The Material World of Word Choice: Where is the Law *Ex Post Peugh*?

I. INTRODUCTION

“On July 4, 1980, Ms. Washabaugh left her home and told friends that she was moving to Los Angeles to live with her new husband. Three days later, police officers found a human hand on the Hollywood Freeway in Los Angeles.”

Justice Thomas delivered this chilling factual description in a 1995 case addressing whether the application of a state’s amendment altering parole procedures to prisoners—who committed their crimes before the amendment—violated the *Ex Post Facto* Clause of the Constitution. The Court concluded that it did not. Justice Thomas wrote creatively to establish his view on *ex post facto* violations, while defending legislation that deferred parole hearings for prisoners convicted of “more than one offense which involves the taking of a life.” He failed, however, to realize that his opinion also announced the same rule that would challenge—and defeat—his position almost two decades later in *Peugh v. United States*.

Justice Sotomayor recently authored the opinion that the appellate courts have been waiting for to resolve a conflict critical to federal sentencing. Her careful word choice in presenting the “touchstone of th[e] Court’s inquiry” demonstrates how an opponent’s opinion from the past can be an invaluable resource in the present. The Court was asked to consider whether the application of post-crime federal Sentencing Guidelines calling for higher sentencing ranges creates an *ex post facto* problem. Petitioner Marvin Peugh raised the *ex post facto* issue properly in both the District Court for the Northern District of Illinois and in the Seventh Circuit Court of Appeals, making the case ripe for the Supreme Court’s review.

This case arises out of the broader issue involving the influence—and destruction—that the Guidelines have had on uniform sentencing in federal courts. The Guidelines, even though
advisory after the 2005 *Booker* decision,\(^{11}\) are “the starting point and initial benchmark” for sentencing judges.\(^{12}\) Miscalculating the Guidelines is “procedural error” on review.\(^{13}\)

In 1999 and 2000, Peugh engaged in two fraudulent white collar schemes, pleaded not guilty, went to trial, and was found guilty of five counts of bank fraud.\(^{14}\) At his sentencing hearing in 2010, Peugh argued that he should have been sentenced under the Guidelines in effect when he committed his crimes, but the district court sentenced him using the low end of the 2009 Guidelines—thirty-three months greater (before enhancement) than the *high* end of the 1998 Guidelines.\(^{15}\) Even though the statutory maximum remained the same, the advisory guideline range practically doubled in under a decade.\(^{16}\) Concerns for injustice uninhibited, could a once-binding-now-non-binding guideline range really trigger an *Ex Post Facto* Clause violation?

This casenote examines how an elementary principle, word choice, crafted the case law surrounding this animated debate. Part II provides a brief history of *ex post facto* law construction, including the cases that have given this term of art its meaning and have challenged its application. Part III will consider the *Peugh* opinion in detail, including the positions taken by the majority and the dissent, which reflect the controversy behind the *ex post facto*-Guidelines debate. Part IV will highlight issues present in both the dissent and the majority opinions in *Peugh*, illustrating how careless error in word selection is a real problem in judicial opinions. First, it will describe how poor word choice can develop rules that run contrary to an original author’s position. Second, it will argue that by centering on the words “*fundamental justice,*"\(^{17}\) the majority in *Peugh* missed an opportunity to reduce the Guidelines’ legal force, and instead, silently reinstated the Guidelines’ pre-*Booker* status. Lastly, it will show that *Peugh* used a lot of words, but held very little to solve the *ex post facto* problem.
II. EX POST FACTO LAW: HOW A CONSTITUTIONAL TERM OF ART HAS CHALLENGED THE COURTS

A. Meet the Clauses

Article I of the Constitution prohibits both Congress and the states from passing any ex post facto legislation, by stating that “[n]o Bill of Attainder or ex post facto Law shall be passed”\(^\text{18}\) and that “[n]o State shall . . . pass any . . . ex post facto Law . . . .”\(^\text{19}\) The description ends there. Although ex post facto literally means “after the fact” in Latin,\(^\text{20}\) both constitutional clauses end with the word law. Such laws were “contrary to the first principles of the social compact, and to every principle of sound legislation.”\(^\text{21}\) Thus, the phrase ex post facto law was considered a “term of art”\(^\text{22}\) and to some, it “has been well understood since at least 1798, when the Court in Calder v. Bull . . . identified four categories of ex post facto laws.”\(^\text{23}\)

B. Defining Ex Post Facto Laws and the Ex Post Facto Clause

[For, naked and without explanation, it is unintelligible, and means nothing.\(^\text{24}\)] Justice Chase provided four categories of ex post facto laws, but category three, “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed”\(^\text{25}\) is the only one at issue in Peugh.\(^\text{26}\) Further, “every ex post facto law must necessarily be retrospective,” but not every retrospective law is prohibited.\(^\text{27}\)

The Court continued to rely on Justice Chase’s interpretation,\(^\text{28}\) but has been divided over whether to employ a strict interpretation of the Ex Post Facto Clause. Specifically, courts and legal scholars\(^\text{29}\) have struggled to determine whether something other than legislation can actually violate the Clause.\(^\text{30}\) The laws must harm the person affected by them,\(^\text{31}\) and “[t]he Clause ‘assur[es] that legislative Acts give fair warning of their effect.’”\(^\text{32}\)

In 1883, the Court departed from its strict common law interpretation of the Clause holding that “any law passed after the commission of an offence which . . . ‘alters the situation of
a party to his disadvantage,’ is an *ex post facto* law.” In 1937, the petitioners in *Lindsey v. Washington* confronted a state statute limiting judges’ discretion for specific crimes. When they committed their grand larceny offense, a requirement of “not more than fifteen years” applied, but two months later, that maximum became the mandatory sentence. Because the new law “operate[d] to [petitioners’] detriment,” the Court held that they could bring their *ex post facto* claim even though they *might* have received the same punishment under the old law.

Fifty years later, in *Miller v. Florida*, the state legislature had enacted legislation for sentencing guidelines—much like the federal scheme at issue today—in order to reduce discrepancies in sentences. The Florida guidelines were “recommendations” from the state’s sentencing commission that required judges to give “clear and convincing reasons in writing” for departures, while in-range sentences were *not* even subject to appellate review. The law at issue in *Miller* increased the rates and lengths of prison time for sexual offenders.

The lower court rejected the petitioner’s *ex post facto* claim, and he was given a higher sentence under the revised guidelines, but the appellate court reversed based on precedent noting that the judge could still impose the higher sentence if he provided ‘clear and convincing reasons’ consistent with the new legislation. The Supreme Court of Florida reversed by characterizing the legislation as “procedural,” which did not need an *ex post facto* analysis. After applying a three-part test, the Supreme Court found an *ex post facto* violation because the guidelines imposed “a high hurdle that must be cleared before discretion can be exercised.”

As Justice Thomas pointed out, it took the Court almost a century to return to its understanding that the “‘term of art [had] an established meaning at the time of the framing of the Constitution.’” Then, two cases, *Morales* and *Garner*, explored the issue of whether legislation that altered parole procedures and increased sentences could violate the *Ex Post Facto*
Clause. The respondent in *Morales* was convicted twice for murder in California, and under the law in place at the time he murdered his second victim, he was eligible for parole hearings each year.\(^4^8\) A new amendment deferred subsequent parole hearings for certain prisoners.\(^4^9\) The Ninth Circuit reversed the lower court’s denial of the respondent’s federal habeas corpus petition and agreed that the amendment was an *ex post facto* violation.\(^5^0\)

Subsequently, Justice Thomas announced the Court’s finding that “the amendment create[d] only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment . . . and [was] insufficient under any threshold we [must] establish under the *Ex Post Facto* Clause.”\(^5^1\) Five years later, in *Garner*, Georgia’s Parole Board amended its rules so that parole hearings would take place every eight years (rather than three) for all inmates serving life sentences who had previously been denied parole.\(^5^2\) The respondent was denied parole in 1989, thus, the Board set reconsideration for 1997.\(^5^3\) The respondent was summarily denied relief in the district court, and the court of appeals reversed.\(^5^4\)

Operating under *Morales*’ fittingly named “significant risk” test, the Court determined that the appellate court’s record did not have enough information regarding the level of risk of increased punishment created by the change in law to decide the issue.\(^5^5\) The case was reversed and remanded for further proceedings,\(^5^6\) but *Garner* fashioned another rule in the process—“the presence of discretion does not displace the protections of the *Ex Post Facto* Clause.”\(^5^7\)

C. Federal Sentencing Reform and its Creation of the *Ex Post Facto* Circuit Split

Following the public crusade for sentencing reform,\(^5^8\) Congress had three policy concerns in mind underlying the Sentencing Reform Act of 1984\(^5^9\) and its new Guidelines—honesty, uniformity, and proportionality.\(^6^0\) Moving from a “medical” model,\(^6^1\) one in which the courts treated criminal offenders as patients in need of rehabilitation, the federal Sentencing
Commission’s new sentencing model created “uniform guidelines that would be binding on federal courts at sentencing.” Sentencing judges operated under this model until *United States v. Booker* in 2005, where the Court held that the Guidelines’ binding status violated the Sixth Amendment because judges (rather than juries) were finding facts impacting sentencing.

Exploring what Congress intended, Justice Breyer, in *Booker’s* remedial opinion, sought to right the wrong embedded within the Guidelines’ enabling statute without invalidating the entire statute. One approach, advanced by Justice Stevens in his dissent, would keep the statute and Guidelines as written and add a jury trial provision. The other approach, which the Court chose, severed two provisions, making the Guidelines advisory “while maintaining a strong connection between the sentence imposed and the offender’s real conduct—a connection important to the increased uniformity of sentencing that Congress [had] intended . . . .”

In *Booker*, the Court stated that the Sentencing Act still “require[d] judges to take account of the Guidelines together with other sentencing goals” including factors in 18 U.S.C. § 3553(a) such as the defendant’s category offense level, policy statements, and the need to provide restitution to victims. Although Justice Scalia “believe[d] that only in ‘Wonderland’” could the Court “infer a standard of review after excising § 3742(e),” the Court reinstated a reasonableness standard of review for appellate courts. Moreover, the Court stood behind its decision eschewing Justice Scalia’s concerns that the review that would be a “discordant symphony” that would “‘wreak havoc’ on the judicial system.”

Three opinions—*Rita*, *Kimbrough*, and *Gall*—were issued by the Court to help shed light on the scope of reasonableness review. The cases encouraged sentencing courts to think outside the Guidelines and appellate courts to provide more deference to non-Guidelines sentencing decisions. *Gall v. United States*, for example, involved a petitioner, who in his second year of
college, distributed ecstasy for roughly seven months, but chose to stop both using and
distributing drugs on his own.\textsuperscript{74} He moved to Arizona and got a job, but was indicted over three
years later.\textsuperscript{75} The district court sentenced him to thirty-six months’ probation instead of the
prescribed imprisonment range.\textsuperscript{76} The appellate court reversed because of the drastic variance,
concluding that it was not “supported by extraordinary circumstances.”\textsuperscript{77}

The Court rejected its finding and application of a rigid mathematical formula and held
that “appellate court[s] must review the sentence under an abuse of discretion standard.”\textsuperscript{78} It
added two more links to the appellate court review’s chain. First, that the “Guidelines should be
the starting point and the initial benchmark” and second, that “[i]f the sentence is within
Guidelines range, the appellate court may, but is not required to, apply a presumption of
reasonableness.”\textsuperscript{79} The Guidelines’ continuing influence and force over sentencing judges
produced the circuit court split that was before the Court in \textit{Peugh}. Circuits recognized the
split,\textsuperscript{80} many addressed it and found \textit{ex post facto} application,\textsuperscript{81} and only one believed that the \textit{Ex
Post Facto} Clause could not be violated by an advisory guideline system.\textsuperscript{82}

\section*{III. IT IS ABOUT TIME!: \textit{PEUGH V. UNITED STATES}}

After one of their farming businesses, Grainery Inc., started experiencing financial
problems in 1999, Peugh and his cousin engaged in two fraudulent schemes.\textsuperscript{83} The loan fraud
and check kiting schemes\textsuperscript{84} allowed the men to defraud one bank of more than $2.5 million and
to overdraw an account at another by $471,000.\textsuperscript{85} Peugh, however, faced two greater misfortunes
than the decline of his businesses. First, his cousin pleaded guilty and agreed to testify against
him at trial.\textsuperscript{86} Second, the Government brought suit against him in the Seventh Circuit—the only
circuit\textsuperscript{87} that advanced the view that the post-\textit{Booker} advisory Guidelines calling for higher
sentences could \textit{not} violate the \textit{Ex Post Fact} Clause.\textsuperscript{88}
At trial, a jury found Peugh guilty of five counts of bank fraud, and at sentencing, Peugh argued that sentencing him under the 2009 Guidelines—ten years after his crimes—presented an *ex post facto* violation because it “would result in a significantly higher sentencing range.” His argument begged the question of whether the district court, sitting in the Seventh Circuit, could accept that the Guidelines might trigger the *Ex Post Facto* Clause. It could not.

After agreeing that Peugh should receive a two-level obstruction-of-justice enhancement for his perjured testimony, the resulting offense level was 27 under the revised Guidelines and 21 under the old Guidelines. The advisory ranges were 70-87 months and 37-46 months respectively. Peugh was sentenced to 70 months—just under six years. Meanwhile, the statutory (binding) maximum of thirty years remained the same. On appeal, the panel affirmed Peugh’s sentence, standing by its prior holding in *United States v. Demaree*.

Justice Sotomayor and the Court were faced with two options. They could accept the petitioner’s argument that the Guidelines could violate the *Ex Post Facto* Clause even though they “no longer impose binding sentencing ranges, [but] they continue to have the force and effect of law, albeit in a more limited fashion” or adopt the Government’s position that no constitutional violation can occur when “it is not binding legal enactment, and it cannot be understood as increasing the previously prescribed penalty for an offense.” The Court chose a modified version of the former.

Following a discussion of the Sentencing Reform Act of 1984, the Guidelines, *Booker* and its progeny, and a history of the *Ex Post Facto* Clause’s origins—much like the one in *Morales*, Justice Sotomayor chose to focus on a pre-*Booker* case, *Miller*, because it presented a similar factual scenario. Unlike the Florida guidelines in *Miller*, the current federal Guidelines do not preclude appellate courts from reviewing within-range sentences or require “clear and
convincing reasons’ for departures,” but the majority refuted the dissent’s position that the “differences [were] dispositive,” finding that the Guidelines “impose a series of requirements on sentencing courts that cabin the exercise of [their] discretion.”

Justice Sotomayor noted that both parties’ arguments were supported, but their arguments also had major weaknesses. Peugh’s force of law argument, while practical, was weak in that it would require the Court to broaden its *ex post facto* understanding to include the *court-mandated* advisory Guidelines, and this weakness was evidenced by the argument’s demotion to a footnote in the petitioner’s brief. On the other hand, the Government’s position, which Justice Thomas’ “dissent echoes,” is premised on assertion that the post-*Booker* Guidelines have truly lost legal force and status.

By combining prior decisions, showing that the Guidelines still retain legal force, and by spotlighting Morales’ “significant risk” test, Justice Sotomayor and the majority reversed the judgment of the Seventh Circuit. The majority concluded that the amended Guidelines range “offended ‘one of the principal interests that the *Ex Post Facto* Clause was designed to serve, fundamental justice.’” Justice Thomas, in a dissent focused on the “punishment affixed by *law,*” failed because he had set the stage for the Court’s decision over two decades ago.

**PART IV: EXPOSING WEAKNESS, EXPOUNDING JUSTICE, AND *EX POST PEUGH***

A. Keeping Friends Close and Enemies Closer

Surely not “enemies” in the traditional sense, Justice Sotomayor and Justice Thomas were, nevertheless, on opposite sides of the *Ex Post Facto* Clause debate. By highlighting a rule Justice Thomas announced in 1995 and focusing on the weak points of his dissent, the majority in *Peugh* halted a common sense injustice embedded in the current federal sentencing scheme.
Reading *Peugh* for the first time, I did not see that both *Morales* and *Garner* did not find *ex post facto* violations. By reducing this reality to one sentence sensibly placed at the end of Part III of her opinion, Justice Sotomayor guided her readers to believe that it does not take a “law” to create an *Ex Post Facto* Clause violation. The “touchstone of th[e] Court’s inquiry” was not whether the Guidelines are law; rather, it was “whether a given change in law presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’”

Justice Sotomayor drew another weapon from *Morales*, “the *Ex Post Facto* Clause forbids the [government] to enhance the measure of punishment by altering the substantive ‘formula’ used to calculate the applicable sentencing range.” When Justice Thomas cited *Weaver* and *Miller* for this idea, he probably did not anticipate he would be cited for holding the same. Justice Sotomayor (albeit strategically) dropped the prior case references. If he had not announced the “significant risk” test in *Morales*, Justice Thomas would not have had to include a footnote apology in his *Peugh* dissent. More importantly, Justice Sotomayor would have lacked the foundation she needed to broaden the scope of *ex post facto* review.

**B. Minority Report: Missing an Opportunity by Voting with the Majority**

“The applicable guideline range nudges him toward the sentencing range, but his freedom to impose a reasonable sentence outside the range is unfettered. We conclude that the *ex post facto* clause should only apply to laws and regulations that bind rather than advise . . . .”

At first glance, the words “nudge,” “freedom,” “reasonable,” and “unfettered” seem misplaced in the same sentence describing the Guidelines. But, what if the Seventh Circuit was on to something? Although suspect in its generalization that the Sentencing Commission typically has good reasons for guideline changes, this opinion’s central premise—that the Guidelines are advisory—could have helped the Court reduce the Guidelines’ force.
Described as “mind-numbingly incoherent” by one district court judge, Justice Breyer’s explanation of an appellate court’s reasonableness review has confused the lower courts.\(^{117}\) By following the Seventh Circuit’s lead, the Court could have reduced the impact of the Guidelines by telling judges to consider relevant (arguably more important) factors first and by explicitly eliminating judges’ fear of reversal.\(^{118}\) Doing so, however, would have contradicted prior holdings and instead, the Court refuted the only opinion praising the Guidelines as advisory.\(^{119}\)

In an effort to keep the Court’s post-Booker decisions intact and to promote short-term fundamental justice, the Peugh majority missed an opportunity to promote long-term change. There are serious issues surrounding the post-Booker Guidelines. Not least of which is that at least five cases—Apprendi, Booker, Kimbrough, Rita, and Gall—must be consulted to even begin to understand the “now constitutional” Guidelines and their appropriate review. Judges are burdened by a broken framework. Justice Sotomayor pointedly challenged this concept with her comparison of the Guidelines to a policy paper.\(^{120}\) Nonetheless, rather than seizing the opportunity to demote the Guidelines’ status, the Court has essentially reinstated the Guidelines’ pre-Booker legal force. At this rate, the courts’ anchor\(^{121}\) is likely to start sinking some ships.

**C. Aftermath: Where is the Law Ex Post Peugh?**

“The government is unaware of any case in which this Court has applied the *Ex Post Facto* Clause to advisory provisions.”\(^{122}\) It is now. And so are many others anxiously appealing sentences crafted with anything other than law. Justice Sotomayor’s intentional journey through the common law and case law will fall to the way side—much like the outcome of Morales and Garner—as other courts cite this opinion. The Court has given legal risk takers a new toy.

Poor math—6+13+2=19\(^{123}\)—was not the only hiccup in Justice Sotomayor’s opinion. Suppose, for example, that Peugh had been sentenced to fifty-five months rather than seventy.
The sentencing judge gives reasons for his or her determination, but happens to choose a sentence length suspiciously close to the middle of the old and the new advisory ranges. The sentence will likely stand even post-Peugh.

Contrary to what some journalists suggest, the Court has fallen short of holding that post-crime Guidelines can no longer be used in sentencing determinations. It could have, but instead, it held that “[d]istrict courts must begin their sentencing analysis with the Guidelines in effect at the time of the offense . . . . The newer Guidelines, meanwhile, will have a status of one of many reasons a district court might give for deviating from the Guidelines, a status that is simply not equivalent . . . .” There are a lot of words there, but not enough to answer (among other things) what other factors will qualify as something less than a law but more than a suggestion for “ex post facto purposes.”

V. CONCLUSION

Word choice is material in judicial writing. It matters. There is no “careless error” standard of review, but maybe there should be. Peugh is just one example of why. Justice Sotomayor did an excellent job of using prior case law—specifically, a case written by her challenger—to prevent an obvious injustice. And to be fair, nineteen was Peugh’s original offense level before a two-level enhancement was added.

Her opinion, however, will leave readers questioning the law ex post Peugh. Not only will sentencing judges wonder if the Guidelines are considered law (again), but Justice Sotomayor’s not-so-sleight of hand in Peugh will likely challenge her in the future. This is not the end of the ex post facto discussion concerning the Guidelines. It is only the beginning of the discussion concerning factors yet to be considered. Will a strongly-encouraged-not-to-be-overlooked consultation with a policy paper actually be a future ex post facto problem?

2 Id. at 501-02.

3 Id. at 509 ("The amendment creates only the most speculative and attenuated possibility of producing the prohibited effect of increasing the measure of punishment . . . .").

4 Id. at 503.


7 Peugh, slip op. at 8.

8 See id. at 1.

9 See Petition for Writ of Certiorari, supra note 5, at 3.


13 Peugh, slip op. at 5-6.

14 Id. at 2.

15 Id. at 3 ("[T]he district court rejected Peugh’s argument that the 2009 Guidelines violated the Ex Post Facto Clause, noting that it was foreclosed by Seventh Circuit precedent.”).

16 See id. at 3.
17 *Id. at 20* (explaining that “fundamental justice” was one of the interests served by the *Ex Post Facto* Clause).

18 U.S. CONST. art. I, § 9, cl. 3.

19 U.S. CONST. art. I, § 10, cl. 1.

20 Holley, *supra* note 6, at 11.


22 *Peugh*, slip op. at 7 (quoting Collins v. Youngblood, 497 U.S. 37, 41 (1990)).


24 Calder v. Bull, 3 U.S. 386, 390 (1798) (emphasis added) (discussing the endeavor to provide guidance as to what laws are considered an *ex post facto laws*).

25 *Id.*

26 *Peugh*, slip op. at 7.

27 *Calder*, 3 U.S. at 391.


29 Compare Holley, *supra* note 6, at 557 (arguing that the use of post-crime Guidelines does not violate the *Ex Post Facto* Clause), with 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. 1037, 1037 (2008) (“[B]ecause the post-Booker Sentencing Guidelines create a substantial risk of increased punishment if applied retroactively, they are subject to the restrictions placed upon federal legislation by the Ex Post Facto Clause.”).

30 *Peugh*, slip op. at 15 (noting that the dissent echoes the Government’s argument that the Guidelines are not “‘law’ within the meaning of the *Ex Post Facto* Clause”).
31 Miller, 482 U.S. at 430 (describing the retroactivity and harm elements for ex post facto laws (citing Weaver v. Graham, 450 U.S. 24, 29 (1981))).

32 Brief for the Petitioner, supra note 5, at 18 (quoting Weaver, 450 U.S. at 28-29).

33 Peugh, slip op. at 9 (Thomas, J., dissenting) (emphasis omitted) (quoting Kring v. Missouri, 107 U.S. 221, 235 (1883), overruled by Collins v. Youngblood, 497 U.S. 37, 49 (1990)).

34 301 U.S. 397, 401 (1937) (stating that judges could no longer consider a sentence less than fifteen years as prescribed by the old statute).

35 See id. at 398-99.

36 See id. at 401-02.


38 Id.


40 See id. at 427.

41 Id. at 428 (citation omitted).

42 See id.

43 See id. at 435 (describing the Court’s analysis that the new legislation had the force and effect of law, was not flexible, and negatively impacted the petitioner’s sentence).

44 Id.


46 Id.

48 *Morales*, 514 U.S. at 503.

49 See id. (showing that the amendment only applied to those with more two murder offenses).

50 *Id.* at 504.

51 *Id.* at 509 (citing Dobbert v. Florida, 432 U.S. 282, 293-94 (1977)).

52 *Garner*, 529 U.S. at 247.

53 *Id.*

54 *Id.* at 248.

55 *Id.* at 256-57.

56 See id. at 257.

57 *Id.* at 253.


61 Dillon, *supra* note 29, at 1038 (citing Dufresne v. Baer, 744 F.2d 1543, 1547 (11th Cir. 1984)).


64 *Booker*, 543 U.S. at 246 (Breyer, J., remedial opinion).

65 See id. at 249 (describing how Congress would not want to follow the dissent’s approach).

66 *Id.* at 246.

67 *Id.*

69 Booker, 543 U.S. at 249 (Breyer, J., remedial opinion).

70 Id. at 261.

71 See id. at 263.

72 See generally Dillon, supra note 29, at 1044 (providing an overview of post-Booker cases on reasonableness review).

73 Id.


75 See id. at 42.

76 Id. at 43 ("[T]he report recommended a sentencing range of 30 to 37 months of imprisonment.").

77 Id. at 45.

78 See id. at 49-51.

79 Id.

80 See e.g., United States v. Lewis, 606 F.3d 193, 199 (4th Cir. 2010) ("Although we have previously recognized this circuit split, we have not had occasion to rule on the issue.").

81 See id. at 203 (upholding the district court’s decision to use Guidelines in effect at the time of the crime); see also United States v. Ortiz, 621 F.3d 82, 87 (2d Cir. 2010) (finding that the D.C. Circuit’s interpretation and finding that the “advisory Guidelines regime, violated the Clause” was appropriate (citing United States v. Turner, 548 F.3d 1094, 1110 (D.C. Cir. 2008))).

82 Dillon, supra note 29, at 1049; see also Petition for Writ of Certiorari, supra note 5, at 8 (stating that five circuits upheld ex post facto challenges).

84 Id. (describing that Peugh and his cousin committed loan fraud by falsely representing future grain delivery contracts and check kiting by inflating bank account balances with bad checks).

85 See id. at 739.

86 Id.

87 Dillon, supra notes 29 and 82, at 1049.

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

89 Peugh, 675 F.3d at 739.

90 See id. (explaining that the court was bound by prior Seventh Circuit precedent which did not accept that the advisory Guidelines carried could trigger an ex post facto violation).

91 Brief for the Petitioner, supra note 5, at 10-11.

92 Id. at 13.

93 See 18 U.S.C. § 1344 (1994) (“One who knowingly commits bank fraud … shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.”); see also 18 U.S.C. § 1344 (2006) (same).

94 Peugh, 675 F.3d at 741.

95 Brief for the Petitioner, supra note 5, at 20.

96 Brief for the United States, supra note 5, at 14.


98 See id. at 4-8.

99 Id. at 9.

100 See id. at 12.

101 Id. at 8 (“Each of the parties can point to prior decisions of this Court that lend support . . . .”)
Brief for the Petitioner, supra note 5, at 21 n.6 (“The Guidelines, which ‘are the equivalent of legislative rules adopted by federal agencies. . . .” (citation omitted).

Peugh, slip op. at 15.

Id. at 20.

Id.

Id. at 12 (Thomas, J., dissenting).

Id. at 12 (Sotomayor, J.) (“Common sense indicates that in general, this system will steer district courts to more within-Guidelines sentences.”).

Id. at 16 (“Although these cases reached differing conclusions with respect to whether there was an ex post facto violation . . . .”) (citations omitted).

Id. at 8.

See Morales, 514 U.S. at 505.

Peugh, slip op. at 19.

Morales, 514 U.S. at 505.

See Peugh, slip op. at 19.

Id. at 10 (Thomas, J., dissenting) (noting that as Morales’ author, he failed to reconnect ex post facto jurisprudence to the original understanding of the term).

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

See id.

Dillon, supra note 29, at 1043 (arguing that Justice Breyer’s explanation “is mind-numbingly incoherent” (citing United States v. Kandirakis, 441 F. Supp. 2d 282, 293 (D. Mass. 2006)).

See id. at 1088-89 (reviewing empirical data that reveal reversal is a concern).

Jones, supra note 10, at 32. (noting that the Seventh Circuit was the minority view).
120 Peugh v. United States, No. 12-62, slip op. at 17 (U.S. June 10, 2013) (discussing how policy papers are not required for courts’ review and deviations from them do not require explanation).

121 Dillon, supra note 29, at 1089 n.320 (illustrating Judge Nancy Gertner’s understanding that the Guidelines are a benchmark, or “anchor” to simplify complex tasks).

122 Brief for the United States, supra note 5, at 9.


126 Peugh, slip op. at 18.

127 See id.

128 See Brief for the United States, supra note 5, at 4-5.

I hereby certify that I have completed this submission in accordance with the Completion rules and in accordance with the collaboration and academic integrity requirements of the University of Miami School of Law Honor Code.

CGN: 131156