenty-seven month sentence, according to the old Guidelines, would have been above the sentencing range but three months shorter than the thirty month sentence he actually imposed.¹⁹² It is interesting to note that the Government actually agreed with the defendant's argument on appeal—that the sentence imposed was reversible error—but the Seventh Circuit panel stated, “[W]e are not required to accept [the Government's] confession.”¹⁹³

Indeed, the Seventh Circuit panel defied the position of both parties—that the defendant's sentence was in error—and held that the Ex Post Facto Clause should not apply to the Guidelines.¹⁹⁴ The Seventh

187. See *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006).

188. See *supra* notes 12–14 and accompanying text.

189. *Demaree*, 459 F.3d at 792.

190. *Id.*

191. *Id.* at 792–93.

192. *Id.* at 793.

193. *Id.* (citing *United States v. Walker*, 447 F.3d 999, 1005–07 & n.7 (7th Cir. 2006)).

194. See *id.* at 795 (holding “the ex post facto clause should apply only to laws and regulations that bind rather than advise” (citations omitted)).

Circuit opinion, written by Judge Richard A. Posner, began by stating the purposes of the Ex Post Facto Clause, which included that the Ex Post Facto Clause protected people from “being punished more severely than their crime was punishable when committed.”¹⁹⁵ However, the court limited the purpose of the Ex Post Facto Clause by stating the clause’s “purpose is not to enable criminals to calculate with precision the punishments that might be imposed on them.”¹⁹⁶ That purpose, the court noted, would go beyond the concerns of the Ex Post Facto Clause and would be impracticable.¹⁹⁷ Also, the court noted that even when the Guidelines were mandatory, “no criminal could have guessed within three months what his sentence would be if he committed [the defendant’s] offenses.”¹⁹⁸

The Seventh Circuit panel next outlined the ex post facto law tests of the U.S. Supreme Court¹⁹⁹ and noted the following: “Any of these formulas, interpreted literally, would encompass a change in even voluntary sentencing guidelines, for official guidelines, even if purely advisory are bound to influence judges’ sentencing decisions.”²⁰⁰ But the court decided not to apply these various tests literally without interpreting them in the context in which they were made.²⁰¹ Thus, the court explained that in *Miller* the judge was required to have “clear and convincing” reasons to depart from a guidelines sentencing range and a sentence within that range could not be appealed.²⁰² Before *Booker*, the Guidelines “were similarly constraining.”²⁰³ The literal test for finding an ex post facto law—whether the law disadvantages the defendant—thus changes in the context of a purely advisory regulation, such as the federal Sentencing Guidelines after *Booker*. If the ex post facto law test was applied literally, the result would be a “constitutional prohibition . . . unmoored from both its purpose

195. *Id.* at 793 (citations omitted).

196. *Id.* (citations omitted).

197. *Id.*

198. *Id.*

199. *Id.* at 794 (citations omitted) (stating the ex post facto law test has varied and once considered “whether [the law] place[d] the defendant at a disadvantage or substantial disadvantage compared to the law as it stood when he committed the crime of which he has been convicted . . . or imposed a significant risk of enhanced punishment”).

200. *Id.*

201. *Id.* (“[I]t is a disservice to courts to interpret their verbal formulas without reference to context.”).

202. *Id.* (citing *Miller v. Florida*, 482 U.S. 423, 432–33 (1987)).

203. *Id.*

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and the circumstances in which statutes and regulations have heretofore been deemed to be ex post facto laws.”²⁰⁴ The court gave examples of laws illustrating its point. Congress could pass a law that urges federal judges to give longer sentences to a certain class of criminals, or it could appropriate more money for federal prisons on the theory that prison overcrowding induces judges to give shorter prison sentences.²⁰⁵ The laws in these examples, the court reasoned, “would tend to lead to longer sentences on average, but the effect on the values animating the ex post facto clause would be attenuated.”²⁰⁶

The court next rejected the argument that a sentence within the Guidelines range is presumptively reasonable, and thus district courts that utilize a postoffense Guideline specifying a higher sentence will apply that higher sentence instead of the pre-offense Guidelines’ lower range, creating ex post facto concerns.²⁰⁷ The court, in rejecting this argument, stated the sentencing judge “is not required—or indeed permitted—to ‘presume’ that a sentence within the guidelines range is the correct sentence and if he wants to depart [the judge only needs to] give a reason why it’s not correct.”²⁰⁸ All the sentencing judge is required to do is consider the guidelines when imposing a sentence, impose a sentence within the statutory range, and impose a sentence consistent with the factors listed in 18 U.S.C. § 3553(a).²⁰⁹ The judge’s “choice of sentence, whether inside or outside the guideline range, is discretionary and subject therefore to only light appellate review.”²¹⁰ The court further explained the Guidelines merely “nudge[] [the sentencing judge] toward the sentencing range, but his freedom to impose a reasonable sentence outside the range is unfettered.”²¹¹

The final reason the Seventh Circuit panel stated for rejecting the argument that the Ex Post Facto Clause controls the Guidelines is that “whenever a law or regulation is advisory, the judge can always say not that he based his sentence on it but that he took the advice implicit in it.”²¹²

204. *Id.*

205. *Id.*

206. *Id.*

207. *Id.* at 794–95 (citations omitted).

208. *Id.* (citing *United States v. Brown*, 450 F.3d 76, 81–82 (1st Cir. 2006)).

209. *Id.* at 795 (citing *United States v. Miller*, 450 F.3d 270, 275 (7th Cir. 2006)).

210. *Id.* (citations omitted).

211. *Id.*

212. *Id.*

The court reasoned that instead of actually applying the amended Guidelines retroactively, the judge who wanted to give a sentence based on the amended Guidelines could simply say he used the information embodied in the new Guidelines in choosing a sentence consistent with § 3553(a) factors.²¹³ Therefore, a judge who does exactly this in imposing a sentence could not be found to be unreasonable because the Commission is a body of experts in criminal punishment who change the sentencing range for a good reason.²¹⁴

More recently, in *United States v. Nurek*, the Seventh Circuit upheld its decision in *Demaree*.²¹⁵ In *Nurek*, the defendant pleaded guilty to “knowingly receiving child pornography.”²¹⁶ The district judge used the 2006 Guidelines, in effect at the time of the sentencing, in lieu of the 2003 Guidelines, which were in effect at the time the crime was committed, in calculating the defendant’s sentencing range.²¹⁷ The 2006 Guidelines suggested a base offense level for the defendant that was five levels higher than the level under the 2003 Guidelines.²¹⁸ The resulting Guidelines range was 292 to 365 months, which was above the statutory maximum of 240 months, so the statutory maximum became the default range.²¹⁹ The defendant appealed to the Seventh Circuit, claiming the application of the 2006 Guidelines was a violation of the Ex Post Facto Clause.²²⁰ The Seventh Circuit reaffirmed its holding in *Demaree* and stated the defendant’s challenge was squarely foreclosed by *Demaree*.²²¹ Applying most of the same arguments made by the Seventh Circuit in *Demaree*,²²² the court refused to overturn *Demaree* and the defendant’s sentence.²²³ The Seventh Circuit has been the only circuit thus far to definitively hold the Ex Post Facto Clause does not apply to the Guidelines, but as the next subheading of this Note discusses, the Fifth Circuit may decide to follow the Seventh Circuit’s lead.

213. *See id.*

214. *Id.*

215. *United States v. Nurek*, 578 F.3d 618, 625 (7th Cir. 2009).

216. *Id.* at 621.

217. *Id.*

218. *Id.*

219. *Id.* at 622 (citation omitted).

220. *Id.*

221. *Id.* at 625.

222. *United States v. Demaree*, 459 F.3d 791, 794–95 (7th Cir. 2006).

223. *See Nurek*, 578 F.3d at 625–26.

2. *The Fifth Circuit's Indecisive Interpretation*

The Fifth Circuit's interpretation of whether the Ex Post Facto Clause controls the Guidelines post-*Booker* can be summarized as indecisive. The Fifth Circuit first flirted with this issue post-*Booker* in *United States v. Reesor*.²²⁴ The defendant in *Reesor* pleaded guilty to a total of thirty-three counts.²²⁵ In a very brief analysis, the court decided the retroactive application of a section in the 2000 Guidelines in calculating the defendant's sentence violated the Ex Post Facto Clause.²²⁶ The court held the 1998 Guidelines should be applied in calculating the sentence.²²⁷ However, the court vacated some of the defendant's sentences, which required recalculation of the Guidelines range regardless of ex post facto concerns.²²⁸

In a later decision, the Fifth Circuit appeared to follow its decision in *Reesor*.²²⁹ In *United States v. Austin*, the defendant pleaded guilty to healthcare fraud.²³⁰ The defendant committed healthcare fraud in 1998, while his sentencing commenced in 2005, when the 2004 Guidelines were controlling.²³¹ The 2004 Guidelines "loss calculation" enhancement increased the defendant's base offense level by sixteen points, whereas the 1998 Guidelines enhancement increased the base offense level by twelve points.²³² The district court used the 1998 Guidelines in calculating the advisory sentencing range;²³³ thus, a violation of the Ex Post Facto Clause was not at issue. However, a three-judge circuit panel stated in dicta that when the Guidelines range in effect at the time of sentencing yields a higher penalty than the Guidelines range in effect at the time the crime is committed, the court should apply the Guidelines in effect when the offense occurred.²³⁴ Doing so, according to the court, would avoid ex post facto concerns.²³⁵

224. *United States v. Reesor*, 418 F.3d 466, 479 (5th Cir. 2005).

225. *See id.* at 468.

226. *Id.* at 479.

227. *See id.* (noting the "appropriate version" should be used).

228. *Id.*; *see also* *United States v. Rodarte-Vasquez*, 488 F.3d 316, 325 n.2 (5th Cir. 2007) (Jones, C.J., concurring).

229. *See* *United States v. Austin*, 479 F.3d 363, 367 (5th Cir. 2007).

230. *Id.* at 365.

231. *Id.* at 366.

232. *Id.* at 366–67.

233. *Id.* at 367.

234. *Id.*

235. *Id.* ("[T]o avoid ex post facto concerns, the court uses the Guidelines

The Fifth Circuit, in *United States v. Rodarte-Vasquez*, seemed to indicate that it was willing to depart from its prescribed rule in *Reasor* and *Austin*—that the Ex Post Facto Clause applies to the Guidelines.²³⁶ In *Rodarte-Vasquez*, the defendant pleaded guilty to “illegal reentry after deportation.”²³⁷ The presentence report used the 2003 Guidelines, which recommended a sixteen-level enhancement because the defendant was previously deported for an alien-smuggling offense.²³⁸ The 2002 Guidelines, in effect at the time the offense occurred, limited this enhancement only to previous alien smuggling that was committed for profit.²³⁹ The district court utilized the 2003 Guidelines and sentenced the defendant to forty-six months in prison.²⁴⁰

The Fifth Circuit held that application of the 2003 Guidelines constituted an ex post facto violation.²⁴¹ The court vacated the defendant’s sentence and remanded to the district court to apply the 2002 Guidelines to resentencing.²⁴² However, the court stated it was reviewing the sentence “under the *Booker*-rejected mandatory guidelines regime.”²⁴³ Chief Judge Edith Jones’s concurring opinion clarified the holding, stating, “[A]s this case arises from a pre-*Booker* sentencing, we do not reach the issue whether the *ex post facto* clause can apply to a post-*Booker* sentence.”²⁴⁴ Chief Judge Jones further stated that “[p]ost-*Booker* the guidelines are informative, not mandatory.”²⁴⁵ Following this characterization, Chief Judge Jones stated that the purely advisory Guidelines presented no ex post facto problem.²⁴⁶ Chief Judge Jones’s concurring opinion in *Rodarte-Vasquez* left the door open for the Fifth Circuit to follow the Seventh Circuit in holding the Ex Post Facto Clause does not apply to the Guidelines.

In *United States v. Castillo-Estevez*,²⁴⁷ Chief Judge Jones and the Fifth

yielding the lesser penalty.”).

236. *United States v. Rodarte-Vasquez*, 488 F.3d 316, 324 (5th Cir. 2007).

237. *Id.* at 318.

238. *Id.*

239. *Id.* at 319.

240. *Id.*

241. *Id.* at 324.

242. *Id.*

243. *Id.* at 322 (citation omitted).

244. *Id.* at 325 (Jones, C.J., concurring).

245. *Id.*

246. *Id.*

247. *United States v. Castillo-Estevez*, 597 F.3d 238 (5th Cir. 2010).

Circuit had the opportunity to walk through that door but declined to do so. In *Castillo-Estevez*, the defendant pleaded guilty to “being unlawfully present in the United States after deportation.”²⁴⁸ Based on the defendant’s past state drug trafficking offenses, the district court applied a sixteen-level sentencing enhancement in compliance with the 2008 Guidelines and sentenced the defendant to thirty-seven months in prison.²⁴⁹ The defendant argued the 2007 Guidelines, which were in effect at the time the offense occurred and had a more restrictive definition of a drug trafficking offense that was not met, should have been applied.²⁵⁰ Thus, the 2007 Guidelines would have reduced his sentence.²⁵¹

In Chief Judge Jones’s opinion, the court declined to determine whether the Ex Post Facto Clause applies to the Guidelines post-*Booker*.²⁵² The court avoided the issue by stating that because the defendant raised the argument for the first time on appeal, the court would review the application of the 2008 Guidelines for plain error.²⁵³ The court held that even if the district court’s application of the 2008 Guidelines violated the Ex Post Facto Clause, the error would not be plain in light of cases decided after *Booker*, including *Rodarte-Vasquez* and *Demaree*.²⁵⁴ The sentence was not plain error, “because the caselaw reveals a ‘reasonable dispute’ regarding the *ex post facto* implications of retroactive application of the advisory guidelines.”²⁵⁵ *Castillo-Estevez* displays the Fifth Circuit’s indecision on whether the Ex Post Facto Clause applies to the Guidelines. The conflicting decisions on the issue emanating from the Fifth Circuit create uncertainty, calling for a definitive decision to resolve the issue.

B. *The Ex Post Facto Clause Does Apply to the U.S. Sentencing Guidelines*

1. *The D.C. and Second Circuit’s “Substantial Risk” Test*

While the Fifth Circuit has given the impression it may agree with the Seventh Circuit in holding the Ex Post Facto Clause does not control the Guidelines, the majority of circuits take the opposite view.²⁵⁶ In *United*

248. *Id.* at 239.

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.* at 241.

253. *Id.* at 240.

254. *Id.* at 241.

255. *Id.*

256. *See, e.g., United States v. Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010); *United*

States v. Turner, the D.C. Circuit took this opposite view.²⁵⁷ In *Turner*, the defendant was convicted of conspiracy to commit bribery and to defraud the United States.²⁵⁸ The defendant received the money from his crime in 2001.²⁵⁹ The version of the Guidelines in effect at the time of the crime called for a sentencing range of twenty-one to twenty-seven months.²⁶⁰ In 2004, the Guidelines were amended to increase the sentencing range to thirty-three to forty-one months.²⁶¹ In 2007, the district court used the version in effect at sentencing, after the 2004 amendment, to sentence the defendant to thirty-three months.²⁶²

On appeal, the defendant argued the use of the amended Guidelines violated the Ex Post Facto Clause because it imposed a harsher penalty than the pre-offense version in effect when the crime was committed in 2001.²⁶³ The Government argued the conspiracy ended in 2005, based on acts to conceal the initial crime; thus, there was no ex post facto problem because the district court properly applied the correct base offense level at the time the offense ended.²⁶⁴ The court disagreed and held the conspiracy ended in 2001.²⁶⁵ The court then held, under *Garner* and *Miller*, that the use of the 2006 Guidelines “created a substantial risk” that the defendant’s sentence was more severe and was thus a violation of the Ex Post Facto Clause.²⁶⁶ The court noted that the district court, using the harsher 2006 Guidelines, sentenced the defendant to the bottom of the 2006 Guidelines range—thirty-three to forty-one months—while the more lenient 2000 Guidelines likely would have led to a lesser range—twenty-one to twenty-seven months.²⁶⁷

States v. Lewis, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Lanham*, 617 F.3d 873, 890 (6th Cir. 2010); *United States v. Thompson*, 518 F.3d 832, 870 (10th Cir. 2008); *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) (citing *Miller v. Florida*, 482 U.S. 423, 435 (1987)); *United States v. Wood*, 486 F.3d 781, 790–91 (3d Cir. 2007); *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (citing *United States v. Larrabee*, 436 F.3d 890, 894 (8th Cir. 2006)).

257. *See Turner*, 548 F.3d at 1100.

258. *Id.* at 1096.

259. *Id.*

260. *Id.*

261. *Id.*

262. *Id.*

263. *See id.* (noting the increase in the Guidelines ranges).

264. *Id.*

265. *Id.* at 1098.

266. *Id.* at 1100 (citing *Miller v. Florida*, 482 U.S. 423, 433 (1987)).

267. *Id.*

Also, in finding a violation of the Ex Post Facto Clause, the D.C. Circuit expressly rejected the Seventh Circuit's argument in *Demaree*, which held judges could get around a rule that the Ex Post Facto Clause applies to the Guidelines by simply looking to postoffense amendments to the Guidelines for the reasonableness of a departure.²⁶⁸ The D.C. Circuit stated it "reject[ed] the idea that district judges will misrepresent the true basis for their actions."²⁶⁹ The court then rejected the Seventh Circuit's argument in *Demaree* that "district judges have 'unfettered' freedom to impose sentences outside the sentencing range and that sentences within the range are not presumptively reasonable."²⁷⁰ The D.C. Circuit reasoned the Supreme Court in *Rita* confirmed that "courts may apply a presumption of reasonableness" to a sentence calculated within the Guidelines range.²⁷¹ As a result, the court reasoned judges are more likely to sentence within the Guidelines in order to avoid being overruled at the appellate level for a sentence imposed outside the Guidelines.²⁷² Finally, the D.C. Circuit emphasized that judges use the Guidelines as a starting point or anchor, which influences the sentences judges impose.²⁷³

Recently, the Second Circuit followed the D.C. Circuit's substantial risk standard in *United States v. Ortiz*.²⁷⁴ In *Ortiz*, the defendant pleaded "guilty to being a felon in possession of a firearm . . . and possession of

268. *Id.* at 1099 (citing *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006)).

269. *Id.*

270. *Id.* (citing *Demaree*, 459 F.3d at 795).

271. *Id.* (citations omitted). The *Turner* court seems to indicate *Rita* overruled *Demaree* by holding that an appellate court may presume a sentence within the Guidelines is reasonable. *See id.* However, the *Demaree* court made clear the district court—as opposed to an appellate court—may not apply a presumption of reasonableness to a sentence within the Guidelines range. *See Demaree*, 459 F.3d at 794–95 (citing *United States v. Brown*, 450 F.3d 76, 81–82 (1st Cir. 2006)). The Supreme Court reiterated this distinction in *Rita*. *Rita v. United States*, 551 U.S. 338, 351 (2007).

272. *Turner*, 548 F.3d at 1099 (citing Graham C. Mullen & J.P. Davis, *Mandatory Guidelines: The Oxymoronic State of Sentencing After United States v. Booker*, 41 U. RICH. L. REV. 625 (2007)). It is important to note the U.S. Supreme Court, in both *Gall* and *Kimbrough*, held a sentence imposed outside of the Guidelines is subject to a highly deferential abuse-of-discretion standard, which indicates sentencing judges would not hastily impose a default sentencing range within the Guidelines to avoid an appellate court reversal. *See Gall v. United States*, 552 U.S. 38, 51 (2007); *Kimbrough v. United States*, 552 U.S. 85, 111 (2007); *see also supra* Part V.C.

273. *Turner*, 548 F.3d at 1099–100 (citations omitted).

274. *United States v. Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010).

narcotics with intent to distribute.”²⁷⁵ In regard to the sentencing of the firearms charge, the district court applied a four-level enhancement because the serial number of one of the firearms the defendant possessed was obliterated.²⁷⁶ This four-level enhancement was enacted by the Commission after the defendant committed the crime.²⁷⁷ According to the amended Guidelines, the sentencing range was 168 to 210 months, as opposed to the unamended Guidelines range, which was 151 to 188 months.²⁷⁸ The district court utilized the amended Guidelines range, but sentenced the defendant to 120 months, which is forty-eight months below the bottom of the amended Guidelines range.²⁷⁹ Although the defendant received a non-Guidelines sentence, he still contended that the use of the amended Guideline for an obliterated serial number was in violation of the Ex Post Facto Clause.²⁸⁰

In deciding the issue, the Second Circuit adopted the D.C. Circuit’s substantial risk standard.²⁸¹ The court stated that the substantial risk standard “appropriately implements the *Ex Post Facto* Clause in the context of sentencing under the advisory Guidelines regime, and is faithful to Supreme Court jurisprudence explaining that the Clause protects against a postoffense change that ‘create[s] a significant risk of increas[ing] [the] punishment.’”²⁸² The court rejected the approach of the Seventh Circuit and recognized there may be circumstances where the Ex Post Facto Clause applies to the Guidelines.²⁸³ But the court was quick to acknowledge the substantial risk standard “does not invalidate every sentence imposed after a Guidelines range has been increased after the date of the offense.”²⁸⁴ In fact, the court distinguished this case from *Turner*.²⁸⁵ In *Turner*, the district court sentenced the defendant to the bottom of the postoffense Guidelines range, and the D.C. Circuit reasoned that if the district judge would have used the pre-offense Guidelines range,

275. *Id.* at 84.

276. *Id.* (citations omitted).

277. *See id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(4) app. C, amend. 691 (2006)).

278. *Id.* at 85.

279. *Id.* at 84.

280. *Id.* at 84–85.

281. *Id.* at 87.

282. *Id.* (alteration in original) (quoting *Garner v. Jones*, 529 U.S. 244, 255 (2000)).

283. *Id.*

284. *Id.*

285. *See id.* at 87–88.

it was likely the sentence would have been lower.²⁸⁶ Thus, the defendant's sentence in *Turner* created a substantial risk that the sentence imposed was more severe than if the pre-offense Guidelines would have been utilized.²⁸⁷ However, the defendant in *Ortiz* suffered no substantial risk.²⁸⁸ Under the unamended Guidelines, the defendant's range would have been 151 to 188 months, whereas the amended Guidelines range was 168 to 210 months.²⁸⁹ The district court, however, imposed a non-Guidelines sentence of 120 months, well below either Guidelines range.²⁹⁰ The Second Circuit reasoned there was no substantial risk, let alone any risk at all, that the district court would have made a more generous departure from the Guidelines had the judge calculated the Guidelines range using the unamended Guidelines.²⁹¹

2. *The Third Circuit's Interpretation: United States v. Wood*

While the D.C. and Second Circuits have reviewed ex post facto claims regarding the Guidelines under the more nuanced substantial risk standard, the Third Circuit has categorically held the Ex Post Facto Clause applies to the Guidelines in every instance where the retroactive application of amended Guidelines imposes a harsher penalty than if the unamended Guidelines were used to calculate the sentence.²⁹² The defendant in *Wood* was convicted of "conspiracy to interfere with interstate commerce by robbery, . . . interference with interstate commerce by robbery, . . . and using and carrying a firearm during and in relation to a crime of violence."²⁹³ The district court imposed a sentence of 240 months, which incorporated a six-level enhancement for the defendant's actions of creating a substantial risk of serious bodily harm to a police officer.²⁹⁴ The defendant argued that application of the six-level enhancement violated the Ex Post Facto Clause.²⁹⁵ The six-level enhancement was incorporated

286. *Id.* at 87 (citing *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008)).

287. *Id.* (citing *Turner*, 548 F.3d at 1100).

288. *See id.*

289. *Id.* at 87–88.

290. *Id.* at 88.

291. *Id.*

292. *See United States v. Wood*, 486 F.3d 781, 790 (3d Cir. 2007).

293. *Id.* at 783.

294. *Id.* at 786 (citing U.S. SENTENCING GUIDELINES MANUAL § 3A1.2(c) (2004)).

295. *Id.* at 789 (citing U.S. SENTENCING GUIDELINES MANUAL § 3A1.2(c) (footnote omitted)).

into the postoffense Guidelines, whereas prior to the amendment, the defendant would have only received a three-level enhancement and a lower sentence.²⁹⁶ The court noted the sentencing court should apply the Guidelines in effect at the time of sentencing except where “such retroactivity results in harsher penalties, [because] Ex Post Facto Clause problems arise, and courts must apply the earlier version.”²⁹⁷ The court found this was indeed the case and vacated the defendant’s sentence.²⁹⁸ The defendant committed the offenses in 2004,²⁹⁹ which was before the *Booker* decision.³⁰⁰ This could suggest, as in *Rodarte-Vasquez*, that the Third Circuit was reviewing the sentence “under the *Booker*-rejected mandatory guidelines regime,”³⁰¹ and could perhaps leave open the possibility that when reviewing a post-*Booker* sentencing, the Third Circuit may reach a different conclusion.

3. *The Fourth Circuit’s Interpretation: United States v. Lewis*

While the Third Circuit may be open to the possibility of finding the Ex Post Facto Clause does not control the Guidelines in certain cases, the Fourth Circuit foreclosed that option in *United States v. Lewis*.³⁰² In *Lewis*, the defendant “was convicted of possession of a firearm by a convicted felon.”³⁰³ During sentencing, the district court was presented with an amended postoffense Guidelines range and the unamended Guidelines range.³⁰⁴ The amended Guidelines range specified a sentencing range of forty-one to fifty-one months, whereas the unamended Guidelines range specified a range of twenty-one to twenty-seven months.³⁰⁵ The district court ruled the amended Guidelines, if applied, would violate the Ex Post Facto Clause.³⁰⁶ Therefore, the district court sentenced the defendant to twenty-seven months, using the unamended Guidelines range.³⁰⁷ The

296. *Id.* at 790 (citing U.S. SENTENCING GUIDELINES MANUAL § 3A1.2(b) (2002)).

297. *Id.* (citations omitted).

298. *Id.* at 791.

299. *Id.* at 790.

300. *See United States v. Booker*, 543 U.S. 220, 220 (2005).

301. *See United States v. Rodarte-Vasquez*, 488 F.3d 316, 322 (5th Cir. 2007) (citation omitted).

302. *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010).

303. *Id.* at 196.

304. *See id.*

305. *Id.*

306. *Id.* at 197.

307. *Id.*

Government appealed the Ex Post Facto Clause ruling to the Fourth Circuit.³⁰⁸

The Fourth Circuit affirmed the district court's ruling, holding the Guidelines are the starting point in the sentencing process, and therefore, retroactively applying an increased advisory range creates a "significant risk that a defendant will be subject to increased punishment."³⁰⁹ In its analysis, the court distinguished between a "facial" challenge to the Ex Post Facto Clause and an "as-applied" challenge.³¹⁰ The court determined the defendant "was not required to show that the amended Guidelines on their face—i.e., 'by [their] own terms—would have contravened the Ex Post Facto Clause, [but only had] to demonstrate that retroactive application of the amended Guidelines, as applied to him through 'practical implementation,' posed a 'significant risk of increasing his punishment.'"³¹¹ Because the defendant only had to show that through practical implementation the amended Guidelines created a significant risk of increased punishment, the court only had to decide this issue.³¹²

The court addressed this issue by analyzing how important the Guidelines were in sentencing. First, the Fourth Circuit held the Ex Post Facto Clause applies to the Guidelines because "[a] sentence based on an improperly calculated guidelines range will be found unreasonable and vacated."³¹³ Thus, a correct Guidelines calculation range is the crucial starting point for sentencing.³¹⁴ Second, the court emphasized that the Fourth Circuit's standard of review highlighted the importance of the Guidelines because the appellate court may apply a presumption of reasonableness to a sentence within the Guidelines, while a variance from the Guidelines requires a "sufficiently compelling [reason] to support the degree of the variance."³¹⁵ Finally, the federal sentencing statistics emphasize the importance of the Guidelines in the Fourth Circuit.³¹⁶ The statistics showed that 81.9% of sentences imposed in the Fourth Circuit fell

308. *Id.*

309. *Id.* at 199 (citing *Gall v. United States*, 552 U.S. 38, 49 (2007)).

310. *Id.* at 199–200 (citations omitted).

311. *Id.* (footnote omitted).

312. *Id.* at 200 (citations omitted).

313. *Id.* at 200–01 (alteration in original) (quoting *United States v. Abu Ali*, 528 F.3d 210, 260 (4th Cir. 2008)).

314. *Id.* at 201 (citing *United States v. Diaz-Ibarra*, 522 F.3d 343, 347 (4th Cir. 2008)).

315. *Id.* (quoting *United States v. Morace*, 594 F.3d 340, 346 (4th Cir. 2010)).

316. *Id.* (citing *United States v. Turner*, 548 F.3d 1094, 1099 (D.C. Cir. 2008)).

within “the advisory Guidelines range or a government-sponsored departure below the Guidelines range.”³¹⁷ According to the court, the foregoing reasons prove “the Guidelines [are] an important ‘anchor’ for a sentencing judge.”³¹⁸

The court next discussed why it disagreed with *Demaree*.³¹⁹ First, the Seventh Circuit reasoned the defendant’s ex post facto claim failed in light of the discretion conferred on a sentencing court to impose non-Guidelines sentences.³²⁰ The Fourth Circuit characterized this as “an overly narrow view of the scope of the Ex Post Facto Clause.”³²¹ This characterization is succinct because the question is not whether the sentencing courts retain discretion under the Guidelines, but rather “how the sentencing courts exercise their ‘discretion in practice,’ and whether that exercise of discretion creates a ‘significant risk’ of prolonged punishment.”³²² The court also disagreed with *Demaree* that a sentencing court only has to consider the Guidelines before exercising its unfettered discretion to impose a sentence outside the Guidelines.³²³ However, in the Fourth Circuit, a district court’s mere consideration of the Guidelines is insufficient; the district court must correctly calculate the range and give an explanation of how it arrived at that calculation.³²⁴

Finally, Fourth Circuit appellate review of a sentence is not light—a procedural error in determining a sentence, such as incorrectly calculating the correct Guideline range, requires the Fourth Circuit to vacate the sentence.³²⁵ Therefore, “a properly calculated Guidelines range is a precondition of appellate review of a sentence’s substantive reasonableness.”³²⁶ The arguments set forth in *Lewis* could quite possibly be the strongest in favor of entertaining ex post facto claims in accordance

317. *Id.* (citing U.S. SENTENCING COMM’N, FINAL QUARTERLY DATA REPORT: FISCAL YEAR 2009, at 2–3 [hereinafter “2009 FINAL QUARTERLY DATA REPORT”]).

318. *Id.* at 202 (citing *Turner*, 548 F.3d at 1099).

319. *See id.* at 202–03.

320. *Id.* at 202 (citing *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006)).

321. *Id.* (citing *Demaree*, 459 F.3d at 795).

322. *Id.* (citing *Fletcher v. Reilly*, 433 F.3d 867, 867–77 (D.C. Cir. 2006)).

323. *Id.* at 202–03 (citing *Demaree*, 459 F.3d at 795).

324. *Id.* at 203 (citing *United States v. Wilkinson*, 590 F.3d 259, 270 (4th Cir. 2010)).

325. *Id.* (citing *United States v. Abu Ali*, 528 F.3d 210, 260 (4th Cir. 2008)).

326. *Id.*

with the Guidelines.

4. *The Sixth Circuit's Interpretation: United States v. Lanham*

The Sixth Circuit has also joined the majority of its sister circuits in finding that the Ex Post Facto Clause applies to the Guidelines.³²⁷ In *United States v. Lanham*, the “[d]efendants committed their offenses in 2003 when the 2002 Guidelines were in effect.”³²⁸ In effect at the time of sentencing, the 2008 Guidelines established a higher sentencing range.³²⁹ The district court used the 2002 Guidelines to calculate the defendants’ sentences.³³⁰

The Government appealed the district court’s use of the 2002 Guidelines in lieu of the 2008 Guidelines in calculating the sentencing range.³³¹ The Government argued there would be no Ex Post Facto Clause violation if the higher ranged 2008 Guidelines were used.³³² The Sixth Circuit rejected this contention.³³³ Much like the D.C.,³³⁴ Second,³³⁵ and Fourth Circuits,³³⁶ the court stated, “The Sentencing Guidelines are still relevant and a starting point for determining a defendant’s sentence.”³³⁷ A sentencing judge may only depart from a Guidelines sentence “when the Guidelines range is unable to meet the goals of the Sentencing Guidelines.”³³⁸ The advisory Guidelines also do not completely eliminate ex post facto concerns because the Government was only interested in using the 2008 Guidelines so the defendants’ sentences would be enhanced, which demonstrates the ex post facto problems with applying the 2008 Guidelines.

5. *The Eighth Circuit's Interpretation: United States v. Carter*

The Eighth Circuit also takes the approach that the Ex Post Facto

327. *United States v. Lanham*, 617 F.3d 873, 890 (6th Cir. 2010).
 328. *Id.* at 889.
 329. *Id.*
 330. *Id.* at 882–83.
 331. *See id.* at 889.
 332. *Id.*
 333. *Id.* at 889–90.
 334. *See, e.g., United States v. Turner*, 548 F.3d 1094, 1099–1100 (D.C. Cir. 2008).
 335. *See, e.g., United States v. Ortiz*, 621 F.3d 82, 88 (2d Cir. 2010).
 336. *See, e.g., United States v. Lewis*, 606 F.3d 193, 202 (4th Cir. 2010).
 337. *Id.*
 338. *Lanham*, 617 F.3d at 890 (citing 18 U.S.C. § 3553(a) (2006)).

Clause applies to the Guidelines.³³⁹ In *United States v. Carter*, the district court sentenced the defendant to 295 months for sexual abuse of a minor and related crimes.³⁴⁰ The defendant appealed the sentence, arguing the court violated the Ex Post Facto Clause in applying a postoffense sentencing enhancement.³⁴¹

The Eighth Circuit first stated the ““retrospective application of the Guidelines implicates the *ex post facto* clause.””³⁴² The court referred to section 1B1.11 of the Guidelines, which directs a court to apply the version of the Guidelines in effect at the date of sentencing unless doing so violates the Ex Post Facto Clause.³⁴³ However, the court did not reach the *ex post facto* claim³⁴⁴ and affirmed his sentence on a procedural issue.³⁴⁵

6. *The Tenth Circuit’s Interpretation: United States v. Thompson*

The Tenth Circuit has also held that the Ex Post Facto Clause applies to the Guidelines.³⁴⁶ In *United States v. Thompson*, the defendant was convicted of three counts, resulting in a sentence of twenty-seven months of imprisonment and thirty-six months of supervised release.³⁴⁷ The district court sentenced the defendant under the amended 2005 Guidelines, resulting in a higher sentencing range.³⁴⁸ The defendant argued the district court should have used the pre-offense 1989 Guidelines in calculating her sentencing range.³⁴⁹

The Tenth Circuit set forth a two-prong test to determine whether a version of the Guidelines violated the Ex Post Facto Clause.³⁵⁰ Under this test, the appellate court must first determine whether the sentencing court applied the Guidelines to events that occurred before they were enacted.³⁵¹ Second, the appellate court must determine whether the Guidelines

339. *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007).

340. *Id.* (footnote omitted).

341. *Id.* at 644.

342. *Id.* at 643 (citations omitted).

343. *Id.*

344. *Id.* at 645–46.

345. *Id.* at 646.

346. *See United States v. Thompson*, 518 F.3d 832, 870 (10th Cir. 2008).

347. *Id.* at 849.

348. *See id.* at 869.

349. *See id.*

350. *Id.* at 870 (citing *United States v. Gerber*, 24 F.3d 93, 95–96 (10th Cir. 1994)).

351. *Id.* (citing *Gerber*, 24 F.3d at 96).

disadvantaged the affected offender.³⁵² The court determined the first prong was not fulfilled because the court found overt acts after 2001.³⁵³ Although the district court applied the 2005 Guidelines, the 2005 Guidelines and the 2001 Guidelines were the same in regards to the defendant's sentencing range.³⁵⁴ Essentially, the district court applied the correct Guidelines range, and the sentence was affirmed.³⁵⁵ The majority of circuits agree that the Ex Post Facto Clause applies to the Guidelines.

VII. SCHOLARLY DEBATE SURROUNDING THE ISSUE

The issue as to whether the Ex Post Facto Clause applies to the Guidelines has sparked a debate in the world of academia. Both James R. Dillon—arguing in favor of the Ex Post Facto Clause application to the Guidelines³⁵⁶—and Daniel M. Levy—arguing in opposition to the application of the Ex Post Facto Clause to the Guidelines³⁵⁷—address the issue by applying the Supreme Court's two-prong ex post facto test found in *Garner* and *Morales*. First, the Ex Post Facto Clause will prohibit facial application of a rule that significantly increases the risk that a defendant will receive a higher sentence under the amended rule compared to the unamended rule.³⁵⁸ Second, if the rule is not deemed facially inconsistent with the Ex Post Facto Clause, a defendant can present evidence showing that an amended rule's practical implementation creates a greater punishment than the unamended rule, which would result in a violation of the Ex Post Facto Clause.³⁵⁹

Dillon argues that the advisory Guidelines violate the first prong of the *Garner* test.³⁶⁰ Because the Court in *Gall* dictated that judges first calculate the correct Guidelines range,³⁶¹ applying a revised Guideline that specifies a higher sentencing range creates a substantial risk of a higher sentence.³⁶² Levy counters that even though the sentencing judge must calculate the Guidelines range, the sentencing court considers other factors

352. *Id.* (citing *Gerber*, 24 F.3d at 96).

353. *Id.*

354. *Id.* at 870 n.20.

355. *Id.* at 870.

356. *See* Dillon, *supra* note 66, at 1077–94.

357. *See* Levy, *supra* note 109, at 2658–66.

358. *See* *Garner v. Jones*, 529 U.S. 244, 255 (2000).

359. *See id.*

360. *See* Dillon, *supra* note 66, at 1078–88.

361. *Gall v. United States*, 552 U.S. 38, 49 (2007).

362. *See* Dillon, *supra* note 66, at 1088.

besides the appropriate Guidelines range.³⁶³ Also, the district court is not to presume the Guidelines are reasonable.³⁶⁴ Finally, the *Garner* test requires a finding of a significant risk of increased punishment, not any risk at all.³⁶⁵ Appellate courts review a district court's sentence under an abuse-of-discretion standard, which indicates that judges have discretion in imposing sentences.³⁶⁶ Thus, the risk of an increased punishment under an amended, higher-ranged Guideline is simply not significant and would not be a violation of the Ex Post Facto Clause.³⁶⁷

Regarding the second prong of the *Garner* test, Dillon argues statistical evidence of the implementation of the Guidelines indicates the Ex Post Facto Clause does apply to the Guidelines.³⁶⁸ First, there is a high rate of compliance with the Guidelines by district courts in imposing a sentence.³⁶⁹ Second, there are high affirmation rates of sentences within the Guidelines and a high reversal rate of sentences below the Guidelines.³⁷⁰ These reasons suggest the practical application of an amended Guideline, which specifies a higher sentencing range, would be in violation of the Ex Post Facto Clause. Dillon also relies on *United States ex rel. Forman v. McCall*,³⁷¹ in which the Third Circuit held a compliance rate of seventy-five percent with the Adult Guidelines for Parole Decision Making of the U.S. Parole Commission did not invoke an Ex Post Facto Clause violation.³⁷² Dillon compares the seventy-five percent compliance rate in *Forman* with the near eighty-seven percent compliance rate of the Guidelines, and finds that because the Guidelines compliance rate is much higher than the *Forman* compliance rate, the Guidelines are subject to the Ex Post Facto Clause.³⁷³ In sum, Dillon argues that empirical data reveals

363. Levy, *supra* note 109, at 2660 (citing 18 U.S.C. § 3553(a) (2006)).

364. *Id.* (citing *Gall*, 128 S. Ct. at 596–97).

365. *Id.* (citing *Garner v. Jones*, 529 U.S. 244, 255 (2000)).

366. *Id.* (citations omitted).

367. *Id.*

368. See Dillon, *supra* note 66, at 1089–94.

369. See *id.* at 1090 (citing U.S. SENTENCING COMM'N, FINAL QUARTERLY DATA REPORT FISCAL YEAR 2007, at 1 (2008) [hereinafter "2007 FINAL QUARTERLY DATA REPORT"]) (stating district courts sentenced within the Guidelines range 86.7% of the time in 2007).

370. See *id.* at 1091–92 (citing Appendix to Brief for the New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioner at 3a, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06-5754)).

371. *United States ex rel. Forman v. McCall*, 776 F.2d 1156 (3d Cir. 1985).

372. See Dillon, *supra* note 66, at 1090–91 (citing *Forman*, 776 F.2d at 1163).

373. See *id.* at 1090–91.

district courts lack sentencing discretion.

Levy finds flaws in Dillon's empirical data.³⁷⁴ First, Dillon's use of district courts' compliance rates extends only between nine and ten months from the *Gall* and *Kimbrough* decisions.³⁷⁵ Levy argues more time is needed to let the precedent from *Gall* and *Kimbrough* filter down to the district courts.³⁷⁶ Levy next argues that Dillon's data classifies government-sponsored sentences below the Guidelines as sentences within the Guidelines.³⁷⁷ According to Levy, the government-sponsored sentences should not be included in the data sample because these sentences are not left entirely to the judge's discretion.³⁷⁸

Regarding Dillon's appellate statistics data, Levy contends this data is irrelevant because it comes from an amicus curiae brief in *Rita*, a case that was decided before *Gall* and *Kimbrough*.³⁷⁹ This data is irrelevant because *Rita*, *Gall*, and *Kimbrough* set forth the sentencing procedure and emphasized the abuse-of-discretion review standard.³⁸⁰

Levy also argues there is a problem with using percentages to decide constitutional issues.³⁸¹ According to Levy, a rule that sets a specific compliance percentage to show the Guidelines are subject to the Ex Post Facto Clause would be arbitrary.³⁸² Levy notes the Court rejected the requirement that a judge has "to supply mathematically proportional compelling evidence to justify a departure from the Guidelines."³⁸³ According to Levy, a rule that sets a specific compliance percentage to indicate when the Ex Post Facto Clause applies to the Guidelines would be arbitrary.³⁸⁴ Because of these reasons, Levy argues, the advisory Guidelines do not meet the second prong of the *Garner* test.

374. See Levy, *supra* note 109, at 2660–65.

375. *Id.* at 2661 (citing U.S. SENTENCING COMM'N, POST-KIMBROUGH/GALL DATA REPORT tbl.1, n.1 (2008), available at http://www.usc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Kimbrough_Gall/USSC_Kimbrough_Gall_Report_Final_FY2008.pdf).

376. See *id.*

377. *Id.* (footnote omitted).

378. *Id.* at 2661–62.

379. *Id.* at 2662 (footnote omitted).

380. *Id.*

381. *Id.* at 2663.

382. *Id.*

383. *Id.* (citing *Gall v. United States*, 128 S. Ct. 586, 596 (2007)).

384. *Id.*

Finally, Levy argues that characterizing the Guidelines as “laws” is impracticable.³⁸⁵ Much like the Seventh Circuit in *Demaree*, Levy argues judges could easily avoid a rule that the Ex Post Facto Clause controls the Guidelines by using the information contained in the amended Guidelines in sentencing a defendant under the § 3553(a) factors.³⁸⁶ Any judge that used the amended Guidelines in this manner to increase a defendant’s sentence could not be acting unreasonably if the sentence fell within the range of the Guidelines in effect at sentencing.³⁸⁷ As an example of the impracticability of such a rule, Levy uses Eighth Circuit jurisprudence.³⁸⁸ The Eighth Circuit, in *United States v. Larrabee*, looked to postoffense Guidelines amendments when assessing the reasonableness of a sentence, and affirmed a sentence greater than the recommended range in the pre-offense version of the Guidelines.³⁸⁹ Yet, in *Carter*, the Eighth Circuit held the Ex Post Facto Clause prohibited a judge from using amended Guidelines if that Guideline specified a higher sentence than the unamended Guidelines.³⁹⁰ Thus, according to Levy, the Ex Post Facto Clause loses its substance because a court could simply circumvent it by applying postoffense amendments contained in an amended version of the Guidelines in determining a sentence under the § 3553(a) factors.³⁹¹

VIII. THE EX POST FACTO CLAUSE SHOULD NOT APPLY TO THE GUIDELINES

A. *The First Prong of the Garner Test*

The Ex Post Facto Clause does not apply to the Guidelines under the first prong of the *Garner* test. Under this prong, no rule that “by its own terms show[s] a significant risk” of an increased punishment can be applied retroactively.³⁹² The Guidelines are advisory and thus cannot pose a significant risk of increased punishment if applied retroactively. The Court in *Booker* held “[a]ny fact (other than a prior conviction) which is

385. See *id.* at 2665–66.

386. *Id.* at 2665 (citing *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006)).

387. *Id.* (citing *Demaree*, 459 F.3d at 795).

388. See *id.*

389. *United States v. Larrabee*, 436 F.3d 890, 891–92 (8th Cir. 2006).

390. *United States v. Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (citations omitted).

391. Levy, *supra* note 109, at 2665.

392. *Garner v. Jones*, 529 U.S. 244, 255 (2000).

necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt.”³⁹³ Thus, the defendant’s Sixth Amendment right to a jury trial was incompatible with the Guidelines because the defendant’s sentence reflected evidence that was found by a preponderance of the evidence.³⁹⁴ The Court remedied this problem by making the Guidelines advisory.³⁹⁵ Those who interpret the Ex Post Facto Clause to apply to the Guidelines suggest the Guidelines are binding laws in direct contradiction to the Court in *Booker*. Not only is this interpretation a contradiction of Supreme Court precedent, it also “creates a constitutional contradiction.”³⁹⁶ If the Ex Post Facto Clause controls the Guidelines, then the Guidelines carry legal force under the Ex Post Facto Clause but not under the Sixth Amendment.³⁹⁷

Additionally, one of the purposes of the Ex Post Facto Clause was to ensure certainty by giving fair notice of the laws to the people.³⁹⁸ The advisory Guidelines present no notice problems according to the Supreme Court.³⁹⁹ In *Irizarry v. United States*, the Court confronted the issue of whether Federal Rule of Criminal Procedure 32(h) applied to every sentence that varied from the recommended Guidelines range.⁴⁰⁰ Rule 32(h) states in part, “Before the court may depart from the applicable sentencing range on a ground not identified for departure either in the presentence report or in a party’s prehearing submission, the court must give the parties reasonable notice that it is contemplating such a departure.”⁴⁰¹

The Court concluded that Rule 32(h) did not apply to every variance from the Guidelines, stating, “Now faced with advisory Guidelines, neither the Government nor the defendant may place the same degree of reliance on the type of ‘expectancy’ that gave rise to a special need for notice

393. *United States v. Booker*, 543 U.S. 220, 244 (2005).

394. *See id.* at 235.

395. *Id.* at 245.

396. *See United States v. Lewis*, 606 F.3d 193, 205 (4th Cir. 2010) (Goodwin, J., dissenting).

397. *Id.*

398. *See Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388–89 (1798) (opinion of Chase, J.); *see also Miller v. Florida*, 482 U.S. 423, 430 (1987) (citing *Weaver v. Graham*, 450 U.S. 24, 30 (1981)).

399. *See Irizarry v. United States*, 553 U.S. 708, 713–14 (2008).

400. *Id.*

401. FED. R. CRIM. P. 32(h).

Indeed, a sentence outside the Guidelines carries no presumption of unreasonableness.⁴⁰² *Irizarry* is relevant in the ex post facto context because no defendant has any rightful expectation to a sentence within the Guidelines. If there is no rightful expectation to a sentence within the Guidelines, then there can be no complaint when the defendant's Guideline range is changed; the defendant's only rightful expectation is to be sentenced under the applicable statutory range. The statutory range gives a defendant all the notice he needs for Ex Post Facto Clause purposes.

However, courts that apply the Ex Post Facto Clause to the Guidelines find that the retroactive application of the Guidelines fulfills the first prong of the *Garner* test. The central argument of these courts is that the Supreme Court mandates district courts to begin the sentencing process by correctly calculating the appropriate Guideline range; therefore, according to these courts, the Guidelines provide an initial benchmark or anchor for judges, which likely influences the sentence imposed.⁴⁰³ However, correctly calculating the appropriate Guideline range is not the end-all, be-all of the sentencing process. Other considerations, such as the § 3553(a) factors, are also mandatorily required to be considered by a sentencing judge and are just as likely to influence the sentence imposed.⁴⁰⁴ As *Gall* makes clear, the sentencing judge may not presume the correctly calculated Guidelines range is reasonable.⁴⁰⁵ Moreover, the sentencing judge has the permission to “tailor the sentence in light of other statutory concerns,”⁴⁰⁶ and the judge can also disregard the advice of the Guidelines based solely on policy grounds.⁴⁰⁷ The sentencing decision must also reflect an individualized assessment based on the facts presented—the assessment is entitled to due deference from an appellate court.⁴⁰⁸ Requiring a district court to correctly calculate the applicable Guidelines range simply ensures the Guidelines advice is correct.⁴⁰⁹ The district court is not “anchored” down by the Guidelines range, nor bound to impose a sentence within that

402. *Irizarry*, 553 U.S. at 713–14 (citations omitted).

403. *See, e.g.*, *United States v. Lewis*, 606 F.3d 193, 200 (4th Cir. 2010); *United States v. Turner*, 548 F.3d 1094, 1099–1100 (D.C. Cir. 2008) (citations omitted); *see also* *Dillon*, *supra* note 66, at 1088.

404. *See Gall v. United States*, 552 U.S. 38, 49–50 (2007).

405. *Id.* at 50 (citation omitted).

406. *United States v. Booker*, 543 U.S. 220, 245 (2005) (citation omitted).

407. *Kimbrough v. United States*, 552 U.S. 85, 101 (2007) (citation omitted).

408. *Gall*, 552 U.S. at 50–51.

409. *United States v. Lewis*, 606 F.3d 193, 207 (4th Cir. 2010) (Goodwin, J., dissenting).

range.⁴¹⁰ Calculating the correct Guidelines range is simply the first step in a sentencing procedure that is based on the defendant's own individualized facts, which guide the court in imposing an appropriate sentence under § 3553(a) factors.

In sum, retroactive application of an amended Guideline that specifies a higher sentencing range does not provide "by its own terms . . . a significant risk" of increased punishment.⁴¹¹ The Guidelines are advisory and do not have the force of law, and holding otherwise would be in defiance of Supreme Court precedent and would create a constitutional contradiction. Defendants also have no rightful expectation to be given notice when a sentencing court is considering a departure from the Guidelines range because a defendant is not entitled to a Guidelines range. Fair notice of the defendant's expected sentence is found in the applicable statute. Finally, the sentencing judge is not "anchored" down by the Guidelines range. The Guidelines range is only the starting point in the sentencing process, which as a whole advises and informs the judge on the appropriate sentence to be imposed.

B. *The Second Prong of the Garner Test*

Even if a retroactively applied rule by its own terms does not provide for a significant risk of increased punishment, a violation of the Ex Post Facto Clause can be found when the practical implementation of that rule creates a higher punishment.⁴¹² Practical implementation of the Guidelines can be found in the caselaw, beginning with *Gall* and *Kimbrough*. In both of these cases, the Supreme Court upheld district court sentences below the Guidelines.⁴¹³ Also, all circuit courts have upheld sentences outside the Guidelines range.⁴¹⁴ These cases show the Guidelines, by practical

410. *See id.*

411. *Garner v. Jones*, 529 U.S. 244, 255 (2000).

412. *See id.*

413. *Gall*, 552 U.S. at 59–60; *Kimbrough v. United States*, 552 U.S. 85, 111–12 (2007).

414. *See, e.g.*, *United States v. Stewart*, 590 F.3d 93, 136–37, 144 (2d Cir. 2009) (holding that a sentence below the Guidelines range was reasonable); *United States v. Tomko*, 562 F.3d 558, 560, 571 (3d Cir. 2009) (holding the district court did not abuse its discretion in sentencing the defendant below the Guidelines range); *United States v. Autery*, 555 F.3d 864, 867 (9th Cir. 2009) (affirming a sentence of probation when the Guidelines specified a sentence of imprisonment); *United States v. Shaw*, 560 F.3d 1230, 1232, 1241 (11th Cir. 2009) (finding that a sentence above the Guidelines range was not unreasonable); *United States v. Thurston*, 544 F.3d 22, 24, 26 (1st Cir. 2008) (holding the defendant's sentence below the Guidelines range was reasonable); *United*

implementation, are advisory so long as the sentencing judge articulates sound reasoning for sentencing outside the Guidelines range.⁴¹⁵

Courts and commentators applying the Ex Post Facto Clause to the Guidelines argue the empirical data proves that the practical implication of the Guidelines creates a significant risk of increased punishment.⁴¹⁶ This is simply not so. First, courts and commentators applying the Ex Post Facto Clause to the Guidelines seem to distort the data to conform to their preconceived convictions. Both the Fourth Circuit and Dillon argue the district court's compliance rates—which are very high in their interpretation of the data—indicate the practical implementation of retroactive Guidelines constitutes a significant risk of increased punishment.⁴¹⁷ But both data samples include sentences with government-sponsored departures.⁴¹⁸ Sentences resulting from government-sponsored departures should not be incorporated into data because it is impossible to say what a defendant's sentence would have been if left solely to the judge's discretion.

States v. Evans, 526 F.3d 155, 158 (4th Cir. 2008) (affirming a more than 300% deviation above the Guidelines range sentence); United States v. Duhon, 541 F.3d 391, 394 (5th Cir. 2008) (affirming a sentence of probation when the Guidelines specified a sentence of imprisonment); United States v. Vowell, 516 F.3d 503, 511–13 (6th Cir. 2008) (affirming a sentence well above the Guidelines range); United States v. McIntyre, 531 F.3d 481, 482 (7th Cir. 2008) (finding that a sentence above the Guidelines range was reasonable); United States v. Bueno, 549 F.3d 1176, 1180, 1182 (8th Cir. 2008) (finding a sentence of probation reasonable although the Guidelines specified a sentence of imprisonment); United States v. Pinson, 542 F.3d 822, 833, 839 (10th Cir. 2008) (affirming a sentence above the Guidelines range); United States v. Gardellini, 545 F.3d 1089, 1090 (D.C. Cir. 2008) (affirming a sentence below the Guidelines range).

415. See *Kimbrough*, 552 U.S. at 111 (Scalia, J., concurring) (quoting *Booker* and subsequent cases). “These statements mean that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines.” *Id.* at 113.

416. See, e.g., United States v. Lewis, 606 F.3d 193, 201–02 (4th Cir. 2010); Dillon, *supra* note 66, at 1089–94.

417. See *Lewis*, 606 F.3d at 201 (citing 2009 FINAL QUARTERLY DATA REPORT, *supra* note 317) (noting 81.9% of sentences imposed in the Fourth Circuit fell within the Guidelines range or a government-sponsored departure below the Guidelines range); Dillon, *supra* note 66, at 1090 (citing 2007 FINAL QUARTERLY DATA REPORT, *supra* note 369) (stating district courts sentenced within the Guideline range 86.7% of the time in 2007).

418. See *Lewis*, 606 F.3d at 201 (citing 2009 FINAL QUARTERLY DATA REPORT, *supra* note 317); Dillon, *supra* note 66, at 1090 (citing 2007 FINAL QUARTERLY DATA REPORT, *supra* note 369).

When excluding government-sponsored departures from the data sample, the results are wildly different. In the fourth quarter, district courts' compliance rate with the Guidelines range was 54.6%.⁴¹⁹ The Fourth Circuit had only a 61.8% compliance rate.⁴²⁰ These compliance rates are well below Dillon's 86.7% rate and the Fourth Circuit's 81.9% respectively.⁴²¹ In addition, these rates fall well below Dillon's example in *Forman*, where the court held a compliance rate of 75% was not an Ex Post Facto Clause violation.⁴²² The 54.6% compliance rate for the fourth quarter of 2010 shows a marked decline from the first quarter of 2008, which was 60%.⁴²³ This decline shows that the decisions of *Gall* and *Kimbrough*—decided in 2007—and the highly deferential abuse-of-discretion appellate review standards emanating from those two decisions, have filtered down to the district courts.

The main problem with using compliance rates to infer the Ex Post Facto Clause applies to the Guidelines is that the compliance rates do not reflect why the courts sentenced within the Guidelines range.⁴²⁴ The Guidelines compliance rates do not prove district courts sentenced within the Guidelines because they felt fear of being reversed on appeal if they did not sentence within the Guidelines, nor do the rates prove the district court lazily applied a Guidelines sentence because they did not want to provide an in-depth explanation of their sentence, which is a requirement when the court varies from a Guidelines sentence.⁴²⁵ In fact, the Supreme Court has already rejected the use of a mathematical formula using the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence.⁴²⁶ In addition, utilizing the compliance rates to determine the constitutional issue is arbitrary

419. U.S. SENTENCING COMM'N, UNITED STATES SENTENCING COMMISSION FINAL QUARTERLY DATA REPORT FISCAL YEAR 2010, at 12 (2010) [hereinafter "2010 FINAL QUARTERLY DATA REPORT"], available at http://www.ussc.gov/Data_and_Statistics/Federal_Sentencing_Statistics/Quarterly_Sentencing_Updates/USSC_2010_Quarter_Report_Final.pdf.

420. *Id.* at 2 tbl. 2.

421. *Lewis*, 606 F.3d at 201 (citing 2009 FINAL QUARTERLY DATA REPORT, *supra* note 317); Dillon, *supra* note 66, at 1090 (citing 2009 FINAL QUARTERLY DATA REPORT, *supra* note 317).

422. See Dillon, *supra* note 66, at 1090–91 (citing United States *ex rel.* Forman v. McCall, 776 F.2d 1156, 1163 (3d Cir. 1985)).

423. 2010 FINAL QUARTERLY DATA REPORT, *supra* note 419, at 12.

424. See *Lewis*, 606 F.3d at 208 (Goodwin, J., dissenting).

425. *Id.*

426. *Gall v. United States*, 552 U.S. 38, 47 (2007).

because, as the above analysis shows, those taking different sides on the issue can skew the compliance rates to reflect their side of the argument.

Therefore, the practical implementation of retroactive Guidelines does not create a significant risk of an increased sentence. First, the Supreme Court and all circuit courts have affirmed sentences that fell below the Guidelines range.⁴²⁷ Second, the district court compliance rates with the Guidelines have fallen drastically since the decisions in *Gall* and *Kimbrough*. Third, those who rely on the compliance rates to prove that the practical implementation of the Guidelines violates the Ex Post Facto Clause neglect to consider that the compliance rates do not prove why the district courts sentence within the Guidelines. Finally, the compliance rates can be skewed to fit either side of the argument in debating the constitutional issue.

IX. CONCLUSION

The Ex Post Facto Clause should not apply to the Guidelines because they are advisory and do not carry the force of law. In *Booker*, the Supreme Court ruled the then-mandatory nature of the Guidelines violated a defendant's Sixth Amendment right to a jury trial.⁴²⁸ The Court remedied this problem by declaring the Guidelines advisory.⁴²⁹ Since *Booker*, the Court has only ruled in favor of giving district courts broad discretion in imposing sentences outside the Guidelines range. In both *Gall* and *Kimbrough*, the Court affirmed sentences below the Guidelines range and specified that appellate courts should review sentences for abuse of discretion.⁴³⁰ All of the circuit courts have responded by affirming sentences outside the Guidelines range.⁴³¹ These decisions emphasize the discretion held by district courts in sentencing and the advisory nature of the Guidelines. Because of this discretion, a defendant has no right to a particular Guideline sentence. A defendant has only the right to a sentence within the applicable statutory minimum and maximum sentence. Therefore, using an amended version of the Guidelines that specifies a higher sentence than the unamended version does not violate the Ex Post Facto Clause.

However, every circuit other than the Seventh Circuit has ruled the

427. See *supra* text accompanying notes 413–14.

428. See *supra* text accompanying note 117.

429. See *supra* text accompanying note 133.

430. See *supra* Part V.C.

431. See *supra* note 414.

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Ex Post Facto Clause applies to the retroactive application of the Guidelines. These circuits neglect the holdings in *Booker*, *Gall*, and *Kimbrough*, which promote sentencing discretion. They create a constitutional contradiction by holding the Guidelines as mandatory laws under the Ex Post Facto Clause but advisory under the Sixth Amendment. These circuits also erroneously presume judges impose sentences within the Guidelines range because a sentence within the Guidelines is presumptively reasonable in contradiction to Supreme Court precedent. Finally, these circuit courts mistakenly utilize statistical data to conclude the Ex Post Facto Clause applies to the Guidelines in contradiction to Supreme Court precedent. These circuits need to be intellectually consistent and hold that the Guidelines are advisory both for purposes of the Sixth Amendment and the Ex Post Facto Clause.

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