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Harsher Sentencing Guidelines Can't Be Used for Old Offenses, Justices Say

By ADAM LIPTAK

WASHINGTON — In a 5-to-4 decision that broke along ideological lines, the Supreme Court on Monday ruled that courts violate the Constitution when they rely on current federal sentencing guidelines if those guidelines call for harsher punishment than the ones in place at the time of the offense.

If such sentencing guidelines were mandatory, as they once were, the case would have been easy. But in 2005 the Supreme Court ruled that the guidelines must be treated as advisory to avoid running afoul of a line of Sixth Amendment cases requiring that juries rather than judges make the factual findings supporting criminal sentences.

The question that divided the justices on Monday was whether the current discretionary guidelines retained enough force to subject defendants to a substantial risk of additional punishment and thus violate the Constitution's ex post facto clause, which prohibits enhanced retroactive punishment.

The case, *Peugh v. United States*, No. 12-62, arose from bank fraud committed in 1999 and 2000 by Marvin Peugh, an owner of two farming businesses. When it came time for sentencing in 2010, the trial judge took note of the guidelines then in place, which suggested a sentence between 70 and 87 months. The judge settled on the lower number.

Had the judge instead referred to the guidelines in place at the time of the fraud, the suggested range would have been 30 to 37 months. "The low end of the 2009 guidelines range," still in effect in 2010, Justice Sonia Sotomayor wrote for the majority on Monday, "was 33 months higher than the high end of the 1998 guidelines range," which were in effect in 1999 and 2000.

Justice Sotomayor said guidelines imposed significant constraints on sentencing judges even after being made advisory. The guidelines remained, she said, quoting an earlier Supreme Court decision, "the starting point and the initial benchmark." Trial judges are required to explain the basis for the sentences they impose, she added, with a major departure from the guidelines requiring "a more significant justification than a minor one."

Appellate review of sentences is relaxed, though it does take account of variance from the guidelines along with other factors. “Common sense indicates that, in general, this system will steer district courts to more within-guidelines sentences,” Justice Sotomayor wrote.

That was enough, she said, to establish a violation of the ex post facto clause in Mr. Peugh’s case under the standard set out in a 1995 decision, [California Department of Corrections v. Morales](#). That decision said the clause bars new laws that create a “sufficient risk of increasing the measure of punishment attached to the covered crimes.”

“A retrospective increase in the guidelines range applicable to a defendant,” Justice Sotomayor concluded, “creates a sufficient risk of a higher sentence to constitute an ex post facto violation.”

Justices Ruth Bader Ginsburg, Stephen G. Breyer and Elena Kagan joined all of the majority opinion, and Justice Anthony M. Kennedy most of it.

In dissent, Justice Clarence Thomas wrote that the guidelines, since they are only advisory, “do not constrain the discretion of district courts and, thus, have no legal effect on a defendant’s sentence.” That means, he said, that there was no violation of the ex post facto clause under the standard announced in the Morales case.

Chief Justice John G. Roberts Jr. and Justices Antonin Scalia and Samuel A. Alito Jr. joined that part of Justice Thomas’s dissent.

Writing only for himself, Justice Thomas added that the analysis both sides had used, derived from the Morales decision, was at odds with the original meaning of the ex post facto clause, which referred, he said, only to “the punishment affixed by law.”

This was, he said, self-criticism. “As the author of Morales,” Justice Thomas wrote, “failure to apply the original meaning was an error to which I succumbed.”

In another development on Monday, the court let stand a court order [barring abortion protesters from displaying images of aborted fetuses](#) in places where they may disturb children. As is their custom, the justices gave no reasons for declining to hear the case.