The Evolution of the U.S. Sentencing Guidelines: A Discretionary Tale

I. Introduction

“Just use your best judgment.” At one time or another, every person has been or will be on the receiving end of this seemingly harmless phrase. Discretion can be a liberating feeling, allowing us to freely employ our own experience in order to reach the best possible decision in any given situation. In the context of district judges sentencing convicted criminal defendants in the United States, however, that discretion has proven to raise significant constitutional concerns.

In an attempt to resolve a split among the courts of appeals, the Supreme Court recently handed down its latest decision in a long line of cases examining the constitutionality of the retroactive application of amended U.S. Sentencing Guidelines (the “Guidelines”) to criminal defendants. In a 5-4 decision, Justice Sotomayor delivered the Court’s majority opinion in Peugh v. United States, holding that a violation of the Ex Post Facto Clause of the U.S. Constitution had occurred when the petitioner, Marvin Peugh, was sentenced according to the 2009 Guidelines, resulting in a higher applicable sentencing range than the range provided by the 1998 Guidelines then in effect when he committed those acts. A fundamental factor in the majority’s decision was the fact that the amended Guidelines, despite being “effectively advisory,” “enhance[d] the measure of punishment,” creating a “significant risk” of a higher sentence for Peugh.

At first glance, the situation presents a clear-cut constitutional violation. Peugh committed the offenses when the 1998 Guidelines were in effect, which would have resulted in a sentencing range of 30 to 37 months; when he was sentenced in May 2010, however, the 2009 Guidelines in effect provided a sentencing range of 70 to 87 months, ultimately resulting in a
sentence of 70 months of imprisonment for Peugh. One could reasonably infer that, had the 1998 Guidelines been applied, then Peugh’s sentence would have been drastically reduced.

What lies beneath the surface, however, is a long line of cases and legal history dating back to this country’s founding that provide the necessary framework by which we may judge the constitutionality of the retroactive application of revised Guidelines to any given criminal defendant. *Peugh v. United States* provides us with the last available link in an evolutionary chain that details how the Guidelines came to be, how they have been applied over time, and how they will be applied in the future. This note will attempt to evaluate that evolution in order to understand whether the final link before us today provides us with a clear compass heading of how to apply the Guidelines in the future so as to fulfill the Guidelines’ objectives, or whether—as is unfortunately seems to be the case here—the Court has left us more lost than we were before *Peugh v. United States*.

**II. Prior Law and Perspective**

The U.S. Constitution prohibits both federal and state governments from passing any “*ex post facto* Law.” The authoritative interpretation of the phrase “*ex post facto* law” has been and continues to be the Court’s decision in *Calder v. Bull*, in which Justice Chase explained that an *ex post facto* law is “[e]very law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed.” From this interpretation, we see that two key elements in Justice Chase’s definition cause significant constitutional issues in the context of Guidelines that would have provided a lower sentencing range when in effect at the time of a particular criminal defendant’s offenses in comparison to the sentencing ranges provided by revised Guidelines in effect at the time of sentencing.
The first such issue is whether the Guidelines, made advisory rather than mandatory by the Court’s decision in *United States v. Booker*,\(^{14}\) possess the binding legal effect of laws for purposes of the *Ex Post Facto* Clause. On one hand, the Court has made clear that, although *Booker* essentially allowed sentencing judges to utilize a certain degree of discretion at sentencing, “The presence of discretion does not displace the protections of the *Ex Post Facto* Clause, however.”\(^{15}\) Furthermore, even though the district courts are not formally bound to apply the Guidelines, they still “must consult those Guidelines and take them into account when sentencing.”\(^{16}\) For the sake of national consistency in federal sentencing, the Court has held that the Guidelines should be the “starting point and initial benchmark” for sentencing.\(^{17}\)

A valuable example of this principle is present in the Court’s earlier decision in *Miller v. Florida*, in which the Court struck down a state sentencing scheme by which the sentencing judge had discretion to fix the sentence within the range of the state’s guidelines “without the requirement of a written explanation.”\(^{18}\) If the sentencing judge wanted to impose a sentence outside that range, however, he or she “had to give clear and convincing reasons in writing for doing so…”\(^{19}\) Justice O’Connor reasoned that the revised guidelines did not provide “flexible ‘guideposts’ for use in the exercise of discretion,”\(^{20}\) but that they “create[d] a high hurdle that must be cleared before discretion can be exercised.”\(^{21}\) From these examples, we see that obstacles to the exercise of discretion, as well as the mere existence (or lack thereof) of discretion itself, do not remove sentencing guidelines—state or federal—from the purview of the *Ex Post Facto* Clause.\(^{22}\)

Yet, on the other hand, despite the fact that the vast majority of post-*Booker* district courts have imposed within-Guidelines sentences,\(^{23}\) it is equally apparent that the Guidelines are far from binding and constitute nothing more than a helpful advisory tool used to inform a
sentencing judge’s decision. In *United States v. Demaree*, the Seventh Circuit decided that the Guidelines “nudge” the sentencing judge towards the applicable sentencing range, but that “his freedom to impose a reasonable sentence outside the range is unfettered.” This line of reasoning is buttressed by the fact that the Court held that “courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.” Thus, by applying the same standard of review “no matter what sentence the district court ultimately selects, Gall reinforces that the district court’s independent judgment, not the Guidelines, is what should determine a defendant’s sentence.”

The second such issue posed by the application of revised Guidelines to past criminal offenses is whether the Guidelines “change[] the punishment, and inflict[] a greater punishment, than the law annexed to the crime, when committed.” The “touchstone of this Court’s inquiry” is whether the “retroactive application of the change” in the Guidelines “created a sufficient risk of increasing the measure of punishment attached to the covered crimes.”

*Morales* provides the key notion that “mere speculation or conjecture that a change in law will retrospectively increase the punishment for a crime will not suffice to establish a violation of the *Ex Post Facto* Clause.” In *Morales*, the Court found that a California amendment, which increased the time intervals between parole hearings for prisoners convicted of “more than one offense which involves the taking of a life” created “only the most speculative and attenuated possibility of...increasing the measure of punishment for covered crimes, and such conjectural effects are insufficient under any threshold we might establish under the *Ex Post Facto* Clause.”

With such a wealth of precedent, we arrive at an impasse at which we must determine whether the retroactive application of the now advisory Guidelines, serving as an initial
benchmark for determining a criminal defendant sentence, carries the weight of law and is in effect the “basis for the sentence,” carrying with it a “significant risk of increasing his [the criminal defendant’s] punishment,” or whether the use of the advisory Guidelines is merely an informative tool to be used in the exercise of a sentencing judge’s discretion, by which a criminal defendant has no constitutional entitlement to better, worse, or equal discretion than would have been exercised under the Guidelines in effect at the date of the criminal defendant’s offense.

III. Peugh v. United States

Through the actions of the petitioner, Marvin Peugh, and his cousin, Steven Hollewell, the Court was presented an appropriate opportunity to decide once and for all an issue that had split the federal courts of appeals: Whether the Ex Post Facto Clause of the U.S. Constitution is violated when a criminal defendant is sentenced under Guidelines that are revised after the defendant committed his criminal acts, and when the revised Guidelines provide a higher sentencing range than the Guidelines in effect at the time of the offenses.

The cousins ran two farming-related businesses in Illinois when cash-flow problems began to arise. Between 1999 and 2000, Peugh and Hollewell began to engage in two fraudulent schemes designed to make their financial woes disappear. By fraudulently obtaining a series of bank loans, and by “check kiting,” or passing bad checks between their accounts, the two cousins were able to secure millions in bank loans and were able to overdraw another account by $471,000. While Hollewell pleaded guilty to one count of check kiting, Peugh went to trial and was found guilty of five counts of bank fraud and was sentenced according to the 2009 Guidelines in effect at the date of his sentence, resulting in a sentencing range of 70 to 87 months. The court sentenced Peugh to 70 months’ imprisonment, at the bottom of the
recommended range; however, had Peugh been sentenced under the 1998 Guidelines in effect during the time of his offenses, the Guidelines would have provided a sentencing range between 30 and 37 months. Had Peugh received even the maximum sentence under the 1998 Guidelines range, it still would have been 33 months fewer than the sentence he actually received.

On appeal in the Seventh Circuit, Peugh argued that his sentence violated the *Ex Post Facto* Clause of the U.S. Constitution due to the fact that his being sentenced under the 2009 Guidelines resulted in a “significantly higher sentencing range.” Despite Peugh’s insistence that the Seventh Circuit overrule its holding in *United States v. Demaree*, the court stood by its reasoning in *Demaree*, reiterating the notion that the advisory nature of the Guidelines eliminates any *ex post facto* issue.

Writing for the 5-4 majority, Justice Sotomayor reversed the Seventh Circuit’s decision, holding that a retrospective increase in the Guidelines range creates a sufficient risk of a higher sentence, constituting an *ex post facto* violation. Justice Sotomayor noted that because the Guidelines provide a range that serves as the starting point for sentencing, and because failure to correctly calculate that range constitutes procedural error, then the Guidelines “are in a real sense the basis for the sentence.” Furthermore, Justice Sotomayor stated that district courts are steered towards using within-Guidelines sentences by the federal system’s procedural rules of appellate review to the point where, even after *Booker*, the district courts impose within-Guidelines sentences in the vast majority of cases. Due to the fact that the amended Guidelines, as applied in this situation, “enhance[d] the measure of punishment by altering the substantive ‘formula’ used to calculate the applicable sentencing range,” there was a
“‘significant risk’ of a higher sentence for Peugh,”\textsuperscript{53} resulting in a violation of the \textit{Ex Post Facto} Clause.

In dissent, Justice Thomas explained that the Guidelines’ advisory nature means that “district courts must ‘make an individualized assessment’ of the appropriate sentence ‘based on the facts presented.’”\textsuperscript{54} Justice Thomas further noted that the requirement of an explanation is essential for “meaningful appellate review,” and that courts of appeals may not presume that a district court was unreasonable in issuing a sentence outside of the range provided by the Guidelines.\textsuperscript{55} As a result, “reasonableness review does not meaningfully constrain the discretion of district courts to sentence offenders within either of the two ranges,”\textsuperscript{56} and retroactive Guidelines that “merely create a risk that a defendant will receive a higher sentence” do not raise \textit{ex post facto} concerns.\textsuperscript{57}

\section*{IV. Analysis}

It is clear from the Court’s decision in \textit{Peugh v. United States}, as well as from decades of the Court’s precedents that informed Justice Sotomayor’s decision, that the presence of discretion vested in the district courts after the Court’s decision in \textit{Booker} plays an enormous role in determining the constitutionality of the retroactive application of revised Guidelines to a criminal defendant’s sentence. To argue one way or the other whether Justice Sotomayor and the majority “got it right” would be an exercise with no end in sight. Even if the revised Guidelines do impose a much harsher \textit{recommended} range than did the Guidelines then in effect when a criminal defendant committed his or her offenses, to automatically conclude that a district court judge would certainly impose a sentence within that harsher range would be nothing more than mere speculation given the advisory nature of the Guidelines.
In examining Justice Sotomayor’s reasoning, it becomes apparent that she viewed the advisory nature of the Guidelines after Booker not as a helpful legislative reference, but more as a manual of directives aimed at influencing sentencing judges to conform with the Guidelines, despite being advisory. Such a sentiment surely carries at least some merit; however, after examining the Court’s precedents, it becomes clear that the majority’s opinion, rather than providing a definitive framework for applying the Guidelines, may have instead produced a questionable application of Supreme Court precedent to the issue at hand, leaving us less certain than before of how to retroactively apply the Guidelines in federal courts.

A helpful analogy exists between the advisory nature of parole guidelines, allowing parole boards to exercise discretion in determining when a prisoner may be released, and the Guidelines, which are advisory in the sense that a district court must consider them, but is ultimately able to depart from those ranges if the court feels that a sentence outside the range is more appropriate.\(^5^8\) As a result, if, by virtue of the discretion available to parole boards, the parole guidelines do not raise an *ex post facto* concern, then the same should hold true for the Guidelines.\(^5^9\) The Seventh Circuit would then be vindicated, as the discretion present in the advisory nature of the Guidelines should vitiate any *ex post facto* problem.\(^6^0\)

Despite the presence of discretion, Justice Sotomayor observed that even after the Guidelines were made advisory by Court’s decision in *United States v. Booker*, district courts imposed within-Guidelines sentences in a vast majority of cases, while imposing sentences above or below the ranges set forth by the Guidelines in less than one-fifth of cases since 2007.\(^6^1\) From this, it can be inferred that Justice Sotomayor did not view the Guidelines as advisory in nature, but that her fear was that the district courts used the Guidelines in an almost pre-Booker manner, in that the Guidelines “represent the Federal Government’s authoritative view of the
appropriate sentences for specific crimes.”

Justice Sotomayor’s rather aggressive definition of the Guidelines is further detailed by her contention that the “Guidelines are in a real sense the basis for the sentence” and that the ability of a district court to sentence outside of the range provided by the Guidelines “does not deprive the Guidelines of force as the framework for sentencing.”

Such a stark view of the purported influence exerted by the Guidelines does raise constitutional concerns, but the mere fact that a Guideline serves as the starting point from which a district court makes its decision does not automatically translate into a “significant risk…that [the Guidelines’] retroactive application will result in a longer period of incarceration than under the earlier rule.” Furthermore, just because a majority of district courts choose—in their own independent judgment under Booker—to sentence criminal defendants within the range provided by the Guidelines does not necessarily lead to the conclusion that the district courts are doing so because the Guidelines, albeit advisory in nature, have the binding effect of law. Under 18 U.S.C. § 3553(a), the Guidelines inform a district court’s sentencing discretion rather than binding the court, and seeking advice from the Guidelines is not only permissible, but is a beneficial practice.

Justice Sotomayor’s focus on the statistics of the sentences imposed by the district courts since 2007 raises a significant question as to why she would look to statistics of past sentences rendered in order to support her conclusion in the first place. After all, “[T]he ex post facto clause looks to the standard of punishment prescribed by a statute, rather than the sentence actually imposed.” Accordingly, the 1994 bank fraud statute in effect at the time of Peugh’s offense provided that whomever committed such an offense “shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.” In looking at the 2006 statute in
effect at the time of Peugh’s sentencing, that statute provides that anyone who commits such an offense “shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.”\textsuperscript{69} The permissible statutory sentence for bank fraud did not change between the time of Peugh’s offense and sentencing, and, as a result, relying on the revised Guidelines did not violate the Ex Post Facto Clause.\textsuperscript{70}

Justice Sotomayor was certainly worried that the new standards of appellate review following United States v. Booker,\textsuperscript{71} resembled the sentencing regime in Miller v. Florida by creating a “sentencing regime [that] puts in place procedural ‘hurdle[s]’ that, in practice, make the imposition of a non-Guidelines sentence less likely.”\textsuperscript{72} Such a fear would be valid if the sentencing regime in place after Booker and Gall resembled the sentencing regime in Miller v. Florida, but it is obvious that such is not the case.

Under Florida’s regime in Miller, a sentencing judge who fixed a sentence within the recommended range could do so “without the requirement of a written explanation”; while a sentencing judge who wished to depart from the range had to give “clear and convincing reasons in writing for doing so.”\textsuperscript{73} Additionally, only those sentences that fell outside of the recommended range provided by the guidelines would be subject to appellate review,\textsuperscript{74} such that if a sentencing judge imposed a sentence within the recommended range, that sentence would not be reviewable at the appellate level. Justice O’Connor’s reasoning in invalidating such a system is sound: Florida’s regime did not provide “flexible ‘guideposts’ for use in the exercise of discretion; instead, [it] create[d] a high hurdle that must be cleared before discretion can be exercised.”\textsuperscript{75} Under that system, a sentencing judge could only impose a sentence outside the recommended range after “first finding ‘clear and convincing reasons…proven beyond a reasonable doubt.’”\textsuperscript{76}
Yet, the standard of reviewing district court sentences after *Gall v. United States* paints a different picture entirely than illustrated in *Miller*. “[W]hile the extent of the difference between a particular sentence and the recommended Guidelines range is surely relevant, courts of appeals must review all sentences—whether inside, just outside, or significantly outside the Guidelines range—under a deferential abuse-of-discretion standard.”77 Furthermore, appellate courts may, but are not bound to, apply a presumption of reasonableness to within-Guidelines sentences; however, an appellate court may not apply a presumption of unreasonableness to a sentence outside the Guidelines range.78

It is difficult to see how the deferential standard set forth by *Gall*, allowing district courts to sentence inside or outside of the Guidelines range, comes anywhere near the stringent regime set forth in *Miller* as described by Justice Sotomayor. Perhaps there is some risk that the standards of review following *Gall* could result in longer incarcerations, but that is not enough to satisfy the Court’s precedents. “The touchstone of this Court’s inquiry is whether a given change in law presents a ‘sufficient risk of increasing the measure of punishment attached to the covered crimes.’”79 Speculation and conjecture are not enough to establish an *ex post facto* violation,80 and neither is the fear that district courts may be imposing sentences within the recommended Guidelines range because they are being forced to do so. This is especially true when one considers the possibility that district courts impose within-Guidelines sentences a majority of the time because independent judgment, experience, and knowledge of the facts of each particular case require the imposition of that particular sentence to satisfy the statutory requirements set forth by the Sentencing Reform Act of 1984.81
V. Conclusion

At the outset, *Peugh v. United States* seemed to provide a “[]suitable vehicle”\textsuperscript{82} for the resolution of a significant constitutional concern. A split among the courts of appeals provided the Court with an opportunity to apply its precedent in a way that would resolve any question as to how revised Guidelines should, if at all, be applied retroactively against criminal defendants. It is a question with significant consequences, as no one can doubt the unconstitutionality of a criminal defendant serving more time in prison just because the laws of the United States have been upwardly changed between the date of offense and the date of sentencing. Such a question requires a careful analysis of precedent and a prudent consideration of policy concerns, and if *Peugh v. United States* provided us with the vehicle to resolve the question, we are unfortunately still without a clear map as to how to move forward in the future. Justice Sotomayor and the majority did not necessarily fail in providing us with that map; however, we are unfortunately left at a place no closer to our destination.

2 Id., slip op. at 1.


5 Id., slip op. at 20 (citing Garner v. Jones, 529 U.S. 244, 251 (2000)).


7 Peugh, (No. 12-62), slip op. at 2-3.

8 Id., slip op. at 3.

9 Id.


11 U.S. CONST. art. I., § 9, cl. 3; art. I., § 10, cl. 1.


13 Id. at 390 (emphasis in original).

14 Booker, 543 U.S. at 245-46 (opinion of Breyer, J.).

15 Garner, 529 U.S. at 253.

16 Booker, 543 U.S. at 264 (opinion of Breyer, J.).


Id.

Id. at 435.

Id.

See Benjamin Holley, The Constitutionality of Post-Crime Guidelines Sentencing, 37 Wm. Mitchell L. Rev. 533, 543 (2011) (noting that when a sentencing judge has no discretion to impose a lesser sentence, or when discretion can only be exercised after passing a “high hurdle,” an ex post facto violation is found).

Peugh, (No. 12-62), slip op. at 12.

Brief for the United States at 12, Peugh v. United States, 569 U.S. _____ (2013) (No. 12-62) ("But the advisory Guidelines do not raise ex post facto concerns simply because district courts find them to be good advice.").

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

Gall, 552 U.S. at 41.

Brief for the United States, supra note 19, at 34 (emphasis added).

Calder, 3 U.S. 386 at 390 (emphasis in original).

Peugh, (No. 12-62), slip op. at 8;

Garner, 529 U.S. at 250 (quoting Morales, 514 U.S. at 509).


Morales, 514 U.S. at 503 (citations omitted).

Id. at 509.

Gall, 552 U.S. at 49.
35 *Peugh*, (No. 12-62), slip op. at 11 ("…if the judge uses the sentencing range as the beginning point to explain the decision to deviate from it, *then the Guidelines are in a real sense the basis for the sentence.*") (emphasis in original) (citations omitted).

36 *Garner*, 529 U.S. at 255.

37 *Id.* at 258 (Scalia, J., concurring in part) ("I know of no precedent…that a defendant is entitled to the same degree of mercy or clemency that he could have expected at the time he committed his offense.").

38 *Id.* ("Discretion to be compassionate or harsh is inherent in the sentencing scheme, and being denied compassion is one of the risks that the offender knowingly assumes.").

39 *See* Petition for a Writ of Certiorari at i, *Peugh v. United States*, 569 U.S. _____ (2013) (No. 12-62) (stating that the Seventh Circuit held that the *Ex Post Facto* Clause is never violated by retroactive application of the Sentencing Guidelines, while eight courts of appeals have held otherwise).

40 *Peugh*, (No. 12-62), slip op. at 1.

41 *Id.*, slip op. at 2.

42 *Id.*

43 *Id.*, slip op. at 2-3.

44 *Id.*

45 *United States v. Peugh*, 675 F. 3d at 741.

46 *Demaree*, 459 F. 3d at 795 (holding that the *Ex Post Facto* Clause should only apply to laws and regulations that bind rather than advise).

47 *United States v. Peugh*, 675 F. 3d at 741.

48 *Peugh*, (No. 12-62), slip op. at 13.
49 *Id.*, slip op. at 11.

50 *See* Gall, 552 U.S. at 51 (explaining that failure to calculate the correct Guidelines range constitutes procedural error, and that the district court must include an explanation for deviation from the Guidelines range).

51 *Peugh*, (No. 12-62), slip op. at 12.

52 *Id.*, slip op. at 19 (quoting *Morales*, 514 U.S. at 505).

53 *Id.*, slip op. at 19-20.

54 *Id.*, slip op. at 2 (Thomas, J., dissenting) (quoting *Gall*, 552 U.S. at 50).

55 *Id.*, slip op. at 3 (Thomas, J., dissenting) (citing *Gall*, 552 U.S. at 47, 50).

56 *Id.*, slip op. at 4-5 (Thomas, J., dissenting).

57 *Id.*, slip op. at 13 (Thomas, J., dissenting) (emphasis in original).


59 *Id.*

60 *United States v. Peugh*, 675 F. 3d at 741.

61 *Peugh*, (No. 12-62), slip op. at 12.

62 *Id.*, slip op. at 14 (emphasis added).

63 *Id.*, slip op at 11 (emphasis deleted).

64 *Id.*

65 *Garner*, 529 U.S. at 255.


Peugh, (No. 12-62), slip op. at 8 (Thomas, J., dissenting).

Booker, 543 U.S. at 259, 261 (replacing de novo review of departures from the applicable Guidelines range with “review for ‘unreasonable[ness]’”).


Miller, 482 U.S. at 426 (citations omitted).

Id.

Id. at 435.

Id.

Gall, 552 U.S. at 41 (emphasis added).

Id. at 51.

Peugh, (No. 12-62), slip op. at 8 (citing Garner, 529 U.S. at 250).

Id.


Petition for a Writ of Certiorari, supra note 39, at 3.

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 554655.