Guidelines are advisory only, an increase in the applicable sentencing range is *ex post facto* if applied to a previously committed crime because of a significant risk of a lengthier sentence being imposed.[1938] But laws providing heavier penalties for new crimes thereafter committed by habitual criminals;[1939] "prescrib[ing] electrocution as the method of producing death instead of hanging, fix[ing] the place therefor within the penitentiary, and permitt[ing] the presence of more invited witnesses that had theretofore been allowed";[1940] or providing for close confinement of six to nine months in the penitentiary, in lieu of three to six months in jail prior to execution, and substituting the warden for the sheriff as hangman, have been sustained.[1941]

In *Dobbert v. Florida*,[1942] the Court may have formulated a new test for determining when the punishment provided by a criminal statute is *ex post facto*. The defendant murdered two of his children at a time when Florida law provided the death penalty upon conviction for certain takings of life. Subsequently, the Supreme Court held capital sentencing laws similar to Florida's unconstitutional, although convictions obtained under the statutes were not to be overturned,[1943] and the Florida Supreme Court voided its death penalty statutes on the authority of the High Court decision. The Florida legislature then enacted a new capital punishment law, which was sustained. Dobbert was convicted and sentenced to death under the new law, which had been enacted after the commission of his offenses. The Court rejected the *ex post facto* challenge to the sentence on the basis that whether or not the old statute was constitutional, "it clearly indicated Florida's view of the severity of murder and of the degree of punishment which the legislature wished to impose upon murderers. The statute was intended to provide maximum deterrence, and its existence on the statute books provided fair warning as to the degree of culpability which the State as-

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of covered offenders. Henceforth, "the focus of *ex post facto* inquiry is . . . whether any such change alters the definition of criminal conduct or increases the penalty by which a crime is punishable." Id. at 506 n.3. *Accord*, Garner v. Jones, 529 U.S. 244 (2000) (evidence insufficient to determine whether change in frequency of parole hearings significantly increases the likelihood of prolonging incarceration). *But see* Lynce v. Mathis, 519 U.S. 433 (1997) (cancellation of release credits already earned and used, resulting in reincarceration, violates the Clause).

[1938] Peugh v. United States, 569 U.S. ___, No. 12–62, slip op. (2013).

[1939] Gryger v. Burke, 334 U.S. 728 (1948); McDonald v. Massachusetts, 180 U.S. 311 (1901); Graham v. West Virginia, 224 U.S. 616 (1912).

[1940] Malloy v. South Carolina, 237 U.S. 180, 183 (1915).

[1941] Rooney v. North Dakota, 196 U.S. 319, 324 (1905).

[1942] 432 U.S. 282, 297–98 (1977).

[1943] Furman v. Georgia, 408 U.S. 238 (1972). The new law was sustained in Proffitt v. Florida, 428 U.S. 242 (1976).