No.

In the Supreme Court of the United States

MATTHEW HENSLEY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a sentencing judge may, consistent with the Ex Post Facto Clause, employ the version of the U.S. Sentencing Guidelines Manual in effect at the time of sentencing even though it produces a longer sentence calculation than the Guidelines Manual in effect at the time the offense was committed.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Matthew Hensley respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 574 F.3d 384. The district court's oral ruling on sentencing (App., *infra*, 15a-30a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND REGULATORY PROVISIONS INVOLVED

U.S. Const. Art. I, § 9 provides in relevant part:

> No Bill of Attainder or ex post facto Law shall be passed.

The U.S. Sentencing Guidelines Manual § 1B1.11 (2008) provides in relevant part:

> (a) The court shall use the Guidelines Manual in effect on the date that the defendant is sentenced.
>
> (b)(1) If the court determines that use of the Guidelines Manual in effect on the date that the defendant is sentenced would violate the *ex post facto* clause of the United States Constitution, the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed.

STATEMENT

Prior to *United States* v. *Booker*, 543 U.S. 220 (2005), the courts of appeals agreed that the Ex Post Facto Clause barred a court from using the United States Sentencing Guidelines Manual in effect on the date of sentencing, if that Manual called for a harsher sentence than the Manual in effect at the time the defendant committed his offense. *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994); *United States* v. *Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (collecting cases); see also *Miller* v. *Florida*, 482 U.S. 423 (1987) (concerning Florida sentencing guidelines).

In the wake of this Court's holding in *Booker* rendering the Guidelines advisory, the courts of appeals have reached conflicting conclusions about whether the Ex Post Facto Clause is violated by the use of a post-offense version of the Guidelines that calculates a harsher sentence.

The Seventh Circuit has determined that the Guidelines no longer implicate the Ex Post Facto Clause. It held in the present case that the district court properly used the Guidelines Manual in effect at the time of petitioner's sentencing, even though it produced a 43- to 54-month increase in petitioner's recommended Guidelines sentencing range, as compared to the Guidelines Manual in effect at the time petitioner committed his offense. See App. 6a.

The D.C. Circuit has reached the opposite conclusion. It determined in *United States* v. *Turner* that "the existence of discretion does not foreclose an *ex post facto* claim" and held that the Clause continues, post-*Booker*, to bar retroactive application of

harsher Guidelines. 548 F.3d 1094, 1100 (D.C. Cir. 2008).

The other courts of appeals' statements regarding the issue indicate conflicting views regarding this question. And the issue recurs with great frequency: more than 55 cases since *Booker* have raised the question regarding application of the Ex Post Facto Clause presented here. See page 20 & note 8, *infra*.

The lower courts' disagreement—and the resulting disparate treatment of similarly-situated defendants—stems from their conflicting views regarding an important issue of Ex Post Facto Clause jurisprudence: whether the formal status of a legal rule conclusively determines the applicability of the Ex Post Facto Clause, or whether the legal rule's potential and practical effects are relevant to the analysis, as this Court held in *Miller* v. Florida, *supra*.

Those potential and practical effects are dispositive here. This Court has made clear that a judge's use of the Guidelines at sentencing is formally discretionary: one factor among many to be taken into account, and subject to light appellate review. See *Kimbrough* v. *United States*, 128 S. Ct. 558, 564 (2007); *Booker*, 543 U.S. 220. But district courts are still required by law to calculate the Guidelines range as "the starting point and initial benchmark," *Gall* v. *United States*, 128 S. Ct. 586, 596 (2007); a court of appeals may apply a presumption of reasonableness to a within-Guidelines sentence, see *Rita*, 551 U.S. at 347; and in practice, over 80% of all federal sentences, even today, continue to conform with the Guidelines, see pp. 28-32, *infra*. And Congress has charged the U.S. Sentencing Commission by statute with prescribing Guidelines to avoid unwar-

ranted sentencing disparities, see *Rita* v. *United States*, 551 U.S. 338, 347-348 (2007).

This Court should grant review to clarify the particular question regarding the status of the Guidelines under the Ex Post Facto Clause and to reaffirm its prior holdings that a legal rule's formal status is not dispositive in determining the Clause's applicability.

A. Legal Background

1. The Sentencing Reform Act of 1984 ("SRA"), Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 & 28 U.S.C.), established and delegated authority to the U.S. Sentencing Commission to write sentencing guidelines to carry out Congress's basic sentencing objectives of achieving fairness and proportionality, avoiding unwarranted sentencing disparities, and maintaining flexibility for individualized sentences when warranted. The Guidelines establish base offense levels for federal crimes, provide a method for determining a defendant's criminal history, and recommend departures based on the circumstances of the offense and the offender's criminal history. Each year, the Sentencing Commission issues a new Guidelines Manual, which incorporates amendments to the prior version of the Guidelines.

Courts use the Guidelines Manual in the sentencing process to calculate a final offense level, which translates into a recommended sentencing range when cross-referenced with the defendant's history category. Prior to *Booker*, judges were required to sentence defendants according to the Guidelines. Departures from the Guidelines' recom-

mendations were permitted but required justification. 18 U.S.C. § 3553(b)(1) (2003).

In *Booker*, this Court held that the mandatory nature of the Guidelines violated the Sixth Amendment. It struck down the provisions of the SRA that made the Guidelines mandatory and that established standards of review on appeal. *Booker*, 543 U.S. at 245. Thus, following *Booker*, the Guidelines sentence is advisory to the district court, not mandatory. See *Kimbrough*, 128 S. Ct. at 564.

Four Supreme Court decisions following *Booker* further clarified the status of the Guidelines. *Rita*, established that the courts of appeals may apply a presumption of reasonableness to within-Guidelines sentences. *Gall* further clarified that all sentences, "whether inside, just outside, or significantly outside the Guidelines range" are subject to the same abuse-of-discretion standard on appellate review, with no heightened standard for sentences outside of the Guidelines range. 128 S. Ct. at 591. On the same day as its decision in *Gall*, this Court held in *Kimbrough* that "the Guidelines * * * now serve as one factor among several that courts must consider in determining an appropriate sentence," and that although the judge "must include the Guidelines range in the array of factors warranting consideration," the judge can find a policy disagreement with the Guidelines or decide that a Guidelines sentence is "greater than necessary." 128 S. Ct. at 564 (internal quotation marks omitted).

Most recently, *Spears* v. *United States* held that "district courts are entitled to reject and vary categorically from the crack-cocaine Guidelines based on a policy disagreement with those Guidelines." 129 S. Ct. 840, 843-844 (2009).

2. Since 1992, the Guidelines have specified that a sentencing court is to use the Guidelines Manual "in effect on the date that the defendant is sentenced," except when such use "would violate the *ex post facto* clause," in which case "the court shall use the Guidelines Manual in effect on the date that the offense of conviction was committed." U.S.S.G. § 1B1.11(a), (b)(1) (2008).

Before *Booker*, the lower courts had reached a consensus that use of the Guidelines Manual in effect at the time of sentencing would violate the Ex Post Facto Clause if that Manual provided for a harsher sentence than the Manual in effect at the time of the defendant's offense. See *United States* v. *Seacott*, 15 F.3d 1380, 1386 (7th Cir. 1994); *United States* v. *Schnell*, 982 F.2d 216, 218 (7th Cir. 1992) (collecting cases). Those rulings rested on this Court's holding in *Miller* v. *Florida*, 482 U.S. 423 (1987), that retroactive application of Florida's sentencing guidelines (which resembled the pre-*Booker* federal Sentencing Guidelines) violated the Ex Post Facto Clause.

Even after *Booker*, the government agreed that the advisory nature of the Guidelines did not exempt them from Ex Post Facto analysis. It reasoned that the federal sentencing system still operated sufficiently like the Florida guideline system considered in *Miller* that the Ex Post Facto Clause would apply to federal Guidelines revisions that increased a defendant's Guidelines range. It was only after the Court's decisions in *Gall* and *Kimbrough* that the Solicitor General instructed the government (in August 2008) to abandon its position that the Ex Post Facto Clause bars the use of the Guidelines in effect at the time of sentencing when those Guidelines result in a

higher advisory Guidelines range. See U.S. Br. at 25-28, *United States* v. *Rooks*, No. 08-4725, 2009 WL 872121 (4th Cir. Feb. 2, 2009).

B. Proceedings Below

In 2006, petitioner was charged in a one-count indictment with attempting to solicit a minor over the Internet in violation of 18 U.S.C. § 2422(b). Petitioner was convicted in the Northern District of Indiana, and was originally scheduled to be sentenced on October 31, 2007. See App. 5a-6a. The statutory minimum sentence for petitioner's offense was 120 months. 18 U.S.C. § 2422(b). The 2006 Guidelines Manual, in effect on the originally scheduled sentencing date, recommended a base offense level of 24 and a sentencing range of between 78 and 97 months. App. 6a.

The government requested that petitioner's sentencing hearing be postponed to January 11, 2008, by which time the 2007 Guidelines Manual was in effect. The 2007 Manual included a four-point increase in the base offense level over the level specified in the 2006 Manual—to 28—and calculated a recommended sentencing range of 121 to 151 months. *Ibid.* This range represented a 43- to 54-month increase from the 2006 recommended Guidelines range.

At the 2008 sentencing hearing, petitioner objected to the court's use of the 2007 Guidelines in determining his sentence, arguing that such use would violate the Ex Post Facto Clause.[1] However, the district court stated:

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[1] Petitioner has argued throughout his appeal that he should have been sentenced under the 2006 Guidelines, which were in effect on October 31, 2007 (the date on which petitioner was

> I'm going to apply the [2007] guidelines that are in effect on today's date because that's what the Supreme Court directs me to do. * * * I * * * believe that what the Supreme Court and what the Seventh Circuit has directed more recently is that I am to apply the guidelines that are in effect on the day of the sentencing.

App. 20a-21a. After calculating the recommended Guidelines range, the court concluded, "I do think that a guideline sentence in this case is altogether appropriate. And I have calculated the guidelines to be 121 months to 151 months given the guidelines in effect at sentencing." *Id.* at 24a-25a. The court ultimately sentenced petitioner to 125 months—at the low end of the 2007 Guidelines range, but well above the 2006 Guidelines range.

Petitioner appealed the sentencing decision on Ex Post Facto grounds. The Court of Appeals for the Seventh Circuit affirmed, relying on its prior decision in *United States* v. *Demaree*, 459 F.3d 791 (7th Cir. 2006) (Posner, J.), cert. denied, 551 U.S. 1167 (2007). See App. 12a-14a.

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originally scheduled to be sentenced). At the time of petitioner's offense, the 2005 Guidelines were in effect. However, the 2005 Guidelines recommend the same base offense level and point enhancements as the 2006 Guidelines for petitioner's offense. See U.S. Sentencing Guidelines Manual § 2G1.3 (2006); U.S. Sentencing Guidelines Manual § 2G1.3 (2005). Therefore, had the sentencing taken place on October 31, 2007, use of the 2006 Guidelines would have resulted in the same calculated sentencing range as use of the 2005 Guidelines, and therefore would not have implicated the Ex Post Facto Clause. For this reason, petitioner argued that the court should have used the 2006 Guidelines in calculating his sentence.

The *Demaree* court had concluded that "the ex post facto clause should apply only to laws and regulations that bind rather than advise," and that because the Guidelines are advisory under *Booker*, a district court's reference to the most recent Guidelines Manual does not offend the Ex Post Facto Clause even if that Manual recommends a harsher sentence than the one in effect when the defendant committed the offense. 459 F.3d at 795.

REASONS FOR GRANTING THE PETITION

The clear, acknowledged conflict among the courts of appeals on the question presented is producing, and will continue to produce, disparate outcomes on substantially identical facts. Each year, for each amendment to the Guidelines that upwardly revises the recommended sentence for an offense, defendants who commit offenses prior to a pertinent amendment but are sentenced thereafter will receive differential treatment at sentencing based solely on the circuits in which their convictions arose.

The root of the disagreement among the lower courts lies in their conflicting interpretations of this Court's Ex Post Facto Clause decisions—in particular, whether the Guidelines' formal advisory status is dispositive of the Ex Post Facto inquiry or whether their functional importance also must be considered. As illustrated by the district court's use of the Guidelines below, the Guidelines in practice continue to exert a very significant gravitational force at sentencing.

This Court's post-*Booker* decisions make clear that "a district court should begin all sentencing proceedings by *correctly* calculating the applicable Guidelines range," using the guidelines as the "start-

ing point and initial benchmark" for the sentence, and only then considering other factors. *Gall*, 128 S. Ct. at 596 (emphasis added). Unless the question presented is resolved by this Court, district courts in the Seventh Circuit and perhaps elsewhere will begin the sentencing process by calculating a sentence according to Guidelines that may be substantially different (and more unfavorable) than those in place on the date of the crime for which these defendants are sentenced. Whether such a practice violates the Ex Post Facto Clause–and, more generally, what standards courts should apply in resolving Ex Post Facto Clause claims—are frequently-recurring, important questions in urgent need of resolution by this Court.

A. The Courts Of Appeals Are Divided On The Question Whether Advisory Sentencing Guidelines Implicate The Ex Post Facto Clause.

1. The Seventh And D.C. Circuits Are Clearly Divided On The Question Presented.

The Seventh and D.C. Circuits have reached squarely conflicting conclusions regarding the question whether, after this Court's decisions rendering the Guidelines advisory, a sentencing judge's application of a newer, harsher version of the Guidelines, which was not in effect at the time of the defendant's offense, violates the Ex Post Facto Clause.

a. The Seventh Circuit holds that "the ex post facto clause should apply only to laws and regulations that bind rather than advise" and, therefore, has no applicability to the Guidelines in light of *Booker*. *Demaree*, 459 F.3d at 795.

The 2000 Guidelines in place at the time Demaree committed her offenses called for a sentencing range of 18 to 24 months for a defendant with her criminal history. However, Demaree was sentenced under the 2004 Guidelines effective at the time of her sentencing, which recommended a 27- to 33-month sentence at the same criminal history level. The district judge sentenced Demaree to 30 months but stated that, *if* the 2000 version had been applicable, he would have sentenced her to only 27 months. Demaree appealed, arguing that the judge's application of the 2004 Guidelines violated the Ex Post Facto Clause. See *Demaree*, 459 F.3d at 792-793.

On appeal, the government confessed error, agreeing with Demaree that the district court had improperly used the later, harsher version of the Guidelines in violation of the Ex Post Facto Clause. *Id.* at 793. (At that time, the Solicitor General had not yet instructed the government to abandon its position that the Ex Post Facto Clause bars the use of the Guidelines in effect at the time of sentencing when those Guidelines result in a higher advisory Guideline range. See U.S. Br. at 27, *United States* v. *Rooks*, No. 08-4725, 2009 WL 872121 (4th Cir. Feb. 2, 2009); page 6, *supra*.)

The Seventh Circuit, speaking through Judge Posner, nevertheless affirmed Demaree's sentence, holding that the district court's use of the later, more severe Guidelines did not violate the Ex Post Facto Clause. In reaching its conclusion, the court rejected a "literal[]" "interpret[ation]" of what it described as this Court's "variously stated" formulas for testing whether a measure violates the Ex Post Facto Clause, as established in *Garner* v. *Jones*, 529 U.S. 244, 255-256 (2000), *California Department of Cor-*

rections v. *Morales*, 514 U.S. 499, 506 n.3 (1995), *Weaver* v. *Graham*, 450 U.S. 24, 29 (1981), and *Lindsey* v. *Washington*, 301 U.S. 397, 401-02 (1937) (per curiam). *Demaree*, 459 F.3d at 794.

The Seventh Circuit acknowledged that this Court's test is whether a measure "places the defendant at a disadvantage * * * compared to the law as it stood when he committed the crime," or "imposed a significant risk of enhanced punishment." *Ibid.* The court of appeals also said that, "interpreted literally," this test leads to the conclusion that the advisory Guidelines still implicate the Ex Post Facto Clause. *Ibid.*

The Seventh Circuit nonetheless held that "the ex post facto clause *should* apply only to laws and regulations that bind rather than advise." *Id.* at 795 (emphasis added). In arguing that the post-*Booker* Guidelines fall in the "laws * * * that advise" category, the court of appeals relied heavily on its understanding that a judge's selection of sentence "is discretionary and subject therefore to only light appellate review." *Ibid.* The court also stated that any other holding would be an exercise in "futility," because "whenever a law or regulation is advisory, the judge can always say not that he based his sentence on it but that he took the advice implicit in it." *Ibid.*

The Seventh Circuit has subsequently adhered to its holding in *Demaree*, including in the instant case. See App. 13a-14a.

b. The D.C. Circuit in *Turner* expressly rejected *Demaree*'s holding. Because the Guidelines still serve as an anchor and starting point for calculating sentences, the D.C. Circuit concluded that a court's decision about which version of the Guidelines to use

when sentencing a defendant significantly affects the severity of the resulting sentence. See *Turner*, 548 F.3d at 1099-1100. Thus, the D.C. Circuit held, the Guidelines still implicate the Ex Post Facto Clause. *Turner*, 548 F.3d at 1099-1100.

Turner, relying on this Court's decision in *Garner*, determined that "'[t]he controlling inquiry * * *' is how the [relevant] authority 'exercises discretion in practice' and whether 'exercise[s] of discretion . . . actually create[] a significant risk of prolonging [an inmate's] incarceration.'" *Ibid.* (quoting *Fletcher* v. *Reilly*, 433 F.3d 867, 876 (D.C. Cir. 2006) and *Garner*, 529 U.S. at 251). The D.C. Circuit applied the *Garner* test to the facts of *Turner*: When Turner committed his offense in 2001, the applicable Guidelines base offense level was 10 and his Guidelines sentencing range was 21 to 27 months; by 2006, the former was 14 and the latter 33 to 41 months. *Id.* at 1096. Applying the 2006 Guidelines, the district court sentenced Turner to 33 months. *Ibid.* The D.C. Circuit found that "using the 2006 Guidelines created a substantial risk that Turner's sentence was more severe, thus resulting in a violation of the Ex Post Facto Clause." *Id.* at 1100.

In concluding that retroactive application of a harsher version of the Guidelines continues to implicate the Ex Post Facto Clause, the court referenced this Court's decision in *Rita* that "appellate courts may apply a presumption of reasonableness to a district court sentence calculated in conformity with the Guidelines," and that therefore, "judges are more likely to sentence within the Guidelines." *Id.* at 1099. The *Turner* court also noted that, in fact, "most federal sentences fall within Guidelines ranges even after *Booker*" and that the "impact of *Booker*" on

judges' deviation from the Guidelines has been "minor." *Ibid.* (citing U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 57 (2006); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2007*, at 1 (2007)).

The D.C. Circuit understood that the deference permissibly accorded to within-Guidelines sentences under *Rita* provides an incentive to district court judges to issue within-Guidelines sentences. And it recognized that, empirically, most sentences remain in conformance with the Guidelines. Therefore, it concluded, a judge's decision about which version of the Guidelines to use significantly influences the "risk of increasing the measure of punishment attached to the [defendant's] crimes." *Garner*, 529 U.S. at 250 (internal citations and quotation marks omitted).

2. Several Circuits Have Indicated Agreement With Either The Seventh Circuit's Holding In Demaree *Or The D.C. Circuit's Holding In* Turner.

No other court of appeals has squarely decided whether the Ex Post Facto Clause applies to retroactive application of the now-advisory Guidelines. The First, Sixth, Eighth, and Ninth Circuits, however, have indicated agreement with the D.C. Circuit that retroactive application of a harsher version of the Guidelines still violates the Ex Post Facto Clause. By contrast, the Fifth Circuit has suggested—in seeming agreement with the Seventh Circuit—that the Guidelines no longer implicate the Ex Post Facto Clause because of their advisory nature, and that a court need never apply the Manual in effect at the

time of the defendant's offense, even if a newer, harsher version is in effect at the time of sentencing.

a. *First Circuit.* Through several cases—from one decided immediately following *Booker* to a 2008 ruling—the First Circuit has reiterated, "[w]e expect that the Ex Post Facto Clause [still] requires application of the older Guidelines if those would be more lenient." *United States* v. *Jaca-Nazario*, 521 F.3d 50, 56 (1st Cir. 2008).

The clearest indication of the First Circuit's agreement with *Turner* is the decision *United States* v. *Gilman*, 478 F.3d 440 (1st Cir. 2007).[2] In *Gilman*, the First Circuit acknowledged *Demaree*'s holding but stated in dicta that such a position was "doubtful in this circuit," and cited an early post-*Booker* case—*United States* v. *Cruzado-Laureano*, 404 F.3d 470 (1st Cir. 2005), cert. denied, 546 U.S. 1009—in support. *Gilman*, 478 F.3d at 449. In *Cruzado-Laureano*, the First Circuit had implied that, post-*Booker*, it continued to believe that the Guidelines implicate the Ex Post Facto clause, and that district courts must apply an earlier version of the Guidelines if application of a later version would result in a higher Guidelines range.[3]

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[2] The Sixth Circuit has understood *Gilman* to indicate the First Circuit's rejection of *Demaree*. See *United States* v. *Duane*, 533 F.3d 441, 447 n.1 (6th Cir. 2008).

[3] In *Cruzado-Laureano*, the district court, to avoid violating the Ex Post Facto Clause, sentenced the defendant under the 2000 version of the Guidelines rather than the 2002 version in effect at sentencing. The First Circuit found that the district court had erred in doing so, because the version of the Guidelines in effect at the time of the defendant's offense was the *2001*—not the 2000—version, and the relevant Guidelines provisions had not changed between 2001 and 2002. Rather than analyze

b. *Sixth Circuit.* The Sixth Circuit has also suggested that *Booker* and its progeny do not disturb settled circuit law that retroactive application of a harsher Guidelines Manual violates the Ex Post Facto Clause. In *United States* v. *Duane*, the Sixth Circuit rejected the Seventh Circuit's "conclu[sion] that 'the ex post facto clause should apply only to laws and regulations that bind rather than advise,'" 533 F.3d 441, 447 n.1 (6th Cir. 2008) (quoting *Demaree*, 459 F.3d at 795), and instead "assume[d] *arguendo* that a retroactive change to the Guidelines could implicate the *Ex Post Facto* Clause." *Id.* at 447.

In deciding to make this assumption, rather than embrace the Seventh Circuit's position, *Duane* "decline[d] to read" an earlier Sixth Circuit case, *United States* v. *Barton*, 455 F.3d 649 (6th Cir. 2006), cert. denied, 549 U.S. 1087, "to suggest that a change to the Guidelines does not raise an *ex post facto* concern," because (i) *Barton* "was concerned with retroactively applying *Booker*—a judicial decision—rather than a new version of the Guidelines," (ii) "following *Barton*[,] this court has continued to examine the *ex post facto* implications of applying a revised version of the Guidelines retroactively," and (iii) "a number of other circuits have continued, post-*Booker*, to analyze whether applying revised Guidelines retroactively violates the *Ex Post Facto* Clause." *Id.* at 446-447 & 447 n.1.

The Sixth Circuit further observed that the Seventh Circuit's approach "is somewhat inconsistent with our recognition—in the context of parole guide-

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whether the district court's erroneous application of the 2000 version prejudiced the defendant, the First Circuit reversed and remanded for resentencing under the 2002 Guidelines. 404 F.3d at 488-489.

lines—that 'the [Supreme Court has] made clear that guidelines that affect discretion, rather than mandate outcomes, are nevertheless subject to ex post facto scrutiny * * * .'" *Id.* at 447 (quoting *Michael* v. *Ghee*, 498 F.3d 372, 382 (6th Cir. 2007) (citing *Garner*, 529 U.S. at 253), cert. denied, 128 S. Ct. 2067 (2008)) (alteration in original).

c. *Eighth Circuit.* The Eighth Circuit has also suggested since *Booker* that "retrospective application of the [advisory] Guidelines implicates the *ex post facto* clause." *United States* v. *Carter*, 490 F.3d 641, 643 (8th Cir. 2007) (quoting *United States* v. *Larrabee*, 436 F.3d 890, 894 (8th Cir. 2006)[4]). In *Carter*, the Eighth Circuit acknowledged but declined to embrace the Seventh Circuit's holding in *Demaree* "that the *ex post facto* clause does not apply to the now-advisory guidelines," and instead decided to "proceed to address Mr. Carter's *ex post facto* claim." *Ibid.*[5] See also *United States* v. *Anderson*, 570 F.3d 1025, 1034 n.7 (8th Cir. 2009) ("[W]e assume that the Ex Post Facto Clause applies to a district court's application of the sentencing guidelines even after * * * *Booker* * * * .") (citing *Carter*, 490 F.3d at 643).

d. *Ninth Circuit.* The Ninth Circuit has also suggested that *Booker* and its progeny do not disturb the

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[4] *Larrabee* concerned appellate review of the reasonableness of a district court's non-Guidelines sentence with reference to a version of the Guidelines that was not in effect at the time of the offense of conviction, not the use of later Guidelines in the initial Guidelines calculation. 436 F.3d at 893-894.

[5] The *Carter* court ultimately decided that the defendant had forfeited his Ex Post Facto challenge. *Carter*, 490 F.3d at 645-646.

pre-*Booker* consensus that the Guidelines (although now advisory) implicate the Ex Post Facto Clause. For example, in *United States* v. *Stevens*, the Ninth Circuit vacated and remanded on Ex Post Facto grounds a sentence originally calculated post-*Booker* by reference to a substantive amendment to the Guidelines that had not been in effect when the crime was committed, because "we cannot say on this record that the court would have imposed the same 360-month sentence had it not erred in its base offense level calculation." 462 F.3d 1169, 1172 (9th Cir. 2006). See also *United States* v. *Rising Sun*, 522 F.3d 989, 993 n.1 (9th Cir. 2008) (stating in dicta that the district court was "correct" when it "determined that the Ex Post Facto Clause [would be] implicated" by using the version of the Guidelines in effect on the day of sentencing because it called for a higher base offense level than the Guidelines in effect at the time of the offense of conviction).[6]

e. *Fifth Circuit.* In *United States* v. *Rodarte-Vasquez*, the Fifth Circuit concluded that the district court's retroactive application of a harsher version of the Guidelines at a pre-*Booker* sentencing "constituted an *ex post facto* violation." 488 F.3d 316, 324 (5th Cir. 2007). However, in her concurring opinion, Chief Judge Jones clarified that the court had not

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[6] See also *United States* v. *Andres*, 178 Fed. Appx. 736, 741 (9th Cir. 2006) (unpublished opinion) ("reject[ing] [the] argument that *Booker* rendered discretionary the particular Guidelines Manual to be utilized" and noting that "[b]ecause the district court determined that use of the Guidelines in effect at the time of [the post-*Booker*] sentencing might implicate the ex post facto clause, it *properly* * * * applied the version in effect on the last day of the offense of conviction" as opposed to the date of sentencing) (internal quotation marks omitted) (emphasis added).

"reach[ed] the issue whether the *ex post facto* clause can apply to a post-*Booker* sentence" because the case "ar[o]se[] from a pre-*Booker* sentencing":

> Post-*Booker*, the guidelines are informative, not mandatory. A purely advisory regulation does not present an *ex post facto* problem solely because it is traceable to Congress and will possibly disadvantage a defendant. This principle has been recognized by the Supreme Court with respect to the parole guidelines, see, *e.g.*, *Garner*, * * * and I see no reason not to extend it to the present context. Judge Posner persuasively adopted this view in * * * *Demaree*[.]

Id. at 325 (Jones, J., concurring).[7]

The Fifth Circuit has continued to cite Judge Jones's concurring opinion in *Rodarte-Vasquez* as evidence for the Fifth Circuit's potential agreement with *Demaree*. See *United States* v. *Sanchez*, 527 F.3d 463, 466 (5th Cir. 2008) (discussing how this opinion "suggest[s] that, post-*Booker*, the sentencing guidelines cannot present an ex post facto problem because they are purely advisory"). See also *United States* v. *Boyd*, 317 Fed. Appx. 415, 417 (5th Cir. 2009) (unpublished opinion) (reviewing for plain error the district court's decision to sentence Boyd "under the incorrect version of the now-advisory guidelines," deciding not to reverse because the "error [was] not obvious," and citing Chief Judge Jones's concurring opinion in *Rodarte-Vasquez* for the proposition that "[a]fter *Booker*, it is not clear that an ex

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[7] Thus, the Sixth Circuit was incorrect when, in *Duane*, 533 F.3d at 447 n.1, it interpreted *Rodarte-Vasquez* as indicating the Fifth Circuit's disagreement with *Demaree*.

post facto violation occurs when a district court sentences a defendant under the incorrect version of the now-advisory guidelines"), cert. denied, 2009 WL 1808271 (2009); *United States* v. *McBirney*, 261 Fed. Appx. 741, 747 n.11 (5th Cir. 2008) (unpublished opinion) (citing Chief Judge Jones's concurring opinion in *Rodarte-Vasquez* for support for its characterization of the proposition that the Guidelines still implicate the Ex Post Facto Clause as "dubious * * * now that the guidelines are advisory, not mandatory"), cert. denied, 129 S. Ct. 43.

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The Seventh Circuit and the D.C. Circuit have reached holdings fundamentally at odds with each other on the question of whether the now-advisory Guidelines continue to implicate the Ex Post Facto Clause. Several of the other courts of appealshave suggested agreement with either *Demaree* or *Turner*. In light of the clear, acknowledged conflict, and the disagreeing views expressed by other courts of appeals, certiorari is warranted now to resolve the conflicting views regarding the question presented.

B. The Question Presented Recurs Frequently And Requires Resolution.

The question of which Guidelines Manual a sentencing judge should apply—the Manual in effect at sentencing, which results in a longer calculated sentence, or the Manual in effect at the time of the defendant's offense—recurs with great frequency. We have identified more than 55 cases in which the issue has arisen since *Booker*.[8] Of course, this represents

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[8] See the cases discussed in Part A, *supra*, as well as *United States* v. *McGowan*, 315 Fed. Appx. 338 (2nd Cir. 2009); *United*

States v. *Boyle*, 283 Fed. Appx. 825 (2d Cir. 2007), aff'd, 129 S. Ct. 2237 (2009); *United States* v. *Kilkenny*, 493 F.3d 122 (2d Cir. 2007); *United States* v. *Ausburn*, 502 F.3d 313 (3d Cir. 2007), cert. denied, 129 S. Ct. 32 (2008); *United States* v. *Wood*, 486 F.3d 781 (3d Cir. 2007), cert. denied, 128 S. Ct. 130; *United States* v. *Share*, 223 Fed. Appx. 103 (3rd Cir. 2007); Reply Brief of Appellant, *United States* v. *Knight*, No. 09-4282, 2009 WL 2627151 (4th Cir. Aug. 27, 2009); Opening Brief for Appellant Newmark, *United States* v. *Newmark*, No. 08-3356, 2009 WL 2816993 (4th Cir. July 27, 2009); *United States* v. *Sinclair*, 293 Fed. Appx. 235 (4th Cir. 2008); *United States* v. *Iskander*, 407 F.3d 232 (4th Cir. 2005); *United States* v. *Austin*, 479 F.3d 363 (5th Cir. 2007); *United States* v. *Kilgarlin*, 157 Fed. Appx. 716 (5th Cir. 2005); *United States* v. *Reasor*, 418 F.3d 466 (5th Cir. 2005); Brief of Defendant-Appellant, *United States* v. *Jones*, No. 08-2175, 2009 WL 982859 (6th Cir. Apr. 1, 2009); *United States* v. *Jeross*, 521 F.3d 562 (6th Cir. 2008), cert. denied, 129 S. Ct. 1311 (2009); *United States* v. *Burke*, 252 Fed. Appx. 49 (6th Cir. 2007); *United States* v. *Davis*, 397 F.3d 340 (6th Cir. 2005); *United States* v. *Harmon*, 409 F.3d 701 (6th Cir. 2005); *United States* v. *Lacefield*, 146 Fed. Appx. 15 (6th Cir. 2005); *United States* v. *Braggs*, 196 Fed. Appx. 442 (8th Cir. 2006); Appellant's Opening Brief, *United States* v. *Forrester*, No. 09-50029, 2009 WL 3044538 (9th Cir. Apr. 17, 2009); Defendant-Appellant's Opening Brief, *United States* v. *Breton-Rodriguez*, Nos. 08-10266, 08-10400, 2009 WL 2955489 (9th Cir. Feb. 2, 2009); Appellant's Opening Brief, *United States* v. *Riley*, No. 08-50009, 2008 WL 4659676 (9th Cir. Sep. 9, 2008); *United States* v. *Mix*, 457 F.3d 906 (9th Cir. 2006); *United States* v. *Scott*, 529 F.3d 1290 (10th Cir. 2008); *United States* v. *Zirger*, 257 Fed. Appx. 59 (10th Cir. 2007); *United States* v. *Jones*, 254 Fed. Appx. 711 (10th Cir. 2007), cert. denied, 2009 WL 1574243 (2009); *United States* v. *Hoff*, 215 Fed. Appx. 720 (10th Cir. 2007); *United States* v. *Fowler*, No. 08-16413, 2009 WL 2515735 (11th Cir. Aug. 19, 2009); *United States* v. *Shira*, 286 Fed. Appx. 650 (11th Cir. 2008); *United States* v. *Mathis*, 239 Fed. Appx. 513 (11th Cir. 2007), cert. denied, 128 S. Ct. 1687 (2008); *United States* v. *Kladek*, No. 08CR0290(PJS/AJB), 2009 WL 2835158 (D. Minn. Aug. 31, 2009); *Nash* v. *United States*, Nos. 1:07-cr-00002, 1:08-cv-00620, 2009 WL 262217 (S.D. Ohio Feb. 4, 2009); *United States* v. *Doyle*, 621 F. Supp. 2d 345 (W.D. Va.

only a fraction of the actual number of cases in which courts have had to address this question post-*Booker*, because only a fraction of all sentencing decisions are reported in judicial opinions and not all sentencing decisions are appealed.

The question whether the Guidelines still implicate the Ex Post Facto Clause will continue to arise as the Sentencing Commission continues to amend the Guidelines. Each year, the Federal Sentencing Commission revises the Guidelines, including modifying sentences for preexisting crimes. A significant number of these amendments represent upward revisions to recommended sentences. For example, at least *one-third* of the Guidelines amendments (21 of 63) made since *Booker* upwardly revised a base offense level, created a new upward enhancement, or otherwise increased the penalty for a preexisting offense. See U.S. Sentencing Commission Guidelines Manual app. C. supp. (2008).

Amendment 723, effective November 1, 2008, for example, added an offense characteristic that provides a four-level enhancement for violations of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301 *et seq.* ("FDCA"). The Sentencing Commission rationalized this enhancement by explaining that it was based on "public comment and testimony that an enhancement is appropriate to account for * * * second or subsequent FDCA violations." U.S. Sentencing Commission Guidelines Manual app. C. supp. 297 (2008). Another amendment, number 691, addresses a number of issues relevant to the primary

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2009); *United States* v. *Lewis*, 603 F. Supp. 2d 874 (E.D. Va. 2009); *United States* v. *Restrepo-Suares*, 516 F. Supp. 2d 112 (D.D.C. 2007); *United States* v. *Kandirakis*, 441 F. Supp. 2d 282 (D. Mass. 2006).

firearms guideline, § 2K2.1 (Unlawful Receipt, Possession, or Transportation of Firearms or Ammunition; Prohibited Transactions Involving Firearms or Ammunition). The Amendment, *inter alia*, provides a four-level enhancement at § 2K2.1(b)(5) if the defendant engaged in the trafficking of firearms, and modifies § 2K2.1(b)(4) to increase penalties for offenses involving altered or obliterated serial numbers. See *id.* at 166-173. The other amendments cover a similarly diverse set of issues.

The Sentencing Commission's consistent pattern of upward revisions to the Guidelines means that courts will continue to be confronted with the question of whether to apply newer, more severe versions of the Guidelines over the versions in effect at the time of defendants' offenses. Until this Court resolves the question, courts will continue to answer this question in different ways, affecting a substantial number of defendants' sentences across the country.

Indeed, statements by judges, scholars, and commentators confirm the importance of the question presented. See C. Clayman & H. Protass, *The Ex Post Facto Clause in the Post*-Booker *World*, New York Law Journal, July 1, 2009, at 4 (quoting U.S. District Judge Lewis A. Kaplan as describing the question of whether the Ex Post Facto Clause continues to apply to the Guidelines in the wake of *Booker* as "fascinating" and "intriguing"); Douglas Berman's Sentencing Law and Policy Blog, at http://sentencing.typepad.com (Dec. 5, 2008 and April 17, 2009); J. Dillon, *Doubting* Demaree, 110 W. Va. L. Rev. 1033 (2008); D. Levy, *Defending* Demaree*: The Ex Post Facto Clause's Lack of Control Over*

the Federal Sentencing Guidelines After Booker, 77 Fordham L. Rev. 2623 (2009).

C. The Ex Post Facto Clause Prohibits The Retroactive Use By A District Court Of A Version Of The Guidelines That Calculates A Harsher Sentence.

This Court's Ex Post Facto jurisprudence has consistently emphasized the functional effect of retroactive modifications to the law over purely formal considerations. The retroactive application of measures that create a "sufficient" or "significant risk" of increasing a defendant's punishment triggers the Ex Post Facto Clause. *Garner*, 529 U.S. at 250-251 (quoting *Morales*, 514 U.S. at 509). Retroactively applying the harsher 2007 Guidelines to petitioner substantially risked prolonging his punishment and therefore violated the Ex Post Facto Clause.

1. Measures That Sufficiently Risk Prolonging The Period Of Punishment Violate The Ex Post Facto Clause.

The Ex Post Facto Clause bars the retroactive application of measures that pose a "sufficient" or "significant risk of prolonging" a defendant's punishment. *Id.* at 251 (quoting *Morales*, 514 U.S. 509). A two-pronged inquiry is used to assess the existence of such a risk. *Id.* at 251, 255. A court must first examine a measure's effect *formally*, by considering its substance and the "framework" in which it operates, including the degree of discretion allowed in its implementation. See *id.* at 251.

If the formal analysis fails to reveal a significant risk, a second, practical inquiry applies: A challenger 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." *Id.* at 255 (emphasis added).[9]

Garner applied both prongs of the analysis to a state administrative rule that increased the interval between parole reconsideration hearings, for prisoners serving life sentences, from three to eight years. *Id.* at 247. The rule allowed authorities "broad discretion" to hold more frequent hearings if warranted to determine early release. *Id.* at 253. A formal evaluation of the rule did not reveal a sufficient risk of prolonged punishment. *Id.* at 254. But applying the empirical analysis led this Court to reverse and remand because the courts below failed to consider whether the measure "*in its operation*" significantly risked increasing Garner's punishment. *Id.* at 257 (emphasis added).

That the measure at issue in *Garner* allowed for discretion in its implementation did not exempt it from Ex Post Facto scrutiny. "The presence of discre-

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[9] *Garner* is the governing and most recent articulation of this Court's general Ex Post Facto analysis. However, the retroactive application of the Guidelines would also violate the Clause under the analysis applied in *Miller* v. *Florida*, 482 U.S. 423 (1987), which prohibits the retroactive application of measures that "substantially disadvantage" defendants. *Id.* at 432. Here, for example, petitioner was substantially disadvantaged, in the sense defined by *Miller*, by the district court's erroneous determination of a Guidelines range above, rather than substantially below, the statutory minimum for the offense of conviction. See App. 6a. As described in the text, district courts' general adherence to the Guidelines range in the overwhelming majority of cases means that, *Booker* notwithstanding, an erroneous calculation will generally lead to a different sentence. See *Gall*, 128 S. Ct. at 596.

tion does *not* displace the protections of the *Ex Post Facto* Clause * * * ." *Id.* at 253 (emphasis added). *Garner* held that any measure—whether binding or advisory in nature—that poses more than a "speculative" risk of increasing the length of incarceration violates the Ex Post Facto Clause. *Id.* at 251 (quoting *Morales*, 514 U.S. at 509). "[I]t is the *effect*, not the form, of the law that determines whether it is *ex post facto*." *Weaver* v. *Graham*, 450 U.S. 24, 31 (1981) (emphasis added); see *Cummings* v. *Missouri*, 71 U.S. 277, 325 (1866); *Fletcher* v. *Peck*, 10 U.S. 87, 138-139 (1810) (Marshall, C.J.) (invalidating a measure that had the "effect" of an ex post facto law).

2. Retroactively Applying The 2007 Guidelines To Petitioner Violated The Ex Post Facto Clause.

Here, applying a harsher version of the Guidelines at sentencing than the one in effect at the time of petitioner's offense violated the Ex Post Facto Clause under both of the standards adopted by this Court. In declaring that the Ex Post Facto Clause applies solely to "laws and regulations that bind rather than advise," *Demaree*, 495 F.3d at 795, the Seventh Circuit ignored this Court's precedents squarely rejecting that approach. Applying the standard set forth by this Court reveals the extent of the Seventh Circuit's error.

a. Under this Court's "formal" analysis, the Guidelines create a significant risk of prolonged punishment when applied retroactively. Following *Booker* this Court has made clear that the Guidelines must serve as "the starting point and the initial benchmark" in the sentencing process. *Gall*, 128 S. Ct. at 596. District judges must calculate the Guidelines' prescribed sentencing range and consider any

relevant policy statements produced by the Sentencing Commission. See 18 U.S.C. § 3553(a)(4)-(5). "[F]ailing to calculate (or improperly calculating) the Guidelines range," in fact, constitutes a "significant procedural error." *Gall*, 128 S. Ct. at 597.

The particular version of the Guidelines that a judge uses, therefore, forms the axis around which the sentencing calculus revolves. Starting the process by considering newer Guidelines that call for harsher punishments inevitably pulls the determination toward a stiffer sentence.

Moreover, the presumption of reasonableness attached to within-Guidelines sentences on appellate review provides that within-Guidelines sentences remain the default outcome. See *Rita*, 551 U.S. 338. Seven circuits employ the presumption of reasonableness.[10] *Rita* acknowledged that the "presumption [might] encourage sentencing judges to impose Guidelines sentences," even though district judges cannot apply the presumption themselves. *Id.* at 354. And as former Judge McConnell noted, "the rebuttability of the presumption is more theoretical than real." *United States* v. *Pruitt*, 502 F.3d 1154, 1166 (10th Cir. 2007) (concurring opinion), judgment vacated, 128 S. Ct. 1869 (2008). *Rita* thus incentivizes judges to render within-Guidelines sentences.

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[10] See *United States* v. *Wilms*, 495 F.3d 277 (6th Cir. 2007); *United States* v. *Dorcely*, 454 F.3d 366 (D.C. Cir. 2006); *United States* v. *Kristl*, 437 F.3d 1050 (10th Cir. 2006); *United States* v. *Green*, 436 F.3d 449 (4th Cir. 2006); *United States* v. *Alonzo*, 435 F.3d 551 (5th Cir. 2006); *United States* v. *Mykytiuk*, 415 F.3d 606 (7th Cir. 2005); *United States* v. *Lincoln*, 413 F.3d 716 (8th Cir. 2005).

The continuing magnetism of the Guidelines in the sentencing process is not surprising. *Booker* itself confirmed that the Sentencing Commission would continue "writing Guidelines" so as to "promote uniformity in the sentencing process." 543 U.S. at 263-264. But of course only Guidelines that truly "guide" sentencing decisions can promote uniformity.

The present case exemplifies the continued very significant impact of the Guidelines. The sentencing judge "did not pull the [sentence of 125 months] out of thin air." *Turner*, 548 F.3d at 1100. The 2007 Guidelines prescribed a range between 121 and 151 months, and he selected a sentence on the low end. App. 6a. Had the judge relied on the prior Guidelines, which called for a lower sentence by 43 to 54 months, petitioner may well have received a sentence closer to the mandatory minimum. See App. 6a. And, under *Garner*, petitioner need only show that application of the 2007 Guidelines sufficiently *risked* increasing his sentence, 529 U.S. at 251, not that it definitively did so, *Miller*, 482 U.S. at 432. In sum, the Guidelines' continuing—and strong—gravitational force ensures that applying the upwardly revised Guidelines to petitioner created a serious risk of enhancing his punishment.

b. The empirical examination prescribed by the second prong of this Court's decision in *Garner* leads to the same conclusion as the formal analysis.

To begin with, the Sentencing Commission's statistics indicate that the post-*Booker*, -*Kimbrough*, and -*Gall* Guidelines possess a magnetic pull closely equivalent to the pre-*Booker* Guidelines. The Sentencing Commission defines the Guidelines "conformance rate" as the combined rate of within-Guidelines and government-sponsored below-

Guidelines sentences. U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing*, at vi (2006).

In the 13-month period from mid-2003 through mid-2004, the Guidelines conformance rate stood at 93.7%. *Id.* at 45-46. In the year following *Booker*, the conformance rate remained strikingly high, at 85.9%. *Id.* at 57.

The conformance rate has remained in the mid- to low-80% range since then: It was 86.3% in fiscal year 2006, 86.4% in fiscal year 2007, 85.0% in fiscal year 2008, and 82.4% in the first three quarters of fiscal year 2009. See U.S. Sentencing Commission, *Preliminary Quarterly Data Report* 1 (2009); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2008*, at 1 (2008); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2007*, at 1 (2007); U.S. Sentencing Commission, *Final Quarterly Data Report: Fiscal Year 2006*, at 1 (2006). Figures 1 and 2 depict these statistics graphically. The top line in Figure 1 displays the Guidelines conformance rate for fiscal year 2001 through the immediate post-*Booker* period. The top line in Figure 2 displays the Guidelines conformance rate for fiscal year 2004 through the first three quarters of fiscal year 2009.

Figure 1: Quarterly Sentencing Data FY2001 – Post-*Booker*[11]

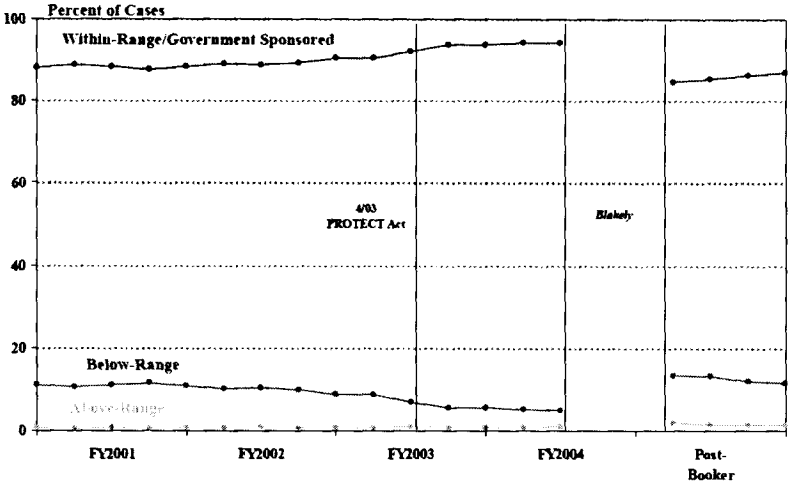
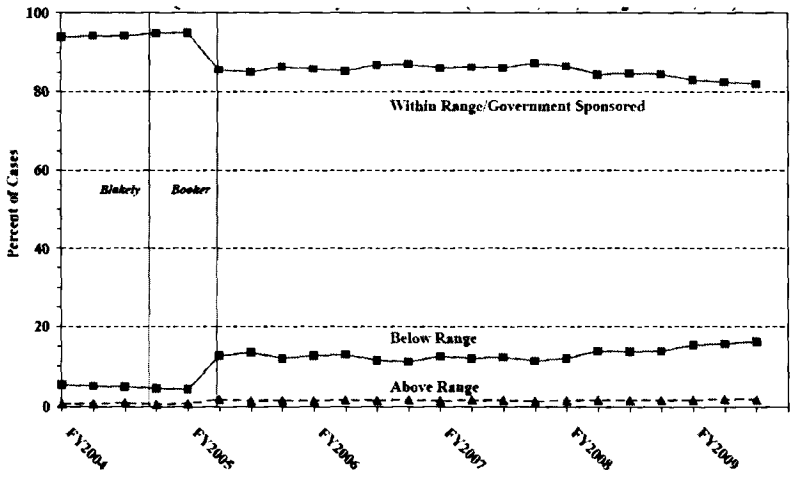


Figure 2: Quarterly Sentencing Data FY2004 – First Three Quarters of FY2009[12]



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[11] Reprinted from U.S. Sentencing Commission, *Final Report on the Impact of* United States v. Booker *on Federal Sentencing* 56 (2006).

[12] Reprinted from U.S. Sentencing Commission, *Preliminary Quarterly Data Report* 11 (2009).

Statistics also confirm the hypothesis articulated by this Court in *Rita*—that the presumption of reasonableness for within-Guidelines sentences on appellate review might "encourage sentencing judges to impose Guidelines sentences." *Rita*, 551 U.S. at 354. An extensive, multivariate study released in 2007 found that "a circuit's adoption of a presumption of reasonableness decreases the frequency of below-Guidelines" sentencing decisions issued by district judges. A. Robbins & L. Lao, The Effect of Presumptions: An Empirical Examination of Inter-Circuit Sentencing Disparities after *United States v. Booker* 25 (Nov. 4, 2007) (unpublished manuscript), *available at* http://tinyurl.com/EffectofPresumptions. Although the decrease was less than one percent, it was statistically significant, demonstrating the clear pull of the presumption. *Ibid.* The study drew upon a reservoir of "145,047 individual-level observations recorded by the United States Sentencing Commission (comprising all recorded federal sentences in all twelve circuits for a one-year period beginning in November 2004 and ending in October 2006)." *Id.* at 1.

Similarly, a study by the New York Council of Defense Lawyers analyzing 1,515 circuit cases decided between January 1, 2006 and November 16, 2006 revealed that circuits adopting the presumption of reasonableness reverse below-Guidelines sentences at a far greater rate than circuits not employing the presumption. See Brief for New York Council of Defense Lawyers as Amicus Curiae Supporting Petitioner App. at 1a-3a, *Rita*, 551 U.S. 338 (No. 06-5754), *available at* http://tinyurl.com/NYCDLAmicus. Circuits adopting the presumption vacated below-Guidelines sentences in 47 out of 51 cases, a rate of 92%. *Id.* at 3a. Circuits not adopting the presump-

tion, in contrast, vacated below-Guidelines sentences in thirteen of twenty cases, a rate of only 65%. *Ibid.*

These statistics confirm the Guidelines' continuing guiding force, even following *Booker* and its progeny. Operating within a formalized framework that requires sentencing judges to consult them and incentivizes judges to hew closely to them, the Guidelines continue to unify sentencing decisionmaking. Even now, almost five years after *Booker*, more than 80% of sentences conform to the Guidelines.

The Guidelines, therefore, are not purely hortatory devices that fail to exert sway over the sentencing process. Instead, the Guidelines remain the critical component of sentencing decisions, drawing district courts and circuits—particularly those recognizing the presumption of reasonableness—to issue within-Guidelines sentences.

In an environment in which courts ordinarily apply the governing Guidelines, the question of *which* Guidelines a court applies matters immensely. Retroactively applying harsher Guidelines naturally creates a substantial risk of increasing a defendant's punishment. In this case, applying the newer and harsher 2007 Guidelines to petitioner violated the Ex Post Facto Clause.

Only review by this Court can resolve the conflict below and restore the protections secured by the Ex Post Facto Clause to the sentencing process.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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