

## ***Peugh v. United States: When a Resolution Only Exacerbates the Problem***

### **I. Introduction**

“Listen up! No practice on Saturday but I will be here at nine for anyone that still wants to workout,” our coach liked to announce. The team coined them “voluntary” practices: they were technically voluntary, but in all reality they mandatory because we felt like we had to attend. Ultimately, it was a mystery as to whether we actually had to show up, so most of us erred on the safe side and showed up Saturday. The Supreme Court’s recent decision in *Peugh v. United States*<sup>1</sup> presents a similar idea of “voluntary” Federal Sentencing Guidelines: not quite voluntary, but not quite mandatory. At face value, *Peugh* serves to resolve disparate treatment by the courts regarding whether the Guidelines could implicate the *Ex Post Facto* Clause, but in practical terms, the decision disappointingly does little more than add to the confusion.

Until *United States v. Booker*, the Guidelines were mandatory and had “the force and effect of laws.”<sup>2</sup> *Booker* however, severed the provision of the Sentencing Reform Act that made the Guidelines mandatory, thus rendering the Guidelines merely an initial advisory benchmark in sentencing.<sup>3</sup> Although now advisory, the Guidelines continue to play a significant role in both the pre-trial phase and sentencing phase. The Guidelines have been called “mental anchors” regarding plea bargains because the Government relies on the Guidelines when offering plea bargains, and defendants rely on the estimated sentences when accepting or declining.<sup>4</sup> Additionally, the Guidelines still strongly influence judges because the Guidelines remain the starting point of sentencing and any departure must be justified to promote fair sentencing.<sup>5</sup> Thus, the highly influential nature of the Guidelines also acts like a judge’s mental anchor.<sup>6</sup>

Prior to *Peugh*, a Federal Circuit split existed regarding the applicability of the Guidelines to the *Ex Post Facto* Clause of the United States Constitution. The District of

Columbia, Second Circuit, Fourth Circuit, Sixth Circuit and Eleventh Circuit determined that the *Ex Post Facto* Clause was violated when Guidelines in place at the time of sentencing created a significant risk of a harsher punishment than the Guidelines in place when the offense occurred.<sup>7</sup> Meanwhile, the Seventh Circuit, from which *Peugh* evolved, held that the *Ex Post Facto* Clause was not violated in such circumstances because the Guidelines are merely advisory and not binding.<sup>8</sup> The split undermined the Guidelines' intent because it created a "real disparity in federal sentencing," and defendants convicted of the same charges faced different sentences.<sup>9</sup>

This note reviews the Court's clarification that the Guidelines can implicate the *Ex Post Facto* Clause if there is a significant risk of harsher punishment when using the Guidelines in place at sentencing as the starting point instead of those in place at the time of the offense, and suggests that the "voluntary" nature of the Guidelines continues to pose problems. Part II reviews the evolution of the *Ex Post Facto* Clause and the Guidelines, while discussing competing viewpoints on the Guidelines' applicability to the *Ex Post Facto* Clause. Part III chronicles the history of *Peugh* from sentencing, through appeal to the Seventh Circuit, and onto the Supreme Court. Part IV discusses the Court's attempt to use *Peugh* to resolve the disparate treatment of the Guidelines in relation to the *Ex Post Facto* Clause, and proceeds to explain how the resolution does little more than create additional confusion. Finally, Part V reiterates that the "voluntary" nature of the Guidelines will continue to pose problems for future cases.

## **II. The *Ex Post Facto* Clause v. The Federal Sentencing Guidelines**

### **A. The *Ex Post Facto* Clause and the Guidelines Evolve**

The United States Constitution states, "[n]o Bill of Attainder or ex post facto Law shall be passed."<sup>10</sup> However, it was not until *Calder v. Bull* that the Court clarified what constituted *Ex Post Facto* laws.<sup>11</sup> *Calder* acknowledged the Constitution's failure to explain the term and

stated four types of laws that fell within the intent of the prohibition, including “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.”<sup>12</sup> Later, in *Miller v. Florida*, the Court explained that the Clause was intended to ensure that “legislative enactments give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed.”<sup>13</sup> *Miller* went on to note that “the lack of fair notice and governmental restraint beyond what was prescribed when the crime was consummated,” was a central concern of the Clause.<sup>14</sup> While these clarifications helped regarding official laws, it remained unclear as to whether advisory guidelines fell within this prohibition.

When Congress created the Federal Sentencing Guidelines in 1984, it sought to 1) achieve more honest sentencing by having sentences be determined by the court instead of the parole system, 2) achieve a more uniform system of sentencing for similar crimes, and 3) ensure that the sentences being given were proportional to the crime committed.<sup>15</sup> Courts were directed to use the Guidelines in effect on the date of sentencing *unless* the court determined that doing so would violate the *Ex Post Facto* Clause.<sup>16</sup> The Guidelines remained mandatory until *Booker*, when Section 3553(b)(1) of the Reform Act was severed.<sup>17</sup> In *Booker*, the defendant was sentenced to thirty years for possession with intent to distribute cocaine.<sup>18</sup> Based on the jury findings, the sentencing guidelines prescribed a sentence of 210 to 262 months in prison, but the sentencing judge held a post-trial sentencing proceeding and determined that the defendant was guilty of additional charges, and was therefore instead subject to 360 months to life in prison.<sup>19</sup> The Court held that “mandatory Guidelines ran afoul of the Sixth Amendment by allowing judges to find facts that increased the penalty for a crime beyond the maximum authorized by the

facts established by a plea of guilty or a jury verdict.”<sup>20</sup> Thus, once the Guidelines were no longer mandatory, the “voluntary” nature evolved.

### **B. “Voluntary” Guidelines Can Violate the Ex Post Facto Clause**

The majority of courts support the notion that the advisory Guidelines can violate the *Ex Post Facto* Clause even though they are merely advisory. Although prior to *Peugh* the Court had not addressed *advisory* Guidelines, its reasoning behind cases that addressed binding Guidelines supports this notion. In *Lindsey v. Washington*, the Court determined that the petitioners were wrongly sentenced to the new mandatory fifteen years imprisonment, when at the time of the offense, fifteen years was only the maximum sentence that could be imposed.<sup>21</sup> The Court explained that removing the possibility of a sentence less than fifteen years was a “plainly to the substantial disadvantage of petitioners,” because they no longer had the opportunity to be sentenced to less than fifteen years.<sup>22</sup>

Similarly, in *Miller* the Court determined that the petitioner was substantially disadvantaged by increased state sentencing guidelines because under Florida law, a sentence within the state’s sentencing guidelines was unreviewable.<sup>23</sup> There, the petitioner was sentenced to seven years imprisonment based on the prescribed five and a half to seven years instead of the three and a half to four and a half year sentence in place at the time of the offense.<sup>24</sup> Accordingly, the Court held that the petitioner was not provided with sufficient notice of the increased penalty, and that because the change was specifically intended to punish the offender, the *Ex Post Facto* Clause was violated.<sup>25</sup> The Court’s emphasis on disadvantages to defendants and lack of notice regarding binding laws supports the viewpoint that advisory guidelines capable of having the same effects, can also implicate the *Ex Post Facto* Clause.

Additionally, in *Gall v. United States* the Court had an opportunity to clarify that “a district court should begin all sentencing proceedings by correctly calculating the applicable Guidelines range.”<sup>26</sup> Moreover, various circuit courts since *Booker* have also advanced the notion that an advisory Guideline can violate the *Ex Post Facto* Clause. The Second Circuit has clarified that a sentence imposed under the Guidelines at the time of sentencing *can* violate the Clause.<sup>27</sup> The Second Circuit also acknowledged that by using the substantial risk standard established in *Garner v. Jones*, sentences imposed based on an increased range will only violate the *Ex Post Facto* Clause when the new Guidelines *significantly* increased the risk of a harsher punishment.<sup>28</sup> In *Garner*, the Court established the “substantial risk” test when it reversed a judgment that failed to consider whether an amendment lengthening respondent’s time of imprisonment created a significant risk of increased punishment.<sup>29</sup> The Fourth Circuit followed suit, noting that the question is whether the amended guidelines result in a significant risk of increased punishment, and acknowledged the importance of the Guidelines as a crucial “starting point” and “initial benchmark” for sentencing.<sup>30</sup> Since *Booker*, the Fourth Circuit has vacated at least eight decisions on the basis of Guideline calculation error,<sup>31</sup> which further signifies the practical impact the advisory Guidelines continue to have on sentences.

### C. “Voluntary” Guidelines Are Still Not Law

Although many courts apply a liberal interpretation to the word “law” in the *Ex Post Facto* Clause, some judges, as well as the Seventh Circuit, disagree and insist that the Guidelines are not binding law, and therefore, cannot implicate the *Ex Post Facto* Clause. While the Fourth Circuit has generally taken the more liberal stance, Judge Goodwin’s dissent in *Lewis* argued that the Guidelines lack legal force.<sup>32</sup> He stated “[c]ritical to relief under the *Ex Post Facto* Clause is not an individual’s right to less punishment, but the lack of fair notice and governmental restraint

when the legislature increases punishment beyond what was prescribed when the crime was consummated.”<sup>33</sup> Judge Goodwin’s contention that a defendant’s “only expectation is that he will be sentenced within the provided statutory range,”<sup>34</sup> seemed to suggest that, regardless of which Guideline was used, the *Ex Post Facto* Clause could not be implicated.

Meanwhile, the Seventh Circuit continued to be the overwhelming outlier in its decisions regarding the Guidelines and the *Ex Post Facto* Clause. In *United States v. Demaree*, the court refused to apply the *Ex Post Facto* Clause to the Guidelines, noting, “the applicable guideline nudges [the judge] toward the sentencing range, but [the judge’s] freedom to impose a reasonable sentence outside the range is unfettered.”<sup>35</sup> Consequently, in *Demaree*, the court determined that “the ex post facto clause should apply only to laws and regulations that bind rather than advise.”<sup>36</sup> Thus, when the Seventh Circuit was presented with *United States v. Peugh*, it held fast to its *Demaree* precedent.<sup>37</sup>

### **III. Trying to Set it Straight: *Peugh v. United States***

#### **A. The Seventh Circuit’s Reliance on Precedent**

Marvin Peugh’s troubles began in 1996 when he and his cousin formed two companies and proceeded to fraudulently obtain bank loans through false representations of lucrative contracts, while also inflating the companies’ bank accounts by writing bad checks.<sup>38</sup> Peugh and his cousin were later charged with nine counts of bank fraud in violation of 18 U.S.C. § 1344.<sup>39</sup> Peugh’s cousin pleaded guilty and in 2009 a jury found Peugh guilty of five charges.<sup>40</sup>

In an attempt to reduce his sentence, Peugh argued that he should be sentenced under the Guidelines in place at the time of his offenses, rather than the higher Guidelines in place at sentencing in 2009.<sup>41</sup> Using the 1998 Guidelines, Peugh would likely face a sentence from thirty to thirty-seven months, while he would face seventy to eighty-seven months using the 2009

Guidelines.<sup>42</sup> Although the statute carried the same thirty-three year maximum sentence at the time of his offense<sup>43</sup> and at the time of his sentencing,<sup>44</sup> Peugh claimed that using the 2009 Guidelines would significantly increase his chance of a higher sentence and violate the *Ex Post Facto* Clause.<sup>45</sup> Unsurprisingly, the court rejected Peugh's argument due to the court's binding precedent established in *Demaree*.<sup>46</sup> Accordingly, the court applied the Guidelines in place at the time of sentencing and sentenced Peugh to seventy months imprisonment.<sup>47</sup>

On appeal, the Seventh Circuit affirmed Peugh's conviction and sentence.<sup>48</sup> The court quickly shot down Peugh's *Ex Post Facto* Clause argument and noted that its previous decision in *Demaree* "vitiates any ex post facto problem" of using the harsher Guidelines, due to the mere advisory nature of the Guidelines.<sup>49</sup> The decision not only affirmed Peugh's sentence, but in theory also affirmed the conflict between the circuit courts regarding the applicability of the Guidelines to the *Ex Post Facto* Clause.

### **B. The Supreme Court's Emphasis on "Significant Risk"**

Faced with disparate treatment by the circuit courts, the Supreme Court granted certiorari to clarify whether the *Ex Post Facto* Clause could be violated when the Guidelines used at the time of sentencing yield a higher sentencing range than those from the time of the offense.<sup>50</sup> The Court reversed and remanded the case, holding that in Peugh's case, there was an *Ex Post Facto* violation because the new Guidelines "created a 'significant risk' of a higher sentence for Peugh."<sup>51</sup> Acknowledging *Booker*'s impact on the Guidelines, the Court noted that "the Guidelines are no longer binding, and the district court must consider all of the factors set forth in § 3553(a) to guide its discretion at sentencing."<sup>52</sup> However, the Court also recognized that the Guidelines are the "starting point and the initial benchmark" and that any departure from the Guidelines must be explained.<sup>53</sup> In comparing *Peugh* to *Miller*, the Court likened the Guidelines

to Florida's sentencing scheme, which "impose a series of requirements on sentencing courts that cabin the exercise of discretion."<sup>54</sup> Justice Sotomayor noted that like *Miller*, the "reason-giving requirements and standards of appellate review meant that while variation was possible it was burdensome; and so in the ordinary case, a defendant would receive a within-guidelines sentence."<sup>55</sup> Thus, there was a "significant risk" that an increase in the sentence range would result in a longer sentence for the defendant.<sup>56</sup>

Notably, the Court pointed out that because an incorrect sentence calculation under the Guidelines is procedural error, the Guidelines are used as the starting point for sentence calculations.<sup>57</sup> Although the dissent and Government argued that the Guidelines "lack sufficient legal effect to attain the status of a 'law' within the meaning of the *Ex Post Facto* Clause," the majority determined that the Court's precedents "firmly establish that changes in law need not bind a sentencing authority," to violate the Clause.<sup>58</sup> Further, the majority explained that its decision does not preclude a district court from deviating from the older Guidelines' range, and in fact, the newer Guidelines could very well be a valid reason for the court to impose a sentence higher than the old range.<sup>59</sup>

Understandably, the dissent echoed the Government's contention that "[t]he retroactive application of subsequently amended Guidelines does not create a 'sufficient risk' of increasing a defendant's punishment."<sup>60</sup> First, the dissent argued that the Guidelines are not mandatory so they are not law, and second, that because the Guidelines are not mandatory the risk resulting from amended Guidelines has no legal effect.<sup>61</sup> With a strict interpretation of the word "law" in the *Ex Post Facto* Clause, the dissent summed up its argument that because the Guidelines are advisory, "[i]t is difficult to see how [the Guidelines] . . . could ever constitute an ex post facto violation."<sup>62</sup> Although the Court attempted to resolve the issue, the explanations behind both the

majority and dissent lend support to the notion of “voluntary” Guidelines that will continue to pose problems in practice.

#### **IV. Resolving One Conflict and Creating More**

##### **A. An Appreciated Attempt at Resolution**

*Peugh* presented an opportunity for the Court to flex its conflict resolving muscles and end the disparate treatment regarding the Guidelines’ applicability to the *Ex Post Facto* Clause. The necessity of the Court’s review was clear, yet relatively ironic, considering the Guidelines were partly created to end disparate sentencing in federal courts.<sup>63</sup> In its attempt, the Court sided with the viewpoint that non-legally binding advisory guidelines *can* violate the *Ex Post Facto* Clause and emphasized that the main consideration must be on whether using new Guidelines would result in a “significant risk” of increased punishment.<sup>64</sup>

Relying on *Garner*’s “significant risk” test,<sup>65</sup> *Peugh* extends *Gall*’s holding and clarifies which Guidelines should be the starting point.<sup>66</sup> *Peugh*’s holding confirms that the majority of the circuit courts had been appropriately applying the Guidelines to the *Ex Post Facto* Clause,<sup>67</sup> and corrects the Seventh Circuit’s treatment.<sup>68</sup> In doing so, the Court succeeds in resolving the disparate treatment between circuit courts. And like *Miller*, the majority continues to hold true to the intent of the *Ex Post Facto* Clause, by acknowledging the importance of notice regarding potential punishment.<sup>69</sup> Unfortunately, while the majority’s resolution certainly is appreciated and makes sense at face value, when considering its implications moving forward, the resolution arguably only creates new conflict that will require future resolution.

##### **B. The Attempted Resolution’s New Problems**

First, although somewhat subtly, this decision supports the contention that the Guidelines carry so much weight that they stand at the point right before crossing into legally mandatory

territory, and thus have a “voluntary” nature. Moving forward, this “voluntary” nature of the Guidelines will pose a challenge for defendants and the legal community. The majority’s decision to subject the advisory Guidelines to the *Ex Post Facto* Clause leaves room to question whether or not these Guidelines truly are voluntary. Because the Guidelines *must* be the first consideration in sentencing,<sup>70</sup> a judge still has to follow them to some extent. Although the Seventh Circuit would argue that judges have the freedom to sentence outside the Guidelines,<sup>71</sup> that notion ignores the pressure to conform that has become part of judges’ culture.<sup>72</sup> The Guidelines’ “voluntary” nature makes it reasonable to expect judges to impose sentences within the Guidelines to 1) be consistent with sentencing, 2) avoid being reversed on appeal, and 3) avoid the additional work of justifying a sentence outside the range. This exacerbates the problem because judges will continue to be uncertain as to whether they should adhere to the specified Guidelines’ range, or if they really can depart without being reversed. Even the dissent never explicitly disagrees that the Guidelines guide and affect sentencing; the dissent simply believes that the Guidelines have no legal effect that would significantly affect the risk of a harsher punishment.<sup>73</sup> Unfortunately, the dissent and other critics<sup>74</sup> repeatedly ignore the fact that the Guidelines continue to be “practical law” that influence sentences and provide estimates relied upon by defendants and attorneys.

Further, the majority’s reliance on *Miller*’s concern for notice<sup>75</sup> seems to acknowledge the point that such “practical law” Guidelines have the same effect on punishment as do Guidelines that are legally binding. If this is true, opponents will likely argue that the “practical laws” are then “laws” and create similar *Booker* Sixth Amendment concerns.<sup>76</sup> Consequently, in practical terms, the opinion seems to reinforce the “voluntary” nature of the Guidelines, which

simply continues the confusion: are they voluntary or are they mandatory and what should judges, counsel, and defendants do?

A second problem *Peugh* creates is how one goes about determining what constitutes a “significant risk”. Importantly, the Court’s decision does not mean that the ex post facto clause will *always* be violated if the old Guidelines are not used as a starting point. Without carefully reading the opinion, the holding could easily be misconstrued to mean the *Ex Post Facto* Clause will always be violated if the sentence is not within the old Guidelines’ sentencing range. In actuality, the prohibition can only be violated when there is a “significant risk” of increased punishment. The phrase “significant risk” is rather ambiguous and leaves defendants, counsel and judges having to predict whether the increased punishment constitutes a “significant risk”. Is a two-year increase significant? Certainly a defendant would consider facing two additional years in prison a significant risk of facing harsher punishment. On the other hand, judges might believe that two years is a minimal increase compared to some of the sentences they impose. Judges who share Judge Goodwin’s belief that a defendant can only expect to be sentenced within the statutory range as opposed to the Guidelines’ range,<sup>77</sup> likely will not consider any change in the Guidelines’ range a “significant risk” of increased punishment because the range would still be within the statutory range.

With lack of fair notice being a central concern of the *Ex Post Facto* Clause,<sup>78</sup> the ambiguity of the term “significant risk” does little to provide a defendant with fair notice, and leaves him or her guessing which Guidelines he or she will be subject to. Further, like Justice Thomas pointed out in his dissent, because the Guidelines are merely advisory, one might believe there is no opportunity for the Guidelines to create a “significant risk” for an *Ex Post Facto* violation.<sup>79</sup> If a judge shares Justice Thomas’ viewpoint, he or she will likely apply the

“significant risk” test differently than a judge that sides with the majority. And while one may argue that a defendant should be subject to whatever punishment fits the crime, the ambiguity of and reliance on the “significant risk” factor also creates problems for prosecutors when determining terms of a plea bargain.<sup>80</sup> Finally, it is difficult to see how this holding helps judges be more consistent or confident in their sentences. A more sympathetic judge might consider a two-year increase a “significant risk” in harsher punishment and therefore, sentence based on Guidelines in place at the time of the offense, while a stricter judge might disagree and sentence based on Guidelines in place at the time of sentencing. Even further, a sentencing judge still has discretion to deviate from the old Guidelines, and can sentence within the new, harsher sentencing range, provided the decision is justified. Consistent with *Demaree*’s argument,<sup>81</sup> if a judge has the freedom to impose a sentence outside the applicable Guideline range, the majority’s resolution does little to help judges other than indicating which sentencing range he or she would have to explain his or her departure from. Accordingly, in practical terms, *Peugh* actually does little to help judges when determining sentences.

## V. Conclusion

While *Peugh* reconciles one question, it creates several new conflicts at the same time. Although the opinion makes it clear that the advisory Guidelines can implicate the *Ex Post Facto* Clause if using new Guidelines would significantly increase a defendant’s risk of harsher punishment, it poses a new question about what constitutes “significant risk” and exacerbates the Guidelines’ “voluntary” nature. Like athletes feel when faced with “voluntary” practices, the Court’s decision in *Peugh* will likely continue pressuring judges to conform to the Guidelines and confusion in the entire legal community regarding how they should handle sentencing.

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<sup>1</sup> *Peugh v. United States*, No. 12-62, slip op. (June 10, 2013).

<sup>2</sup> *United States v. Booker*, 543 U.S. 220, 233-34 (2005) (citation omitted).

<sup>3</sup> *See Peugh*, No. 12-62, slip op. at 4-5.

<sup>4</sup> *See* Petition for a Writ of Certiorari at 13, *Peugh*, No. 12-62, slip op. (July 16, 2012).

<sup>5</sup> *See Gall v. United States*, 552 U.S. 38, 49-50 (2007).

<sup>6</sup> *See* Brief of Petitioner at 23-25, *Peugh*, No. 12-62, slip op. (Dec. 26, 2012) (explaining that the Guidelines' starting point is like an anchor for judges that has become accepted as part of the culture, which makes judges more likely to sentence within the Guidelines).

<sup>7</sup> *See* Petition for a Writ of Certiorari at 2.

<sup>8</sup> *See id.*

<sup>9</sup> M. Jackson Jones, *The United States Sentencing Guidelines are Not Law!: Establishing the Reasons "United States Sentencing Guidelines" and "Ex Post Facto Clause" Should Never be Used in the Same Sentence*, 32 U. LA VERNE L. REV. 7, 24 (2010).

<sup>10</sup> U.S. CONST. art. I, § 9, cl. 3.

<sup>11</sup> *See* Benjamin Holley, *The Constitutionality of Post-Crime Guidelines Sentencing*, 37 WM. MITCHELL L. REV. 533, 539 (2011).

<sup>12</sup> *Calder v. Bull*, 3 U.S. 386, 390 (1798).

<sup>13</sup> *Miller v. Florida*, 482 U.S. 423, 430 (1987) (citation omitted).

<sup>14</sup> *Id.*

<sup>15</sup> *See* M. Jackson Jones, *The United States Sentencing Guidelines are Not Law!: Establishing the Reasons "United States Sentencing Guidelines" and "Ex Post Facto Clause" Should Never be Used in the Same Sentence*, 32 U. LA VERNE L. REV. 7, 17 (2010).

<sup>16</sup> *United States v. Lewis*, 606 F.3d 193, 198 (4th Cir. 2010) (citing USSG § 1B1.11 (b)(1)).

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<sup>17</sup> *See* Jones, *supra* note 131 at 22.

<sup>18</sup> *See* United States v. Booker, 543 U.S. 220, 227 (2005).

<sup>19</sup> *See id.*

<sup>20</sup> Peugh v. United States, No. 12-62, slip op. at 4 (June 10, 2013) (citation omitted).

<sup>21</sup> *See* Lindsey v. Washington, 301 U.S. 397, 399-402 (1937).

<sup>22</sup> *Id.* at 401-02.

<sup>23</sup> *See* Miller v. Florida, 482 U.S. 423, 432-33 (1987).

<sup>24</sup> *Id.* at 424.

<sup>25</sup> *Id.* at 431-34.

<sup>26</sup> Gall v. United States, 552 U.S. 38, 49 (2007) (citing Rita v. United States, 551 U.S. 338, 347-48 (2007)).

<sup>27</sup> *See* United States v. Ortiz, 621 F.3d 82, 83-88 (2d Cir. 2010) (clarifying that using the Guidelines in place at the time of sentencing in this case did not violate the Clause because the defendant was sentenced to a term below both Guideline ranges, so there was no significant risk of harsher punishment).

<sup>28</sup> *See id.* at 87.

<sup>29</sup> *See* Garner v. Jones, 529 U.S. 244, 256-57 (2000).

<sup>30</sup> United States v. Lewis, 606 F.3d 193, 199 (4th Cir. 2010) (citing *Gall*, 552 U.S. at 49).

<sup>31</sup> *See id.* at 201.

<sup>32</sup> *Id.* at 203 (Goodwin, C.J., dissenting).

<sup>33</sup> *Id.* at 205 (Goodwin, C.J., dissenting) (citing Weaver v. Graham, 450 U.S. 24, 30 (1981)).

<sup>34</sup> *Id.* at 206 (Goodwin, C.J., dissenting).

<sup>35</sup> United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006).

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<sup>36</sup> *Id.*

<sup>37</sup> *See generally* United States v. Peugh, 675 F.3d 736 (7th Cir. 2012), *rev'd*, No. 12-62, slip op. (June 10, 2013).

<sup>38</sup> *See id.* at 738.

<sup>39</sup> *See id.*

<sup>40</sup> *See id.* at 739.

<sup>41</sup> *See id.*

<sup>42</sup> *See id.* at 2-3.

<sup>43</sup> *See* 18 U.S.C. § 1344 (1994).

<sup>44</sup> *See* 18 U.S.C. § 1344 (2006).

<sup>45</sup> *See United States v. Peugh*, 675 F.3d at 739.

<sup>46</sup> *See id.*

<sup>47</sup> *See id.* at 738.

<sup>48</sup> *See id.*

<sup>49</sup> *Id.* at 741.

<sup>50</sup> *See* Peugh v. United States, No. 12-62, slip op. at 3-4 (June 10, 2013).

<sup>51</sup> *Id.* at 19-20.

<sup>52</sup> *Id.* at 5 (citing United States v. Booker, 543 U.S. 220, 259-60, 264 (2005)).

<sup>53</sup> *Id.* (citing Gall v. United States, 552 U.S. 38, 49 (2007)).

<sup>54</sup> *Id.* at 12.

<sup>55</sup> *Id.* at 10.

<sup>56</sup> *See id.*

<sup>57</sup> *See id.* at 11.

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<sup>58</sup> *Id.* at 15 (citing *Lindsey v. Washington*, 301 U.S. 397 [sic]).

<sup>59</sup> *See id.* at 18.

<sup>60</sup> *Id.* at 1 (Thomas, J., dissenting).

<sup>61</sup> *Id.* at 2 (Thomas, J., dissenting).

<sup>62</sup> *Id.* at 6 (Thomas, J., dissenting).

<sup>63</sup> *See* M. Jackson Jones, *The United States Sentencing Guidelines are Not Law!: Establishing the Reasons “United States Sentencing Guidelines” and “Ex Post Facto Clause” Should Never be Used in the Same Sentence*, 32 U. LA VERNE L. REV. 7, 13-14 (2010).

<sup>64</sup> *See Peugh*, No. 12-62, slip op. at 19-20.

<sup>65</sup> *See id.* at 10 n.4 (citing *Garner v. Jones*, 529 U.S. 244, 250, 251 (2000)).

<sup>66</sup> *See Peugh*, No. 12-62, slip op. at 13, 19-20.

<sup>67</sup> *See* Petition for a Writ of Certiorari at 2, *Peugh*, No. 12-62, slip op.

<sup>68</sup> *See generally* *United States v. Peugh*, 675 F.3d 736 (7th Cir. 2012), *rev’d*, No. 12-62, slip op. (June 10, 2013).

<sup>69</sup> *See Miller v. Florida*, 482 U.S. 423, 430 (1987).

<sup>70</sup> *See Gall v. United States*, 552 U.S. 38, 49 (2007).

<sup>71</sup> *See United States v. Demaree*, 459F.3d 791, 795 (7th Cir. 2006) (nothing that although the Guidelines influence judges, the Guidelines do not prevent judges from sentencing outside the applicable range).

<sup>72</sup> *See* Brief of Petitioner, at 23-25, *Peugh*, No. 12-62, slip op. (discussing how the Guidelines influence judges in practical terms).

<sup>73</sup> *See Peugh*, No. 12-62, slip op. at 1-2 (Thomas, J., dissenting).

<sup>74</sup> *See generally* M. Jackson Jones, *The United States Sentencing Guidelines are Not Law!*:

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*Establishing the Reasons “United States Sentencing Guidelines” and “Ex Post Facto Clause” Should Never be Used in the Same Sentence*, 32 U. LA VERNE L. REV. 7 (2010).

<sup>75</sup> See *Miller v. Florida*, 482 U.S. 423, 430 (1987).

<sup>76</sup> See *Peugh*, No. 12-62, slip. op. at 4 (discussing how mandatory Guidelines violated the Sixth Amendment because defendants were being subjected to increased punishment based on facts that were not established by a plea of guilty or by the jury).

<sup>77</sup> See *United States v. Lewis*, 606 F.3d 193, 206 (4th Cir. 2010) (Goodwin, C.J., dissenting).

<sup>78</sup> See *Miller*, 482 U.S. at 430.

<sup>79</sup> See *Peugh*, No. 12-62, slip op. at 1-2 (Thomas, J., dissenting).

<sup>80</sup> See Petition for a Writ of Certiorari at 13, *Peugh*, No. 12-62, slip op.

<sup>81</sup> See *United States v. Demaree*, 459 F.3d 791, 795 (7th Cir. 2006) (emphasizing that a judge has the freedom to sentence outside the applicable Guideline range, provided the decision is justified).

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

*Signed 195016.*