CRIMINAL LAW — SENTENCING GUIDELINES — SECOND CIRCUIT HOLDS THAT IMPOSING BELOW-GUIDELINES SENTENCE USING RETROACTIVE GUIDELINES RANGE INCREASE DOES NOT VIOLATE EX POST FACTO CLAUSE. — *United States v. Ortiz*, 621 F.3d 82 (2d Cir. 2010).

The Ex Post Facto Clause[1] prohibits the government from "chang[ing] the punishment, and inflict[ing] a greater punishment, than the law annexed to the crime, when committed."[2] When the U.S. Sentencing Guidelines were binding, circuit courts uniformly held that this constitutional prohibition barred judges from imposing a sentence using a Guidelines range that had increased after the crime was committed.[3] Since the Supreme Court rendered the Guidelines advisory in *United States v. Booker*,[4] both courts[5] and commentators[6] have disagreed about whether ex post facto concerns still apply. Recently, in *United States v. Ortiz*,[7] the Second Circuit joined two other circuits[8] in adopting a "substantial risk" standard to decide when retroactive application of severity-enhancing Guidelines amendments violates the Ex Post Facto Clause. The panel went on to conclude that no violation had occurred in the instant case, because the defendant's sentence fell far below the Guidelines range.[9] In so concluding, the Second Circuit failed to consider the anchoring effect of the Guidelines even on sentences that significantly depart from the advisory range. A better approach would have been to recognize that increasing the Guidelines range presumptively creates a significant risk of increasing a defendant's sentence, and therefore that retroactive application of such a range usually violates the Ex Post Facto Clause.

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1 U.S. CONST. art. I, § 9, cl. 3 ("No Bill of Attainder or ex post facto Law shall be passed.").

2 Calder v. Bull, 3 U.S. (3 Dall.) 386, 390 (1798) (opinion of Chase, J.) (emphasis omitted).

3 *See* William P. Ferranti, Comment, *Revised Sentencing Guidelines and the Ex Post Facto Clause*, 70 U. CHI. L. REV. 1011, 1011 (2003). Although the Supreme Court never explicitly addressed the question for the U.S. Guidelines, it struck down the retroactive application of enhancements to Florida's guideline system in *Miller v. Florida*, 482 U.S. 423, 435–36 (1987).

4 543 U.S. 220, 245 (2005).

5 *Compare* United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006) (Posner, J.) ("[T]he ex post facto clause should apply only to laws and regulations that bind rather than advise . . . ."), *with* United States v. Lewis, 606 F.3d 193, 199 (4th Cir. 2010) ("[T]he retroactive application of severity-enhancing Guidelines amendments contravenes the Ex Post Facto Clause.").

6 *Compare* Daniel M. Levy, Note, *Defending* Demaree*: The Ex Post Facto Clause's Lack of Control over the Federal Sentencing Guidelines After* Booker, 77 FORDHAM L. REV. 2623 (2009), *with* 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 (2008).

7 621 F.3d 82 (2d Cir. 2010).

8 *See Lewis*, 606 F.3d at 203; United States v. Turner, 548 F.3d 1094, 1100 (D.C. Cir. 2008).

9 *Ortiz*, 621 F.3d at 87–88.

On March 30, 2006, police obtained a warrant to search the residence of Eric Ortiz, a convicted felon.[10] The police found and seized firearms, ammunition, drugs, and drug paraphernalia during that search.[11] They arrested Ortiz, who provided a written confession.[12]

The United States charged Ortiz with drug possession, possessing a firearm in furtherance of a drug crime, and being a felon in possession of a firearm.[13] After unsuccessfully moving to suppress his confession and the evidence found at his home,[14] Ortiz pled guilty to the felon-in-possession and drug charges.[15] The district court, using the Guidelines in effect at the time of sentencing, calculated his advisory sentencing range to be 168 to 210 months.[16] Importantly, this calculation included a four-level enhancement due to the obliteration of the serial number on one of the guns.[17] The Sentencing Guidelines in force at the time that Ortiz committed the crime, however, would have imposed only a two-level enhancement for the obliteration,[18] and thus the advisory sentencing range would have been 151 to 188 months.[19] Ortiz did not object to the district court's use of the amended Guidelines at the time of sentencing.[20]

After reviewing the statutory sentencing factors,[21] the district court sentenced Ortiz to 120 months of incarceration, 48 months lower than the bottom of the calculated Guidelines range.[22] Ortiz appealed, arguing that the district court mischaracterized one of his previous convictions as a crime of violence, that the obliterated serial number enhancement was inapplicable because he was unaware of the obliteration, and that even if the enhancement were applicable, adding four levels violated the Ex Post Facto Clause.[23]

The Second Circuit affirmed.[24] Writing for a unanimous panel, Judge Newman[25] summarily rejected Ortiz's first two claims, citing

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10 United States v. Ortiz, 499 F. Supp. 2d 224, 226 (E.D.N.Y. 2007).

11 *Id.* at 227.

12 *Id.* at 231.

13 *Id.* at 226.

14 *Id.*

15 *Ortiz*, 621 F.3d at 84.

16 *Id.*

17 *Id.*; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(4) (2006).

18 *Ortiz*, 621 F.3d at 84; *see also* U.S. SENTENCING GUIDELINES MANUAL § 2K2.1(b)(4) (2005). The Sentencing Commission increased the enhancement on November 1, 2006. *See* U.S. SENTENCING GUIDELINES SUPP. APP. C. amend. 691 (2007).

19 *Ortiz*, 621 F.3d at 85.

20 *Id.* at 84.

21 Transcript of Sentencing Hearing at 34–39, United States v. Ortiz, No. 06-CR-00532(DLI) (E.D.N.Y. 2007); *see also* 18 U.S.C. § 3553(a) (2006).

22 *Ortiz*, 621 F.3d at 84.

23 *Id.* at 84–85.

24 *Id.* at 83–84.

25 Judge Newman was joined by Judge Pooler and District Judge Rakoff, sitting by designation.

Second Circuit precedent.[26] Turning to his ex post facto claim, the court noted that it faced a question of first impression in the Second Circuit[27] and observed that other circuit courts had split on whether the Ex Post Facto Clause retains any applicability to advisory Sentencing Guidelines.[28]

The court adopted the D.C. Circuit's "substantial risk" standard, which it characterized as a "more nuanced approach to the issue."[29] This standard provides that an ex post facto violation occurred if "using the [amended] Guidelines created a substantial risk that [the defendant's] sentence was more severe."[30] The panel argued that this standard both accords with Supreme Court ex post facto jurisprudence[31] and recognizes the potential for ex post facto violations in an advisory regime without assuming that such violations exist in every case involving amended Guidelines.[32]

Turning to Ortiz, the panel held that this standard afforded him no relief.[33] Emphasizing the district court's "generous" forty-eight-month deviation from the amended Guidelines range,[34] the panel concluded that there was "no substantial risk, indeed, no risk at all" that the district court would have imposed a lower sentence if it had used the less severe Guidelines in force when the crime was committed.[35] The court therefore affirmed Ortiz's sentence.[36]

The Second Circuit thus adopted an approach to the Ex Post Facto Clause that turns in part on how far a sentencing judge deviates from

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[26] *Ortiz*, 621 F.3d at 85.

[27] *Id.* at 86 n.3. The Second Circuit had not explicitly revisited its precedent holding that retroactive application of severity-enhancing Guidelines violates the Ex Post Facto Clause, *see* United States v. Gonzalez, 281 F.3d 38, 45 (2d Cir. 2002), since the Supreme Court rendered the Guidelines advisory in *Booker*.

[28] *Ortiz*, 621 F.3d at 86. The panel contrasted the Seventh Circuit's conclusion that the clause does not apply due to the "unfettered" sentencing discretion of the district court with other circuits' decisions that the clause applies despite the Guidelines' advisory nature. *Id.* at 86 (quoting United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006)) (internal quotation mark omitted). The panel also discussed, without deciding, the appropriate standard of review. Because Ortiz failed to object to the use of the amended Guidelines in the court below, the government claimed at oral argument that the Second Circuit should review for plain error; however, because the government had not so specified in its brief, Ortiz argued that the government had forfeited its forfeiture argument. *Id.* at 85. While recognizing that Ortiz's argument would probably prevail, the panel nonetheless declined to rule definitively on that issue, holding instead that his ex post facto claim would fail under any standard of review. *Id.* at 86.

[29] *Id.* at 87.

[30] *Id.* (alteration in original) (quoting United States v. Turner, 548 F.3d 1094, 1100 (D.C. Cir. 2008)).

[31] *Id.* (citing Garner v. Jones, 529 U.S. 244, 255 (2000)).

[32] *Id.*

[33] *Id.*

[34] *Id.* at 88.

[35] *Id.*

[36] *Id.*

the Guidelines. Debate over the applicability of the Ex Post Facto Clause to the advisory Guidelines has largely focused on whether the *existence* of judicial discretion to sentence outside the calculated range ameliorates ex post facto concerns. *Ortiz* raises the separate but related question of whether the *exercise* of judicial discretion obviates these concerns. The Second Circuit answered in the affirmative. Although this approach initially seems appealing as a compromise between two absolutist positions — "invalidat[ing] every sentence imposed after a Guidelines range has been increased after the date of the offense" and "reject[ing] an *Ex Post Facto* challenge to any non-Guidelines sentence"[37] — it neither recognizes the gravitational pull of Guidelines calculations on judicial discretion, nor provides guidance to sentencing judges deciding which version of the Guidelines to apply.[38] The panel should have held that applying an increased Guidelines range presumptively violates the Ex Post Facto Clause, and consequently remanded for resentencing.

The court in *Ortiz* implicitly accepted a narrative that admits only two options for judicial sentencing: a sentencing judge either follows the Guidelines or completely discards them and chooses a sentence from the broad statutory range using an independent framework.[39] A more general form of this dichotomy lies at the heart of the debate over the applicability of the Ex Post Facto Clause to Guidelines amendments after *Booker*. Arguments that the Ex Post Facto Clause is no longer applicable emphasize both judges' discretion to disregard the Guidelines and their willingness to do so.[40] Those arguing the opposite note that appellate review favors within-Guidelines sentences[41] and cite empirical evidence that most sentences still follow the Guidelines.[42] The question is thus often framed as a debate over whether judges follow the advisory Guidelines.

But this framing fails to account for the influence that the initial Guidelines range exerts over the eventual sentence, even when the sen-

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[37] *Id.* at 87.

[38] *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (2010) ("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.").

[39] *Cf. Ortiz*, 621 F.3d at 88 (suggesting that the district court's non-Guidelines sentence was not affected by the Guidelines range).

[40] *See, e.g.*, United States v. Demaree, 459 F.3d 791, 795 (7th Cir. 2006); M. Jackson Jones, *The United States Sentencing Guidelines Are Not Law!: Establishing the Reasons "United States Sentencing Guidelines" and "Ex Post Facto Clause" Should Never Be Used in the Same Sentence*, 32 U. LA VERNE L. REV. 7, 43 (2010).

[41] *See, e.g.*, Christine M. Zeivel, *Ex-Post-*Booker*: Retroactive Application of Federal Sentencing Guidelines*, 83 CHI.-KENT L. REV. 395, 411 (2008).

[42] *See, e.g.*, United States v. Turner, 548 F.3d 1094, 1099 (D.C. Cir. 2008) ("[I]ndeed, the actual impact of *Booker* on sentencing has been minor."); Dillon, *supra* note 6, at 1090.

tence falls outside the range. Judges, like most people, are apt to "come up with or evaluate numbers by focusing on a reference point (an anchor) and then adjusting up or down from that anchor."[43] Courts and commentators have begun to recognize that "the 300-odd page Guideline Manual provides ready-made anchors."[44] The D.C. Circuit noted in *United States v. Turner*[45] that "[p]ractically speaking, applicable Sentencing Guidelines provide a starting point or 'anchor' for judges and are likely to influence the sentences judges impose."[46] Most district courts that have addressed the question candidly admit that they are heavily influenced — though not bound — by the Guidelines.[47] The language of appellate sentencing review, which uses terms such as "departures" and "deviations,"[48] reinforces the idea of starting with the Guidelines and then adjusting. The ideas behind such language are also reflected in substantive principles of appellate sentencing review that likely increase the Guidelines' anchoring effect.[49] For instance, appellate courts subject greater "deviations" to more exacting scrutiny than lesser ones[50] and afford more deference to deviations in cases "outside the 'heartland'"[51] of the Guidelines than to deviations based on policy disagreements that apply "even in a mine-run case."[52]

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[43] Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2515 (2004).

[44] Nancy Gertner, *What Yogi Berra Teaches About Post-*Booker *Sentencing*, 115 YALE L.J. POCKET PART 137, 138 (2006).

[45] 548 F.3d 1094 (D.C. Cir. 2008).

[46] *Id.* at 1099.

[47] *See, e.g.*, United States v. Sweeney, 715 F. Supp. 2d 565, 572 (S.D.N.Y. 2010) ("Even non-Guidelines sentences are 'anchored' by the Guidelines . . . ." (quoting *Turner*, 548 F.3d at 1099)); United States v. Kladek, 651 F. Supp. 2d 992, 996 (D. Minn. 2009) ("[T]he Guidelines continue to have a substantial — indeed, unavoidable — influence on sentencing decisions."). Interestingly, even in the case in which the Seventh Circuit held that amendments to advisory Guidelines never pose ex post facto concerns, the sentencing judge clearly stated that he would have imposed a lower sentence if he had used a lower Guidelines range. *See* United States v. Demaree, 459 F.3d 791, 792–93 (7th Cir. 2006).

[48] *See, e.g.*, Gall v. United States, 128 S. Ct. 586, 597 (2007) (instructing appellate judges to consider "the extent of the *deviation*" from the Guidelines range and "find[ing] it uncontroversial that a major *departure* should be supported by a more significant justification than a minor one" (emphases added)).

[49] *Cf.* Rita v. United States, 127 S. Ct. 2456, 2465, 2467 (2007) (recognizing that an appellate presumption that within-Guidelines sentences are substantively reasonable may "encourage sentencing judges to impose Guidelines sentences," *id.* at 2467, even though these judges do not "enjoy the benefit of a legal presumption that the Guidelines sentence should apply," *id.* at 2465).

[50] *Gall*, 128 S. Ct. at 597. The Supreme Court did, however, reject "a rigid mathematical formula that uses the percentage of a departure as the standard for determining the strength of the justifications required for a specific sentence." *Id.* at 595.

[51] Kimbrough v. United States, 128 S. Ct. 558, 575 (2007) (quoting *Rita*, 127 S. Ct. at 2465) (internal quotation mark omitted).

[52] *Id.*

Studies demonstrate that the anchoring effect is a general psychological phenomenon. Scholars have observed it in other contexts,[53] including plea bargaining,[54] punitive damages,[55] and non-Guidelines sentencing.[56] Moreover, recent functional magnetic resonance imaging (fMRI) experiments demonstrate another form of Guidelines influence: the part of the brain responsible for selecting a sentence from a wide range is separate from the part that handles structured and logical cognitive processes.[57] Sentencing judges are required to begin by calculating the Guidelines range,[58] a structured and logical process.[59] Since this mode of thinking uses a different part of the brain than do more intuitive determinations, judges are unlikely to shift back to completely indeterminate sentencing after calculating the Guidelines. Thus, not only does the calculated Guidelines range affect the eventual sentence, but the very process of calculating that range also affects judicial discretion by making "the decisionmaking process . . . more concrete and standardized."[60]

Applying this anchoring analysis to *Ortiz* shows that the panel erred by concluding that there was no risk that the defendant would have received a lower sentence under the unamended Guidelines. In *Turner*, the D.C. Circuit concluded that applying a Guidelines amendment created a substantial risk of increasing the defendant's sentence, since the sentence exactly matched the bottom of the Guidelines range and thus did not come "out of thin air."[61] But just because Ortiz's sentence fell significantly outside the range does not mean that it *did* come out of thin air. To be sure, the 120-month sentence formed a round ten years, which could be interpreted as evidence of a determination unaffected by the Guidelines. However, the anchoring effect suggests that this sentence was still likely a departure from the Guidelines, not an independent evaluation. Given the silent record,[62] the

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53 *See* Bibas, *supra* note 43, at 2515–19.

54 *Id.* at 2517–19.

55 *See* Cass R. Sunstein et al., *Predictably Incoherent Judgments*, 54 STAN. L. REV. 1153, 1167–70 (2002).

56 *See* Birte Englich & Thomas Mussweiler, *Sentencing Under Uncertainty: Anchoring Effects in the Courtroom*, 31 J. APPLIED SOC. PSYCHOL. 1535, 1537 (2001) (suggesting that "a demanded or suggested sentence may serve as an anchor to which the final sentence is assimilated").

57 *See* Rebecca Krauss, Comment, *Neuroscience and Institutional Choice in Federal Sentencing Law*, 120 YALE L.J. 367, 367–68 (2010) (citing Joshua W. Buckholtz et al., *The Neural Correlates of Third-Party Punishment*, 60 NEURON 930 (2008)).

58 *See* Gall v. United States, 128 S. Ct. 586, 596 (2007).

59 *See* Krauss, *supra* note 57, at 376 ("A sentencing judge who conducts intricate Guidelines calculations . . . appears to be making a scientific, deductive decision.").

60 *Id.* at 377; *see also id.* at 376–77.

61 United States v. Turner, 548 F.3d 1094, 1100 (D.C. Cir. 2008).

62 District court judges occasionally indicate when disputed points would not affect their sentences. *See, e.g.*, United States v. Wetherald, No. 09-11687, 2011 WL 1107208, at *6 (11th Cir. Mar. 28, 2011) (quoting the sentencing judge as stating that "if I was operating under the 2002

sentencing judge may well have begun with the Guidelines range and found sufficient mitigating factors to warrant a four-year reduction.[63] The judge must have had compelling reasons for the hefty departure, reasons that presumably would have applied even to a lower sentencing range, so there was indeed a substantial risk that Ortiz would have received a lower sentence under the unamended Guidelines.[64] The Second Circuit therefore erroneously applied the "substantial risk" test that it adopted.

Not only did the panel err in the application of its adopted test, but that test as formulated also poses significant administrability problems for district courts. To be sure, appellate standards at times diverge from those of district courts.[65] But the *Ortiz* court provided no alternative standard for district courts to apply, leaving them with either an unworkable test or no guidance at all.

District courts must use the Guidelines in effect at the time of sentencing unless doing so "would violate the *ex post facto* clause of the United States Constitution," in which case they should "use the Guidelines Manual in effect on the date that the offense of conviction was committed."[66] Whether applying amended Guidelines violates the Ex Post Facto Clause is therefore a threshold inquiry for calculating the Guidelines range, which is itself a threshold calculation for determining the eventual sentence. If district courts use the *Ortiz* test to determine which Guidelines to use, however, they must consider the variation between the Guidelines range and the eventual sentence before they choose which version of the Guidelines to use. The *Ortiz* test thus requires district courts to perform a bizarrely circular inquiry, in which decisions about which version of the Guidelines to use and what calculations to make would depend on whether they anticipate choosing to exercise their discretion later in the sentencing process.

Ex post facto doctrine does not require that district courts perform such mental contortions; it simply provides that retroactively applying

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guidelines versus the 2008 guidelines, I don't think it would have made a difference"). *Ortiz* was not such a case, however, because the lower Guidelines range was never considered by the district court. *See Ortiz*, 621 F.3d at 84.

[63] *See Ortiz*, 621 F.3d at 84.

[64] By creating a standard akin to "harmless error" review, *see, e.g.*, Chapman v. California, 386 U.S. 18, 23–24 (1967), the Second Circuit failed to consider that the anchoring effect means that errors in Guidelines calculations are rarely harmless. *Cf.* United States v. Sweeney, 715 F. Supp. 2d 565, 572 (S.D.N.Y. 2010) ("[A] court's decision to deviate does not belie the conclusion that retrospective application of Guidelines increases poses a 'significant risk of increased punishment.'" (quoting Garner v. Jones, 529 U.S. 244, 256 (2000))).

[65] *See, e.g.*, Rita v. United States, 127 S. Ct. 2456, 2459, 2467 (2007) (allowing appellate courts to presume that within-Guidelines sentences are substantively reasonable, *id.* at 2459, while forbidding sentencing courts from presuming that the Guidelines should apply, *id.* at 2465).

[66] U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(a), (b)(1) (2010); *accord* 18 U.S.C. § 3553(a)(4)(A)(ii) (2006).

changes that "create[] a significant risk of prolonging [a defendant's] incarceration" violate the clause.[67] The influence that the Guidelines exert over defendants' eventual sentences signifies that sentencing range increases almost always create a significant risk of a higher sentence. A presumption that retroactively applying a Guidelines amendment that increases the recommended sentencing range violates the Ex Post Facto Clause would both recognize the anchoring effect of the Guidelines and be administrable by district courts.[68] In fact, this analysis would be essentially equivalent to the ex post facto inquiry that courts conducted before *Booker*.[69]

In practice, district courts applying the *Ortiz* "substantial risk" test have begun to shift their inquiries in this direction, often citing the substantial influence of the Guidelines on sentencing outcomes.[70] But the Second Circuit and other appellate courts would do well to simplify the required analysis by adopting a formal presumption that retroactive use of amendments that increase the Guidelines sentencing range violates the Ex Post Facto Clause. Such a rule would provide district courts with an administrable framework and effectively enforce the constitutional guarantee by accounting for the anchoring effect.

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[67] *Garner*, 529 U.S. at 251.

[68] The First Circuit recently adopted such an approach, requiring district court judges to use the Guidelines in force at the time of the crime if the severity was subsequently enhanced in order to "avoid any hint of *ex post facto* increase in penalty." United States v. Rodriguez, 630 F.3d 39, 42 (1st Cir. 2010) (quoting United States v. Maldonado, 242 F.3d 1, 5 (1st Cir. 2001)) (internal quotation marks omitted). The panel explicitly declined, however, to rest on constitutional grounds, *id.*, a decision at odds with the requirement that a sentencing judge use the Guidelines in effect at the time of sentencing unless doing so violates the *constitutional* prohibition of ex post facto laws. *See* U.S. SENTENCING GUIDELINES MANUAL § 1B1.11(b)(1) (2010).

[69] *See* United States v. Schnell, 982 F.2d 216, 218 (7th Cir. 1992) (listing cases from other circuits holding that the Ex Post Facto Clause prohibits retroactive application of Guidelines range increases); United States v. Seacott, 15 F.3d 1380, 1386 (7th Cir. 1994) (joining other circuits in so holding). As with the pre-*Booker* analysis, not every amendment poses ex post facto concerns; procedural or clarifying changes in particular would not violate the clause. *See, e.g.*, United States v. Saucedo-Patino, 358 F.3d 790, 792–93 (11th Cir. 2004) (holding that retroactively applying a changed standard of review does not violate the Ex Post Facto Clause); United States v. Harris, 41 F.3d 1121, 1123–24 (7th Cir. 1994) (holding that retroactively applying a nonsubstantive Guidelines amendment does not violate the Ex Post Facto Clause).

[70] *See, e.g.*, United States v. Peters, No. 03-CR-211S, 2011 WL 280988, at *2 (W.D.N.Y. Jan. 26, 2011) (noting that the defendant "undoubtedly faces a substantial risk of a more severe sentence, because the advisory guideline range has increased"). District courts in other circuits have adopted a similar analysis. *See, e.g.*, United States v. Kladek, 651 F. Supp. 2d 992, 995 (D. Minn. 2009) ("There is no question that applying Guidelines that recommend a higher sentence creates a significant risk of prolonging a defendant's incarceration . . . ."); United States v. Doyle, 621 F. Supp. 2d 345, 351 (W.D. Va. 2009) ("A change in the Guidelines range is not a mere change in . . . procedure; rather, it is a substantive change likely to alter the quantum of punishment imposed.").