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Looking at the Law

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Ex Post Facto Problems: Changes in Sentencing Guidelines and Statutes and Policy Statements on Revocation of Supervision

Introduction

THE COMBINATION of Congress' now annual push to get tough on crime and the United States Sentencing Commission's yearly fine-tuning of the guidelines and policy statements frequently results in enhanced Federal criminal penalties. Some of these statutes and all of the sentencing guidelines and policy statements provide that they apply to offenders sentenced after a particular date regardless of when the offense occurred. Does this offend the ex post facto clause of the Constitution? A deceptively simple question. This article will explore whether guideline amendments have ex post facto consequences, whether these amendments must be considered in groups to determine if they enhance punishment overall, how to handle multiple count cases when offenses occurred under different guidelines, and the applicability of the ex post facto clause to statutes and policy statements controlling the revocation of supervision.

Background

The Constitution provides that "no Bill of Attainder[1] or ex post facto Law shall be passed," Art. I, § 9, Cl. 3. The first important, and still valued, exposition of this clause is in *Calder* v. *Bull*, 3 Dall. 386 (1798), in which Justice Chase gives the historical antecedent for the provision. Recounting that the parliament of Great Britain had declared acts to be treason that were not treason when committed, retrospectively changed rules of evidence and increased punishment, Justice Chase found these acts to be legislative judgments motivated by "ambition or personal resentment and vindictive malice. . . . To prevent such and similar acts of violence and injustice, I believe the federal and state legislatures were prohibited from passing any bill of attainder or any ex post facto law." Justice Chase then summarized what the Constitution prohibited:

> 1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different testimony, than the law required at the time of the commission of the offense, in order to convict the offender." *Id.* at 390.

Along with preventing vindictiveness and ensuring the separation of powers by prohibiting the legislature from making judicial determinations, the ex post facto clause provides individuals with the security that they can rely on the law until given notice that it has changed. *Weaver* v. *Graham*, 450 U.S. 24, 28 (1981).

The Supreme Court has developed a two-part test to determine whether a law violates the ex post facto clause: "it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it." *Id.* at 30 (footnote omitted); *Miller* v. *Florida*, 482 U.S. 423, 430 (1987). Additionally, to violate the prohibition on ex post facto laws, a provision must affect "substantial personal rights," not merely change "modes of procedure which do not affect matters of substance."[2] *Dobbert* v. *Florida*, 432 U.S. 282, 293 (1977).

In *Miller* v. *Florida*, the Supreme Court applied this test to a change in the Florida sentencing guidelines, which increased the guideline range for sexual offenses by more than 2 years from the range established at the time Miller committed his offense. Rejecting the state's argument that the offender was warned by a provision in the guidelines that they were subject to revision, the Court in a unanimous decision held that the notice of *potential* change is insufficient to avoid an ex post facto violation.

The increased guideline range was found to disadvantage Miller in spite of the fact that he might have received the same sentence if the judge had departed from the lower guidelines in effect at the time of the offense. "[O]ne is not

barred from challenging a change in the penal code on ex post facto grounds simply because the sentence he received under the new law was not more onerous than that which he could have received under the old." *Id.* at 432, quoting *Dobbert* v. *Florida,* 432 U.S. at 300. The change in the guidelines substantially disadvantaged the offender because to have departed upward from the lower guidelines, the sentencing judge would have been required to state a rationale for departure, which could be reviewed on appeal. Such a statement was unnecessary once the guidelines were increased, making the higher sentence presumptive. Finally, the Court rejected the argument that the guidelines were merely procedural, holding that they intentionally and substantially increased punishment.

While disadvantageous changes in criminal penalties cannot be made retroactive because of the ex post facto clause, favorable changes in penalties usually are not retroactive because of the general savings clause, 1 U.S.C. § 109, Repeal of Statutes as Affecting Existing Liabilities.[3]

Sentencing Guideline Amendments

Does the Ex Post Facto Clause Apply?

The Sentencing Reform Act of 1984 provides both that the guidelines are subject to periodic amendment (*see* 28 U.S.C. § 994(o) and (p)) and that the guidelines and policy statements in effect at the time of sentencing apply (*see* 18 U.S.C. § 3553(a)(4) and (5)).[4] Clearly, Congress did not believe that the ex post facto clause would apply to guideline changes.[5]

All circuits that have considered the issue—the District of Columbia, First, Fourth, Fifth, and Eighth—disagree with Congress' determination, finding under the reasoning of *Miller* v. *Florida* that guideline amendments that disadvantage offenders and apply to offenses committed prior to the effective date of the amendments violate the ex post facto clause. The leading case is *United States* v. *Suarez,* 911 F.2d 1016 (5th Cir. 1990), in which the court found an ex post facto violation when a change in the guidelines that went into effect after the offense eliminated the requirement that the government show scienter before a sentence for a drug offense could be enhanced for possession of a firearm:

> Finally, finding an ex post facto law in this case furthers one of the purposes behind the constitutional prohibition on such laws: "to prevent prosecution and punishment without fair warning." *Rubino [v. Lynaugh],* 845 F.2d [1266] at 1272 [(5th Cir. 1988)] (citing *Miller,* 482 U.S. at 429-30, 107 S. Ct. at 2450-51). Although the sentencing statute states that the guidelines to apply are those "in effect on the date the defendant is sentenced," 18 U.S.C. § 3553(a)(4) & (5), such constructive notice that the guidelines may change cannot override the constitutional prohibition against ex post facto laws.

Id. at 1022.

Accord, United States v. *Lam,* 924 F.2d 298 (D.C. Cir. 1991) (removal of scienter requirement of drug weight is ex post facto violation); *United States* v. *Stephenson,* 921 F.2d 438 (2d Cir. 1990) (guidelines in effect at time of initial sentencing should be used when base offense level would be increased by guideline in effect at time of resentencing); *United States* v. *Harotunian,* 920 F.2d 1040 (1st Cir. 1990) (increase in base offense level for theft is ex post facto violation); *United States* v. *Morrow,* 925 F.2d 779 (4th Cir. 1991) (amended guideline expanding official victim adjustment violates ex post facto clause); *United States* v. *Swanger,* 919 F.2d 94 (8th Cir. 1990) (government concedes that guideline increase is ex post facto violation). The case law is clear—when a guideline changes to the disadvantage of the offender, apply the guideline in effect at the time of the offense.

The case law is equally clear that guideline sentencing applies to continuing offenses that began before and concluded after enactment of the Sentencing Reform Act (sometimes called straddle offenses). *United States* v. *Thomas,* 895 F.2d 51, 57 (1st Cir. 1990); *United States* v. *Story,* 891 F.2d 988, 992-96 (2d Cir. 1989) (detailed discussion of the legislative history of the Sentencing Act of 1987); *United States* v. *Rosa,* 891 F.2d 1063, 1068-69 (3d Cir. 1989); *United States* v. *Sheffer,* 896 F.2d 842, 844-45 (4th Cir.), *cert. denied,* ____U.S.____, 111 S. Ct. 432 (1990); *United States* v. *White,* 869 F.2d 822, 826 (5th Cir.), *cert. denied,* 490 U.S. 1112 (1989); *United States* v. *Walton,* 908 F.2d 1289, 1299 (6th Cir.), *cert. denied,* ____U.S.____, 111 S. Ct. 532 (1990); *United States* v. *Fazio,* 914 F.2d 950, 959 (7th Cir. 1990); *United States* v. *Lee,* 886 F.2d 998, 1003 (8th Cir. 1989); *United States* v. *Gray,* 876 F.2d 1411, 1418 (9th Cir. 1989), *cert. denied,* ____U.S.____, 110 S. Ct. 2168 (1990); *United States* v. *Williams,* 897 F.2d 1034, 1040 (10th Cir. 1990). Similarly, the guidelines in effect at the conclusion of a continuing offense that straddles a guideline change should probably apply.

Effect of Favorable and Unfavorable Amendments

It is far from clear what guidelines to use when, at the time of sentencing, individual guidelines have been amended making them more favorable than individual guidelines in effect at the time of the offense, while other guidelines

have been amended making them more adverse than the guidelines in effect at the time of the offense. Does the defendant get the best of each individual guideline in effect at the time of the offense and each individual guideline in effect at the time of sentencing, or the best "guideline set" in effect at the time of the offense as compared to the "guideline set" in effect at the time of sentencing?

The Sentencing Commission opines in *Questions Most Frequently Asked About the Sentencing Guidelines*, Vol. IV, page 19 (December 1, 1990), without conceding that amendments to the guidelines ever implicate the ex post facto clause, that if *Miller* v. *Florida* does apply, then the sentencing range calculated with all the guidelines in effect at the time of sentencing should be compared with the sentencing range calculated using all the guidelines in effect at the time of the offense and the lower of the two ranges used. The support the Sentencing Commission gives for this approach is that "the focus of *Miller*, however, is not simply on the effect of a single amendment in isolation, but rather on the combined effect of all applicable amendments in a particular set of guidelines."

United States v. *Stephenson*, 921 F.2d at 441, agrees with the Commission's position that the most beneficial package of guidelines should be applied. The court rejected Stephenson's argument that upon resentencing he should get the advantage of favorable changes in the guidelines, which occurred since his original sentencing, but not be subject to unfavorable amendments. Finding that the Sentencing Commission intended the guidelines to be applied as a "cohesive and integrated whole," the court reasoned that:

> Applying various provisions taken from different versions of the Guidelines would upset the coherency and balance the Commission achieved in promulgating the Guidelines. Such an application would also contravene the express legislative objective of seeking uniformity in sentencing.

Id. See also *United States* v. *Lenfesty*, 923 F.2d 1293 (8th Cir.), *cert. denied*, ____U.S.____, 111 S.Ct. 1602 (1991) (held that when two related guidelines change, one favorable to defendant, the other unfavorable, and both guidelines crossreference the other, the defendant should be sentenced under the most favorable guideline set, rather than have the advantage of individual guideline changes.)

The court's reasoning in *Stephenson*, that to utilize the best of both sets of guidelines would upset the coherency and uniformity of the guidelines, echoes the congressional reasoning given for the mistaken conclusion that the ex post facto clause does not apply to guideline amendments.[6] The Sentencing Commission's rationale for its view that *Miller* v. *Florida* focuses on the combined effect of a set of guidelines is also not determinative. *Miller* does not explicitly or implicitly address the varying effects of favorable and unfavorable changes in amendments.

The issue of the ex post facto effects of favorable and unfavorable statutory changes is directly addressed in *Weaver* v. *Graham*, 450 U.S. at 34-36. In *Weaver*, the state of Florida argued that its retrospective application of a change in the credit given prisoners for good behavior (called gain-time in Florida) did not disadvantage the prisoner because other changes made at the same time increased the availability of gain-time deductions. The Court recognized that the changes made were a coordinated effort to create incentives for productive conduct but, after analyzing each provision separately, found that the advantageous changes did not compensate for the disadvantageous changes. The disadvantageous changes were found to violate the ex post facto clause, but the Court went on to hold that the defendant may still reap the benefits of the advantageous changes. "In remanding for this relief, we note that only the ex post facto portion of the new law is void as to petitioner, and therefore, any severable provisions which are not ex post facto may still be applied to him. *See* 2 C. Sands, *Sutherland on Statutory Construction* § 44.04 (4th ed. 1973)." *Weaver* v. *Graham*, at 36, n. 22.

The problem of giving an offender the best of both the new and the old provisions does not arise often, as most statutes, whether they have favorable or unfavorable consequences for offenders, apply to offenses committed after their effective date. This is true for adverse changes because of the ex post facto clause and favorable changes because of the general savings clause, 1 U.S.C. § 109.[7] However, section 3553(a)(4) and (5), in providing that the guidelines and policy statements to be applied are those in effect on the date of sentencing, does not follow the typical pattern. Moreover, both paragraphs contain language that supports the conclusion that Congress intended all the guidelines and policy statements (i.e., the "guideline set") in effect on the date of sentencing to be used.[8] To give meaning to the plain language of these sections, one would conclude that the guidelines version in effect on the date of sentencing should be used except if an individual guideline is more adverse. For adverse amendments, the guidelines in effect on the date of the offense should be used. As the Court found

in *Weaver* v. *Graham*, "only the ex post facto portion is void . . . and . . . any severable provisions which are not ex post facto may still be applied. . . ." *Id.* This approach seems especially mandated when there is an explicit statutory provision, like that in section 3553(a)(4) and (5), making changes retroactive so long as they do not offend the ex post facto clause.

If Congress wants to ensure that defendants do not get the best of the guidelines in effect at the time of the offense and at the time of sentencing, section 3553(a)(4) and (5) could be amended to provide that the guidelines in effect at the time of the offense should be used. This is exactly what Congress did through the enactment of the Sentencing Act of 1987, when it cured the ex post facto problems of the Sentencing Reform Act of 1984 by providing that the 1984 Act was to apply to all offenses committed after its effective date, rather than to all offenders convicted after its effective date.

Offenses Occurring at Different Times

While it seems complicated enough to determine what guidelines to use for a single criminal act, a further question arises of what guidelines to use for multiple criminal counts, where some of the counts occurred prior to a guideline amendment and others occurred after it. The Sentencing Commission provides the following advice in *Questions Most Frequently Asked About the Sentencing Guidelines*, Vol. IV, page 20:

> In such cases, the *Guidelines Manual* in effect at the time of the most recent count of conviction should be applied to the defendant's offense conduct in its entirety (whether or not the counts are aggregatable under U.S.S.G. § 3D1.2(d)). For example, in sentencing a defendant in January 1991 convicted of three counts of bank robbery, one of which occurred on November 1, 1990, and the other two of which occurred in October 1988, the November 1990 *Guideline Manual* should be used for all counts.

This approach seems to be based on the idea that all multiple counts, independent of the type of offenses involved or whether they are linked, should be treated as if they are part of a continuing offense, and, thus, for ex post facto purposes, the end of the continuing offense should control what guidelines apply.[9] This is a novel approach for which I could find no support in the case law.

The continuing offense doctrine is an exception, not the norm. The Supreme Court in *Toussie* v. *United States*, 397 U.S. 112 (1970), in considering whether the failure to register for the draft was a continuing offense for purposes of determining when the statute of limitations begins to run, held that the doctrine of continuing offense applied only in limited circumstances. The Court established a test for continuing offenses: An offense is not to be considered continuing "unless the explicit language of the substantive criminal statute compels such a conclusion, or the nature of the crime involved is such that Congress must assuredly have intended that it be treated as a continuing one." *Id.* at 115.

In *United States* v. *Gray*, 876 F.2d 1411, 1418, the Ninth Circuit applied this test and determined that failure to appear was a continuing offense, which straddled the effective date of the Sentencing Reform Act, requiring guideline sentencing. In *United States* v. *Kirkman*, 755 F. Supp. 304 (D. Idaho 1991), the court found that tax evasion from 1986, when tax returns were filed in 1988, was not a continuing offense, and, thus, the Sentencing Reform Act did not apply.

The Sentencing Commission's approach, to treat all multiple counts as continuing for purposes of determining the applicable guideline range, appears without foundation. The example the Commission provides concerning multiple counts of bank robbery is clearly not a continuing offense under the *Toussie* test—there is no explicit language in the statute, 18 U.S.C. § 2113, which compels the conclusion that bank robbery is a continuing offense and the nature of the offense is not one that Congress "assuredly" intended to treat as a continuing one.

As is done to determine statutory penalties, it is my advice that, in a multiple count case, the guidelines in effect at the time of each count be used. While this may be administratively difficult when many guidelines have changed over time (for instance a combination of changes to offense conduct, criminal history, and multiple count adjustments), administrative problems cannot override the constitutional principle embodied in the ex post facto clause. It is also difficult to determine statutory penalties given the multiple changes to the drug and fine laws since 1984, but that is not a basis for avoiding use of the law in effect at the time each count of a multi-count case is committed.

Ex Post Facto Problems Concerning Community Supervision

Effective Date of Statutory Changes

Section 7303(a) of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, amends 18 U.S.C. § 3563(a) by providing for a mandatory condition of probation that a probationer not possess controlled substances.[10] Section 7303(a) also amends 18 U.S.C. § 3565(a) to provide that a violation of

such a condition shall result in mandatory revocation of probation. Upon revocation, the court is to "sentence the defendant to not less than one-third of the original sentence." Similarly, section 7303(b) amends 18 U.S.C. § 3583 by providing for a mandatory condition of supervised release that a releasee not possess controlled substances, that a violation of this condition will result in mandatory revocation, and that the violating releasee serve at least one-third of the term of supervised release in prison. Section 7303(d) provides that these amendments apply with respect to persons whose probation or supervised release begins after December 31, 1988.[11]

Are these changes in the law retrospective in that they apply to offenses that occurred before their effective date, and do they disadvantage the offender—that is, do they violate the ex post facto clause? The effective date provision looks not to the date the offense occurred, but to a later time when supervision commenced. The argument can be made that the notice principle of the ex post facto clause is satisfied here because the releasee is notified prior to release of the mandatory condition and results of violating the condition. However, such an argument was rejected in *Beebe* v. *Phelps*, 650 F.2d 774 (5th Cir. 1981). After Beebe was convicted, but before he was released on parole, the manner in which good time was calculated was changed. The court held that the critical issue was not whether the prisoner had notice prior to being paroled that he may lose good time if he violated the conditions of release, but "that the forfeiture provision, which was passed after the commission of the armed robbery, alters his punishment for that offense to his disadvantage." *Id.* at 776.

Also rejected has been the argument that community release is voluntary, so that changes in the circumstances of that release that occur after the commission of the offense, but prior to commencement of supervision, are a voluntary acceptance of those conditions. In *Greenfield* v. *Scafati*, 277 F. Supp. 644 (D. Mass. 1967), *aff'd mem.*, 390 U.S. 713 (1968), a three-judge court considered an amendment in a good time statute affecting revocation of parole that occurred after the offender committed the crime, but before he was paroled. The government argued that the defendant had accepted the conditions voluntarily, but the court held that there was a consequential difference in providing "unqualified parole and parole cum onere, i.e., subject to [the changed good time]" *id.* at 646. The fact that the parolee could reject the parole did not alter the fact that the good time statute, as amended, retroactively burdened the parolee. Similarly, changes which occurred after the commission of the offense in the standards for making a reparole decision have been held to violate the ex post facto clause. *Shepard* v. *Taylor*, 556 F.2d 648 (2d Cir. 1977).

While none of these cases deals with the addition of mandatory release conditions or mandatory revocation requirements, such elements are arguably just as integral a part of the sentence as good time determinations and reparole criteria. Thus, the retrospective application of such conditions would be a violation of the ex post facto clause if they are more onerous than those provisions in effect at the time of the offense.

Prior to the 1988 amendments, judges could, as an exercise of discretion, impose conditions of release that prohibited drug possession and could revoke for violation of such conditions. The real change made in 1988 was to make these conditions and revocations mandatory. One could argue that a defendant cannot show that he would not have had a drug condition imposed, or revoked for its violation, prior to the 1988 statutory change, but such an argument has been foreclosed by the Supreme Court. In *Lindsey* v. *Washington*, 301 U.S. 397 (1937), the Court held that a retrospective change in the penalty for bank robbery from not more than 15 years to a mandatory term of 15 years violates the ex post facto clause. "It is true that petitioner might have been sentenced to 15 years under the old statute. But the ex post facto clause looks to the standard of punishment prescribed by a statute, rather than to the sentence actually imposed." *Id.* at 401. *See also Miller* v. *Florida*, 482 U.S. at 432. Like a mandatory imprisonment term, a mandatory supervision condition, mandatory revocation, and a mandatory imprisonment term upon revocation are adverse regardless of whether they discretionarily could have been imposed prior to the amendment to the statute.

Although there are no cases directly on point, application of the mandatory conditions and revocation provisions to offenses that occurred prior to the effective date of the changes probably violates the ex post facto clause.

Sentencing Commission Policy Statements on Revocation of Supervision

On November 1, 1990, the Sentencing Commission issued policy statements on probation and supervised release violations. *See* Sentencing Guidelines at 7B1.1 *et seq.* In an introduction to chapter seven, the Commission explained that it was issuing policy statements, rather than guide-

lines because:

> Unlike guidelines, policy statements are not subject to the May 1 statutory deadline for submission to Congress, and the Commission believed that it would benefit from the additional time to consider complex issues relating to revocation guidelines provided by the policy statement option.
>
> Moreover, the Commission anticipates that, because of its greater flexibility, the policy statement option will provide better opportunities for evaluation by the courts and the Commission. This flexibility is important, given that supervised release as a method of post-incarceration supervision and transformation of probation from a suspension of sentence to a sentence in itself represents recent changes in federal sentencing practices. After an adequate period of evaluation, the Commission intends to promulgate revocation guidelines.

The factors that the Commission points to as to why it issued policy statements rather than guidelines are the same reasons that policy statements probably are not laws for ex post facto purposes. As the Commission notes, policy statements, unlike guidelines, do not require submission to Congress. *See* 28 U.S.C. § 994(p). In *Miller* v. *Florida*, 482 U.S. at 435, the Court distinguished the Florida sentencing guidelines from Federal parole guidelines, which had been found not to have ex post facto consequences, in part because the Florida guidelines were laws enacted by the Florida legislature. The United States Sentencing Guidelines are not enacted in the same affirmative manner as the Florida guidelines, but are at least submitted to Congress. The fact that the policy statements are not even submitted to Congress is worth noting, although probably not determinative, in deciding whether they have ex post facto consequences.

It appeared more important to the Court in *Miller* that the Florida guidelines were not merely flexible guideposts than whether or not they were passed by the legislature. However, policy statements, unlike guidelines, could be characterized as "flexible guideposts."[12] While section 3553(a)(5) requires that a sentencing judge consider policy statements, section 3553(b) does not require that the judge actually impose a sentence based on the policy statements. Thus, they are not binding on the sentencing court and, not being binding, probably do not have the type of adverse effect necessary for ex post facto consequences.

Nevertheless, the manner in which courts have sometimes employed policy statements, as if they were mandatory, makes them appear de facto, if not de jure, guidelines and, thus, potentially subject to ex post facto consideration.[13] In issuing policy statements on revocation, the Sentencing Commission has tried to cut against this trend by pointing out that the policy statements were intentionally issued so that courts would have flexibility in experimenting and commenting on the Commission's revocation approach.

Once the Sentencing Commission does issue guidelines on revocation, as it says it intends to do, guideline use would be mandatory. The revocation guidelines, by limiting discretion, would be an adverse change and should only be mandatory for those offenses committed after the guidelines effective date. As discussed above, the fact that revocation of supervision is involved does not change the ex post facto analysis.

Conclusion

The failure by both Congress and the Sentencing Commission to recognize the ex post facto problems inherent in retroactive application of adverse criminal penalties has further complicated an already complicated area of the law. Effective dates of adverse criminal penalties, be they statutes or guideline amendments, are amenable to a clear and easy rule—they apply only to offenses committed on or after their effective date. If Congress and the Sentencing Commission want to simplify the process, they should make use of this rule.

NOTES

[1]The Supreme Court has defined bills of attainder as "legislative acts, no matter what their form, that apply either to named individuals or to easily ascertainable members of a group in such a way as to inflict punishment on them without a judicial trial." *United States* v. *Brown*, 381 U.S. 437, 448-449 (1965), quoting *United States* v. *Lovett*, 328 U.S. 303 (1946).

[2]A prime example of a statute that has been found to be procedural is the Bail Reform Act of 1984 (Pub. L. No. 98-473, Title II, Ch. II, Oct. 12, 1984). Even though the change brought about by the 1984 Act may work to the disadvantage of a defendant, it does not increase punishment or change the ingredients of the offense or the facts necessary to establish guilt. *United States* v. *Crabtree*, 754 F.2d 1200 (5th Cir.), *cert. denied*, 473 U.S. 905 (1985). *See also United States* v. *Affleck*, 765 F.2d 944, 948-950 (10th Cir. 1985); *United States* v. *Powell*, 761 F.2d 1227, 1234 (8th Cir. 1985); *United States* v. *Molt*, 758 F.2d 1198, 1200-01 (7th Cir. 1985), *cert. denied*, 475 U.S. 1081 (1986); and *United States* v. *Miller*, 753 F.2d 19, 21 (3d Cir. 1985). The changes in the bail laws made by the Mandatory Detention for Offenders Convicted of Serious Crimes Act (Pub. L. No. 101-647, Title IX, § 902, Nov. 29, 1990) are very similar to the changes in the 1984 Bail Act. Thus, the changes made by the 1990 Bail Act, affecting the availability of bail pending sentencing or pending appeal, are probably procedural and do not implicate the ex post facto clause.

[3]Section 109 of Title 1, United States Code, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability. The

expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

An example of a "favorable change" that, because of section 109, is not retroactive is the amendment to 18 U.S.C. § 3559(a) in the Sentencing Act of 1987 (Pub. L. 100-185, § 5, Dec. 11, 1987), which redefines a B felony as an offense punishable by 25 years or more where previously a B felony was defined as an offense punishable by 20 years or more. (C felonies were also redefined at the same time.) Thus, a bank robbery punishable by 20 years imprisonment committed prior to the amendment to 3559(a), but sentenced after the amendment, would still be classified as a B felony with the consequence (among others) that the offender is ineligible for probation pursuant to 18 U.S.C. § 3561(a)(1).

[4]"Looking at the Law," 51 *Federal Probation* 48 (Dec. 1987), addressed the issue of ex post facto problems with the effective date provisions of the Sentencing Reform Act of 1984 (Pub. L. No. 98-473, Title II, Ch. II, Oct. 12, 1984), which provided that the Act was to apply to offenders *convicted* after its effective date. The Sentencing Act of 1987 (Pub. L. 100-182, § 2, Dec. 7, 1987) amended the 1984 Act and eliminated the ex post facto problem by providing that the 1984 Act would apply only to offenses *committed* after the effective date of the 1984 Act, i.e., Nov. 1, 1987.

[5]*See* S. Rep. No. 98-225, 98th Cong., 1st Sess. 77-78 (Sept. 14, 1983) ("Use of guidelines and policy statements since revised would only create significant administrative difficulties. Moreover, it would be inconsistent with the philosophy embodied in this legislation, that the Sentencing Commission can and should continually revise its guidelines and policies to assure that they are the most sophisticated statements available and will most appropriately carry out the purposes of sentencing. . . . To impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.")

[6]*See* note 5.

[7]*See* note 3.

[8]Section 3553(a)(4) and (5) of title 18, United States Code, includes in the listing of factors the court should consider in imposing sentence the following:

(4) the kinds of sentence and the sentencing range established for the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines that are issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(1) and that are in effect on the date the defendant is sentenced;

(5) any pertinent policy statement issued by the Sentencing Commission pursuant to 28 U.S.C. § 994(a)(2) that is in effect on the date the defendant is sentenced.

[9]*See* text at discussion of "Does the Ex Post Facto Clause Apply?"

[10]"Looking at the Law," 54 *Federal Probation* 65, 71 (March 1990), addressed the question of what constitutes possession within the meaning of 18 U.S.C. §§ 3565(a) and 3583(g).

[11]This retroactive effective date provision in the Anti-Drug Abuse Act of 1988 is not an isolated occurrence. Other recent penalty changes present similar problems, e.g., 21 U.S.C. § 862, Denial of Federal Benefits to Drug Traffickers and Possessors (formerly 21 U.S.C. § 853a), takes effect for *convictions* occurring after September 1, 1989.

[12]*See* S. Rep. No. 98-255, 98th Cong., 1st Sess. 165-168 (policy statements are "general in nature").

[13]A good example of a policy statement being treated more like a mandatory guideline is the policy statement on substantial assistance to authorities, 5K1.1. This policy statement provides that a motion of the government is required before the court can depart for substantial assistance. The courts of appeals have heard objections to this component of the policy statement, but have held that the Commission has a rational basis for including this requirement and have upheld it. *United States* v. *Rexach*, 896 F.2d 710 (2d Cir.), *cert. denied*, ___U.S.___, 111 S. Ct. 433 (1990); *United States* v. *Bruno*, 897 F.2d 691 (3d Cir. 1990); *United States* v. *Francois*, 889 F.2d 1341 (4th Cir. 1989), *cert. denied*, ___U.S.___, 110 S. Ct. 1822 (1990); *United States* v. *White*, 869 F.2d 822 (5th Cir.), *cert. denied*, ___U.S.___, 109 S. Ct. 3172 (1989); *United States* v. *Levy*, 904 F.2d 1026 (6th Cir. 1990), *cert. denied*, ___U.S.___, 111 S. Ct. 974 (1991); *United States* v. *Lewis*, 896 F.2d 246 (7th Cir. 1990); *United States* v. *Justice*, 877 F.2d 664 (8th Cir.), *cert. denied*, ___U.S.___, 110 S. Ct. 375 (1989); *United States* v. *Ayarza*, 874 F.2d 647 (9th Cir. 1989), *cert. denied*, ___U.S.___, 110 S. Ct. 847 (1990); *United States* v. *Alamin*, 895 F.2d 1335 (11th Cir.). Although several of these cases note that 5K1.1 is a policy statement, only the Eighth Circuit in *United States* v. *Justice*, 877 F.2d at 668-9, questions (but does not actually decide) whether a motion of the government is required. Other courts have suggested that refusal by the government to file a motion that is arbitrary or in bad faith may be reviewable, *United States* v. *Rexach*, 896 F.2d at 714; *United States* v. *LaGuardia*, 902 F.2d 1010, 1017 n. 6 (1st Cir. 1990), but have not rejected the idea that such a motion can be required by way of a policy statement. In *United States* v. *Garcia*, 926 F.2d 125, 127-28 (2d Cir. 1991), the court allowed a departure without a government motion, but characterized the departure as one for activities facilitating the proper administration of justice, not for substantial assistance. The way the courts have required mandatory adherence to 5K1.1 makes the policy statement less of a "flexible guidepost" and more of the type of "high hurdle" the defendant must clear that the Court in *Miller* found to be amenable to the ex post facto clause.