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Cover Page Footnote

J.D. Candidate, 2010, Fordham University School of Law; M. Eng., 2003, B.S., 2002, Massachusetts Institute of Technology. I want to thank Professor John Pfaff for his invaluable guidance throughout the Note-writing process and my family—especially my loving wife—and friends for their support.

NOTES

DEFENDING DEMAREE: THE EX POST FACTO CLAUSE'S LACK OF CONTROL OVER THE FEDERAL SENTENCING GUIDELINES AFTER BOOKER

*Daniel M. Levy**

In 2005, the U.S. Supreme Court held that the Federal Sentencing Guidelines violated a defendant's Sixth Amendment right to a jury trial because they allowed a judge to depart from a mandatory range based on facts not presented to a jury. As a solution, the Court modified the Guidelines to be "advisory," yet curiously held that sentences were still subject to appellate review for reasonableness. Given this tension, U.S. courts of appeals are split on whether the Guidelines are "laws," subject to the Ex Post Facto Clause of the U.S. Constitution. This Note argues that the Guidelines are advisory, given the level of deference the Supreme Court and circuit courts have recently given to sentencing judges in departures from the Guidelines, and thus they are not "laws" under the Ex Post Facto Clause.

INTRODUCTION

The issue now, of course, is this: With the discretion that we have, how much discretion are we going to be given? The only thing we are working with is the notion of reasonableness; that is, is the sentence we impose reasonable? We consult the Guidelines, we look at the other factors, and we impose a sentence. Now, post-[*United States v. Booker*], I write more sentencing opinions than I used to because I think it is important that I explain my rationale for why I think a sentence in a particular case is appropriate.¹

U.S. District Judge Gregory A. Presnell of the U.S. District Court for the Middle District of Florida discussed this issue of the extent of sentencing

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1. Panel Discussion, *Federal Sentencing Under "Advisory" Guidelines: Observations by District Judges*, 75 FORDHAM L. REV. 1, 12 (2006) (remarks of U.S. District Judge of the Middle District of Florida Gregory A. Presnell).

discretion during a panel in 2006. He was referring to the 2005 decision, *United States v. Booker*,² in which the U.S. Supreme Court rendered the then-mandatory U.S. Sentencing Guidelines (the Sentencing Guidelines or the Guidelines) advisory.³ The Court ordered that sentencing judges still had to consult the Guidelines, but were free to consider other statutory factors in fashioning their own sentences.⁴ In an apparent point of tension, the Court also held that, even though the Guidelines were advisory, sentences were subject to mandatory appellate review for unreasonableness.⁵ In dissent, Justice Antonin Scalia questioned the future of sentencing discretion. On one hand, he wondered if unreasonableness review would “preserve *de facto* mandatory Guidelines by discouraging district courts from sentencing outside Guidelines ranges.”⁶ On the other, he asked, would this review become just a “formality, used by busy appellate judges only to ensure that busy district judges say all the right things when they explain how they have exercised their newly restored discretion?”⁷

In *United States v. Demaree*,⁸ a case in the U.S. Court of Appeals for the Seventh Circuit, the tension between “advisory” Guidelines and mandatory appellate reasonableness review coalesced into a debate over whether Article I, Section 9, Clause 3, commonly known as the Ex Post Facto Clause, of the U.S. Constitution⁹ applies to the Guidelines. The Ex Post Facto Clause prohibits the application of any law that increases the punishment for a defendant who committed a crime before that law came into effect.¹⁰ Faced with a choice between the version of the “advisory” Sentencing Guidelines in effect at the time of a defendant’s offense and a later version in effect at the time of sentencing, does the Ex Post Facto Clause prohibit using the later version if that version recommends a harsher penalty? In *Demaree*, the Seventh Circuit answered no in an opinion by Judge Richard A. Posner.¹¹ The court held that the Ex Post Facto Clause did not apply to the Sentencing Guidelines because the Supreme Court

2. 543 U.S. 220 (2005). See generally Daniel Richman, *Federal Sentencing in 2007: The Supreme Court Holds—The Center Doesn’t*, 117 YALE L.J. 1374 (2008); Kate Stith, *The Arc of the Pendulum: Judges, Prosecutors, and the Exercise of Discretion*, 117 YALE L.J. 1420, 1476–84 (2008).

3. See *Booker*, 543 U.S. at 246 (Breyer, J., opinion of the Court in part). For information on the background and operation of the United States Sentencing Guidelines (the Guidelines or the Sentencing Guidelines), see *infra* Part I.B.

4. See *Booker*, 543 U.S. at 245–46; *infra* note 166 and accompanying text.

5. See *Booker*, 543 U.S. at 261. In his dissenting opinion, Justice Antonin Scalia expressed his frustration with this tension: “If the Guidelines are no longer binding, one would think that the provision designed to ensure compliance with them would, in its totality, be inoperative. The Court holds otherwise.” *Id.* at 306 (Scalia, J., dissenting in part).

6. *Id.* (Scalia, J., dissenting in part).

7. *Id.*

8. 459 F.3d 791 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 3055 (2007).

9. U.S. CONST. art. 1, § 9, cl. 3 (“No . . . ex post facto Law shall be passed.”).

10. See *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 389 (1798); *infra* Part I.A.1.

11. See *Demaree*, 459 F.3d at 795 (“We conclude that the [E]x [P]ost [F]acto [C]lause should apply only to laws and regulations that bind rather than advise . . .”).

rendered the Guidelines advisory in *Booker*.¹² As advisory, they were not “laws” under the Ex Post Facto Clause.¹³ Regarding the forcefulness of appellate review of sentences, the Seventh Circuit explicitly answered Justice Scalia’s question from his dissent in *Booker*. In the Seventh Circuit, the Guidelines “nudge” a district court toward a sentencing range, but the court’s “freedom to impose a reasonable sentence outside the range is unfettered.”¹⁴

Other U.S. courts of appeals have taken the opposite view—the Ex Post Facto Clause does apply to the Sentencing Guidelines.¹⁵ They reason that, notwithstanding *Booker*, the Guidelines still influence a judge’s discretion. As such, they are “laws” under the Ex Post Facto Clause.¹⁶ Thus, a court may not use a postoffense version of the Guidelines that specifies a harsher penalty than a preoffense version did.¹⁷ This Note examines this emerging conflict of whether the Ex Post Facto Clause should apply to the Sentencing Guidelines after *Booker*. Part I provides background information on the Supreme Court’s Ex Post Facto Clause jurisprudence, the history and operation of the Sentencing Guidelines, the Supreme Court’s Ex Post Facto Clause jurisprudence regarding the Guidelines, the line of Supreme Court cases, including *Booker*, that explain how the Sixth Amendment’s jury trial guarantee led the Court to its decision in *Booker*, and how the Court and circuit courts have enforced appellate review of sentencing decisions since *Booker*. Part II analyzes the conflict among U.S. courts of appeals and commentators regarding whether the Ex Post Facto Clause applies to the Sentencing Guidelines. Part III concludes that the Ex Post Facto Clause should not apply to the Sentencing Guidelines because classifying them as “laws” is synonymous with calling them “mandatory.” Such a result would cause a conflict with the Supreme Court’s holding in *Booker* that mandatory Guidelines are unconstitutional. As a corollary, Part III argues that reasonableness review has not rendered the Guidelines effectively mandatory. Courts should continue to apply reasonableness review leniently so as not to endanger the “advisory” status—and constitutionality—of the Guidelines.

12. See *id.* at 794 (“*Booker* demoted the Guidelines from rules to advice” (quoting *United States v. Roche*, 415 F.3d 614, 619 (7th Cir. 2005))).

13. See *id.* at 795.

14. *Id.* Note that this holding still includes the limitation of reasonability on the sentence.

15. See *infra* Part II.B (discussing the U.S. Courts of Appeals for the First, Sixth, Eighth, and District of Columbia Circuits).

16. See, e.g., *United States v. Duane*, 533 F.3d 441, 447 (6th Cir. 2008); *infra* Part II.B.2.

17. See, e.g., *Duane*, 533 F.3d at 447; *infra* Part II.B.2.

I. THE EX POST FACTO CLAUSE, FEDERAL SENTENCING GUIDELINES, AND *BOOKER*

Part I of this Note provides the history and legal framework with which to analyze the issue of whether the Ex Post Facto Clause should control the Sentencing Guidelines. Part I.A introduces the Ex Post Facto Clause and examines recent Supreme Court decisions regarding parole guidelines and the Ex Post Facto Clause. Part I.B discusses the history and operation of the Federal Sentencing Guidelines and Sentencing Commission. Part I.C discusses *Miller v. Florida*,¹⁸ a decision in which the Supreme Court held that the Ex Post Facto Clause applied to Florida's sentencing guidelines, which at the time operated in the same "mandatory" manner as the Federal Guidelines. Finally, Part I.D summarizes the Supreme Court's jurisprudence leading to the decision in *Booker*. This part also discusses sentencing decisions and practices after *Booker*.

A. *Ex Post Facto Clause Jurisprudence*

The U.S. Constitution prohibits ex post facto laws, but does not explain what they are. Instead, judicial interpretation of the Constitution has given the term its meaning. This part discusses Supreme Court cases that define an ex post facto law. Part I.A.1 looks back to *Calder v. Bull*¹⁹ for the historical definition. Parts I.A.2 and I.A.3 discuss the modern cases, *California Department of Corrections v. Morales*²⁰ and *Garner v. Jones*,²¹ that explain which administrative regulations are ex post facto laws.

1. The Historical Definition of an Ex Post Facto Law: *Calder v. Bull*

The U.S. Constitution frankly states, "[n]o . . . ex post facto Law shall be passed."²² In the famous case of *Calder v. Bull*, Justice Samuel Chase held that the Ex Post Facto Clause prohibits the application of any law that increases the punishment for a criminal defendant who commits an offense before that law took effect.²³ The Justices in *Calder* also explained that there were two purposes for the Ex Post Facto Clause: (1) to restrain federal and state legislatures from enacting vindictive legislation²⁴ and (2)

18. 482 U.S. 423 (1987).

19. 3 U.S. (3 Dall.) 386 (1798).

20. 514 U.S. 499 (1995).

21. 529 U.S. 244 (2000).

22. U.S. CONST. art. 1, § 9, cl. 3.

23. *Calder*, 3 U.S. (3 Dall.) at 390 (Chase, J.) (stating that ex post facto laws include "[e]very law that *changes the punishment*, and inflicts a *greater punishment*, than the law annexed to the crime, when committed"). This was one of four types of ex post facto laws that Justice Samuel Chase enumerated. See *id.*; see also *Collins v. Youngblood*, 497 U.S. 37, 41-42 (1990) (reinforcing *Calder*).

24. See *Calder*, 3 U.S. (3 Dall.) at 389 ("[T]he advocates of [ex post facto] laws were stimulated by ambition, or personal resentment, and vindictive malice. To prevent such . . . acts of violence and injustice, I believe, the Federal and State Legislatures, were prohibited from passing . . . any *ex post facto law*."); *id.* at 396 (Paterson, J.) ("[T]he power of passing

to give fair warning and to permit people to rely on the laws until the legislature changes them.²⁵

2. The “Sufficient Risk” Test for an Ex Post Facto Law: *California Department of Corrections v. Morales*

California Department of Corrections v. Morales set forth a general rule to determine the scope of Justice Chase’s definition of an ex post facto law. In *Morales*, a California state court sentenced the defendant to life in prison for first-degree murder.²⁶ After his release on parole in 1980, the defendant committed a second homicide, and the state court sentenced him to a term of fifteen years to life in prison for second-degree murder.²⁷ The defendant was eligible for parole in 1990, but the parole board denied parole to the defendant at his first hearing in 1989.²⁸

California law in effect at the time of the defendant’s second murder required the California parole board to provide annual parole suitability hearings to a prisoner every year after the first denial of parole.²⁹ However, after the second murder, the state legislature passed a law authorizing the parole board to defer the subsequent parole hearings for up to three years.³⁰ The board could defer the hearing if (1) the inmate was responsible for “more than one offense which involves the taking of a life” and (2) the parole board enumerated its findings as to why it was unreasonable to expect that it would grant parole in the intervening years.³¹ The defendant argued that the application of the new law increased his punishment by possibly keeping him in prison longer, and thus violated the Ex Post Facto Clause.³²

The Supreme Court disagreed with the defendant.³³ The Court declined to apply the Ex Post Facto Clause to every “minor . . . change[] that might produce some remote risk of impact on a prisoner’s expected term of

[ex post facto] laws should be withheld from legislators; as it is a dangerous instrument in the hands of bold, unprincipled, aspiring, and party men, and has been [too] often used to effect the most detestable purposes.”)

25. See *id.* at 388 (Chase, J.) (“[N]o man should be compelled to do what the laws do *not* require; *nor* to refrain from acts which the laws permit.”); see also *Miller v. Florida*, 482 U.S. 423, 430 (1987) (“Thus, almost from the outset, we have recognized that central to the *ex post facto* prohibition is a concern for ‘the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated.’” (quoting *Weaver v. Graham*, 450 U.S. 24, 30 (1981))).

26. *Cal. Dep’t of Corrs. v. Morales*, 514 U.S. 499, 502 (1995).

27. *Id.*

28. *Id.* at 502–03.

29. *Id.* at 503 (citing 1977 Cal. Stat. 667).

30. *Id.* (citing CAL. PENAL CODE § 3041.5(b)(2) (West 1982)).

31. *Id.* (quoting CAL. PENAL CODE § 3041.5(b)(2)).

32. *Id.* at 505. The U.S. Supreme Court stated, “[R]espondent relies chiefly on a trilogy of cases holding that a legislature may not stiffen the ‘standard of punishment’ applicable to crimes that have already been committed.” *Id.* One of the cases in the trilogy was *Miller v. Florida*, 482 U.S. 423 (1987). *Id.* For a discussion of *Miller*, see *infra* Part I.C.

33. *Morales*, 514 U.S. at 504.

confinement.”³⁴ Instead the Court acknowledged that the issue is a “matter of ‘degree.’”³⁵ The Court further held that the application of the new law to the defendant violated the Ex Post Facto Clause if it produced a “sufficient risk of increasing the measure of punishment attached to [his] crimes.”³⁶ The Court then decided that in the case of the defendant and similar criminals, the new law did not produce such a risk.³⁷ In order to delay the defendant’s hearing under the new law, the parole board would have to state the reasons why it thought parole would be unreasonable in the intervening years.³⁸ Thus, the Court basically saw the new law as a way for the board to skip parole hearings that were not likely to result in a grant of parole.³⁹

3. The Two-Pronged Test for an Ex Post Facto Law: *Garner v. Jones*

Garner v. Jones built upon *Morales* by explaining a two-pronged framework for analyzing which administrative regulations qualify as ex post facto “laws.” In *Garner*, the respondent escaped from prison five years after he had begun serving a life sentence in Georgia for committing murder.⁴⁰ He then committed another murder over two years after his escape, resulting in another life sentence.⁴¹

Georgia law required the State’s Board of Pardons and Paroles (the Georgia Parole Board) to consider inmates serving life sentences for parole seven years after imprisonment.⁴² After this initial review, state law authorized the Georgia Parole Board to set the intervals between subsequent parole hearings.⁴³ At the time the respondent committed the second murder, the Georgia Parole Board’s rules stated that the board would reconsider inmates for parole every three years.⁴⁴ After the respondent returned to prison after the second murder, the board amended its rules to provide an eight-year minimum interval between reviews for inmates serving life sentences.⁴⁵

The U.S. Court of Appeals for the Eleventh Circuit found that the retroactive application of the amended rule violated the Ex Post Facto Clause.⁴⁶ The court reasoned that the group of inmates serving life

34. *Id.* at 508.

35. *Id.* at 509 (quoting *Beazell v. Ohio*, 269 U.S. 167, 171 (1925)).

36. *Id.*

37. *Id.* at 509–11. The Court also pointed out that, under the new law, the parole board could still conduct yearly reviews for criminals with a more realistic chance of parole. *See id.* at 511.

38. *See id.* at 511; *supra* note 31 and accompanying text.

39. *Id.* at 512 (“[T]he amendment simply allows the Board to avoid the futility of going through the motions . . . on a yearly basis.”).

40. *Garner v. Jones*, 529 U.S. 244, 247 (2000).

41. *Id.*

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

43. *Id.* (citing GA. CODE ANN. § 42-9-45(a)).

44. *Id.* (citing GA. COMP. R. & REGS. 475-3-.05(2) (1979)).

45. *Id.* (citing GA. COMP. R. & REGS. 475-3-.05(2) (1985)).

46. *Id.* at 248–49.

sentences was likely to be much larger than the group of double murderers at issue in *Morales*.⁴⁷ Thus, the court concluded that the retroactive application of the amended parole rule would increase the length of incarceration for many inmates.⁴⁸

The Supreme Court reversed the Eleventh Circuit's ruling⁴⁹ and set forth a two-pronged test for whether the retroactive application of an amended rule violates the Ex Post Facto Clause. First, the application is a violation if the amended rule shows a significant risk of increased punishment on its face.⁵⁰ The Court emphasized that this inquiry should focus on the entire system of rules rather than just the singular amended rule.⁵¹ Second, if the terms of the rule do not display this risk, the complainant must "demonstrate, by evidence drawn from the rule's practical implementation by the agency charged with exercising discretion, that its retroactive application will result in a longer period of incarceration than under the earlier rule."⁵² The Court also reinforced its holding in *Morales*, stating that the focus of the inquiry should not be on whether a change in the rule produces an ambiguous disadvantage for the offender, but on whether the change increases the penalty for a crime.⁵³

In *Garner*, the Supreme Court found that the Seventh Circuit erred by not considering an internal policy of the Georgia Parole Board for expedited consideration.⁵⁴ The Court reasoned that any particular inmate could invoke this policy should that inmate think that changed circumstances or new information warranted a grant of parole.⁵⁵

In *Morales* and *Garner*, the Supreme Court analyzed the applicability of the Ex Post Facto Clause to parole guidelines. However, the Court employed very broad language, and thus this Note uses this legal framework to analyze whether the Ex Post Facto Clause controls another set of administrative regulations—the Federal Sentencing Guidelines.

47. *Id.* at 249.

48. *Id.*

49. *Id.*

50. *Id.* at 255 ("When the rule does not by its own terms show a significant risk, [proceed to the second prong].").

51. *See id.* ("[T]he general operation of the Georgia parole system may produce relevant evidence and inform further analysis on the point.").

52. *Id.*

53. *See id.* at 250 ("The controlling inquiry, we determined, was whether retroactive application of the change in California law created 'a sufficient risk of increasing the measure of punishment attached to the covered crimes.'" (quoting *Cal. Dep't of Corrs. v. Morales*, 514 U.S. 499, 509 (1995))).

54. *See id.* at 256 ("At a minimum, policy statements, along with the Board's actual practices, provide important instruction as to . . . whether . . . the amendment . . . created a significant risk . . .").

55. *See id.*

B. *The History and Operation of the Sentencing Guidelines*

Before analyzing the applicability of the Ex Post Facto Clause to the Sentencing Guidelines, this Note discusses the origin and operation of the Federal Sentencing Guidelines. Part I.B.1 first describes the creation of the Sentencing Commission. Part I.B.2 then looks at how the Sentencing Commission built the Guidelines and how they operate. These subsections deal only with mandatory Guidelines before *Booker*, unless otherwise noted.

1. The Origin of the Guidelines

From the late nineteenth century to approximately 1970, judges exercised essentially unchecked discretion when imposing sentences.⁵⁶ The reason for this discretion was that the dominant theory of punishment was rehabilitation rather than retribution or deterrence.⁵⁷ Sentencing judges viewed criminals as patients in need of individualized sentences.⁵⁸

However, near the end of this era, experience showed that this rehabilitative sentencing model did not work.⁵⁹ In short, there was no way to tell when the defendant was rehabilitated.⁶⁰ Critics argued that sentencing discretion led to significant differences in the lengths of sentences for similar offenders.⁶¹ Both judges and lawmakers led the movement for sentencing reform that included tighter legislative controls, guidelines, and review procedures.⁶²

In 1984, Congress passed the Sentencing Reform Act (SRA),⁶³ establishing the U.S. Sentencing Commission (the Sentencing Commission

56. See James R. Dillon, *Doubting Demaree: The Application of Ex Post Facto Principles to the United States Sentencing Guidelines After United States v. Booker*, 110 W. VA. L. REV. 1033, 1038 (2008) (citing Douglas A. Berman, *Conceptualizing Booker*, 38 ARIZ. ST. L.J. 387, 389 (2006)); see also Michael Buescher, Note, *Rebuilding the Safety Mechanism: Does 18 U.S.C. § 3553(e) Violate the Separation of Powers?*, 76 FORDHAM L. REV. 1065, 1070 (2007).

57. See Dillon, *supra* note 56, at 1038 (“From the late nineteenth century until around 1970, the federal criminal justice system operated on a ‘medical’ model in which criminal offenders were viewed primarily as patients in need of care and rehabilitation by the penal system.” (citing *Dufresne v. Baer*, 744 F.2d 1543, 1547 (11th Cir. 1984))).

58. See *id.* (citing Berman, *supra* note 56, at 389).

59. See *id.* at 1039.

60. See *id.* (“There is simply no way to know when ‘rehabilitation’ has occurred in an individual.” (quoting Project, *Parole Release Decisionmaking and the Sentencing Process*, 84 YALE L.J. 810, 827 (1975))).

61. See *id.* at 1039–40 (citing Ilene H. Nagel, *Structuring Sentencing Discretion: The New Federal Sentencing Guidelines*, 80 J. CRIM. L. & CRIMINOLOGY 883, 883–84 (1990)).

62. See *id.*; see also Richman, *supra* note 2, at 1385.

63. See Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 U.S.C. and 28 U.S.C.). A little over 90% of active federal district judges were appointed after Congress passed the Sentencing Reform Act. See Stith, *supra* note 2, at 1496 n.333. Including senior judges, the percentage of judges appointed after the Guidelines took effect is more than 66%. See *id.*

or the Commission),⁶⁴ which has many duties. The Commission must establish federal sentencing policies that satisfy 18 U.S.C. § 3553(a)(2),⁶⁵ which specifies four purposes of sentencing. These purposes are (1) retribution and respect for the law, (2) deterrence of future criminal conduct, (3) incapacitation of the offender, and (4) rehabilitation of the offender.⁶⁶ The Commission's sentencing policies must also balance providing "certainty and fairness" and "avoiding unwarranted sentencing disparities" among similarly situated defendants with "maintaining sufficient flexibility to permit individualized sentences" when previously unconsidered mitigating or aggravating factors exist.⁶⁷ Finally, the Commission's policies must "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."⁶⁸

The Commission also performs duties related to the maintenance of its sentencing policies. The Commission must measure the effectiveness of sentencing, penal, and correctional practices in meeting the purposes of sentencing in § 3553(a)(2).⁶⁹ The Commission shall also promulgate the Sentencing Guidelines and general policy statements regarding the use of the Guidelines.⁷⁰ The SRA instructs the Commission to consult with various federal criminal justice authorities and to revise the Guidelines as necessary based on public comments⁷¹ and new data.⁷²

In addition to establishing the Commission, the SRA commands courts to impose sentences that are "sufficient, but not greater than necessary."⁷³ In particular, courts must consider (1) "the nature and circumstances of the offense and the history and characteristics of the defendant,"⁷⁴ (2) the four factors that the Commission considers when promulgating the Guidelines,⁷⁵ (3) the available sentences, (4) the Sentencing Guidelines, (5) any policy statement of the Commission, (6) the need to avoid unwarranted sentencing disparity among similarly situated defendants, and (7) the need to provide

64. See Sentencing Reform Act, 98 Stat. at 2017 (codified as amended at 28 U.S.C. §§ 991–998 (2006)).

65. See 28 U.S.C. § 991(b)(1)(A).

66. See 18 U.S.C. § 3553(a)(2) (2006). For a brief overview of these theories of punishment, see PAUL H. ROBINSON, CRIMINAL LAW: CASE STUDIES AND CONTROVERSIES 82–90 (3d ed. 2005).

67. 28 U.S.C. § 991(b)(1)(B).

68. *Id.* § 991(b)(1)(C).

69. *Id.* § 991(b)(2).

70. See *id.* § 994(a).

71. The Sentencing Commission posts notices in the Federal Register regarding proposed amendments to the Guidelines, policy statements, or commentary; these notices request comments from the public. See, e.g., Sentencing Guidelines for United States Courts, 73 Fed. Reg. 4931, 4932 (proposed Jan. 28, 2008).

72. See 28 U.S.C. § 994(o). For a complete list of the Commission's duties, see *id.* § 994.

73. 18 U.S.C. § 3553(a) (2006).

74. *Id.* § 3553(a)(1).

75. See *supra* note 66 and accompanying text.

restitution to the victims of the offense.⁷⁶ However, before *Booker*, the SRA mandated that the court follow the Guidelines unless it found other factors that the Commission did not consider in formulating a particular sentence.⁷⁷

To depart from the “mandatory” Guidelines, a judge, as fact finder, could consider evidence that would be inadmissible during a criminal trial.⁷⁸ The evidence only needed to have “sufficient indicia of reliability to support its probable accuracy,”⁷⁹ but the defendant still had many procedural protections that the judge had to work to overcome. Specifically, the defendant and the prosecution could present evidence regarding particular sentencing factors.⁸⁰ The judge had to find all disputed facts by a preponderance of the evidence.⁸¹ The defendant also had the right to appeal a sentence for a number of reasons, including that the sentence was above the Guidelines’ range.⁸² Before *Booker*, appellate courts reviewed district court sentences de novo.⁸³ In combination with the SRA’s command to follow the Guidelines,⁸⁴ these procedural protections under a “mandatory” sentencing regime provided a good basis for a court to hold that the Guidelines had the force of law, as this Note later discusses.⁸⁵

2. The Operation of the Guidelines

The Sentencing Commission’s basic philosophy in constructing the Guidelines focused on using empirical data to determine appropriate sentences.⁸⁶ The Commission recognized that a major hurdle in eliminating sentencing disparity was that different theories of punishment produced different sentences.⁸⁷ For example, consider a bank robber. A “just deserts” theorist would impose a sentence based on the moral culpability of a bank robbery.⁸⁸ A crime-control theorist would imprison the robber until

76. See 18 U.S.C. § 3553(a).

77. 18 U.S.C. § 3553(b)(1) (2000) (“[T]he court shall impose a sentence of the kind, and within the [Sentencing Guidelines] range . . . unless the court finds . . . an aggravating or mitigating circumstance . . . not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a [different] sentence . . .”). In 2005, in *United States v. Booker*, the Supreme Court held the “mandatory” Guidelines to be unconstitutional and excised this section of the statute. See *infra* Part I.D.2.

78. See U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (2008) (citing 18 U.S.C. § 3661 and collecting cases regarding such admissible evidence).

79. See *id.* § 6A1.3(a).

80. See *id.*

81. See *id.* § 6A1.3 cmt. background; see also *United States v. Booker*, 543 U.S. 220, 226 (2005).

82. See 18 U.S.C. § 3742(a)(3) (2006).

83. 18 U.S.C. § 3742(e) (2000). See generally *infra* Part I.D.2.

84. See *supra* note 77 and accompanying text.

85. See generally *infra* Part I.C.

86. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 editorial note (The Basic Approach para. 11).

87. See *id.* (The Basic Approach para. 9).

88. Cf. ROBINSON, *supra* note 66, at 86 (“An actor . . . is punished according to the degree of his or her blameworthiness, no more and no less.”).

the risk that the robber would commit another robbery was sufficiently low, regardless of the moral culpability of the crime.⁸⁹ The Commission sought to minimize this conflict⁹⁰ by relying on a large amount of empirical data.⁹¹ The Commission analyzed the data and identified relevant distinctions in offenders' situations that seemed to affect sentencing decisions.⁹² These distinctions were "ones that the community believe[d], or . . . found over time, to be important from either a just deserts or crime control perspective."⁹³ The Commission then adjusted the sentences for specific crimes either because of statutory directives or because it detected inconsistencies in treatment.⁹⁴

The Guidelines use a sentencing table that identifies a range of punishment based on the defendant's "criminal history category" and "offense level."⁹⁵ The criminal history category is a number from one to six and is based on the offender's prior convictions.⁹⁶ The offense level is a number from one to forty-three.⁹⁷ The defendant's offense level starts with a base number that the Commission defines for each crime in chapter 2 of the Guidelines.⁹⁸ A court then applies aggravating or mitigating factors that the Commission defines separately in chapters 2 and 3 of the Guidelines.⁹⁹ These factors adjust the base offense level up or down accordingly.¹⁰⁰ The court then finds the appropriate range on the sentencing table by locating the intersection of the final offense level and the criminal history category.¹⁰¹ As this part has discussed, the Guidelines were fairly mandatory at their inception, so a district court judge had little say in the resulting sentence. The next part of this Note examines a decision in which the Supreme Court logically concluded that the Guidelines were "laws" under the Ex Post Facto Clause because they were mandatory.

C. *The Ex Post Facto Clause's Control over "Mandatory" Sentencing Guidelines*

Part I.A set forth the controlling tests for whether administrative regulations are ex post facto laws, and Part I.B described the origin and operations of the Guidelines. This part examines *Miller v. Florida*, a

89. Cf. *id.* at 84 (discussing an extreme form of crime control where a pickpocket's hands are cut off).

90. For a more detailed discussion on this conflict, see *id.* at 87–89.

91. See U.S. SENTENCING GUIDELINES MANUAL § 1A1.3 editorial note (The Basic Approach para. 11).

92. See *id.* (The Basic Approach paras. 11–12).

93. See *id.* (The Basic Approach para. 13).

94. See *id.* (The Basic Approach para. 14).

95. See *id.* § 5A.

96. See *id.* § 4A.

97. See *id.* § 5A.

98. See *id.* § 1B1.1(b). See generally *id.* § 2.

99. See *id.* § 1B1.1(b)–(e).

100. See *id.*

101. See *id.* § 5A.

decision in which the Supreme Court found the Guidelines, as mandatory, to be ex post facto laws.

The Supreme Court decided *Miller* in 1987, unanimously holding that the Ex Post Facto Clause prohibited increasing a defendant's sentence by retroactively applying Florida's sentencing guidelines.¹⁰² In *Miller*, the guidelines in effect on the defendant's date of offense specified a presumptive sentence of 3.5–4.5 years.¹⁰³ The guidelines in effect at the time of sentencing specified a range of 5.5–7 years.¹⁰⁴ The trial court used the later version of the Florida guidelines to sentence the defendant to seven years in prison.¹⁰⁵

The Supreme Court held that the trial court violated the Ex Post Facto Clause by using the later version of the state guidelines, which had the "force and effect of law" and "substantially disadvantaged" the defendant.¹⁰⁶ The Court relied on the fact that, if the sentencing judge imposed a sentence of seven years under the old guidelines, he would have been required to provide clear and convincing reasons for departing from the presumptive range.¹⁰⁷ Under the new guidelines, the seven year sentence fell within the presumptive range, and thus the judge would not have had to provide any reasoning.¹⁰⁸ The Court held that this change substantially disadvantaged the defendant because it foreclosed his ability to challenge a sentence longer than his presumptive sentence under the old guidelines.¹⁰⁹ The Florida sentencing guidelines in *Miller* operated in a manner virtually identical to the Federal Sentencing Guidelines.¹¹⁰ As a result, after *Miller*, all of the U.S. courts of appeals agreed that the Ex Post Facto Clause also barred the retrospective application of the Federal Sentencing Guidelines to increase a defendant's sentence.¹¹¹

102. *Miller v. Florida*, 482 U.S. 423, 435–36 (1987). The Florida sentencing guidelines operated in much the same way as the Federal Guidelines. See *infra* note 110 and accompanying text. In subsequent decisions, all of the U.S. courts of appeals agreed that the reasoning in *Miller v. Florida* applied to the Federal Guidelines. See *infra* note 111 and accompanying text.

103. *Miller*, 482 U.S. at 424.

104. *Id.*

105. *Id.*

106. *Id.* at 432, 435. It is important to note that the Court in *California Department of Corrections v. Morales* abrogated the "substantially disadvantaged" test. 514 U.S. 499, 506 n.3 (1995); see also *supra* notes 32–34 and accompanying text. However, the outcome in *Miller* would have remained the same under the test in *Morales*. *Morales*, 514 U.S. at 506 n.3.

107. *Miller*, 482 U.S. at 432; see also *United States v. Booker*, 543 U.S. 220, 226 (2005) (discussing the preponderance-of-the-evidence standard for the Federal Guidelines); U.S. SENTENCING GUIDELINES MANUAL § 6A1.3 cmt. background (2008) (setting forth the Commission's belief that the preponderance-of-the-evidence standard is appropriate for the Guidelines).

108. *Miller*, 482 U.S. at 432–33.

109. See *id.*

110. See Dillon, *supra* note 56, at 1047.

111. *United States v. Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (citing *United States v. Kopp*, 951 F.2d 521, 526 (3d Cir. 1991); *United States v. Nagi*, 947 F.2d 211, 213 n.1 (6th Cir. 1991); *United States v. Sweeten*, 933 F.2d 765, 772 (9th Cir. 1991), *overruled on other*

Originally, neither Congress nor the Sentencing Commission believed that the Ex Post Facto Clause would apply to the Guidelines.¹¹² In 1992,¹¹³ the Sentencing Commission responded to *Miller* and the subsequent reaction from the courts of appeals by amending the Guidelines.¹¹⁴ The Sentencing Commission added § 1B1.11, which specified that the sentencing court must use the version in effect on the date of sentencing unless doing so violated the Ex Post Facto Clause.¹¹⁵ Section 1B.11 instructs that if a court finds an Ex Post Facto Clause violation, it must use the Guidelines in effect on the date of the offense.¹¹⁶ Note that § 1B.11 does not dictate that the Sentencing Guidelines are subject to the Ex Post Facto Clause. As Part I.C showed, that question is for the courts. However, it is still an open question whether the Ex Post Facto Clause controls the current Sentencing Guidelines, given that they are no longer mandatory. The next section of this Note discusses the line of Supreme Court cases that led to this seismic shift in the Guidelines and the aftermath in the lower courts.

D. *The Sixth Amendment and the Sentencing Guidelines*

The Sixth Amendment to the Constitution protects a criminal defendant's right to a "speedy and public trial, by an impartial jury."¹¹⁷ This subsection of this Note summarizes the Supreme Court's Sixth Amendment jurisprudence as applied to the Sentencing Guidelines. Part I.D.1 discusses *Apprendi v. New Jersey*¹¹⁸ and *Blakely v. Washington*,¹¹⁹ two cases in which the Supreme Court clarified the role of the jury in sentencing decisions. Next, Part I.D.2 examines the *Booker* decision, which rendered the Guidelines advisory. Parts I.D.3 and I.D.4 review *Rita v. United States*,¹²⁰ *Gall v. United States*,¹²¹ and *Kimbrough v. United States*,¹²² three

grounds by United States v. Grisel, 488 F.3d 844 (9th Cir. 2007); United States v. Young, 932 F.2d 1035, 1038 n.3 (2d Cir. 1991); United States v. Smith, 930 F.2d 1450, 1452 n.3 (10th Cir. 1991); United States v. Morrow, 925 F.2d 779, 782–83 (4th Cir. 1991); United States v. Lam Kwong-Wah, 924 F.2d 298, 304–05 (D.C. Cir. 1991); United States v. Harotunian, 920 F.2d 1040, 1042 (1st Cir. 1990); United States v. Swanger, 919 F.2d 94, 95 (8th Cir. 1990); United States v. Worthy, 915 F.2d 1514, 1516 n.7 (11th Cir. 1990); United States v. Suarez, 911 F.2d 1016, 1021–22 (5th Cir. 1990).

112. U.S. SENTENCING GUIDELINES MANUAL § 1B1.11 cmt. background (2008) (citing S. REP. NO. 98-225, at 77–78 (1983)).

113. See *id.* § 1B1.11 hist. n.

114. See *id.* § 1B1.11 cmt. background ("While the Commission concurs in the policy expressed by Congress, courts to date generally have held that the [E]x [P]ost [F]acto [C]lause does apply to sentencing guideline amendments that subject the defendant to increased punishment." (emphasis omitted)).

115. See *id.* § 1B1.11(a)–(b)(1).

116. See *id.* § 1B1.11(b)(1). Section 1B1.11(b)(2)–(3) of the Sentencing Guidelines is outside of the scope of this Note. See *infra* note 290.

117. U.S. CONST. amend. VI.

118. 530 U.S. 466 (2000).

119. 542 U.S. 296 (2004).

120. 127 S. Ct. 2456 (2007).

121. 128 S. Ct. 586 (2007).

post-*Booker* cases where the Supreme Court clarified the standards of judicial review for sentencing decisions both within and outside of the Guidelines.¹²³ Finally, Part I.D.5 discusses sentencing data and decisions in U.S. district and circuit courts since *Gall* and *Kimbrough*.

1. The Role of a Jury in Sentencing: *Apprendi v. New Jersey* and *Blakely v. Washington*

In *Apprendi v. New Jersey*, the defendant admitted to firing several bullets into the home of an African American family that had just moved into an all-white neighborhood.¹²⁴ The defendant pled guilty to two counts of second-degree possession of a firearm for an unlawful purpose and one count of third-degree unlawful possession of an antipersonnel bomb.¹²⁵ Under New Jersey law, the defendant's maximum sentence for these crimes was twenty years.¹²⁶

The state requested that the court enhance the defendant's sentence on the ground that he committed the offense with a biased purpose.¹²⁷ With this enhancement, the defendant's maximum sentence would have been thirty years.¹²⁸ At an evidentiary hearing, the judge found, by a preponderance of the evidence, that the biased purpose enhancement applied.¹²⁹ The defendant appealed, arguing that the Due Process Clause of Section 1 of the Fourteenth Amendment to the Constitution¹³⁰ required a jury to find, beyond a reasonable doubt, that he acted with a biased purpose.¹³¹

The Supreme Court held that the combination of the Fifth Amendment Due Process Clause¹³² and the Sixth Amendment's jury trial guarantee mandated that "any fact (other than prior conviction) that increases the maximum penalty for a crime, must be . . . submitted to a jury, and proven

122. 128 S. Ct. 558 (2007).

123. See generally Stith, *supra* note 2, at 1484-94.

124. *Apprendi v. New Jersey*, 530 U.S. 466, 469 (2000).

125. *Id.* at 469-70 (citing N.J. STAT. ANN. §§ 2C:39-4a, 2C:39-3a (West 1995)).

126. *Id.* at 470. The twenty-year maximum was based on the five- to ten-year sentences for the two second-degree counts running consecutively and the three- to five-year sentence for the third-degree count running concurrently. *Id.* (citing N.J. STAT. ANN. § 2C:43-6(a)(2), 2C:43-6(a)(3)).

127. *Id.* (citing N.J. STAT. ANN. § 2C:44-3(e)). In the plea agreement, the state reserved the right to request this enhancement, and the defendant reserved the right to challenge it. *Id.*

128. *Id.*

129. *Id.* at 471.

130. U.S. CONST. amend. XIV, § 1 ("No State shall . . . deprive any person of life, liberty, or property, without due process of the law . . .").

131. *Apprendi*, 530 U.S. at 471.

132. U.S. CONST. amend. V ("No person shall . . . be deprived of life, liberty, or property without due process of law . . ."). The Court relied on precedent involving the Fifth Amendment Due Process Clause but applied the Fourteenth Amendment to the state to reach the same conclusion in this case. See *Apprendi*, 530 U.S. at 476.

beyond a reasonable doubt.”¹³³ The Court largely relied on historical principles for this holding.¹³⁴ In addition, the Court reasoned that courts in the past did not differentiate between an “element” of an offense and a “sentencing factor.”¹³⁵ Historically, a court submitted all elements of the offense to the jury.¹³⁶ In a final point, the Court stated that judges have always exercised sentencing discretion within the permitted statutory range.¹³⁷

In *Blakely v. Washington*, the defendant pled guilty to second-degree kidnapping involving domestic violence and the use of a firearm.¹³⁸ Washington state law limited the sentence for such a crime to ten years.¹³⁹ However, Washington’s Sentencing Reform Act further limited a judge’s discretion to a sentencing range of forty-nine to fifty-three months.¹⁴⁰ This Act also provided that a judge could impose a sentence above the standard range for “substantial and compelling reasons justifying an exceptional sentence.”¹⁴¹ The judge in *Blakely* imposed an above-guidelines sentence of ninety months, justifying the decision on the ground that the petitioner acted with “deliberate cruelty.”¹⁴² The judge supported this determination with thirty-two findings of fact resulting from a bench hearing.¹⁴³

The Supreme Court held that the increased punishment violated the Sixth Amendment. First, the Court recited its rule from *Apprendi*: “[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury, and proved beyond a reasonable doubt.”¹⁴⁴ Next, the Court held that the statutory maximum is the sentence that the judge may impose “solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.”¹⁴⁵ The forty-nine to fifty-three month sentence reflected all the facts in the jury verdict and defendant’s plea agreement.¹⁴⁶ Thus, the judge

133. *Apprendi*, 530 U.S. at 476 (quoting *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).

134. *Id.* at 477 (“[T]rial by jury has been understood to require that ‘the truth of every accusation . . . be confirmed by . . . twelve of [the defendant’s] equals and neighbours . . .’” (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *343)). “[I]n criminal cases[,] . . . the formula ‘beyond a reasonable doubt’ seems to have occurred as late as 1798.” *Id.* at 478.

135. *See id.* at 478 (“Any possible distinction between an ‘element’ of a felony offense and a ‘sentencing factor’ was unknown to the practice of . . . trial by jury . . .” (citing 4 BLACKSTONE, *supra* note 134, at *368)).

136. *See id.*

137. *See id.* at 481.

138. *Blakely v. Washington*, 542 U.S. 296, 298–99 (2004).

139. *Id.* at 299 (citing WASH. REV. CODE ANN. §§ 9A.20.021(1)(b), .030(3) (West 2000)).

140. *Id.* (citation omitted).

141. *Id.* (quoting WASH. REV. CODE ANN. § 9.94A.120(2)).

142. *Id.* at 300 (quoting WASH. REV. CODE ANN. § 9.94A.390(2)(h)(iii)).

143. *Id.*

144. *Id.* at 301 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000)).

145. *Id.* at 303.

146. *See id.* at 304.

could not have found additional facts at the bench hearing to increase the defendant's sentence.¹⁴⁷

2. The Sentencing Guidelines Become "Advisory": *United States v. Booker*

In *United States v. Booker*, a jury convicted the defendant of possessing at least 50 grams of crack cocaine based on evidence that he had carried 92.5 grams of crack in his bag.¹⁴⁸ The Federal Sentencing Guidelines specified a sentence of 210–262 months in prison.¹⁴⁹ However, the judge imposed a sentence of 360 months.¹⁵⁰ The judge supported this sentence with the finding that the defendant possessed 566 grams of crack in addition to the original 92.5 grams in his bag.¹⁵¹

In the first opinion of the Court,¹⁵² Justice John Paul Stevens applied the holding in *Blakely*¹⁵³ to the Sentencing Guidelines and declared their mandatory nature unconstitutional.¹⁵⁴ First, Justice Stevens noted that a judge has always had discretion to impose a sentence within a defined, statutory range.¹⁵⁵ However, the Sentencing Guidelines bound a judge to its range,¹⁵⁶ subject to departures in cases where the judge found aggravating or mitigating circumstances by a preponderance of the evidence.¹⁵⁷ Similar to the holding in *Blakely*, Justice Stevens held that the district court violated the Sixth Amendment by departing from the Sentencing Guidelines' mandatory range based on additional facts—the extra 566 grams of crack—that the jury did not consider.¹⁵⁸ Thus, an appellate court should have reversed the judge's sentence because he should have had no factual basis for the departure from the Guidelines.¹⁵⁹

In the second opinion of the Court in *Booker*, Justice Stephen Breyer laid out two remedial options in light of Justice Stevens's opinion. The first was that the Court could interpret the sentencing statute to require a jury to find any fact—beyond a reasonable doubt—that a sentencing judge might use to

147. *See id.* ("The judge in this case could not have imposed the exceptional [ninety] month sentence solely on the basis of the facts admitted in the guilty plea.")

148. *United States v. Booker*, 543 U.S. 220, 235 (2005) (Stevens, J., opinion of the Court in part).

149. *Id.*

150. *Id.*

151. *Id.*

152. Justices Scalia, David Souter, Clarence Thomas, and Ruth Bader Ginsburg joined Justice John Paul Stevens's opinion. *See id.* at 226 & n.*. There were two majority opinions because Justice Ginsburg also joined Justice Stephen Breyer's remedial opinion. *See id.* at 244 & n.* (Breyer, J.). Chief Justice William Rehnquist, along with Justices Sandra Day O'Connor and Anthony Kennedy, also joined Justice Breyer. *See id.*

153. *See supra* note 145 and accompanying text.

154. *See Booker*, 543 U.S. at 232–33, 243–44 (Stevens, J.).

155. *Id.* at 233.

156. *Id.* at 234.

157. *See id.* (citing 18 U.S.C. § 3553(b)(1) (Supp. IV 2004)).

158. *Id.*

159. *Id.* at 234–35.

increase the defendant's sentence.¹⁶⁰ Alternatively, the Court could render the Sentencing Guidelines advisory by excising the appropriate sections of the sentencing statute.¹⁶¹ The sections at issue were 18 U.S.C. § 3553(b)(1), which directed that the sentencing court “‘shall impose a sentence of the kind, and within the range,’”¹⁶² and 18 U.S.C. § 3742(e), which set forth a de novo standard of review on appeal for departures from the applicable Guidelines' range.¹⁶³ The Court chose to make the Guidelines advisory.¹⁶⁴ Justice Breyer reasoned that Congress would have preferred this remedy in light of the unconstitutionality of mandatory Guidelines.¹⁶⁵ Thus, the Court held that the sentencing court must consider the Sentencing Guideline range, but was also free “to tailor the sentence in light of other statutory concerns.”¹⁶⁶ The Court also held that appellate courts must review whether sentences were unreasonable with regard to the same statutory concerns.¹⁶⁷ As discussed in the Introduction, pairing advisory guidelines with mandatory review for reasonableness created ambiguity and tension.¹⁶⁸ Nevertheless, the Court held that, as advisory, the Sentencing Guidelines would not constrain the judge's range of discretion any further than the statutory sentencing range.¹⁶⁹ The Court then concluded that, because a defendant has no right to a jury determination of a sentence within the judge's discretion, the Guidelines would not violate a defendant's constitutional right to a jury trial.¹⁷⁰

3. Appellate Review of a Sentence Within the Guidelines:

Rita v. United States

In *Rita v. United States*, a jury convicted the defendant of perjury, making false statements, and obstruction of justice.¹⁷¹ Using the

160. *See id.* at 246 (Breyer, J.).

161. *Id.* Even though the Justices disagreed on the proper remedy, they unanimously agreed that rendering the Guidelines advisory would solve the Sixth Amendment problem. *See id.* at 259.

162. *Id.* at 234 (Stevens, J.).

163. *See id.* at 259 (Breyer, J.).

164. *Id.* at 245. The U.S. Department of Justice reacted disagreeably to the *Booker* decision, directing all federal prosecutors to ensure compliance with the Guidelines by any means. *See Richman, supra* note 2, at 1394–95.

165. *See Booker*, 543 U.S. at 246–58.

166. *Id.* at 245–46. The other statutory factors are listed in 18 U.S.C. § 3553(a) (2006). *See supra* notes 74–76 and accompanying text.

167. *See Booker*, 543 U.S. at 261 (“Those [§ 3553(a)] factors in turn will guide appellate courts . . . in determining whether a sentence is unreasonable.”). *But see* Gall v. United States, 128 S. Ct. 586, 594 (2007) (“Our explanation of ‘reasonableness’ review in the *Booker* opinion made it pellucidly clear that the familiar abuse-of-discretion standard of review now applies to appellate review of sentencing decisions.” (citing *Booker*, 543 U.S. at 260–62)).

168. *See supra* notes 5, 167 and accompanying text.

169. *Booker*, 543 U.S. at 233 (Stevens, J.).

170. *Id.*

171. *Rita v. United States*, 127 S. Ct. 2456, 2460 (2007).

Guidelines, the presentence report¹⁷² calculated a recommended sentencing range of thirty-three to forty-one months in prison.¹⁷³ The report also noted that there were no circumstances warranting a deviation from the recommended range.¹⁷⁴ After the sentencing hearing, the judge concluded that a thirty-three month sentence was appropriate.¹⁷⁵ The U.S. Court of Appeals for the Fourth Circuit affirmed the sentence, stating that a sentence that fell within the guidelines was presumptively reasonable.¹⁷⁶

The Supreme Court held that a circuit court could use a presumption of reasonableness to review a district court's sentence falling within the Guidelines.¹⁷⁷ The Court reasoned that the presumption was warranted because both the district court judge and the Sentencing Commission reached the same conclusion regarding the proper punishment.¹⁷⁸ The Court also stressed that only an appellate court, not a district court, may use this presumption.¹⁷⁹ Further, the Court stated that this nonbinding appellate presumption does not require that the judge impose the sentence,¹⁸⁰ but conceded that the presumption may encourage judges to impose sentences within the Guidelines' prescribed ranges.¹⁸¹ The Court was quick to say that even if the presumption encouraged judges to impose within-Guidelines sentences, it would not make the Guidelines unconstitutional under *Booker*, but it would further Congress's goal of diminishing unwarranted sentencing disparity.¹⁸²

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

In *Gall v. United States*, the defendant entered into a plea agreement regarding his involvement in a drug conspiracy.¹⁸³ Specifically, the defendant stipulated that he was responsible for possessing at least 2500

172. Generally, a probation officer must conduct a presentence investigation and submit a presentence report to the court before the court sentences the defendant. See U.S. SENTENCING GUIDELINES MANUAL § 6A1.1 (2008). For more information on presentence reports and sentencing procedures in general, see *id.* § 6A.

173. *Rita*, 127 S. Ct. at 2461.

174. *Id.*

175. *Id.* at 2462.

176. *Id.* U.S. courts of appeals are split as to the use of a presumption of reasonableness for within-Guidelines sentences. See *id.* (collecting cases).

177. *Id.*

178. See *id.* at 2463. The Court explained that 18 U.S.C. § 3553(a) commands the sentencing judge to consider a multitude of factors, including the Sentencing Guidelines, and that 28 U.S.C. § 991(b) tells the Sentencing Commission to write the Guidelines toward the same objectives in 18 U.S.C. § 3553(a)(2). *Id.* "The upshot is that the sentencing statutes envision both the sentencing judge and the Commission as carrying out the same basic § 3553(a) objectives, the one, at retail, the other at wholesale." *Id.*

179. *Id.* at 2465.

180. *Id.* at 2466.

181. *Id.* at 2467.

182. See *id.*

183. *Gall v. United States*, 128 S. Ct. 586, 592 (2007).

grams of ecstasy, but did not necessarily distribute it.¹⁸⁴ In return, the government acknowledged that the defendant had withdrawn from the conspiracy before law enforcement officials caught him.¹⁸⁵ The presentence report recommended a punishment of thirty to thirty-seven months in prison.¹⁸⁶ However, the judge imposed a sentence of only thirty-six months of probation.¹⁸⁷ The district court supported the lenient sentence by citing factors such as the defendant's withdrawal from the conspiracy, socially beneficial postoffense conduct, and compliance with pretrial release.¹⁸⁸

The U.S. Court of Appeals for the Eighth Circuit reversed the district court's departure from the Guidelines.¹⁸⁹ The circuit court characterized the departure as "a 100% downward variance" because it eliminated all prison time.¹⁹⁰ The court then held that there were no extraordinary circumstances present in the case to support such an extraordinary departure from the Guidelines.¹⁹¹

The Supreme Court reversed, holding that the district court's departure from the Guidelines was reasonable.¹⁹² In its opinion, the Court also clarified the sentencing and appellate review processes. A district court must first calculate the sentence according to the Sentencing Guidelines and then hear from the parties before considering whether the sentence is appropriate in light of the other statutory factors in § 3553(a).¹⁹³ The sentencing judge—as opposed to an appellate judge¹⁹⁴—may not presume the Sentencing Guidelines range to be reasonable.¹⁹⁵ The judge must find sufficiently compelling evidence before deciding to depart from the Guidelines.¹⁹⁶ Finally, the judge must explain the reasoning for the sentence "to allow for meaningful appellate review and to promote the perception of fair sentencing."¹⁹⁷

The Supreme Court then held that appellate courts must review sentences for an abuse of discretion, but distinguished between procedural and substantive appellate review.¹⁹⁸ First, the appellate court must ensure that

184. *Id.*

185. *Id.* The sentencing court did not use the Guidelines in effect on the date of sentencing, but that was by agreement, not court order. *Id.*

186. *Id.* at 593.

187. *Id.*

188. Defendant's Gall's Sentencing Memorandum at 7–13, *United States v. Gall*, 374 F. Supp. 2d 758 (S.D. Iowa 2005) (No. 4:04-CR-116).

189. *Gall*, 128 S. Ct. at 594.

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

191. *Id.*

192. *Id.* at 602.

193. *Id.* at 596. For the list of statutory factors, see *supra* notes 74–76 and accompanying text.

194. *See id.* at 597.

195. *Id.* at 596–97.

196. *Id.* ("We find it uncontroversial that a major departure should be supported by a more significant justification than a minor one.")

197. *Id.*

198. *See id.*; *supra* note 167 and accompanying text.

the district court did not make any procedural errors such as improperly calculating or not calculating the Guidelines' sentencing range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors,¹⁹⁹ basing a sentence on clearly erroneous facts, or failing to explain deviations from the Guidelines.²⁰⁰ When reviewing a sentence for substantive reasonableness, the appellate court should take the totality of the circumstances into account.²⁰¹ An appellate court may apply a presumption of reasonableness to a within-Guidelines sentence, but may not assume that a sentence falling outside the Guidelines' range is unreasonable.²⁰² The appellate court may consider the extent of the deviation, but must give due deference to the district court's explanation based on the § 3553(a) factors.²⁰³

In the case of the defendant in *Gall*, the Court specifically rejected requiring a sentencing judge to justify a sentencing departure with exceptional circumstances or mathematically proportionally compelling evidence because these practices would be inconsistent with an abuse-of-discretion standard of review.²⁰⁴ The Court then held that the district court did not commit any significant procedural error.²⁰⁵ The Court also held that, substantively, the district court did not abuse its discretion even though it weighed one of the § 3553(a) factors more heavily than the others.²⁰⁶

In *Kimbrough v. United States*, the defendant pled guilty to drug charges including conspiracy to distribute crack and powder cocaine, possession with intent to distribute more than fifty grams of crack cocaine, and possession with intent to distribute powder cocaine.²⁰⁷ The U.S. District Court for the Eastern District of Virginia determined the defendant's sentence under the Guidelines to be 228–270 months in prison.²⁰⁸ However, the court sentenced the defendant to only 180 months in prison plus five years of supervised release.²⁰⁹ The court reasoned that a sentence in the Guidelines' range "would have been 'greater than necessary' to accomplish the purposes of sentencing set forth in 18 U.S.C. § 3553(a)."²¹⁰ In particular, the district court noted that, if the defendant had been accountable for an equivalent amount of powder cocaine instead of crack, the defendant's sentence under the Guidelines would have only been

199. See *supra* notes 74–76 and accompanying text.

200. See *Gall*, 128 S. Ct. at 597.

201. See *id.*

202. *Id.*

203. *Id.*

204. See *id.* at 596 ("This is inconsistent with the rule that the abuse-of-discretion standard of review applies to appellate review of all sentencing decisions—whether inside or outside the Guidelines range.").

205. *Id.* at 598.

206. See *id.* at 602 ("The District Court quite reasonably attached great weight to *Gall*'s self-motivated rehabilitation . . .").

207. *Kimrough v. United States*, 128 S. Ct. 558, 564 (2007).

208. *Id.* at 565.

209. *Id.*

210. *Id.* (quoting the district court's order).

97–106 months plus the five years of supervised release.²¹¹ The district court decided to impose the below-Guidelines sentence because of the disproportionate and unjust sentencing differential between crack and powder cocaine offenses.²¹²

The Fourth Circuit vacated the sentence, reasoning that a sentence outside the Guidelines range is per se unreasonable when based on a disagreement with the sentencing disparity between crack and powder cocaine offenses.²¹³ The sentencing disparity originated with the Anti-Drug Abuse Act of 1986.²¹⁴ This Act mandated a five-year minimum sentence for defendants accountable for five grams of crack or five hundred grams of powder.²¹⁵ This Act also mandated a ten-year minimum sentence for those accountable for fifty grams of crack or five thousand grams of powder.²¹⁶ Congress originally believed that crack was more dangerous than powder cocaine, and thus treated one gram of crack equal to one hundred grams of powder cocaine for sentencing purposes.²¹⁷ In formulating the Guidelines regarding cocaine sentencing, the Commission adopted this ratio-based approach,²¹⁸ departing from its basic empirical approach.²¹⁹ The ratio was not one hundred-to-one at the time the Supreme Court decided *Kimbrough* due to amendments by the Commission,²²⁰ but varied between twenty-five-to-one and eighty-to-one.²²¹

211. *See id.*

212. *See id.*

213. *See id.*

214. *Id.* at 566. *See generally* Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended in scattered sections of U.S.C.).

215. *Kimbrough*, 128 S. Ct. at 567.

216. *Id.*

217. *See id.* For more background information on the crack/powder cocaine sentencing disparity and reform efforts, see generally THE SENTENCING PROJECT, FEDERAL CRACK COCAINE SENTENCING (2009), available at http://www.sentencingproject.org/Admin/Documents/publications/dp_cracksentencing.pdf; U.S. SENTENCING COMM'N, SPECIAL REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY (1995) [hereinafter 1995 COCAINE REPORT], available at <http://www.ussc.gov/crack/exec.htm>.

218. *See Kimbrough*, 128 S. Ct. at 567.

219. *See id.* *See generally supra* notes 86–94 and accompanying text.

220. *See Kimbrough*, 128 S. Ct. at 569. The Commission had unsuccessfully tried several times to lower the one hundred-to-one ratio because it found that such a large ratio was unwarranted. *See id.* at 568–69 (citing Amendments to the Sentencing Guidelines for United States Courts, 60 Fed. Reg. 25,074, 25,075–77 (May 10, 1995)). The Sentencing Commission has also opposed the cocaine sentencing disparity in reports to Congress. *See, e.g.*, U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 6–9 (2007), available at http://www.ussc.gov/r_congress/cocaine2007.pdf; U.S. SENTENCING COMM'N, REPORT TO THE CONGRESS: COCAINE AND FEDERAL SENTENCING POLICY 103–04 (2002), available at http://www.ussc.gov/r_congress/02crack/2002crackrpt.pdf; 1995 COCAINE REPORT, *supra* note 217, ch. 8, pt. D. In 2007, the Commission succeeded in reducing the base offense level associated with each quantity of crack by two, resulting in the range of ratios. *See Kimbrough*, 128 S. Ct. at 569 (citing Amendments to the Sentencing Guidelines for United States Courts, 72 Fed. Reg. 28,558, 28,571–72 (May 21, 2007)).

221. *See Kimbrough*, 128 S. Ct. at 573.

The Supreme Court reversed the Fourth Circuit's decision, holding that the district court did not abuse its discretion in imposing its sentence.²²² The Court stated that the district court properly cited factors in 18 U.S.C. § 3553(a) relevant to its departure from the Guidelines.²²³ Further, the Court noted that the district court properly relied on the Commission's stance that the crack/powder disparity in the Guidelines does not embody the factors in 18 U.S.C. § 3553(a).²²⁴ In particular, the Court observed that, "as a general matter, 'courts may vary [from Guidelines ranges] based solely on policy considerations, including disagreements with the Guidelines.'"²²⁵ Thus the district court's sentence was reasonable.²²⁶

5. Sentencing in the Lower Courts After *Gall* and *Kimbrough*

Gall and *Kimbrough*, both decided on December 10, 2007,²²⁷ were the last Supreme Court cases to address the general standard of review for departures from the Sentencing Guidelines. The Sentencing Commission has been collecting district court sentencing statistics since these decisions.²²⁸ In 60,317 cases that district courts have decided since *Gall* and *Kimbrough*,²²⁹ the prosecution sponsored 15,254 sentences below the range that the Guidelines recommended.²³⁰ The Sentencing Commission counts these cases as conforming to the Guidelines.²³¹ However, for purposes of this Note, it makes little sense to include these prosecution-sponsored cases in the data sample because this Note is looking solely at instances of judicial discretion. If the government asks for a below-range

222. *See id.* at 576.

223. *See id.* at 575 (citing the nature and circumstances of the crimes, as well as the defendant's history and characteristics).

224. *See id.* at 576; *see also supra* note 220 (discussing the Commission's opposition to the crack/powder disparity).

225. *See id.* at 570 (citing Brief for the United States at 16, *Kimbrough*, 128 S. Ct. 558 (No. 06-6330)).

226. *See id.* at 575.

227. *See id.* at 558; *Gall v. United States*, 128 S. Ct. 586, 586 (2007).

228. *See* U.S. SENTENCING COMM'N, POST-KIMBROUGH/GALL DATA REPORT (2008) [hereinafter *GALL REPORT II*], available at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_Final_FY2008.pdf.

229. *See id.* tbl.1. The time period for this data is from December 10, 2007, through September 30, 2008. *See id.* tbl.1 n.1.

230. *See id.* tbl.1 & n.6. Prosecution-sponsored departures originate from 18 U.S.C. § 3553(e), which states that, "[u]pon motion of the Government, the court shall have the authority to impose a sentence below a level established by statute as a minimum sentence so as to reflect a defendant's substantial assistance in the investigation or prosecution of another person who has committed an offense." 18 U.S.C. § 3553(e) (2006); *see also* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2008) ("Upon motion of the government stating that the defendant has provided substantial assistance in the investigation or prosecution of another person who has committed an offense, the court may depart from the guidelines."). For more background and the argument that these provisions vest too much power in the executive branch of the government, see generally Buescher, *supra* note 56.

231. *See* Dillon, *supra* note 56, at 1090 (citing U.S. SENTENCING COMM'N, FINAL REPORT ON THE IMPACT OF *UNITED STATES V. BOOKER* ON FEDERAL SENTENCING 57 (2006) [hereinafter *BOOKER REPORT*], available at http://www.ussc.gov/booker_report/Booker_Report.pdf).

sentence based on provisions in the Guidelines, it is not accurate to characterize the result as a purely judicial choice. Thus, for the purposes of this Note, the total number of sentencing decisions after *Gall* and *Kimbrough* is 45,063. Of these, 35,732, or 79.3%, were within the Guidelines' recommended range.²³² There have been 981, or 2.2%, sentences above the recommended range.²³³ There have been 8350, or 18.5%, sentences below the recommended range.²³⁴ Table 1 displays this data for the district courts in each circuit. For comparison, Table 2 displays the same data, but includes the prosecution-sponsored below-Guidelines sentences as within-Guidelines sentences.

Table 1: District Court Sentencing Data²³⁵

Circuit	Total Cases (12/10/07– 09/30/08)	Sentences Within Guidelines		Sentences Above Guidelines		Sentences Below Guidelines	
		#	%	#	%	#	%
D.C.	184	123	66.8%	2	1.1%	59	32.1%
1st	1184	876	74.0%	23	1.9%	285	24.1%
2nd	2711	1634	60.3%	24	0.9%	1053	38.8%
3rd	1912	1370	71.7%	40	2.1%	502	26.3%
4th	4201	3403	81.0%	117	2.8%	681	16.2%
5th	11,250	9936	88.3%	269	2.4%	1045	9.3%
6th	3100	2304	74.3%	69	2.2%	727	23.5%
7th	1907	1300	68.2%	40	2.1%	567	29.7%
8th	3633	2852	78.5%	84	2.3%	697	19.2%
9th	6540	5052	77.2%	141	2.2%	1347	20.6%
10th	3618	2945	81.4%	79	2.2%	594	16.4%
11th	4823	3937	81.6%	93	1.9%	793	16.4%
TOTAL	45,063	35,732	79.3%	981	2.2%	8350	18.5%

Although Tables 1 and 2 capture sentencing results at the district court level, they only present part of the picture. Statistics regarding appellate affirmation and denial rates for sentences inside and outside the Guidelines' recommended range are also relevant to determining the extent of district court sentencing discretion. However, to date, there is no such statistical compilation of sentencing data since *Gall* and *Kimbrough*, the relevant time

232. See *GALL REPORT II*, *supra* note 228, tbl.1.

233. See *id.*

234. See *id.*

235. See *id.* tbl.1-DC to tbl.1-11. Note that the percentages will not be the same as those in the source because the prosecution-initiated below-range sentences have been removed from the data sample.

period for this Note. The New York Council of Defense Lawyers examined appellate decisions reviewing sentencing decisions for unreasonableness, but the cases are from January 1, 2006, to November 16, 2006—after *Booker*, but before *Rita*, *Gall*, and *Kimbrough*,²³⁶ and thus irrelevant to the issue in this Note. Nevertheless, examining individual appellate decisions since *Gall* and *Kimbrough* provides detailed insight into a court's reasoning as applied to a particular defendant. Statistics cannot—or at least cannot yet—capture all of the individualized factors a judge must consider under § 3553(a).²³⁷

Table 2: District Court Sentencing Data Including Government-Sponsored Below-Guidelines Sentences²³⁸

Circuit	Total Cases (12/10/07– 09/30/08)	Sentences Within Guidelines		Sentences Above Guidelines		Sentences Below Guidelines	
		#	%	#	%	#	%
D.C.	324	263	81.2%	2	0.6%	59	18.2%
1st	1421	1113	78.3%	23	1.6%	285	20.1%
2nd	3615	2538	70.2%	24	0.7%	1053	29.1%
3rd	2586	2044	79.0%	40	1.5%	502	19.4%
4th	5188	4390	84.6%	117	2.3%	681	13.1%
5th	14,125	12,811	90.7%	269	1.9%	1045	7.4%
6th	4303	3507	81.5%	69	1.6%	727	16.9%
7th	2436	1829	75.1%	40	1.6%	567	23.3%
8th	4468	3687	82.5%	84	1.9%	697	15.6%
9th	11,288	9800	86.8%	141	1.2%	1347	11.9%
10th	4767	4094	85.9%	79	1.7%	594	12.5%
11th	5796	4910	84.7%	93	1.6%	793	13.7%
TOTAL	60,317	50,986	84.5%	981	1.6%	8350	13.8%

236. Appendix to Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at 1a, *Rita v. United States*, 551 U.S. 338 (2007) (No. 06-5754) [hereinafter NYCDL Report]. This study found 1515 cases total. *Id.* at 2a. Circuit courts vacated only 7 out of 154 above-Guidelines sentences that defendants appealed. *Id.* In contrast, circuit courts vacated 60 out of 71 below-Guidelines sentences that the government appealed. *Id.* The New York Council of Defense Lawyers conducted a similar study of Eighth Circuit cases as part of an amicus brief for *Gall v. United States*, with comparably one-sided results. See Appendix to Brief for the New York Council of Defense Lawyers as Amicus Curiae in Support of Petitioner at 1a, *Gall v. United States*, 128 S. Ct. 586 (2007) (No. 06-7949). This study compiled cases from January 1, 2006, through June 30, 2007, *id.*, a time period before *Gall* and *Kimbrough v. United States*.

237. See *supra* notes 74–76 and accompanying text.

238. See GALL REPORT II, *supra* note 228, tbl.1-DC to tbl.1-11.

Many circuits have affirmed sentences below the Guidelines' range on the grounds that the district court did not abuse its discretion in the departure. For instance, in *United States v. Gardellini*,²³⁹ the U.S. Court of Appeals for the District of Columbia Circuit upheld a sentence of five years of probation and a \$15,000 fine for an income tax violation.²⁴⁰ The Sentencing Guidelines suggested a punishment of ten to sixteen months in prison.²⁴¹ The D.C. Circuit stated that the "Guidelines now are advisory only, and substantive appellate review in sentencing cases is narrow and deferential."²⁴² As such, the court said that it would be "unusual" to reverse a district court's sentence,²⁴³ citing many other circuits that have ruled this way.²⁴⁴ The court noted that this sentencing regime would undoubtedly lead to unpredictability, but that it is not the role of the courts "to preserve quasi-mandatory Guidelines."²⁴⁵ Citing *Booker*, the court said that Congress could pass a new law making the Guidelines mandatory as

239. 545 F.3d 1089 (D.C. Cir. 2008).

240. *Id.* at 1091. The circuit court observed that the district court, when analyzing the factors in 18 U.S.C. § 3553(a), emphasized the defendant's cooperation with authorities, low risk of recidivism, depression, and the belief that a harsher sentence would not produce much deterrence for tax evaders. *See id.*

241. *Id.*

242. *Id.* at 1090.

243. *See id.*

244. *See id.* at 1094 n.5 (citing cases from all circuits except the Second Circuit); *see also* *United States v. Howe*, 543 F.3d 128, 137, 141 (3d Cir. 2008) (affirming, in light of *Gall*, a downward variance based on sentencing judge's reasoning); *United States v. Austad*, 519 F.3d 431, 433–36 (8th Cir. 2008) (affirming, based on the district court's reliance on the defendant's postoffense threat and violent history, an eighty-four month prison sentence when the Guidelines specified a range of thirty-six to forty-six months for mailing threatening communications); *United States v. Marshall*, 259 F. App'x 855, 863 (7th Cir. 2008) (affirming a below-Guidelines sentence based on the district court's concern about the defendant's age and family); *United States v. Wachowiak*, 496 F.3d 744, 746–47, 754 (7th Cir. 2007) (affirming a downward variance based on the sentencing judge's positive opinion of the defendant's personal characteristics and low risk of recidivism); Panel Discussion, *supra* note 1, at 12 (Judge Presnell noting, "the Eleventh Circuit has confirmed several below-Guidelines sentences, including one of mine"). In a huge departure from the Guidelines, the U.S. Court of Appeals for the Second Circuit affirmed—based on *Gall* and the district court's careful consideration of the § 3553(a) factors—a sentence of forty-two months in prison for securities fraud and related violations when the Guidelines called for life in prison. *See United States v. Adelson*, Nos. 06-2738-cr, 06-3179, 2008 WL 5155341, at *1 (2d Cir. Dec. 9, 2008). The court also ordered \$50 million in restitution to the shareholders and forfeiture of \$1.2 million in criminal proceeds. *Id.* *United States v. Adelson* certainly sets a high bar in the Second Circuit for overturning a sentence on substantive reasonableness review. *But cf.* *United States v. Cutler*, 520 F.3d 136, 176 (2d Cir. 2008) (holding a lesser downward departure substantively unreasonable).

245. *Gardellini*, 545 F.3d at 1096; *cf.* *United States v. Pickett*, 475 F.3d 1347, 1353 (D.C. Cir. 2007) ("A sentencing judge cannot simply presume that a Guidelines sentence is the correct sentence. To do so would be to take a large step in the direction of returning to the pre-*Booker* regime." (citing *United States v. Demaree*, 459 F.3d 791, 794–95 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 3055 (2007)); *United States v. Brown*, 450 F.3d 76, 81–82 (1st Cir. 2006); *United States v. Cunningham*, 429 F.3d 673, 676 (7th Cir. 2005)).

long as the jury finds all of the facts used to increase a defendant's base offense level.²⁴⁶

Circuit courts have also overturned district courts' sentences as unreasonable.²⁴⁷ In *United States v. Cutler*,²⁴⁸ the U.S. Court of Appeals for the Second Circuit overturned the sentence of the U.S. District Court for the Southern District of New York as procedurally unreasonable.²⁴⁹ The district court had sentenced the defendant to 366 days in prison for bank fraud and related crimes.²⁵⁰ The Sentencing Guidelines called for seventy-eight to ninety-seven months.²⁵¹ The Second Circuit dismissed the sentence because of the district court's procedural errors, factual errors, and misinterpretation of the § 3553(a) factors.²⁵²

In *United States v. Abu Ali*,²⁵³ the Fourth Circuit found a sentence of the Eastern District of Virginia substantively unreasonable because the deviation from the Guidelines was just too large given the circumstances of the offense.²⁵⁴ The district court had sentenced the defendant to thirty years

246. *Gardellini*, 545 F.3d at 1096 (citing *Gall v. United States*, 128 S. Ct. 586, 603 (2007) (Souter, J., concurring); *United States v. Booker*, 543 U.S. 220, 265 (2005)).

247. See generally Stith, *supra* note 2, at 1420 (concluding that, even though there is more sentencing discretion after *Booker*, it is not at the level of the pre-Guidelines era).

248. 520 F.3d 136 (2d Cir. 2008).

249. See *id.* at 176. The majority held that the sentence was substantively unreasonable as well. See *id.* In concurrence, Judge Rosemary Pooler noted that an appellate court should not reach the question of substantive reasonableness until the district court has remedied the procedural errors. See *id.* (Pooler, J., concurring).

250. See *id.* at 139–40.

251. See *id.*

252. *Id.* at 176.

253. 528 F.3d 210 (4th Cir. 2008).

254. See *id.* at 269; see also *United States v. Pugh*, 515 F.3d 1179, 1182, 1191, 1200–01 (11th Cir. 2008) (holding that a sentence of probation for child pornography offenses, when the Guidelines' range was 97–120 months in prison, was substantively unreasonable because the district court did not sufficiently justify the deviation); *United States v. Goldberg*, 491 F.3d 668, 671–72 (7th Cir. 2007) (holding as unreasonable a sentence of one day in prison for possessing child pornography when the Guidelines recommended forty-six to fifty-seven months in prison). But see *United States v. Whitehead*, 532 F.3d 991, 992–93 (9th Cir. 2008) (per curiam) (using abuse-of-discretion review to affirm a sentence of probation when the Guidelines called for forty-one to fifty-one months in prison for copyright-related crimes). For other examples of unreasonable sentences in the Seventh Circuit, see *United States v. Wachowiak*, 496 F.3d 744, 751–53 (7th Cir. 2007). As an aside, a *William and Mary Law Review* Note by David C. Holman argues that substantive reasonableness review contributes to the ongoing unconstitutionality of the Guidelines. See David C. Holman, Note, *Death by a Thousand Cases: After Booker, Rita, and Gall, the Guidelines Still Violate the Sixth Amendment*, 50 WM. & MARY L. REV. 267, 302–03 (2008). That is, this form of appellate review helps to strip district courts of their discretion, and thus the Guidelines are not advisory. See *id.* at 309. Note that the U.S. Court of Appeals for the District of Columbia Circuit has recently cited to Holman's Note with approval, so presumably this court would choose to engage only in procedural reasonableness review. *United States v. Gardellini*, 545 F.3d 1089, 1094 n.5 (D.C. Cir. 2008). While Holman's argument is contrary to the conclusion of this Note that sentencing judges do have sufficient discretion, he does advocate making the Guidelines truly advisory—and thus constitutional—by abolishing substantive reasonableness review in order to make the best of a bad situation. See Holman, *supra*, at 302–09.

in prison for planning to commit terrorist acts in the United States.²⁵⁵ The Sentencing Guidelines called for life in prison.²⁵⁶

In *Booker* the Supreme Court modified the Sentencing Guidelines to be advisory but subject to mandatory review for reasonableness. Two years later, the Court emphasized that the Guidelines were advisory in *Gall* and *Kimbrough*, but also explicitly commanded appellate courts to review sentencing decisions for abuse of discretion, both procedurally and substantively. As this subsection discussed, appellate courts have recently been showing more deference to district court sentencing decisions, although still sometimes overturning sentences for substantive unreasonableness. The next part of this Note discusses this same tension between advisory Guidelines and mandatory appellate review in a different context: whether the Guidelines are mandatory enough to be “laws” pursuant to the Ex Post Facto Clause.

II. THE SPLIT: THE APPLICABILITY OF THE EX POST FACTO CLAUSE TO THE GUIDELINES AFTER *BOOKER*

Parts I.A and I.B of this Note laid out the Supreme Court’s Ex Post Facto Clause jurisprudence and the history and operation of the Sentencing Guidelines. Part I.C then discussed the effect of the Ex Post Facto Clause on “mandatory” Guidelines. Finally, Part I.D explained how the Sixth Amendment’s guarantee to a jury trial led the Supreme Court to render the Guidelines “advisory,” but still subject to appellate review. Part II of this Note discusses an emerging conflict among U.S. courts of appeals and commentators: whether the Ex Post Facto Clause prohibits a district court from increasing a criminal defendant’s sentence by using the version of the Sentencing Guidelines in effect on the date of sentencing rather than on the date of the defendant’s offense, even though the Guidelines are “advisory” after *Booker*. Parts II.A and II.B examine this split among U.S. courts of appeals.²⁵⁷ Part II.B also presents commentators’ criticisms of holding that the Ex Post Facto Clause does not apply to the Guidelines.

255. See *Abu Ali*, 528 F.3d at 221.

256. See *id.* at 258.

257. A few circuits have not yet addressed this issue. See *United States v. Shira*, 286 F. App’x 650, 652–53 (11th Cir. 2008) (noting the split but declining to address the issue); *United States v. Jones*, 254 F. App’x 711, 730 (10th Cir. 2007) (declining to address the issue but looking to the Guidelines in effect on the date of sentencing in determining the reasonableness of a sentence); *United States v. Stevens*, 462 F.3d 1169, 1170 (9th Cir. 2006) (applying the Ex Post Facto Clause to the Guidelines without analyzing the effect of *Booker*). Note that this issue is distinct from ex post facto concerns of the Due Process Clause, see generally *Rogers v. Tennessee*, 532 U.S. 451 (2001), when applying *Booker* retroactively rather than the Guidelines, see *United States v. Duane*, 533 F.3d 441, 446 (6th Cir. 2008) (recognizing the difference as addressed in *United States v. Barton*, 455 F.3d 649 (6th Cir. 2006)). Many circuits have held that retroactively applying *Booker* in this manner presents no ex post facto problem. See, e.g., *United States v. Fairclough*, 439 F.3d 76, 78–79 (2d Cir. 2006); *United States v. Austin*, 432 F.3d 598, 600 (5th Cir. 2005) (per curiam); *United States v. Cross*, 430 F.3d 406, 410 (7th Cir. 2005). But see *United States v. Rodarte-Vasquez*, 488 F.3d 316, 323 (5th Cir. 2007) (declining to apply *Booker* retroactively).

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

This section examines the point of view that the Guidelines are advisory, not “laws,” and thus the Ex Post Facto Clause does not apply to them. Part II.A.1 explores the recent *Demaree* decision, in which the Seventh Circuit became the first and only circuit court to adopt this position thus far.²⁵⁸ Part II.A.2 then discusses a decision of the U.S. Court of Appeals for the Fifth Circuit that may indicate agreement with the Seventh Circuit in the future.

1. The Seventh Circuit: *United States v. Demaree*

In *Demaree*, the defendant pled guilty to wire fraud and tax offenses.²⁵⁹ The version of the Guidelines in effect at the time of the offenses specified a sentencing range of eighteen to twenty-four months.²⁶⁰ The version in effect at the time of sentencing specified a range of twenty-seven to thirty-three months.²⁶¹ The judge used the later version to sentence the defendant to thirty months.²⁶² However, he stated that, if the earlier Guidelines applied, he would have imposed a sentence of twenty-seven months.²⁶³ The only issue on appeal was whether the Ex Post Facto Clause prohibited the application of the postoffense Guidelines to increase the defendant’s sentence.²⁶⁴

The Seventh Circuit held that the sentencing judge could use the later Guidelines, as the Ex Post Facto Clause “should apply only to laws and regulations that bind rather than advise.”²⁶⁵ The Seventh Circuit distinguished the post-*Booker* Sentencing Guidelines from those at issue in *Miller* by pointing out that, in *Miller*, the sentencing judge had to set forth clear and convincing evidence to depart from the presumptive guideline range.²⁶⁶ The Seventh Circuit reasoned that after *Booker*, a federal judge need only consult the Sentencing Guidelines and is subject to only “light

258. *United States v. Demaree*, 459 F.3d 791, 792 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 3055 (2007). At least one district court in the Fourth Circuit agrees with the *United States v. Demaree* decision. See *Hill v. Driver*, No. 5:08CV96, 2009 WL 130217, at *4 (N.D. W. Va. Jan. 14, 2009).

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

260. *Id.* The Guidelines in effect at the time of the offense were the 2000 version. *Id.*

261. *Id.* The Guidelines in effect at the time of sentencing were the 2004 version. *Id.* The issue of whether an appellate court may retroactively apply the *Booker* decision is beyond the scope of this Note. This was not the issue on appeal in *Demaree*.

262. *Id.* The Sentencing Reform Act (SRA) states that the sentencing judge should consider the version of the Sentencing Guidelines in effect at the time of sentencing. 18 U.S.C. § 3553(a)(4)(A)(ii) (2006).

263. *Demaree*, 459 F.3d at 792–93.

264. *Id.* at 792.

265. *Id.* at 795. See generally Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2006/08/seventh_circuit_1.html (Aug. 11, 2006, 13:05 EDT).

266. See *Demaree*, 459 F.3d at 794; see also *supra* notes 101–11 and accompanying text (discussing mandatory sentencing guidelines in effect in *Miller v. Florida*, 482 U.S. 423 (1987)).

appellate review.”²⁶⁷ Thus, the Sentencing Guidelines were not mandatory and the Ex Post Facto Clause did not control them.²⁶⁸ The Seventh Circuit also declared that its holding was consistent with the Supreme Court’s tests of an ex post facto law in *Garner* and *Morales*.²⁶⁹

Further, the Seventh Circuit explained that a rule prohibiting a judge from using the later version of the Guidelines to impose a harsher sentence would be futile.²⁷⁰ The judge could just say that he departed from the earlier version of the Guidelines based on the factors in 18 U.S.C. § 3553(a).²⁷¹ The judge could reason that in adhering to these factors, he looked to the information in the later version of the Guidelines.²⁷² An appellate court could not say that such a judge had acted unreasonably if his sentence fell within the recommended range of the most current version of the Guidelines.²⁷³ So far, the Seventh Circuit is alone in its position that the Ex Post Facto Clause applies to the Guidelines, but as the next subsection of this Note discusses, the Fifth Circuit may not be far behind.

2. The Fifth Circuit: *United States v. Rodarte-Vasquez*

In *United States v. Rodarte-Vasquez*,²⁷⁴ the Fifth Circuit indicated that it might agree with the Seventh Circuit in future cases where the defendant committed the offense after *Booker*.²⁷⁵ In *Rodarte-Vasquez*, the defendant pled guilty to illegal reentry after deportation.²⁷⁶ The presentence report used the 2003 version of the Guidelines, which recommended a sixteen-level enhancement because the defendant was deported for an alien smuggling felony.²⁷⁷ The 2002 Sentencing Guidelines limited this enhancement to alien smuggling felonies committed for profit.²⁷⁸ Using the 2003 Guidelines, the judge sentenced the defendant to forty-six months in prison.²⁷⁹ The defendant objected to his sentence, arguing that the use of the 2003 Guidelines violated the Ex Post Facto Clause because he committed the illegal reentry when the 2002 Guidelines were in effect.²⁸⁰

267. *Demaree*, 459 F.3d at 795.

268. *See id.*

269. *Id.* at 794.

270. *Id.* at 795.

271. *See id.*

272. *See id.*

273. *See id.*

274. 488 F.3d 316 (5th Cir. 2007).

275. *See id.* at 318, 323 (deciding the case under a pre-*Booker* mandatory Guidelines regime because sentencing occurred prior to *Booker*); *id.* at 323 (Jones, C.J., concurring) (indicating that, after *Booker*, the Ex Post Facto Clause does not control the Guidelines because they are advisory). In *Demaree*, the defendant was sentenced prior to *Booker*. Compare *Demaree*, 459 F.3d at 792 (sentencing defendant pursuant to the 2004 Guidelines), with *United States v. Booker*, 543 U.S. 220 (2005) (deciding case on January 12, 2005).

276. *Rodarte-Vasquez*, 488 F.3d at 318.

277. *Id.* (citing U.S. SENTENCING GUIDELINES MANUAL § 2L1.2(b)(1)(A)(vii) (2003)).

278. *Id.* at 319.

279. *Id.*

280. *See id.* at 322.

In her concurring opinion, Chief Judge Edith Jones of the Fifth Circuit stated that “[p]ost-*Booker*, the [G]uidelines are informative, not mandatory.”²⁸¹ Thus, according to Chief Judge Jones, the Ex Post Facto Clause does not bar a judge from using the Guidelines in effect at the time of sentencing to increase the defendant’s sentence.²⁸² The majority did not apply Judge Jones’s reasoning because the sentencing took place prior to *Booker*.²⁸³ The majority decided to review the defendant’s appeal “under the pre-*Booker* mandatory guidelines regime.”²⁸⁴ Under this condition, the majority held that the application of the later version of the Guidelines violated the Ex Post Facto Clause.²⁸⁵ While the Fifth Circuit has indicated that it may later agree with the Seventh Circuit that the Ex Post Facto Clause does not control the Sentencing Guidelines because they are advisory, this is not the case in the majority of other circuit courts to consider the issue. The next part of this Note discusses the opposition of these courts of appeals.

B. *The Ex Post Facto Clause Applies to the Sentencing Guidelines*

Part II.A explored the view, led by the Seventh Circuit in *Demaree*, that the Ex Post Facto Clause does not apply to the Sentencing Guidelines because the Guidelines are advisory after *Booker*. Part II.B discusses the opposite side of the argument—that the Guidelines are still effectively mandatory despite *Booker* and therefore are “laws” under the Ex Post Facto Clause. Thus, a district court may not use the version of the Guidelines in effect on the day of sentencing if doing so would result in a harsher penalty than using the version in effect on the day of the offense. Part II.B.5 discusses a *West Virginia Law Review* article that uses the Supreme Court precedent in *Garner* and *Morales* to support this view.

1. The Eighth Circuit: *United States v. Carter*

Outside the Seventh and Fifth Circuits, courts vary in their degree of opposition to the holding in *Demaree*. In *United States v. Carter*,²⁸⁶ the Eighth Circuit bluntly declined to follow the Seventh Circuit’s holding in *Demaree*.²⁸⁷ In *Carter*, the U.S. District Court for the District of South

281. *Id.* at 325 (Jones, C.J., concurring). *But cf.* *United States v. Austin*, 479 F.3d 363, 367 (5th Cir. 2007) (“[T]o avoid ex post facto concerns, the court uses the Guidelines yielding the lesser penalty.”). Note that the court in *United States v. Austin* did not actually hold that the Ex Post Facto Clause applies to the Guidelines; it merely declined to address the issue. *See id.*

282. *See Rodarte-Vasquez*, 488 F.3d at 325.

283. *See id.*

284. *Id.* at 323 (Barksdale, J.).

285. *Id.* at 324.

286. 490 F.3d 641 (8th Cir. 2007).

287. *See id.* at 643 (citing *United States v. Larrabee*, 436 F.3d 890, 894 (8th Cir. 2006)). However, in *United States v. Larrabee*, the circuit court took postoffense amendments of the Guidelines into account when affirming the reasonableness of a sentence that exceeded the recommended range set forth in the Guidelines in effect at the time of the offense. *See*

Dakota sentenced the defendant to 295 months in prison for sexual abuse of a minor and related crimes.²⁸⁸ The defendant appealed, arguing that the court violated the Ex Post Facto Clause by applying a sentencing enhancement under § 4B1.5(b)(1) of the Guidelines for repeat sexual offenders.²⁸⁹ This section went into effect November 1, 2001, after the defendant committed the offense.²⁹⁰

The Eighth Circuit first stated that the retrospective application of the Sentencing Guidelines implicates the Ex Post Facto Clause.²⁹¹ The court referred to § 1B1.11 of the Guidelines, which directs a court to apply the version in effect at the date of sentencing unless doing so violates the Ex Post Facto Clause.²⁹² However, the court did not reach the defendant's ex post facto claim, affirming his sentence based on a procedural issue.²⁹³

2. The Sixth Circuit: *United States v. Duane*

In *United States v. Duane*,²⁹⁴ the U.S. Court of Appeals for the Sixth Circuit similarly opposed the holding in *Demaree*.²⁹⁵ In *Duane*, the defendant pled guilty to various child pornography charges.²⁹⁶ The presentence report calculated a punishment range of 97–121 months in prison based on the 2005 version of the Guidelines.²⁹⁷ The defendant objected to this range, arguing that the use of the 2005 Guidelines violated the Ex Post Facto Clause because he committed some of the offenses before

Larrabee, 436 F.3d at 891–92; see also *United States v. Jones*, 254 F. App'x 711, 730–31 (10th Cir. 2007) (taking postoffense Guidelines into account during reasonableness review). The court in *United States v. Jones* did not rule on whether the Ex Post Facto Clause applied to the Sentencing Guidelines. *Id.* at 730.

288. *Carter*, 490 F.3d at 643.

289. See *id.* at 644.

290. See *id.* This case was complicated because it involved the “one-book” rule, which instructs the court to apply the version of the Guidelines in effect for the last of multiple offenses to all of the offenses, even if that version would not apply to all the offenses separately. See *id.* at 643–44 (citation omitted). This Note does not discuss the applicability of the Ex Post Facto Clause to the one-book rule, but *United States v. Carter* necessarily addressed the applicability of the Ex Post Facto Clause to the Guidelines. For more information on the one-book rule and a discussion of its unconstitutionality before *Booker*, see William P. Ferranti, Comment, *Revised Sentencing Guidelines and the Ex Post Facto Clause*, 70 U. CHI. L. REV. 1011 (2003).

291. See *Carter*, 490 F.3d at 643; *supra* note 287 and accompanying text.

292. *Carter*, 490 F.3d at 643. However, the Sentencing Commission added section 1B1.11 in response to the holding in *Miller* that the mandatory Sentencing Guidelines violated the Ex Post Facto Clause. See *supra* notes 112–16. This history suggests that any Ex Post Facto Clause inquiry should remain independent from this section. This section only commands that the court use the Guidelines in effect at sentencing unless the court independently finds an ex post facto violation.

293. *Carter*, 490 F.3d at 645–46 (“We conclude that [the defendant] has forfeited his current *ex post facto* claim, and thus we decline to address it on the merits.”).

294. 533 F.3d 441 (6th Cir. 2008).

295. See *id.* at 446 & n.1, 447.

296. See *id.* at 443.

297. *Id.*

that version took effect.²⁹⁸ At the sentencing hearing, the U.S. District Court for the Western District of Kentucky relied on Sixth Circuit precedent to hold that the Sentencing Guidelines did not implicate the Ex Post Facto Clause because the Guidelines were advisory.²⁹⁹ Thus the court overruled the defendant's objection to using the 2005 Guidelines.³⁰⁰

The Sixth Circuit reversed the ruling below, denying that its precedent announced such a rule.³⁰¹ The court cited other Sixth Circuit precedent holding that the retroactive application of the Sentencing Guidelines would violate the Ex Post Facto Clause if doing so resulted in a harsher sentence.³⁰² The court reasoned that, under *Garner*, the Guidelines qualify as ex post facto laws because they affect a judge's discretion.³⁰³

3. The D.C. Circuit: *United States v. Turner*

In *United States v. Turner*,³⁰⁴ the D.C. Circuit recently rejected the decision in *Demaree*.³⁰⁵ In *Turner*, a jury found the defendant guilty of conspiracy to commit bribery and to defraud the United States.³⁰⁶ The defendant had received the money from his crime in 2001.³⁰⁷ The version of the Guidelines in effect at this time specified twenty-one to twenty-seven months in prison.³⁰⁸ In 2004, an amendment to the Guidelines increased the punishment to thirty-three to forty-one months in prison.³⁰⁹ In 2007, the U.S. District Court for the District of Columbia used the version in effect at sentencing, unchanged from 2004, to sentence the defendant to thirty-three months in prison.³¹⁰

On appeal, the defendant argued that the use of the postoffense Guidelines violated the Ex Post Facto Clause because it imposed a harsher penalty than the preoffense version for a crime he committed in 2001.³¹¹ The government argued that the conspiracy ended in 2005 based on acts to

298. *See id.* at 444–45. This case also involved the “one-book” rule. *See id.* at 447. *See generally supra* note 290.

299. *See Duane*, 533 F.3d at 444 (citing *United States v. Barton*, 455 F.3d 649, 655 n.4 (6th Cir. 2006)).

300. *See id.*

301. *See id.* at 446 (“Although we recognize that some language from . . . *Barton* . . . could be read to suggest that a change to the Guidelines does not raise an *ex post facto* concern, we decline to read *Barton* as announcing such a broad rule.”).

302. *See id.* at 447 (citing *United States v. Jeross*, 521 F.3d 562, 572–73 (6th Cir. 2008)).

303. *See id.* (citing *Michael v. Ghee*, 498 F.3d 372, 382 (6th Cir. 2007)).

304. 548 F.3d 1094 (D.C. Cir. 2008).

305. *See id.* at 1096. For more commentary on *United States v. Turner*, see Sentencing Law and Policy, http://sentencing.typepad.com/sentencing_law_and_policy/2008/12/dc-circuit-produces-crisp-split-on-ex-post-issues-after-booker-finally.html (Dec. 5, 2008, 11:26 EST).

306. *Turner*, 548 F.3d at 1096.

307. *Id.*

308. *Id.*

309. *Id.* at 1096 & n.1 (citing U.S. SENTENCING GUIDELINES MANUAL § 2C1.1 (2004)).

310. *Id.* at 1096.

311. *See id.*

conceal the initial crime, and thus the lower court properly applied the harsher sentencing range because that was the range in effect when the defendant's crime ended.³¹² The D.C. Circuit agreed with the defendant, first holding that the conspiracy ended in 2001 because the acts to conceal the initial crime were not part of the conspiracy.³¹³ The court then held that, under *Garner* and *Miller*, the use of the 2004 Guidelines violated the Ex Post Facto Clause because it created a significant risk of increasing the defendant's punishment from the 2001 Guidelines.³¹⁴ The D.C. Circuit reasoned that the district court likely would have followed the earlier, more lenient Guidelines had it used them, pointing out that it followed the later, harsher Guidelines, but sentenced at the very bottom of the range.³¹⁵

In the reasoning for its holding regarding the ex post facto violation, the court rejected the Seventh Circuit's point in *Demaree* that sentencing judges could circumvent a rule that the Ex Post Facto Clause applies to the Guidelines by looking to postoffense amendments to the Guidelines for the reasonableness of a departure.³¹⁶ The D.C. Circuit stated that it did not believe that district court judges would "misrepresent the true basis for their actions."³¹⁷ The D.C. Circuit also rejected the Seventh Circuit's notion that district court judges' discretion in sentencing is "unfettered."³¹⁸ The D.C. Circuit said that district court judges would be more likely to follow the Guidelines because of the holding in *Rita* that an appellate court may find a within-Guidelines sentence presumptively reasonable.³¹⁹

312. *See id.*

313. *See id.* at 1098.

314. *See id.* at 1100.

315. *See id.* The D.C. Circuit did not explicitly state the inference, reasonable or not, that the district court wanted to but did not impose a sentence less than the later Guidelines' range.

316. *See id.* at 1099.

317. *Id.*

318. *See id.*

319. *See id.* The court in *Turner* suggested that *Rita v. United States* overruled the Seventh Circuit's holding in *Demaree* regarding the presumption of reasonableness, *see Turner*, 548 F.3d at 1099–100, but this suggestion is incorrect. The *Turner* court's rationale suggests that the *Demaree* court said that an appellate judge may not apply the presumption of reasonableness. *See id.* ("As to *Demaree*'s first reason, the Supreme Court has since confirmed that appellate courts may apply a presumption of reasonableness to a district court sentence calculated in conformity with the Guidelines." (citing *Rita v. United States*, 551 U.S. 338 (2007); *United States v. Dorcelly*, 454 F.3d 366, 376 (D.C. Cir. 2006))). However, the court in *Demaree* was clear that a sentencing judge—as opposed to an appellate judge—may not apply a presumption of reasonableness to a within-Guidelines sentence. *See United States v. Demaree*, 459 F.3d 791, 794–95 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 3055 (2007). ("The judge is not required—or indeed permitted—to 'presume' that a sentence within the guidelines range is the correct sentence. . . . His choice of sentence, whether inside or outside the guideline range, is discretionary. . . ." (citing *United States v. Brown*, 450 F.3d 76, 81–82 (1st Cir. 2006))). The Court in *Rita* reinforced this distinction. *See supra* note 179 and accompanying text.

4. The First Circuit: *United States v. Gilman*

The U.S. Court of Appeals for the First Circuit is less staunch in its opposition to *Demaree* than the Sixth, Eighth, and D.C. Circuits. In *United States v. Gilman*,³²⁰ the defendant pled guilty to a violation of the Investment Adviser's Act of 1940 and various counts of mail and wire fraud.³²¹ The 2005 Guidelines recommended a sentence of 188–235 months in prison.³²² The defendant appealed, arguing that only one offense occurred after this version of the Guidelines took effect.³²³ He objected to the fact that the later version of the Guidelines provided a longer sentence than the previous version for all of his other offenses.³²⁴

The First Circuit noted the Seventh Circuit's decision in *Demaree* that the Ex Post Facto Clause does not apply to the Guidelines, but then said that "the issue is doubtful in this circuit."³²⁵ The court relied on an earlier First Circuit case, *United States v. Cruzado-Laureano*,³²⁶ for this opposition.³²⁷ However, the court in *Cruzado-Laureano* stated that the Ex Post Facto Clause applied to the Guidelines without analyzing the effect of *Booker*.³²⁸ Thus, while the First Circuit clearly would apply the Ex Post Facto Clause to the Sentencing Guidelines based on *Gilman*, precedential support from First Circuit case law for such a position is simply not that strong.

5. James R. Dillon: Applying *Garner* and *Morales*

To date, the most thorough criticism of the holding in *Demaree* has come from commentators instead of from the courts.³²⁹ James R. Dillon confronts the ex post facto issue with the "advisory" Sentencing Guidelines by applying the Supreme Court's precedent in *Morales* and *Garner*.³³⁰ As discussed above, the test for whether an amended rule's retroactive application violates the Ex Post Facto Clause after *Morales* and *Garner* is two-pronged. First, the Ex Post Facto Clause will prohibit such an application if the terms or words of the rule show that the defendant is at a

320. 478 F.3d 440 (1st Cir. 2007).

321. *Id.* at 443.

322. *See id.* at 444. Later in the case, the conflict seems to be between the 2003 Guidelines and an earlier version. *See id.* at 449. However, the punishment for the defendant's crimes increased in the 2003 Guidelines and was the same in 2005. *See id.* at 449 n.3.

323. *See id.* at 449. Again, this case deals with the "one-book" rule. *See generally supra* note 290.

324. *See Gilman*, 478 F.3d at 449.

325. *Id.*

326. 404 F.3d 470 (1st Cir. 2005) (decided three months after *Booker*).

327. *See Gilman*, 478 F.3d at 449.

328. *See Cruzado-Laureano*, 404 F.3d at 488 n.10; *see also* *United States v. Kingbury*, No. CR-05-51-B-W, 2006 U.S. Dist. LEXIS 62779, at *9 (D. Me. Sept. 1, 2006) (rejecting *Demaree* and following *Cruzado-Laureano*).

329. *See generally* Dillon, *supra* note 56; Christine M. Zeivel, Note, *Ex-Post-Booker: Retroactive Application of Federal Sentencing Guidelines*, 83 CHI.-KENT L. REV. 395 (2008).

330. *See* Dillon, *supra* note 56, at 1077–94.

significant risk of more punishment under the postoffense rule than under the preoffense rule.³³¹ Second, even if the rule allows for discretion in its application, the defendant can also show an ex post facto violation by presenting evidence from the rule's practical implementation that the postoffense rule will result in a greater punishment than the preoffense rule.³³²

Dillon argues that after *Booker*, the "advisory" Guidelines still violate the first prong of the *Garner* inquiry.³³³ Dillon argues that, because the Supreme Court in *Gall* mandated that judges first calculate the appropriate range using the Sentencing Guidelines, application of an upwardly revised Guidelines range creates a substantial risk of increased punishment.³³⁴ Dillon also doubts that allowing appellate courts to require more significant reasoning for larger departures from the Guidelines would also limit the discretion of sentencing judges.³³⁵

Dillon concludes further that empirical evidence of the implementation of the Guidelines indicates that retrospective application of an upwardly revised guideline, satisfying the second prong of the *Garner* test.³³⁶ Dillon argues that after repeated attempts by the Supreme Court to clarify the sentencing and appellate review process, there is still a substantial rate of compliance with the Sentencing Guidelines.³³⁷ Dillon also points to the high affirmation rate of within-guideline sentences, the high reversal rate of below-guideline sentences, and the relatively lower reversal rate of above-guideline sentences as additional evidence of a lack of sentencing discretion.³³⁸

To support his position, Dillon cites *United States ex rel. Forman v. McCall*,³³⁹ in which the Third Circuit found that a compliance rate of 75.4% with the Adult Guidelines for Parole Decision Making of the U.S. Parole Commission was insufficient to establish them as "laws" under the Ex Post Facto Clause.³⁴⁰ Dillon argues that, because the rate of compliance with the Sentencing Guidelines since *Gall* and *Kimbrough*, roughly 85%, is

331. See *supra* notes 50–51 and accompanying text.

332. See *supra* notes 52–53 and accompanying text.

333. See Dillon, *supra* note 56, at 1078–88.

334. See *id.* at 1088 ("[S]o long as the Sentencing Guidelines operate as a 'benchmark or a point of reference or departure' that will exert 'appreciable influence' over the sentencing court . . . the revision will continue to create a substantial risk of increased punishment, and is therefore prohibited by the Ex Post Facto Clause." (quoting *United States v. Rubenstein*, 403 F.3d 93, 98–99 (2d Cir. 2005))). See *supra* notes 192–203 and accompanying text for the Supreme Court's enumerated procedure in *Gall*.

335. See Dillon, *supra* note 56, at 1087–88. In *Gall*, the Supreme Court said that judges should support large departures from the Guidelines with more significant reasoning, but rejected a requirement for a strict mathematical correlation between the reasons and extent of the departure. See *supra* note 204 and accompanying text.

336. See Dillon, *supra* note 56, at 1089–94.

337. See *id.* at 1090.

338. See *id.* at 1091–92 (citing NYCDL Report, *supra* note 236).

339. 776 F.2d 1156 (3d Cir. 1985).

340. See Dillon, *supra* note 56, at 1090–91 (citing *Forman*, 776 F.2d at 1163).

so much higher than 75.4%, the Sentencing Guidelines are not advisory and thus are subject to the Ex Post Facto Clause.³⁴¹ In summary, Dillon argues that empirical data shows that district courts lack sentencing discretion, the only exception being an above-guideline departure.³⁴² Thus, a judge would most likely follow the Guidelines. Dillon concludes that a judge's use of the Guidelines in effect at the time of sentencing would violate the Ex Post Facto Clause if the postoffense Guidelines specified a greater sentence than the preoffense Guidelines. As Part II.B shows, Dillon's position on this legal conflict—whether the Ex Post Facto Clause controls the Federal Sentencing Guidelines—accords with nearly all U.S. courts of appeals that have considered it. Part II.A discussed the only court of appeals, the Seventh Circuit, that has firmly taken the other side. Part III of this Note agrees with the Seventh Circuit, examining recent cases from all U.S. courts of appeals that review sentencing decision quite leniently, strongly suggesting that the Guidelines are no longer “laws” under the Ex Post Facto Clause.

III. THE INAPPLICABILITY OF THE EX POST FACTO CLAUSE TO THE SENTENCING GUIDELINES

The holding of the Seventh Circuit in *Demaree*—that the Ex Post Facto Clause does not apply to the Sentencing Guidelines—must stand for three reasons. First, under *Garner*, the Sentencing Guidelines are not subject to the Ex Post Facto Clause. *Booker* and subsequent cases show that the Guidelines are advisory on their face and in their practical implementation. Thus, their retroactive application does not create a substantial risk of increased punishment when there is an upward adjustment in a sentencing range. Second, the available empirical data on which the Dillon article relies could be misleading. *Gall*, *Kimbrough*, and recent appellate court decisions affirming lenient sentences are much more solid evidence that sentencing judges have actual discretion to depart from the Sentencing Guidelines. Third, judges could easily circumvent a rule that the Ex Post Facto Clause did apply to the Sentencing Guidelines.

A. *The Sentencing Guidelines Under the Garner Inquiry*

Under the first prong of the *Garner* test, the Ex Post Facto Clause does not apply to the Sentencing Guidelines. This prong prohibits the retroactive application of a “rule” that “by its own terms show[s] a significant risk” of

341. See *id.* (citing U.S. SENTENCING COMM'N, PRELIMINARY POST-KIMBROUGH/GALL DATA REPORT (2008) [hereinafter GALL REPORT I], available at http://www.ussc.gov/USSC_Kimbrough_Gall_Report_February_08.pdf). This Note uses a later version of this report. See GALL REPORT II, *supra* note 228. The earlier version includes data only from December 10, 2007, to February 21, 2008, but the percentages are substantially the same. See GALL REPORT I, *supra*, tbl.1 n.1.

342. See Dillon, *supra* note 56, at 1091–92.

an increased punishment.³⁴³ Retroactive application of the Sentencing Guidelines does not pose a significant risk of increased punishment because they are advisory. In *Booker*, the Supreme Court rendered the Guidelines advisory to avoid violating the Sixth Amendment's right to a jury trial.³⁴⁴ If the Guidelines are considered "quasi-mandatory" and a district court increased the defendant's sentence based on facts that the judge found, it would compromise the defendant's right to a jury trial.³⁴⁵ Further, in the cases following *Booker*, the Supreme Court has clearly emphasized that the Sentencing Guidelines are advisory.³⁴⁶ Calling the Sentencing Guidelines "laws" for the purposes of the Ex Post Facto Clause and "advisory" to avoid the Sixth Amendment's right to a trial by jury is simply contradictory.

The Sentencing Guidelines also fail to satisfy the second prong of the *Garner* inquiry. The second prong of the *Garner* test says that an ex post facto "law" is one where evidence of its practical implementation demonstrates that its retroactive application will result in an increased punishment.³⁴⁷ In both *Gall* and *Kimbrough*, the Supreme Court affirmed sentences below the Guidelines' recommended range.³⁴⁸ In *Kimbrough* specifically, the sentencing judge squarely disagreed with the policy in the Guidelines rather than relying on any one non-Guidelines factor in § 3553(a).³⁴⁹ In *Demaree*, the Seventh Circuit announced its rule that the Ex Post Facto Clause does not apply because sentencing judges have essentially unfettered discretion.³⁵⁰ There have also been many recent cases from other circuits that allowed for sentencing discretion by affirming below-Guidelines sentences.³⁵¹ These cases show that the Guidelines are advisory as long as the sentencing judge articulates sound reasoning for

343. See *supra* note 50 and accompanying text.

344. See *supra* notes 161–64 and accompanying text.

345. See *supra* notes 154–58 and accompanying text; see also *supra* notes 245–46 and accompanying text (discussing case in which D.C. Circuit stated that it is not the role of the courts to preserve "quasi-mandatory" Guidelines). For a different point of view, see generally Holman, *supra* note 254. Holman argued that the Guidelines are effectively mandatory, but he advocated making the Guidelines truly "advisory" by eliminating substantive reasonableness review because, otherwise, they would be unconstitutional under *Booker*. See *supra* note 254. This is a parallel tension to the advisory/mandatory ex post facto issue in this Note, which also argues that the "advisory" status should be maintained because, otherwise, the Guidelines would be unconstitutional under *Booker*. Both Holman and this Note agree that calling the Guidelines effectively mandatory is not the solution.

346. See *Kimbrough v. United States*, 128 S. Ct. 558, 576–77 (2007) (Scalia, J., concurring) (collecting quotes from *Booker* and subsequent cases). "These statements mean that the district court is free to make its own reasonable application of the § 3553(a) factors, and to reject (after due consideration) the advice of the Guidelines." *Id.* at 577.

347. See *supra* note 52 and accompanying text.

348. See *supra* notes 192–206, 222–26 and accompanying text.

349. See *supra* notes 210–11 and accompanying text. It remains to be seen whether *Kimbrough* stands for the broad proposition that district courts may reject a Guideline sentence when they disagree with the policy behind it or the narrower proposition that a court may reject the Guidelines only when the Sentencing Commission demonstrates a disagreement with Congress over the policy rationale. See Stith, *supra* note 2, at 1492.

350. See *supra* notes 265–68 and accompanying text.

351. See *supra* notes 240–46 and accompanying text.

departing from the Guidelines.³⁵² In particular, even if judges look to the version of the Guidelines in effect at sentencing, they have real discretion to impose a lenient sentence. This discretion mitigates the two concerns of the Ex Post Facto Clause—lack of fair notice and prevention of vindictive legislation.³⁵³ The defendant cannot complain of lack of notice because he cannot show what his sentence would be under any version of the Guidelines the court might use. Also, if the Sentencing Commission vindictively raised a particular sentence, the judge has the power to reasonably lower the sentence.³⁵⁴

Further, the Ex Post Facto Clause should not apply to the Guidelines because the *Garner* test only finds an ex post facto violation when there is a significant risk of an increased punishment,³⁵⁵ not any risk at all of an increased punishment. This means that the Guidelines do not have to be absolutely advisory, nor must sentencing judges wield absolute discretion for the Guidelines to be free from the Ex Post Facto Clause. Sentencing judges are allowed to exercise “reasonable” discretion, which has become an abuse-of-discretion standard.³⁵⁶ As a result, the risk of an increased punishment from a retroactive use of a harsher version of the Guidelines is less likely to be “significant” and thus an Ex Post Facto Clause violation.

Dillon argues that forcing judges to first calculate the appropriate sentence under the Guidelines satisfies the first prong of the *Garner* test.³⁵⁷ This argument is flawed because it takes one procedural mandate out of the context of the whole sentencing process.³⁵⁸ The district courts have clear instructions to take other factors besides the Guidelines into account.³⁵⁹ Also, the district court judge may not presume the Guidelines to be reasonable.³⁶⁰ Sentencing judges may follow the Guidelines but, after giving them due consideration, are not required to do so.³⁶¹

B. Refuting Empirical Evidence

Dillon also argues that under the second prong in *Garner*, the Sentencing Guidelines are “laws” based on empirical rates of compliance with the Guidelines by sentencing judges as well as rates of affirmation and reversal by appellate courts.³⁶² However, Dillon’s reliance on empirical data is

352. See, e.g., *supra* note 346 and accompanying text.

353. See *supra* notes 24–25 and accompanying text.

354. It seems possible that a judge is equipped to make such a determination by examining legislative history, the circumstances of a case, and other factors to determine if vindictiveness toward a particular defendant exists.

355. See *supra* notes 50–52 and accompanying text.

356. See *supra* note 167 and accompanying text.

357. See *supra* note 334 and accompanying text.

358. Cf. *Garner v. Jones*, 529 U.S. 244, 255 (2000) (“[T]he general operation of the . . . system may produce relevant evidence and inform further analysis on the point.”).

359. See *supra* notes 73–76 and accompanying text.

360. See *supra* note 195 and accompanying text.

361. See *supra* note 346.

362. See *supra* notes 336–41 and accompanying text.

misplaced. He points to the high standard of compliance with the Guidelines, the high affirmation rate of within-Guideline sentences, the high reversal rate of below-Guidelines sentences, and the high affirmation rate of above-Guideline sentences.³⁶³ Then Dillon argues that this data shows that the Sentencing Guidelines strongly influence district courts' sentencing decisions.³⁶⁴ He concludes that this lack of discretion shows that the defendant will receive an increased punishment if a judge is allowed to consider the version of the Guidelines in effect at sentencing, assuming that version specifies a harsher punishment than the version in effect at the time of the defendant's offense.³⁶⁵

The first flaw with this line of reasoning is with the empirical data itself. The data showing a large rate of compliance among the district courts only extends from the *Gall* and *Kimbrough* decisions through September 30, 2008—between nine and ten months.³⁶⁶ As a preliminary concern, Dillon does not justify that this is a long enough time period to glean any sentencing trends.³⁶⁷ This Note does not dive into a complex statistical analysis, but there are reasons to wait for more data. The original sentencing in some of these cases might have taken place before *Booker* under a mandatory regime.³⁶⁸ The precedent from *Gall* and *Kimbrough* might take longer to filter down to district courts than it has to circuit courts. Also, circuit courts have issued decisions close to or after September 30, 2008, trumpeting how deferential they are to lenient sentencing departures,³⁶⁹ which undermines the relevance of this data sample to the conclusion that the Guidelines are still effectively mandatory. Thus, circuit courts should take care before declaring that the Ex Post Facto Clause applies to the Guidelines because this decision will tilt the Guidelines toward the “mandatory”—and unconstitutional—end of the spectrum.

Further, Dillon includes government-sponsored sentences below the Guidelines as within-Guidelines sentences, as the Sentencing Commission instructs.³⁷⁰ However, government-sponsored sentences should not be in the data sample because it is impossible to say what the sentence would

363. See *supra* notes 337–42 and accompanying text. The latest data from the Sentencing Commission shows the compliance rate to be substantially unchanged since the Dillon article. See *supra* note 341.

364. See *supra* notes 337–42 and accompanying text.

365. See *supra* notes 337–42 and accompanying text.

366. See GALL REPORT II, *supra* note 228, tbl.1 n.1.

367. See Dillon, *supra* note 56, at 1091–92. At least one commentator thinks that the data will change in light of *Gall* and *Kimbrough*. See Richman, *supra* note 2, at 1412.

368. See, e.g., *supra* notes 283–85 and accompanying text.

369. See, e.g., *supra* notes 242–45 and accompanying text. The D.C. Circuit decided *United States v. Gardellini* on November 14, 2008. 545 F.3d 1089 (D.C. Cir. 2008). In this opinion, the D.C. Circuit cited other circuits that issued opinions close to or after September 30, 2008. See *id.* at 1094 n.5 (citing, e.g., *United States v. Thurston*, 544 F.3d 22 (1st Cir. 2008) (decided on Oct. 2, 2008); *United States v. Howe*, 543 F.3d 128 (3d Cir. 2008) (decided on Sept. 18, 2008)).

370. See *supra* notes 230–31 and accompanying text.

have been if left solely to the judge's discretion. Tables 1 and 2 of this Note compare the percentage of within-Guidelines sentences including and excluding government-sponsored lenient sentences.³⁷¹ The overall percentage of within-Guidelines sentences is less when excluding the government-sponsored lenient sentences, which results in more discretion under Dillon's reasoning.

The data regarding the appellate statistics is irrelevant because it comes from a report that the New York Council of Defense Lawyers submitted as an amicus curiae brief in *Rita*, a case that the Supreme Court decided before *Gall* and *Kimbrough*.³⁷² The data for the time period before *Rita* is irrelevant because *Rita*, *Gall*, and *Kimbrough* were the cases in which the Court clarified the sentencing procedure and emphasized the abuse-of-discretion standard in the review process. Indeed, the *Booker* opinion does not mention abuse-of-discretion explicitly,³⁷³ notwithstanding the Court's statement in *Gall* that *Booker*'s discussion of the standard of review was extremely clear.³⁷⁴ As discussed above, this abuse-of-discretion standard allows for significant discretion on the part of sentencing judges.³⁷⁵ Further, the decisions in *Gall*, *Kimbrough*, and many appellate court cases since those, have affirmed lenient sentences,³⁷⁶ demonstrating that district court judges have real discretion and are exercising it.

The second flaw with this reasoning is the assumption that the data conclusively shows that district courts lack sentencing discretion. If anything, the data that Dillon cites shows an increase in discretion by sentencing judges. The data that Dillon relies on shows that the rate of within-Guidelines sentences has decreased by about 9% since the *Gall* decision.³⁷⁷ Further, this 9% decline seems significant by Dillon's standards. In *Forman*, a 75.4% compliance rate was low enough for the Third Circuit to exclude the Parole Guidelines from Ex Post Facto Clause scrutiny.³⁷⁸ According to Dillon, an approximately 85% rate of within-Guidelines sentences is so high that the Sentencing Guidelines should be considered "laws."³⁷⁹ However, the 9% decline in within-Guidelines sentences since *Booker* is already about halfway to the rate of compliance in

371. See GALL REPORT II, *supra* note 228, tbls.1–2.

372. See *supra* notes 236, 338 and accompanying text; see also Richman, *supra* note 2, at 1412 ("[T]he strict appellate review given to non-Guidelines sentences can be expected to change in light of *Gall* and *Kimbrough*." (citing *United States v. Carty*, 520 F.3d 984 (9th Cir. 2008); *United States v. Williams*, 517 F.3d 801 (5th Cir. 2008); Memorandum from Jennifer Coffin to Sentencing Reform Comm. (Jan. 16, 2008), available at http://www.fd.org/pdf_lib/case%20review%20post%20gall_kimbrough%201_16_08.pdf)).

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

374. See *supra* note 167 and accompanying text.

375. See *supra* Part I.D.4.

376. See *supra* Part I.D.4; *supra* notes 240–46 and accompanying text.

377. The rate of compliance was 93.7% in the thirteen months before *Blakely v. Washington*, compared to 84.8% in the first quarter of 2008 after *Gall*. Dillon, *supra* note 56, at 1090. This data includes government-sponsored lenient sentences.

378. See *supra* note 340 and accompanying text.

379. See *supra* note 341 and accompanying text.

Forman. Also, *Forman* does not provide a threshold for when a “law” becomes “advisory,” just one rate that the court deems low enough. With the *Gall* and *Kimbrough* decisions being so recent, the rate of within-Guidelines sentences could still fall in a few years to a level that would have been acceptable to the court in *Forman*.

Further, the post-*Gall* sentencing data excluding prosecution-sponsored departures shows that the Guidelines are extremely close to the “advisory” regime in *Forman*. The overall rate of agreement between district courts and the Guidelines is 79.3%.³⁸⁰ This rate is much closer to the 74.5% acceptable rate of agreement in *Forman* than the rate including prosecution-sponsored departures, 84.5%.³⁸¹ The Second Circuit has an agreement rate of 60.3%—well below the threshold rate in *Forman*.³⁸² In fact, six out of the twelve circuits with available data have an agreement rate lower than the rate in *Forman* if prosecution-sponsored departures are excluded.³⁸³

The third flaw is the more general problem of using percentages to decide this constitutional issue. Picking a specific threshold percentage of compliance to show that the Guidelines are mandatory—and thus subject to the Ex Post Facto Clause—is somewhat arbitrary. The relevance of this percentage of compliance is diminished when it is the sole basis for such a conclusion. The Supreme Court has already rejected strict mathematical tests in a related context—a judge does not have to supply mathematically proportional compelling evidence to justify a departure from the Guidelines.³⁸⁴ As Dillon’s article and this Note show, different interpretations of the numbers can lead to wildly different conclusions. There is no way to justify a strict percentage cutoff of within-Guidelines sentences that should trigger Ex Post Facto Clause scrutiny. The empirical data only shows the results of many cases, but the *Gall* and *Kimbrough* decisions emphasized an individualized application of the § 3553(a) factors to the defendant³⁸⁵—the data simply cannot or has not yet been able to capture “the totality of the circumstances.”³⁸⁶

Many reasons for the “high” rate of within-Guidelines sentences could exist, not all of which indicate that the Ex Post Facto Clause should apply to the Guidelines. This uncertainty further diminishes the importance of the rate of compliance in determining this issue. First, a high rate could mean that a judge is “forced” to comply with the Guidelines because appellate courts reverse the majority of deviations from the Guidelines. Surely, under *Garner*, the Ex Post Facto Clause should apply in this case. Second, judges might feel like they must comply even though they do not actually test an appellate court by deviating. A plain-text interpretation of *Garner* seems to

380. See *supra* note 232 and accompanying text.

381. See *supra* tbl.2.

382. See *supra* tbl.1.

383. See *supra* tbl.1.

384. See *supra* note 204 and accompanying text.

385. See *supra* notes 198–203 and accompanying text.

386. See *supra* note 201 and accompanying text.

indicate that it should apply in this situation because a harsher version of the Guidelines would result in a longer sentence for the defendant.

Finally, a high rate of correlation could simply mean that judges usually agree with the Guidelines based on an independent assessment. In this case, a judge has exercised discretion. The only basis that the Ex Post Facto Clause should apply is an inference that the judge will likely follow the Guidelines in one case because they have at other times,³⁸⁷ which is simply not that reasonable because the circumstances and characteristics of every defendant are different. If a judge exercises discretion, the link to the legislature, the Sentencing Guidelines, has not forced the judge's decision, and thus the Ex Post Facto Clause should not apply. In summary, the problem with using the rate of within-Guidelines sentences to decide whether the Ex Post Facto Clause applies is that it does not help to distinguish what factors drive a sentencing judge's decision in a particular case.

While the percentage of within-Guidelines sentences should not be the touchstone in the ex post facto inquiry for all the reasons above, it is not irrelevant to the issue. A high percentage should be one factor in determining whether the Ex Post Facto Clause controls the Guidelines. A 100% compliance rate would be a strong indication that the Ex Post Facto Clause should apply. However, other factors that should play a role in the analysis include statements by the Supreme Court on the appropriate sentencing procedure and standard of review, as well as a careful analysis of appellate courts' review of sentencing decisions.³⁸⁸

In *Gall* and *Kimbrough*, the Supreme Court made it clear that the Guidelines are advisory and that appellate courts should review sentences for abuse-of-discretion, a very lenient standard.³⁸⁹ Recently, many appellate courts have abided by this standard to affirm sentences below the Guidelines' recommended range.³⁹⁰ A high rate of within-Guidelines sentences combined with lenient appellate review suggests that sentencing judges do have free reign, but they usually just agree with the Guidelines. In this case, it is difficult to tell what would happen if the judge had a choice between older, more lenient Guidelines and newer, harsher Guidelines. The conclusion that a judge will choose the newer Guidelines is questionable when the only justification is a high rate of compliance with the Guidelines in general, for all the reasons discussed. Thus, it is difficult to say that the defendant is at a significant risk of increased punishment and that the Ex Post Facto Clause should apply under *Garner*.³⁹¹ In light of all of the doubts about the reliability of the rate of within-Guidelines Sentences

387. See, e.g., *supra* note 315 and accompanying text.

388. Cf. *Garner v. Jones*, 529 U.S. 244, 255 (2000) (emphasizing the general operation of the entire parole system rather than specific rules); *supra* note 51 and accompanying text.

389. See, e.g., *Gall v. United States*, 128 S. Ct. 586, 596 (2007); *supra* note 204 and accompanying text.

390. See *supra* notes 240–46 and accompanying text.

391. See *supra* note 52 and accompanying text.

in contrast to the recent cases from the Supreme Court and courts of appeals affirming lenient sentences, the Ex Post Facto Clause should not apply to the Sentencing Guidelines.

C. *The Impracticality of Characterizing the Sentencing Guidelines as “Laws” Under the Ex Post Facto Clause*

Judges could easily circumvent a rule that the Ex Post Facto Clause did apply to the Sentencing Guidelines. As the *Demaree* court said, judges who wished to use the Guidelines in force at the time of sentencing could say that, in following the factors in 18 U.S.C. § 3553(a), they were using the information in the new Guidelines rather than rigidly following them.³⁹² Further, any judge who used the new set of Guidelines in this manner to increase a defendant’s punishment could not be acting unreasonably if the sentence fell within the range of the Guidelines in effect at sentencing.³⁹³

Eighth Circuit jurisprudence is an example of the impracticality of a rule declaring that the Ex Post Facto Clause is applicable to the Sentencing Guidelines. In *Carter*, the Eighth Circuit held that the Ex Post Facto Clause prohibited a judge from using a postoffense version of the Guidelines if that version specified a harsher punishment than a preoffense version.³⁹⁴ However, in *United States v. Larrabee*³⁹⁵, the Eighth Circuit looked to postoffense amendments to the Sentencing Guidelines when assessing the reasonableness of a defendant’s sentence.³⁹⁶ The court in *Larrabee* affirmed a sentence greater than the recommended range in the preoffense version of the Guidelines.³⁹⁷ Further, the Eighth Circuit later affirmed this approach in *Carter* even while explicitly rejecting the Seventh Circuit’s holding in *Demaree* that the Ex Post Facto Clause does not apply to the Sentencing Guidelines after *Booker*.³⁹⁸ *Carter* demonstrates the impracticality of trying to prevent sentencing judges from looking to a postoffense version of the Guidelines for reasonableness. If judges can do this despite a rule saying the Ex Post Facto Clause bars the application of the postoffense version, the Clause is not a significant barrier at all. In *Turner*, the D.C. Circuit refused to believe that sentencing judges would look to postoffense amendments to justify the reasonableness of their sentences.³⁹⁹ The court characterized this practice as “misrepresent[ing] the true basis for their actions.”⁴⁰⁰ However, the example of the Eighth Circuit in *Carter* and *Larrabee* shows that this practice exists—at least at the appellate level. Further, this example shows that a judge will not

392. See *supra* notes 270–73 and accompanying text.

393. See *supra* notes 270–73 and accompanying text.

394. See *supra* notes 287, 291–92 and accompanying text.

395. 436 F.3d 890 (8th Cir. 2006).

396. See *supra* note 287 and accompanying text.

397. See *supra* note 287 and accompanying text.

398. See *supra* note 287 and accompanying text.

399. See *supra* notes 316–17 and accompanying text.

400. See *supra* note 317 and accompanying text.

necessarily misrepresent the reason for the sentence, but may openly look to postoffense amendments to determine the reasonableness of a sentence.

CONCLUSION

The Ex Post Facto Clause should not apply to the Sentencing Guidelines because they are advisory and not “laws.” In *Booker*, the Supreme Court made the Guidelines advisory in order to avoid a Sixth Amendment problem in which the defendant is deprived of his right to trial by jury.⁴⁰¹ Since *Booker*, the Court has only ruled in favor of giving the sentencing judge discretion to depart from the Guidelines’ recommended range. As in *Gall*, a sentencing judge may rely on the other statutory factors that he or she thinks warrant a departure from a particular sentence.⁴⁰² Under *Kimbrough*, the judge may disagree with the policy behind a particular sentence and impose a sentence that he or she thinks is sufficient, but not greater than necessary.⁴⁰³ This discretion, subject only to review for abuse,⁴⁰⁴ highlights the advisory nature of sentencing today. At a sentencing hearing, a criminal has no right to a particular sentence, other than within the statutory limits, because of this discretion. Thus, the Ex Post Facto Clause does not protect him from a judge looking to the version of the Sentencing Guidelines in effect on the day of sentencing, even if that version suggests a more severe penalty than the version in effect on the date of the offense.

The Seventh Circuit is the only circuit that has ruled that the Ex Post Facto Clause does not apply to the Sentencing Guidelines.⁴⁰⁵ The circuit courts that still apply the Ex Post Facto Clause to the Sentencing Guidelines ignore the holdings in *Booker*, *Gall*, and *Kimbrough* that favor sentencing discretion. These circuits also ignore the reality that judges could circumvent a rule saying that the Ex Post Facto Clause applies to the Guidelines. A judge could overtly cite an aggravating factor from the postoffense version of the Guidelines. The judge could also explain, in an opinion, that a departure from the preoffense version of the Guidelines was based on the statutory factors in 18 U.S.C. § 3553(a) besides the Sentencing Guidelines. An appellate court would have difficulty saying that such departures are unreasonable given that the Sentencing Commission specifically endorses them in a postoffense version of the Guidelines. Finally, these circuits ignore decisions among themselves applying a lenient abuse-of-discretion standard to sentencing decisions. These decisions emphasize that the Guidelines are advisory and thus constitutional under

401. See *supra* notes 161–64 and accompanying text.

402. See *supra* notes 188, 206 and accompanying text.

403. See *supra* notes 210–11, 222–25 and accompanying text.

404. See *supra* note 198 and accompanying text.

405. See *supra* note 258 and accompanying text.

Booker. These circuits should be consistent⁴⁰⁶ and hold that the Guidelines' advisory nature puts them out of the reach of the Ex Post Facto Clause.

406. Compare, e.g., *United States v. Turner*, 548 F.3d 1094, 1100 (D.C. Cir. 2008) (positing that Guidelines significantly control district court sentencing decisions), with *United States v. Gardellini*, 545 F.3d 1089, 1090, 1094 n.5, 1096 (D.C. Cir. 2008) (discussing the substantial deference appellate courts show to district courts' sentencing decisions, the advisory nature of the Guidelines, and how it is not the role of the courts to preserve quasi-mandatory Guidelines and, even positively citing *Demaree*).

Notes & Observations