UNITED STATES DISTRICT COURT
DISTRICT OF XXXXX

UNITED STATES OF AMERICA,	)	
	)	
V.	)	**NO. XX-XXX**
	)	
[CLIENT].	)	

SENTENCING MEMORANDUM

Defendant, [Client Name], by and through undersigned counsel, respectfully submits this sentencing memorandum in support of his request for a sentence consistent with the Fair Sentencing Act of 2010. The plain terms of the Fair Sentencing Act, expressly and by necessary implication, indicate that Congress intended its ameliorative changes to defendants not yet sentenced as of August 3, 2010, the date the Act took effect. In addition, applying the Fair Sentencing Act in this case avoids serious conflict with the equal protection component of the Due Process Clause of the Fifth Amendment and the Eighth Amendment's prohibition against cruel and unusual punishment.

Background

On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010, passed by Congress to "restore fairness to Federal cocaine sentencing." *See* Pub. L. No. 111-220, 124 Stat. 2372 (Preamble). The Act amends the Anti-Drug Abuse Act of 1986 ["1986 law"] by increasing the quantity thresholds that trigger the statutory mandatory minimum penalties for offenses involving cocaine base ("crack") under 21 U.S.C. §§ 841(b) and 960(b). The quantity triggering the five-year mandatory minimum was increased from 5 grams to 28 grams (approximately one ounce), and the quantity triggering the 10-year mandatory minimum

was increased from 50 grams to 280 grams (approximately ten ounces). Pub. L. No. 111-220, § 2. These new quantity thresholds had the effect of reducing the statutory powder-to-crack ratio from 100-to-1 to approximately 18-to-1. For those defendants whose offenses involve more than 50 grams but less than 280 grams of crack, the Act also had the effect of reducing the statutory maximum penalty from life to forty years. The Act does not include a saving provision indicating that Congress intended the old law to apply to pending cases.

In section 8 of the Act, Congress gave the Commission emergency authority, requiring action within no later than ninety days, to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." *Id.* § 8(2). On October 27, 2010, the Commission followed that directive by amending the Drug Quantity Table at USSG § 2D1.1 to reflect the 18-to-1 drug quantity ratio as now set forth in 21 U.S.C. §§ 841(b) and 960(b). Pursuant to the amended guideline, offenses involving at least 500 grams of powder cocaine or at least 28 grams of cocaine base are assigned a base offense level of 26, which corresponds to a guideline range of 63 to 78 months' imprisonment at Criminal History Category I. USSG § 2D1.1 (Nov. 1, 2010 Supp.) Offenses involving at least 5 kilograms of powder cocaine or at least 280 grams of cocaine base are assigned a base offense level of 32, which corresponds to a guideline range of 121 to 151 months' imprisonment at Criminal History Category I. *Id.* The Commission then extrapolated upward and downward from these triggering amounts so that each base offense level likewise reflects the 18-to-1 ratio. *See id.* The Commission expressly stated that these amendments were intended to "account for" the Fair Sentencing Act's new mandatory minimum sentences, and further that its approach is intended to "ensure[] that the relationship between the

statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionately reflected throughout the Drug Quantity Table." USSC, Notice of a temporary, emergency amendment to sentencing guidelines and commentary, 75 Fed. Reg. 66,188, 66,191 (Oct. 27, 2010); USSG, App. C, Amend. 748 (Supp. Nov. 1, 2010).

In a letter dated November 17, 2010, Senators Richard Durbin and Patrick Leahy, members of the Senate Judiciary Committee and lead sponsors of the Fair Sentencing Act, wrote to Attorney General Eric Holder urging him "to apply its modified mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment." *See* Attachment 1. They point out that Congress's goal in passing the Act "was to restore fairness to Federal cocaine sentencing as soon as possible," that "every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." *Id.* They explain that "this sense of urgency is why we required the U.S. Sentencing Commission to promulgate an emergency amendment," and that the amended guideline will apply to "all defendants who have not yet been sentenced." *Id.* They note the "absurd result," "inconsistent with the purpose of the Fair Sentencing Act," should defendants "continue to be sentenced under a law that Congress has determined is unfair for the next five years, until the statute of limitations runs on conduct prior to the enactment of the Fair Sentencing Act." *Id.* And they "wholeheartedly agree" with Judge Hornby's decision in *United States v. Douglas*, __ F. Supp. 2d __, 2010 WL 4260221 (D. Maine Oct. 27, 2010), in which he concluded that Congress intended the ameliorative changes to apply to a defendant not yet sentenced. *Id.* at 2.

[Client] will be sentenced on [DATE]. Applying the Fair Sentencing Act in this case means that [Client] faces a 60-month mandatory minimum sentence, rather than the 120-month mandatory minimum under the old law. Applying USSG § 2D1.1 as amended on November 1, 2010, as this Court is required to do, *see* 18 U.S.C. § 3553(a)(4)(A)(ii), [Client's] base offense level is [XX]. [Here, you might want to go through the other guideline calculations to show the final anticipated range and how it relates to the new mandatory minimum under the FSA.]

I. Congress intended the ameliorative changes in the Fair Sentencing Act to apply to defendants not yet sentenced.

Unlike other statutes, in which Congress has expressly stated that it intended for old law to apply to pending cases or to a particular category of cases, Congress included no such saving provision in the Fair Sentencing Act. To the contrary, Congress included language plainly indicating its intent to end immediately the discriminatory injustice wrought by the 100-to-1 ratio under the old law. As a result, the general saving statute at 1 U.S.C. § 109 does not preclude application of the Fair Sentencing Act to defendants not yet sentenced.

A. The "Normal Rule of Abatement"

At common law, the repeal of a criminal statute, or its re-enactment with increased or decreased penalties, would have abated all prosecutions not yet final. *Bradley v. United States*, 410 U.S. 605, 607-08 (1973). In 1801, Chief Justice Marshall expressed the rule of abatement as follows:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties, but in great national concerns . . . [the law] ought always to receive a construction conforming to its manifest import. . . . In such a case the court must decide according to existing

> laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside.

United States v. Schooner Peggy, 1 Cranch 103, 110 (1801). The "reason for the rule," as later explained by the Supreme Court in *United States v. Chambers*, is that "[p]rosecution for crimes is but an application or enforcement of the law, and if the prosecution continues, the law must continue to vivify it." 291 U.S. 217, 226 (1934). Thus, a conviction "on direct review at a time when the conduct in question is rendered no longer unlawful by statute, must abate." *See Hamm v. City of Rock Hill*, 379 U.S. 306, 312 (1964) (citing *Bell v. Maryland*, 378 U.S. 226 (1964)).

Significantly, this "normal abatement rule covering pending convictions" "does not depend on the imputation of a specific intention to Congress in any particular statute." *Id.* at 313, 315. Rather, the rule generally "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer furnish any legislative purpose, and would be unnecessarily vindictive." *Id.* This rule "is to be read wherever applicable as part of the background against which Congress acts," thus it is "irrelevant that Congress" may not have specifically alluded to the question whether pending prosecutions would be abated. *Id.* at 312-13.[1]

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[1] In *Hamm*, the Court held that, in the absence of a saving clause and in light of Congress's purpose in enacting the Civil Rights Act of 1964, the "normal rule" of abatement applied to strike down pending state convictions for trespass resulting from sit-ins before its passage. 379 U.S. at 310-11. The Court also declined to preserve convictions for transporting liquor following the passage of the Twenty-first Amendment, which abolished Prohibition era laws. *United States v. Chambers*, 291 U.S. 217 (1934).

B. The Saving Statute

To prevent such abatements that might arise from legislative inadvertence, Congress passed the federal saving statute in 1871, now codified at 1 U.S.C. § 109. *See Hamm*, 379 U.S. at 314-15.

Section 109 provides in relevant part:

> 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.

While the federal saving statute supplies a general rule of statutory construction, the Supreme Court explained over one hundred years ago that it "cannot justify a disregard of the will of Congress as manifested either expressly or *by necessary implication* in a subsequent enactment." *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (emphasis added). Thus, the rule does not apply if by "necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the [saving statute]." *Id.* at 465; *see also Hertz v. Woodman*, 218 U.S. 205, 217 (1910) (general saving statute is a "rule of construction . . . to be read and construed as part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress").

In its most recent analysis of the general saving clause, the Supreme Court again recognized that a later enactment can "expressly or by necessary implication" supersede the general saving clause by indicating Congress's intent to abate prosecutions under the old law. In *Marrero v. Warden Lewisburg Penitentiary* 417 U.S. 653, 655-57 (1974), the Supreme Court

considered, on habeas corpus review, whether certain drug offenders sentenced under a law that made them categorically ineligible for parole could benefit from the Comprehensive Drug Abuse Prevention and Control Act of 1970, a new statute abolishing the restriction on parole. The new statute contained a saving clause specifically preserving the harsher penalties for "prosecutions for any violation of law occurring prior to the effective date of [the Act]." *Id.* at 656-57 & n.4. Answering the narrow question whether sentencing "is part of the concept of 'prosecution,'" the Court held that the specific saving clause contained in the new statute preserved the parole restrictions for those sentenced under the old law. *Id.* at 657-58. It further held that ineligibility for parole is an element of "punishment" and thus a "penalty, forfeiture, or liability" under 1 U.S.C. § 109 surviving the repeal. Focusing as it did on whether the parole restriction of the old law constituted a "penalty" under § 109 (and given the dispositive saving clause included in the new law), the Court in *Marrero* did not address whether the new statute either "expressly or by necessary implication" released or extinguished a previous harsher penalty. It nevertheless reaffirmed the principle that a later enactment can be viewed as superseding an earlier one when it "can be said by fair implication or expressly to conflict" with it. *Marrero*, 417 U.S. at 659 n.10 (citing *Great Northern Ry.*).

More recently, Justice Scalia emphasized in his concurring opinion in *Lockhart v. United States*, 546 U.S. 142, 148 (2005), that the Court has consistently "made clear" that an earlier Congress cannot use an "express-statement provision" (such as the one contained in the general saving clause) to "nullify the unambiguous import of a subsequent statute." *Id.* (Scalia, J., concurring) (citing *Great Northern Ry.*, 208 U.S. at 465). He reiterated that "[a] subsequent Congress . . . may exempt itself from such requirements by 'fair implication' – that is, *without* an

express statement." *Id.* (Scalia, J., concurring) (emphasis in original) (citing *Marrero*, 417 U.S. at 659-60 n.10; *Hertz v. Woodman*, 218 U.S. at 218)). As he put it, a subsequent Congress need not use any "magical password" to indicate its intent "[w]hen the plain import of a later statute directly conflicts with an earlier statute." *Id.*

C. The Fair Sentencing Act

Here, the structure and language of the Fair Sentencing Act indicate, either by its express terms or by "necessary implication," that Congress intended the Act's ameliorative changes to apply as soon as possible, and to all pending cases. Most obviously, Congress passed the Fair Sentencing Act to "restore fairness" to crack sentencing, addressing longstanding concerns regarding the racially disparate impact of the 100-to-1 ratio contained in the 1986 law, which turned out to be without evidentiary basis. In addition (and unlike the statute at issue in *Marrero*), the Fair Sentencing Act does not include a specific saving provision. To the contrary, Congress expressly granted the Sentencing Commission emergency authority to promulgate amendments "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act," and specifically directed that it "*shall* [] make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." *See* Pub. L. No. 111-220, § 8 (Aug. 3, 2010).

The Fair Sentencing Act is also different in this respect from another ameliorative statute passed by Congress, 18 U.S.C. § 3553(f), passed in 1994 and granting courts new authority to impose a sentence below the applicable mandatory minimum in certain cases. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 80001(a), 108 Stat. 1796.

There, Congress specified the category of cases to which the new law applied, stating that it would apply to "all sentences imposed on or after the 10th day beginning after the date of enactment of this Act." *Id.* § 80001(c). Notably, in drawing the line at the date of sentencing, Congress clearly meant that the new law would apply to defendants whose offense conduct occurred before the passage of the new law. *Cf. United States v. Flanagan*, 80 F.3d 143 (5th Cir. 1996) (new safety-valve statute, passed after defendant was initially sentenced, unquestionably applied at resentencing after remand). Not only does this provide evidence that Congress need not expressly say that it intends a new law to apply to defendants whose conduct occurred before passage of an act, but unlike the safety valve statute, the Fair Sentencing Act does not specify that it applies only to sentences imposed after a certain date. Instead, Congress emphasized here the need to "restore fairness" and for immediate action.

Perhaps most significant, these provisions are markedly different from those in H.R. 265, the House bill described as the "underpinnings" of S. 1789, the bill ultimately enacted as the Fair Sentencing Act of 2010. *See* 156 Cong. Rec. H6199, H6199-202 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee). Unlike S. 1789, H.R. 265 contained a saving provision specifically stating that "there shall be no retroactive application of any portion of this Act." *Id.* at H6202 (H.R. 265 sec. 11). In addition, H.R. 265 directed only that the Commission "in its discretion, *may* [] promulgate amendments" pursuant to its emergency authority, and only "*may* [] make such conforming amendments as the Commission determines necessary to achieve consistency with other guidelines and applicable law." *Id.* H6201 (H.R. 265 sec. 8) (emphasis

added).[2] And H.R. 265 was not to be effective for 180 days after the date of its enactment. In contrast, S. 1789 contained *no* saving clause, contained *mandatory* directives to the Sentencing Commission, and was to be effective on the date signed by the President.

Following Congress's mandate, the Commission achieved consistency with the Fair Sentencing Act when it amended § 2D1.1 so that effective November 1, 2010, "the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionately reflected throughout the Drug Quantity Table." 75 Fed. Reg. 66,188, 66,191 (Oct. 27, 2010); USSG, App. C, Amend. 748 (Supp. Nov. 1, 2010).

In addition to the provisions of the Fair Sentencing Act, Congress requires (and has required since 1984) that courts at every initial sentencing apply the guidelines that "are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(ii). Pursuant to this provision, and in conjunction with the emergency amendments Congress deemed necessary to "restore fairness" in sentencing crack offenders, Congress now *requires* courts to calculate the advisory guideline range by applying the amended guideline reflecting the new 18-to-1 ratio at every base offense level, including for those whose offense conduct occurred before August 3, 2010. It would makes no sense at all for Congress to require courts to apply the amended guideline to all defendants, resulting in advisory guideline ranges for all calibrated to the 18-to-1 ratio, while at the same time categorically preventing many of the least serious offenders from actually

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[2] *See also Unfairness in Federal Cocaine Sentencing: Is It Time To Crack the 100 To 1 Disparity?: Hearings on H.R. 1459, H.R. 1466, H.R. 265, H.R. 2178, and H.R. 18 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security*, 111th Cong., 1st Sess. 216, 220 (May 21, 2009).

benefiting from their lower advisory guideline range due to the trumping operation of the old mandatory minimums. Such an interpretation would fundamentally undermine Congress's goal of reducing penalties for the least serious offenders.[3]

As emphasized by Justice Scalia in 2005, Congress was not required to use any "magical passwords" to make its intent clear. Taken together, Congress's directive to the Commission in the Fair Sentencing Act to "achieve consistency" with applicable law and its directive to courts to apply the guidelines as amended in every case clearly demonstrate, either expressly or by "necessary implication," Congress's intent to "restore fairness" to all defendants not yet sentenced.

D. Court decisions

After engaging in a detailed analysis of these provisions, Judge Hornby of the District of Maine reached this very conclusion in *United States v. Douglas*, __ F. Supp. 2d __, 2010 WL 4260221 (D. Maine Oct. 27, 2010): "[B]ased upon the context of the Act, its title, its preamble,

[3]This point was emphasized by Professor Douglas Berman, professor of law at the Moritz College of Law at the Ohio State University and an expert in federal sentencing, in letters filed with the District Court for the Southern District of New York in *United States v. Santana*, No. 09-cr1022:

> it would be quite anomalous and inconsistent with the whole goal of the [Fair Sentencing Act] for those defendants subject to the guidelines (i.e., those defendants convicted of offenses involving the highest quantities of crack) to be the only ones to immediately benefit from Congress's revision of the triggering quantities for mandatory minimum sentences for crack offenses.

See Letter from Douglas A. Berman to Hon. Kenneth M. Karas, *United States v. Santana*, No. 09-cr-1022 (S.D.N.Y. Oct. 21, 2010) (Attachment 2); *see also* Letter from Douglas A. Berman to Hon. Kenneth M. Karas, *United States v. Santana*, No. 09-cr-1022 (S.D.N.Y. Nov. 30, 2010) (construing the Fair Sentencing Act in a manner that denies minor crack offenders its benefits "is inconsistent with the language and the context of the statute as a whole," "patently unsound[,] and illogical.") (Docket No. 339) (Attachment 3).

the emergency authority afforded to the Commission, and the Sentencing Reform Act of 1984, . . . Congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before enactment." *Id.* at *6. "If Congress's action here . . . does not satisfy the adverb 'expressly,' interpreting the Fair Sentencing Act to apply to all new sentences is certainly a 'fair implication,' and a 'necessary implication' of what Congress has done. Indeed, it is difficult to see anything as demonstrating a contrary implication." *Id.* at *5. In the end, he noted that he "would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair." *Id.* at *6 n.57.

A number of other district courts have followed suit. *See United States v. Johnson*, No. 6:08-cr-270 (M.D. Fla. Jan. 4, 2011) (Presnell, J.) (relying on Judge Hornby's "thorough and compelling opinion," as well as the letter to Eric Holder from the Act's sponsors endorsing the analysis in *Douglas*, and Professor Berman's letters); *United States v. English*, No. 3:10-cr-53 (S.D. Iowa Dec. 30, 2010) (Pratt, J.) ("[T]he Court is persuaded by Judge Hornby's well-reasoned opinion in *Douglas*); *United States v. Gillam*, No. 1:10-cr-181-2 (W.D. Mich. Dec. 3, 2010) (Neff, J.) (relying on Judge Hornby's analysis in *Douglas*, the letter to Eric Holder from the Act's sponsors, and a blog posting by Professor Berman); *United States v. Jaimespimentz*, No. 09-cr-488-3 (E.D. Pa. Nov. 24, 2010) (Baylson, J.) ("I find Judge Hornby's opinion to be persuasive."); *United States v. Angelo*, Crim. No. 09-202 RWZ (Oct. 27, 2010) (Zobel, J.) ("I fully concur with Judge Hornby's thorough and thoughtful opinion.").[4] **[If your circuit has**

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[4] *See also United States v. Cox*, No. 3:10-cr-85 (W.D. Wis. Jan. 5, 2011) (Conley, C.J.); *United States v. Jones*, No. 4:10 CR 233 (N.D. Ohio Jan. 3, 2011) (Dowd, J.); *United States v. Curl*, No. 09-cr-734-ODW (C.D. Cal. Dec. 22, 2010) (Wright, J.); *United States v. Whitfield*, No. 2:10-cr-0013-MPV (N.D. Miss. Dec. 21, 2010) (Mills, C.J.); *United States v. Holloway*, No. 3:04-cr-

already issued a summary ruling in a case involving a defendant who had already been sentenced when the FSA was passed, you might want to add a short section distinguishing that case right about here. For example: The question whether the Fair Sentencing Act applies to defendants not yet sentenced is a matter of first impression in this Court. The Sixth Circuit has not decided this issue. In *United States v. Carradine*, 621 F.3d 575 (6th Cir. 2010), the Sixth Circuit addressed whether a defendant who had already been sentenced at the time of the passage of the Fair Sentencing Act, and who was appealing his judgment of conviction and sentence, could benefit from Act's modifications of the drug quantity triggers. Without addressing the legislative history or intent of the Fair Sentencing Act, and without the benefit of full briefing,[5] the Court summarily held that "the new law at issue here . . . contains no express statement that it is retroactive nor can we infer any such express intent from its plain language." *Id.* at 580. Thus, *Carradine* addressed only whether Congress "expressly" indicated that the new law applies to still-pending prosecutions. Like every other court of appeals addressing the issue thus far,[6] the panel in *Carradine* did not even acknowledge that the Supreme Court has

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0090 (S.D.W.V. Dec. 20, 2010) (Chambers, J.); *United States v. Gutierrez*, 4:06-cr-40043 (D. Mass. Dec. 17, 2010) (Saylor, J.); *United States v. Johnson*, No. 3:10-cr-138 (E.D. Va. Dec. 7, 2010) (Payne, J.); *United States v. Spencer*, No. 09-cr-400 JW (N.D. Cal. Nov. 30, 2010) (Ware, J.); *United States v. Favors*, No. 1-cr-00384-LY-1 (W.D. Tex. Nov. 23, 2010) (Yeakel, J.); *United States v. Roscoe*, No. 1:10cr126 (W.D. Mich. Nov. 15, 2010) (Neff, J.); *United Sates v. Shelby*, No. 2:09-cr-00379-CJB (E.D. La. Nov. 10, 2010) (Barbier, J.); *United States v. Dixson*, No. 8:08-cr-00360-VMC (M.D. Fla. Aug. 24, 2010) (Covington, J.).

[5] The Court struck the majority of Carradine's supplemental briefing as exceeding allowable page limits. *See Carradine*, 621 F.3d at 580 n.1.

[6] *See United States v. Bell*, 624 F.3d 803 (7th Cir. 2010); *United States v. Brewer*, 624 F.3d 900 n.7 (8th Cir. 2010); *United States v. Brown*, No. 10-1791, 2010 WL 3958760 (8th Cir. Oct. 12, 2010); *United States v. Gomes*, 621 F.3d 1343 (11th Cir. 2010); *United States v. Glover*, No. 09-cr-1725, 2010 WL 4250060 (2d Cir. Oct. 27, 2010); *United States v. Reevey*, No. 10-1812, 2010

consistently and repeatedly made clear that, despite the literal terms of § 109 as enacted by Congress in 1871, a later Congress can exempt itself from its requirements "*without* an express statement" "[w]hen the plain import of a later statute directly conflicts with [it]." *See Lockhart v.* 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (emphasis in original). In any event, because the defendant in *Carradine* was seeking retroactive application of the Fair Sentencing Act in a case in which sentence had already been imposed, it is distinguishable from this case. Indeed, the district courts that have decided to apply the Fair Sentencing Act to defendants not yet sentenced] [These courts] recognize that, although the general saving clause at 1 U.S.C. § 109 has led a number of circuit courts to "refuse to apply the more lenient mandatory minimum sentences of the Fair Sentencing Act to criminal conduct that occurred before August 3, 2010,"[7] none of those cases involved a defendant who had not yet been sentenced. *See Douglas*, __ F. Supp. 2d at __, 2010 WL 4260221 at *3; *see also United States v. Gillam*, No. 1:10-cr-181-2 (W.D. Mich. Dec. 3, 2010) (Neff, J.) (relying on Judge Hornby's analysis in *Douglas*, though aware of *Carradine*); *United States v. Jones*, No. 4:10 CR 233 (N.D. Ohio Jan. 3, 2011) (Dowd, J.) (noting the sparseness of the panel's analysis in *Carradine* and "elect[ing] to follow the decisions of Judge Hornby and Judge Neff"). The Third Circuit recognized as much in *United*

WL 5078239 (3d Cir. Dec. 14, 2010); *United States v. Lewis*, __ F.3d __, No. 09-3329, 2010 WL 4262020, at *3 (10th Cir. Oct. 29, 2010).

[7] *See United States v. Bell*, 624 F.3d 803 (7th Cir. 2010); *United States v. Brewer*, 624 F.3d 900 n.7 (8th Cir. 2010); *United States v. Brown*, No. 10-1791, 2010 WL 3958760 (8th Cir. Oct. 12, 2010); *United States v. Gomes*, 621 F.3d 1343 (11th Cir. 2010); *United States v. Carradine*, 621 F.3d 575 (6th Cir. 2010); *United States v. Glover*, No. 09-cr-1725, 2010 WL 4250060 (2d Cir. Oct. 27, 2010); *United States v. Reevey*, No. 10-1812, 2010 WL 5078239 (3d Cir. Dec. 14, 2010); *United States v. Lewis*, __ F.3d __, No. 09-3329, 2010 WL 4262020, at *3 (10th Cir. Oct. 29, 2010).

States v. Reevey, No. 10-1812, 2010 WL 5078239 (3d Cir. Dec. 14, 2010), when it noted that the courts of appeals have thus far only addressed cases in which the defendant had already been sentenced, circumstances "easily distinguishable" from a case in which the defendant had not yet been sentenced. *Id.* at *4 and n.5 (leaving open the question whether the Fair Sentencing Act applies to defendants not yet sentenced).

E. Legislative history

The legislative history of the Fair Sentencing Act further supports the conclusion that Congress intended its ameliorative provisions to apply immediately and to all defendants sentenced after its effective date. Congress passed the Fair Sentencing Act, with virtually unanimous support, to remedy the racially discriminatory impact of the 100-to-1 drug quantity ratio established by the Anti-Drug Abuse Act of 1986, which set forth mandatory minimum terms of imprisonment for certain defendants that Congress deemed serious or major drug traffickers, *see* Pub. L. 99-570, 100 Stat. 3207, but turned out to have no evidentiary basis. To invoke the general saving statute to preserve the draconian, racially discriminatory provisions of the 1986 law would entirely frustrate the will of Congress and "set its legislative mind to naught." *Great Northern Ry.*, 208 U.S. at 465.

In a rare show of bipartisan unity, Republicans and Democrats alike expressed concern that the 1986 law treated similarly situated offenders differently, with black crack offenders receiving significantly harsher sentences than white offenders who ordinarily trafficked in cocaine powder. Senator Patrick Leahy, a lead sponsor of the Fair Sentencing Act, stated that

the 100-to-1 ratio "is wrong and unfair, and it has needlessly swelled our prisons, wasting precious Federal resources. These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under the law." 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010). Others expressed similar concerns. *See* 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. James E. Clyburn) (current law is "unjust and runs contrary to our fundamental principles of equal protection under the law"); 156 Cong. Rec. H6203 (daily ed. July 28, 2010) (statement of Rep. Steny Hoyer) ("The 100-to-1 disparity is counterproductive and unjust.").[8]

Members of Congress also recognized the total lack of evidentiary basis for the 100-to-1 ratio. Senator Durbin, quoting Vice President Biden, acknowledged that "the myths upon which we based the disparity have since been dispelled or altered." As described by Representative Daniel E. Lungren:

> The conclusion that there is a basis for treating crack and powder differently is in no way justified for the 100-to-1 sentencing ratio contained in the 1986 drug bill. We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it, but that's what we did, thinking we were doing the right thing at the time.
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> Certainly, one of the sad ironies of this entire episode is that a bill which was characterized by some as a response to the crack epidemic in African American communities has led to racial sentencing disparities which simply cannot be ignored in any reasoned discussion of this issue.

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[8] *See also, e.g.*, Rep. Robert C. (Bobby) Scott, July 28, 2010 Press Statement ("differences in penalties for crack and powder cocaine also have a disparate racial impact"); 155 Cong. Rec. S10592 (daily ed. Oct. 15, 2009) (statement of Sen. Patrick Leahy) ("the criminal justice system has unfair and biased cocaine penalties that undermine the Constitution's promise of equal treatment for all Americans"); 155 Cong. Rec. S10492 (daily ed. Oct 15, 2009) (statement of Sen. Jeff Sessions) ("current system is not fair" and "we are not able to defend the sentences that are required to be imposed under the law today").

156 Cong. Rec. H6202 (daily ed. July 28, 2010). Other members of Congress made similar comments on the unfounded assumptions underlying the 1986 law.[9]

Given the longstanding and widespread concerns about the 1986 law, members of Congress expressed an urgent and compelling need to remedy its unfairness. Senator Durbin urged that "[e]very day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." 156 Cong. Rec. S1681 (daily ed. March 17, 2010). Senator Leahy noted Attorney General Eric Holder's reminder that "the stakes are simply too high to let reform in this area wait any longer." *Id.* at S1683. Indeed, a "review of the entirety of the record" demonstrates that "Congress intended the amended sentencing provisions of the FSA to apply not only to those defendants who committed a crack offense after the enactment date, but also as soon as possible to cases currently pending, and especially to those cases which have not yet involved even an initial sentencing." Letter from Professor Douglas Berman to Hon. Kenneth M. Karas, at 2, *United States v. Santana*, No. 09-cr-1022 (S.D.N.Y. Oct. 21, 2010) (Attachment 2).

As the legislative history of the Fair Sentencing Act shows, Congress passed the Act after longstanding criticism of the harsher mandatory minimums. The function of a saving statute "is to express the legislative intention to preserve the designated expectancies, rights or obligations from immediate destruction or interference." Millard H. Ruud, *The Savings Clause – Some*

[9] *See also* 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009); 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Robert C. "Bobby" Scott) ("there is no justification for the 100-to-1 ratio"); 156 Cong. Rec. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) ("This disparity made no sense when it was initially enacted, and makes absolutely no sense today[.]"); 156 Cong. Rec. H6200 (daily ed. July 28, 2010) (Finding No. 9, H.R. 265) ("Most of the assumptions on which the current penalty structure was based have turned out to be unfounded.").

Problems in Construction and Drafting, 33 Tex. L. Rev. 285, 286 (1955). That function is not served when it would be unreasonable to expect that the unjust, racially disparate, scientifically unsound provisions of the 1986 law would remain intact following the provisions of the Act. *See Sutherland Statutes and Statutory Construction* § 41:4 ("fulfillment of the parties' reasonable expectations may require the statute's retroactive application").

The Department of Justice certainly has no legitimate interest in enforcing the arbitrary triggering quantities in the 1986 law. Assistant Attorney General Lanny Breuer made plain the Department's view that the 1986 law "is especially problematic because a growing number of citizens view it as fundamentally unfair. The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine." Statement of Lanny A. Breuer, Ass't Attorney General, Criminal Division, U.S. Dep't of Justice, *Restoring Fairness to Federal Sentencing: Addressing the Crack Powder Disparity*, at 10 (April 29, 2009).[10] And the administration maintained that position during the passage of the Fair Sentencing Act. 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010) (statement of Sen. Patrick Leahy) ("Attorney General Holder also reminded us that 'the stakes are simply too high to let reform in this area wait any longer.'").

Moreover, as set forth above, the lead sponsors of the Fair Sentencing Act have indicated they have no interest in the Department's enforcement of the old Act against defendants not yet sentenced, and have "urge[d]" Attorney General Eric Holder, "to apply its modified mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment." *See* Attachment 1. They emphasize that Congress's goal

in passing the Act "was to restore fairness to Federal cocaine sentencing as soon as possible," and that "every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." *Id.* They explain that "this sense of urgency is why we required the U.S. Sentencing Commission to promulgate an emergency amendment," and that the amended guideline will apply to "all defendants who have not yet been sentenced." *Id.* They note the "absurd result," "inconsistent with the purpose of the Fair Sentencing Act," should defendants "continue to be sentenced under a law that Congress has determined is unfair for the next five years, until the statute of limitations runs on conduct prior to the enactment of the Fair Sentencing Act." *Id.* And they "wholeheartedly agree" with the decision of Judge Hornby in *United States v. Douglas*, *supra*, in which he stated that he "would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair." *Id.* at 2.

II. The general saving statute does not otherwise preserve the crack quantities triggering mandatory minimums under the 1986 law.

Even if it could be said that Congress's intent is not entirely clear, further analysis of the saving statute shows that it does not preserve the 1986 law's unjust restrictions on the court's discretion.

A. The Fair Sentencing Act did not release or extinguish any "penalty."

Unlike the statute at issue in *Marrero*, the Fair Sentencing Act's modification of the amount of cocaine necessary to trigger the mandatory minimum did not plainly "release or extinguish" a "penalty, forfeiture, or liability" in the 1986 law, as those terms are used in 1 U.S.C. § 109. As a result, the general saving statute does not apply.

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[10] Available at http://judiciary.senate.gov/pdf/09-04-29BreuerTestimony.pdf.

In *Marrero*, 417 U.S. at 660, the Supreme Court held that the parole restrictions of the Narcotics Control Act of 1956 constituted a "penalty" and thus survived their repeal in the Comprehensive Drug Abuse Prevention and Control Act of 1970. The new parole provisions of the 1970 Act decreased the amount of time a prisoner might serve by changing the sentence from a fixed term of years to an indeterminate one. In discussing the question whether the general saving statute applied there, the *Marrero* Court focused on the meaning of the words "penalty, forfeiture, or liability," equating them with common law "punishment, in connection with crimes of the highest grade.'" *Id*. at 661 (quoting *United States v. Reisinger*, 128 U.S. 398, 402 (1888)). Given the penal nature of the change in law, the Court held that the general saving statute applied and preserved the parole ineligibility provisions of the old law.

Here, the Fair Sentencing Act did not repeal any penalty contained in the statute. The Act merely modified the extent to which the amount of drugs involved in the offense cabins the court's sentencing discretion. *Harris v. United States,* 536 U.S. 545, 567 (2002) (sentencing factor that triggers mandatory minimum merely limits the court's discretion in selecting penalty within statutory permissible range). The mandatory minimum terms of imprisonment of the 1986 law and the Fair Sentencing Act remain at five and ten years, as do the statutory maximum terms of forty years and life imprisonment. A defendant cannot get more punishment than before the Act and, with one exception that has little practical effect,[11] there is no "*promise* that he will

[11] By increasing the quantities necessary to trigger the mandatory minimums, the Act lowered the statutory maximum for those defendants whose offense involved more than 50 grams of crack cocaine, but less than 280 grams. Those defendants are now subject to a statutory maximum penalty of forty years rather than life imprisonment. Because the vast majority of crack cocaine defendants are sentenced within or below the guideline range, the lowering of the statutory maximum for these defendants has little practical effect. *See* USSC, *Sourcebook of*

receive "'anything less.'" *Harris*, 536 U.S. at 566 (quoting *Apprendi v. New Jersey,* 530 U.S. 466*,* 498 (2000) (Scalia, J., concurring)). The saving statute, therefore, does not bar application of the Fair Sentencing Act to pending cases.

B. The Fair Sentencing Act discarded a procedure, not a penalty.

The general saving statute "does not ordinarily preserve discarded remedies or procedures." *Marrero*, 417 U.S. at 661; *Bridges v. United States*, 346 U.S. 209, 227 n.25 (1953). The line between a right to enforce a liability or penalty, and a remedy or procedure, is contextual, not a bright line. *United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir. 1977) ("[C]ases will arise in which it may fairly be said that a statutory change both alters a penalty and modifies a procedure.").

As an example of a remedy or procedure that would not be preserved by the general saving statute, the Court in *Marrero* cited *United States v. Obermeier*, 186 F.2d 243, 253 (2d Cir. 1950). 417 U.S. at 661. In *Obermeier*, the Second Circuit held that the saving statute did not preserve the period of limitations for a prosecution after Congress had passed legislation reducing the statute of limitations from five to three years. According to *Obermeier,* a statute of limitations defines neither a substantive right nor liability within the meaning of the saving statute. Yet, there is no question that a statute of limitations governs the punishment that may be imposed upon an individual such that a legislature may not extend a statute of limitations for a

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Federal Sentencing Statistics 2009, Table 45 and Figure J (mean sentence for crack cocaine defendants was 114. 8 months; median sentence was 96 months).

criminal offense where the prosecution would otherwise be time-barred without violating the ex post facto clause. *Stogner v. California*, 539 U.S. 607, 613 (2003).

Other examples of remedies or procedures not preserved by the general savings statute, but that nevertheless altered the punishment that could be imposed, include an overhaul of juvenile justice procedure, *United States v. Mechem*, 509 F.2d 1193, 1196 (10th Cir. 1975), and changes in maritime law, which replaced criminal penalties with civil penalties. *Blue Sea Line*, 553 F.2d at 449. In both instances, new legislation either ameliorated or extinguished a penalty, but the courts nonetheless held the saving statute did not preserve the old penalties.

Here, the Fair Sentencing Act's change in the quantity of crack necessary to trigger a mandatory minimum worked a procedural change. In a related context, the Supreme Court has said "[a] rule is substantive rather than procedural if it alters the range of conduct or the class of person that the law punishes. In contrast, rules that regulate only *the manner of determining* the defendant's culpability are procedural." *Schriro v. Summerlin*, 542 U.S. 348, 353 (2004) (emphasis in original). So for example, the rule announced in *Ring v. Arizona*, 536 U.S. 584 (2002) – which requires that an aggravating factor in a death penalty case must be proven to a jury beyond a reasonable doubt – was a procedural rule. *Summerlin*, 542 U.S. at 354 (rejecting Ninth Circuit's view that *Ring* was a substantive rule because it modified the elements of the capital offense under Arizona law). It did not "alter the range of conduct Arizona law subjected to the death penalty." *Id.* "Instead, *Ring* altered the range of permissible methods for determining whether a defendant's conduct is punishable by death, requiring that a jury rather

than a judge find the essential facts bearing on punishment. Rules that allocate decision-making authority in this fashion are prototypical procedural rules." *Id.*[12]

In this case, the Fair Sentencing Act did not alter the range of conduct or the class of persons that the law punishes. Trafficking in crack cocaine is still a crime and no class of persons is excluded from punishment. *Cf., e.g.*, *Curtis v. United States*, 294 F.3d 841, 843 (7th Cir. 2002) (holding that the rule in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), is not retroactive because it addresses the "quantum of evidence required for a sentence, rather than with what primary conduct is unlawful"); *Sepulveda v. United States*, 330 F.3d 55, 62 (1st Cir. 2003).

Instead, the Act altered the *method* for determining the permissible punishment by changing the weight that a judge must place on a particular fact (drug quantity) for sentencing purposes. [**Use this only if it works in your circuit.** The First Circuit has consistently held threshold drug weight to be a "sentencing factor," not an element of the crime. *United States v. Goodine*, 326 F.3d 26 (1st Cir. 2003) ("We find that drug quantity in § 841(b) is a sentencing factor, not an element of separate crimes.").[13]] The Fair Sentencing Act modifies one aspect of

[12] Retroactivity for cases already final should not be confused with the question presented here: whether the general saving statute preserves the mandatory minimum quantity thresholds set forth in the 1986 law. Different rules apply depending on the finality of the judgment and whether the source of the change in law is judicial or legislative: on collateral review, procedural changes set forth in case law are not retroactive, *Teague v. Lane*, 489 U.S. 299 (1989); for cases not yet final, procedural changes set forth in legislation apply retrospectively because the general saving statute does not preserve them. *Marrero*, 417 U.S. at 661 (general saving statute "does not ordinarily preserve discarded remedies or procedures").

[13][*United States v. Wade*, 318 F.3d 698, 705 (6th Cir. 2003); *United States v. Clark*, 538 F.3d 803, 812 (7th Cir. 2008); *United States v. Serrano-Lopez*, 366 F.3d 628, 638 (8th Cir. 2004); *United States v. Jones*, 235 F.3d 1231, 1236 (10th Cir. 2000); *United States v. Duncan*, 400 F.3d 1297, 1308 (11th Cir. 2005).]

the judicial sentencing factor process, allowing broader discretion in applying 18 U.S.C. § 3553(a).

Cases addressing the retroactivity of *United States v. Booker*, 543 U.S. 220 (2005), in post-conviction proceedings under 28 U.S.C § 2255 provide further support for the Fair Sentencing Act as a procedural change. *Booker* dramatically changed federal sentencing by making the sentencing Guidelines, the heart of the Sentencing Reform Act, advisory, rather than mandatory. Yet, courts universally hold that *Booker* wrought a procedural change, not a substantive one, and thus was not applicable to cases that became final before it was decided.[14]

The Fair Sentencing Act makes an even more modest change in the law than *Booker*. It gives judges greater discretionary authority when imposing sentences on certain crack cocaine offenders by increasing the quantity of drugs triggering the mandatory minimum terms. The Fair Sentencing Act's change to threshold crack weights, just like *Booker*'s change of the guidelines from mandatory to advisory, is a procedural rather than substantive change in the law, and as a procedural change, the general saving statute does not apply.

III. Applying the Fair Sentencing Act in this case avoids serious constitutional questions.

This Court should construe the general saving statute and the Fair Sentencing Act in a way that avoids violating the Fifth Amendment guarantee of equal protection and the Eighth

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[14] *See, e.g.*, *In re Fashina*, 486 F.3d 1300, 1304 (D.C. Cir. 2007); *Cirilo-Munoz v. United States*, 404 F.3d 527, 542 (1st Cir. 2005); *Guzman v. United States*, 404 F.3d 139, 142 (2d Cir. 2005); *Lloyd v. United States*, 407 F.3d 608, 611-12 (3d Cir. 2005); *United States v. Morris*, 429 F.3d 65, 69 (4th Cir. 2005); *United States v. Gentry*, 432 F.3d 600, 603 (5th Cir. 2005); *Duncan v. United States*, 552 F.3d 442, 447 (6th Cir. 2009); *McReynolds v. United States*, 397 F.3d 479, 481 (7th Cir. 2005); *Never Misses a Shot v. United States*, 413 F.3d 781, 783 (8th Cir. 2005);

Amendment guarantee against cruel and unusual punishment. When a statute is susceptible to two constructions, one of which raises grave and doubtful constitutional questions, and the other, which avoids such questions, the court's duty is to adopt the latter. *Jones v. United States*, 526 U.S. 227, 239 (1999). The avoidance canon "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). It "is a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

A. Fifth Amendment

The general saving statute must be narrowly construed to avoid conflicting with the equal protection component of the Due Process Clause of the Fifth Amendment. When the Supreme Court announces new rules of substantive or procedural law, those rules apply to cases not yet final. *Griffith v. Kentucky*, 479 U.S. 314 (1987). In *Griffith*, the Supreme Court held that its earlier decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), applied to cases on direct review when the Court decided *Batson*. While relying in part on its own "norms of constitutional adjudication," the Court also recognized that the "selective application of new rules violates the principle of treating similarly situated defendants the same," 479 U.S. at 323, a principle that arises out of the guarantee of equal protection. *See Lawrence v. Texas*, 539 U.S. 558, 579 (2003) (O'Connor, J., concurring).

Griffith's rule applies to cases interpreting congressional statutes. *See Johnson v. United States,* 520 U.S. 461, 467 (1997) (defendant on direct appeal obtained benefit of *United States v.*

United States v. Cruz, 423 F.3d 1119, 1120 (9th Cir. 2005); *United States v. Bellamy*, 411 F.3d

Gaudin, 515 U.S. 506 (1995), which holds that materiality is an element of perjury that must be submitted to jury). The same equal protection principle behind the Supreme Court's decision in *Griffith* should apply here. Just as an ameliorative change in the judicial interpretation of a criminal statute must apply to cases on direct review, e.g., *Gaudin*, it must apply here to an ameliorative change to the drug quantities that trigger a mandatory minimum.

But even more important, to construe the Fair Sentencing Act not to apply to those who have not yet been sentenced (indeed, in any case not yet final) is to impute to Congress an intent to apply a racially discriminatory law without evidentiary basis. As discussed earlier, Congress enacted the Fair Sentencing Act to correct the racially disparate impact of the 100-to-1 drug quantity ratio. Indeed, members of Congress expressly noted that the old ratio was "contrary to our fundamental principles of equal protection under the law." *See, e.g.*, 156 Cong. Rec. H6196-01 (daily ed. July 28, 2010) (Statement of Rep. Clyburn); *see also supra* Part I.E. Here, [Client] has not yet been sentenced, so application of the law currently in effect is even more appropriate.

It is no answer that the disparate ratio of the 1986 law was previously upheld by the court of appeals against equal protection challenges. *See, e.g.*, [*United States v. Singleterry*, 29 F.3d 733, 741 (1st Cir. 1994); *United States v. Mathews*, 168 F.3d 1234, 1251 (11th Cir. 1991).] Even if legislation was not enacted for an impermissible purpose, if Congress later reaffirmed that legislation in the face of evidence that it had a disparate impact on a protected group or lacked rational basis, it may well violate the guarantee of equal protection. *See United States v. Then*, 56 F.3d 464, 468 (2d Cir. 1995) (Calebresi, J., concurring) (citing *Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979)). Under those circumstances, "such challenges would not be precluded

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1182, 1188 (10th Cir. 2005); *Varela v. United States*, 400 F.3d 864, 867 (11th Cir. 2005).

by prior holdings that Congress and the Sentencing Commission had not originally acted with discriminatory intent." *Id.*; *see also United States v. Irizarry*, 322 F. App'x 153, 155 (3d Cir. 2009) (recognizing authority for such challenges).

Here, Congress acted *purposefully* and *positively* to ameliorate the racially disparate impact of the unfounded 100-to-1 ratio in the 1986 law. Under these circumstances, if Congress at the same time intended the 100-to-1 ratio to still apply to those whose conduct occurred before the effective date of the Fair Sentencing Act but who have not yet been sentenced, then it has purposefully reaffirmed discriminatory legislation, in violation of the Fifth Amendment.

B. Eighth Amendment

Applying the Fair Sentencing Act to cases not yet final will also avoid a conflict with the Eighth Amendment.[15] The constitutional protection against cruel and unusual punishment requires that a sentence serve at least one of the purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation. In serving those purposes, the punishment should be "graduated and proportioned" to the offense. *Weems v. United States*, 217 U.S. 349, 367 (1910).

The Supreme Court has delineated two separate lines of inquiry under the Eighth Amendment. One focuses on the particular sentence imposed on the defendant and asks whether it is grossly disproportionate. The other uses "categorical rules to define Eighth Amendment standards." *Graham v. Florida*, __ U.S. __, 130 S. Ct. 2011, 2022 (2010). When a defendant challenges a "sentencing practice itself," "implicat[ing] a particular type of sentence as it applies to an entire class of offenders," a categorical analysis applies. *Id.* (holding that sentence of life

[15] The Eighth Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

without parole in a case involving a juvenile offender who did not commit homicide is cruel and usual).

Here, the categorical analysis applies because the defendant challenges the application of mandatory minimum sentences to those offenders who possess 5 grams or more but less than 280 grams of crack cocaine. These mandatory minimum terms may range from five years to life (for those defendants whose offense involved more than 50 grams of crack cocaine and who had two or more prior convictions for a felony drug offense. 21 U.S.C. § 841(b).

"The analysis begins with objective indicia of national consensus." *Graham*, 130 S. Ct. at 2023. The consensus in our society recognizes that the exceedingly harsh sentences for nonviolent crack cocaine offenders set forth in the 1986 law exceed that which is necessary to accomplish the goals of sentencing, and create arbitrary disparities. *Kimbrough v. United States*, 552 U.S. 85, 95-100 (2007) (criticizing crack-powder disparity); Eric L. Sevigny, *Excessive Uniformity in Federal Drug Sentencing*, 25 J. Quant. Criminology 155, 171 (2009) (describing results of empirical study showing that drug quantity "is not significantly correlated with role in the offense," and that this "lack of association" provides "fairly robust support of the claim of unwarranted or excessive uniformity in federal drug sentencing"). The U.S. Sentencing Commission repeatedly recommended that Congress repeal the 100-to-1 drug quantity ratio in favor of a ratio that would focus the penalties "more closely on serious and major traffickers as described generally in the legislative history of the 1986 Act." *See* USSC, *Cocaine and Federal Sentencing Policy* (2007) (maintaining its "consistently held position that the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act"). Recognizing the urgency of the problem, the Commission lowered

the guidelines for crack offenses, stating again that the 100-to-1 ratio "undermines various congressional objectives set forth in the Sentencing Reform Act and elsewhere." USSG, App. C, Amend. 706. Other states have abolished disproportionally high prison sentences for drug offenders. *See, e.g.*, Jeremy W. Peters, *Albany Reaches Deal to Replay 70's Drug Laws*, N.Y. Times, March 26, 2009, at A1; Associated Press, *Michigan to Drop Minimum Sentence Rules for Drug Crimes*, N.Y. Times, Dec. 26, 2002, at A26.

In addition to community consensus, a court conducting an Eighth Amendment categorical analysis "also considers whether the challenged sentencing practice serves legitimate penological goals." *Graham*, 130 S. Ct. at 2023. In doing so, it looks to the "culpability of the offenders at issue in light of their crimes and characteristics, along with the severity of the punishment in question." *Id.* at 2026. Here, offenders who committed their offenses before August 3, 2010 are not more culpable than those who committed their offenses after August 3, 2010. Indeed, the legislative history of the Fair Sentencing Act and events leading up to its passage shows that the 1986 law overstated the culpability of this category of crack offenders. *See, e.g.*, USSC, *Cocaine and Federal Sentencing Policy* 8-9 (2007) ("[1986] quantity-based penalties sweep too broadly and apply most often to lower level offenders;" "[1986] quantity-based penalties overstate the seriousness of most crack cocaine offenses and fail to provide adequate proportionality.").[16] Two administrations supported changes in the 100-to-1 ratio. *See* Janet Reno & Barry McCaffrey, *Letter to President Clinton: Crack and Powder Cocaine*

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[16]For over a decade, the Commission had urged Congress to reform the 1986 law. *See* USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (1995); USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (1997); USSC, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (2002); *see also Kimbrough v. United States*, 552 U.S. 85 (2007) (citing the Commission's 1995, 1997, and 2002 reports to Congress).

Sentencing Policy in the Federal Criminal Justice System, 10 Fed. Sent'g Rep. 192 (1998); Statement of Lanny Breuer, *supra.*

"With respect to retribution – the interest in seeing that the offender gets his 'just deserts' – the severity of the appropriate punishment necessarily depends on the culpability of the offenders." *Atkins v. Virginia*, 536 U.S. 304, 319 (2002). Congress has determined that the mandatory minimum sentencing provisions of the 1986 law were too severe and did not reflect the relative culpability of drug offenders. Congress's judgment about the culpability of drug offenses provides powerful evidence that society views offenders like the defendant as less deserving of mandatory minimum sentence than other offenders. The public also believes that mandatory minimum sentences are too harsh. *See* Peter H. Rossi & Richard A. Berk, *Public Opinion on Sentencing Federal Crimes* (1997) (public opinion survey conducted for the Sentencing Commission in 1997 found that the guidelines, which are linked to the mandatory minimum drug quantities, produced "much harsher" sentences in drug trafficking cases than survey respondents would have given). To sentence an individual to a lengthier period of incarceration based upon the mere fortuity of when he or she committed the offense would be mindless vengeance, imposed without regard to individual moral accountability.

Nor can continued application of the harsh and discriminatory 1986 law be justified as a matter of deterrence, incapacitation, or rehabilitation. *See Graham*, 130 S. Ct. at 2028; *Ewing v. California*, 538 U.S. 11, 25 (2003); *Kennedy v. Louisiana,* 128 S. Ct. 2641, 2649-50 (2008); *Roper v. Simmons*, 543 U.S. 551, 571-72 (2005). Application of the 1986 law "makes no 'measurable contribution' to the goal of deterrence." *Roper*, 543 U.S at 593. Given that a person who currently commits a cocaine trafficking offense will not be subject to the 1986 law, it

is fanciful to think that a now defunct law will deter anyone. Additionally, the 1986 law never proved to have any deterrent effect. USSC, *Cocaine and Federal Sentencing Policy* B-15 (2007) (statement of Dr. Bruce Johnson) ("nearly impossible to document any deterrent effect of the 100-to-1 drug quantity ratio because crack cocaine distributors rarely mention awareness of it or report changing business activities due to its existence"); *see also* Michael Tonry, *The Mostly Unintended Effects of Mandatory Penalties: Two Centuries of Consistent Findings*, 38 Crime & Just. 65, 100 (2009) ("insufficient credible evidence to conclude that mandatory penalties have significant deterrent effects"). Application of the 1986 law is not necessary to incapacitate a crack cocaine offender. The Fair Sentencing Act in this case sets a five-year minimum mandatory sentence. The Court retains discretion to sentence above the five-year level. As to rehabilitation, mandatory terms of imprisonment do not even purport to advance that purpose, and in reality, they impede it. *See* USSC, *Special Report to Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 6-7, 13-15 (1991). In short, a sentence based on the mandatory minimum provisions of the 1986 law is "a sentence lacking any legitimate penological justification" and "by its nature disproportionate to the offense." *Graham*, 130 S. Ct. at 2028.

Given these grave concerns about the Fifth and Eighth Amendment implications of applying the 1986 law to defendants whose offense occurred before August 3, 2010 and who have not yet been sentenced, this Court should decline to apply the general saving statute to preserve the drug quantities specified in the 1986 law.

Conclusion

[Client] should be sentenced under the provisions of 18 U.S.C. §841(b)(1)(B) *currently* in place, and as further authorized under 18 U.S.C. § 3553, meaning he faces a minimum mandatory sentence of five years.

United States Senate
COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

November 17, 2010

The Honorable Eric Holder
Attorney General
U.S. Department of Justice
950 Pennsylvania Avenue, NW
Washington, D.C. 20530

Dear Attorney General Holder:

Thank you for your leadership in urging Congress to pass the Fair Sentencing Act of 2010 (P.L. 111-220). As the lead sponsors of the Fair Sentencing Act, we write to urge you to apply its modified mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment.

The preamble of the Fair Sentencing Act states that its purpose is to "restore fairness to Federal cocaine sentencing." While the Fair Sentencing Act did not completely eliminate the sentencing disparity between crack and powder cocaine, as the Justice Department had advocated, it did significantly reduce the disparity. We believe this will decrease racial disparities and help restore confidence in the criminal justice system, especially in minority communities.

Our goal in passing the Fair Sentencing Act was to restore fairness to Federal cocaine sentencing as soon as possible. As Senator Durbin said when the Fair Sentencing Act passed the Senate: "We have talked about the need to address the crack-powder disparity for too long. Every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." You expressed a similar sentiment in testimony before the Senate Judiciary Committee, when you urged Congress to eliminate the crack-powder disparity: "The stakes are simply too high to let reform in this area wait any longer."

This sense of urgency is why we required the U.S. Sentencing Commission to promulgate an emergency amendment to the Sentencing Guidelines. The revised Guidelines took effect on November 1, 2010, and will apply to all defendants who have not yet been sentenced.

And this sense of urgency is why the Fair Sentencing Act's reduced crack penalties should apply to defendants whose conduct predates enactment of the legislation but who have not yet been sentenced. Otherwise, defendants will continue to be sentenced under a law that Congress has determined is unfair for the next five years, until the statute of limitations runs on conduct prior to the enactment of the Fair Sentencing Act. This absurd result is obviously inconsistent with the purpose of the Fair Sentencing Act.

As you know, Judge D. Brock Hornby, an appointee of President George H.W. Bush, recently held that the Fair Sentencing Act's reduced mandatory minimums apply to defendants who have not

yet been sentenced. In his opinion, Judge Hornby wrote, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs? … I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair." We wholeheartedly agree with Judge Hornby.

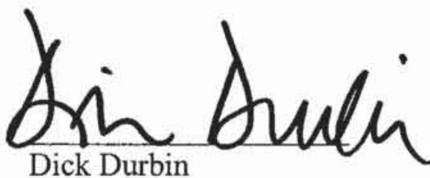
We were therefore disturbed to learn that the Justice Department apparently has taken the position that the Fair Sentencing Act should not apply to defendants who have not yet been sentenced if their conduct took place prior to the legislation's enactment. In his opinion, Judge Hornby states that the Assistant U.S. Attorney in the case said he understood this to be the position of the Department of Justice.

Regardless of the legal merits of this position, the Justice Department has the authority and responsibility to seek sentences consistent with the Fair Sentencing Act as a matter of prosecutorial discretion. This is consistent with your view that reforming the sentencing disparity "cannot wait any longer." It is also consistent with the Justice Department's mission statement, which states that the Department should "seek just punishment for those guilty of unlawful behavior" and "ensure fair and impartial administration of justice for all Americans." As you said in your May 19, 2010 Memorandum to All Federal Prosecutors on Department Policy on Charging and Sentencing, "The reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws." Indeed, it is the Justice Department's obligation not simply to prosecute defendants to the full extent of the law, but to seek justice. In this instance, justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair.

Therefore, we urge you to issue guidance to federal prosecutors instructing them to seek sentences consistent with the Fair Sentencing Act's reduced mandatory minimums for defendants who have not yet been sentenced, regardless of when their conduct took place. Additionally, please provide us with any guidance that you have already issued to federal prosecutors regarding implementation of the Fair Sentencing Act.

Thank you for considering our views. We look forward to your prompt response.

Sincerely,



Dick Durbin

Patrick J. Leahy

THE OHIO STATE UNIVERSITY
Moritz
College of Law

October 21, 2010

Honorable Kenneth M. Karas
United States District Judge
Southern District of New York
United States Courthouse
300 Quarropas Street, Room 533
White Plains, New York 10601-4150

Re: United States v. Elvis Santana, et al.,
09 Cr. 1022 (KMK)

Dear Judge Karas:

Counsel for some defendants in the above-captioned case have informed me that your Honor is currently considering motions to apply the terms of the Fair Sentencing Act of 2010 (hereafter "FSA"), which amended the penalty provisions of 21 U.S.C. § 841, during the upcoming sentencing of pending cases in which the offense behavior took place before the FSA became law. Taking on the role of a de facto amicus curae, I write to supplement some of the arguments set forth by counsel in this case.[1] Because I believe that principles of statutory construction support application of the provisions of FSA to all pending cases, I wanted to write to suggest a resolution to these motions that would enable this Court to avoid wading too deeply into the many complicated constitutional and policy issues that might arise if this Court were to refuse to apply the amended penalty provisions of 21 U.S.C. § 841 in a case of this nature.

As the motion papers already highlight, there are serious constitutional arguments and strong policy considerations supporting the application of the FSA to *all* criminal cases not yet final. But, even more fundamentally, basic principles of statutory interpretation as well as venerated canons of construction suggest the FSA is to be applied to any and all cases such as this one in which an *initial* sentencing has not yet taken place. As detailed below, I believe Congress revealed its intent for the FSA to apply to pending cases through key provisions of the

1 Alexander Eisemann, counsel for defendant William Anderson, has offered to provide this letter to the Court and to distribute it to the Government and all defense counsel by filing it with his ECF account.

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statute itself and through comments by key legislators in the Congressional Record. Moreover, even if this Court finds congressional intent to be unclear, both the rule of lenity and the constitutional doubt canon of statutory construction call for the FSA to be so applied.

I. THE STATUTORY TEXT AND RELATED COMMENTS INDICATE THAT CONGRESS INTENDED THE FAIR SENTENCING ACT OF 2010 TO APPLY TO PENDING CASES AS SOON AS POSSIBLE

The Supreme Court has explained that congressional intent to apply a statute to pending cases may be revealed by the explicit language of the statute itself or by studying the context of the statute as a whole. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997). The Supreme Court has also repeatedly stressed the broader legal "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd of Richmond*, 416 U.S. 696, 711 (1974).

In this setting, the structure, language and context of the FSA strongly suggest that Congress expected and intended for its new crack sentencing provisions to be applied to pending cases as soon as possible. The structure and language of the statute supports this reading in part because the FSA expressly directs that:

> The United States Sentencing Commission shall– (1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and (2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

This provision of the FSA reveals Congress's express goal of having the federal sentencing guidelines amended immediately in order to establish "consistency" between the guidelines and statutes ("applicable law") as soon as possible. The "consistency" sought by Congress obviously involves having the Commission revise downward the sentencing guideline provisions for crack offenses so that they incorporate immediately the same 18:1 quality ratio that is reflected in the new mandatory minimum quantity thresholds set forth in the FSA. And, this consistency has now been achieved through the emergency guideline amendments which were formally approved by the U.S. Sentencing Commission just last week and which will become effective November 1, 2010. *See* U.S. Sentencing Commission, News Release, *United States Sentencing Commission Promulgates Amendment to Implement Fair Sentencing Act of 2010* at 1 (Oct. 15, 2010), *available at* http://www.ussc.gov/PRESS/rel20101015.pdf ("Today

the United States Sentencing Commission voted to promulgate a temporary, emergency amendment to the federal sentencing guidelines consistent with the statutory changes to crack cocaine and other drug trafficking offenses made by the Fair Sentencing Act of 2010. The amendment will take effect on November 1, 2010.")

By requiring the U.S. Sentencing Commission to promulgate guideline amendments "as soon as practicable, and in any event not later than 90 days after the date of enactment of" the FSA, Congress revealed its apparent intent and expectation that the new crack sentencing provisions in the FSA be applied to pending cases as soon as possible. Indeed, now that the crack guidelines have been officially amended to reflect the FSA's new 18:1 ratio — and given the long-standard guideline-application default rule which mandates the application of the guidelines in effect at the time of sentencing, regardless of when the crime was committed, as long as this application does not violate the Ex Post Facto Clause — all defendants as of November 1 to be sentenced pursuant to the newly amended *guidelines*, even those who committed their offenses before the enactment of the FSA, will get the benefit of the new 18:1 ratio that is reflected in the new guidelines. Given this reality, together with the Congressional desire "to achieve consistency" between the relevant sentencing guidelines and statutes, it would be quite anomalous and inconsistent with the whole goal of the FSA for those defendants subject to the guidelines (i.e., those defendants convicted of offenses involving the highest quantities of crack) to be the only ones to immediately benefit from Congress's revision of the triggering quantities for mandatory minimum sentences for crack offenses.

Let me restate this point slightly differently: when the FSA was enacted, Congress was assuredly aware that the default rule of applying amended guidelines to pending cases would require the application of a new 18:1 guideline ratio without regard to when the crack statute was violated. Additionally, Congress demanded that crack guideline amendments be promulgated within ninety days of the FSA's enactment to promote "consistency" between the guidelines and the statute, which in turn signals its intent to apply the FSA to pending cases because the amended guidelines would be applied to pending cases. If the pre-FSA *statute* calibrated to a 100:1 ratio along with a *guideline* calibrated at an 18:1 ratio were applied to determine the sentence in a given crack case, this dichotomous application would undermine, not promote, the stated purpose of sentencing consistency and would, more fundamentally, fly in the face of Congress's obvious desire to ensure that the least serious crack offenders not always be subject to the most severe sentencing terms. In other words, these collective realities, taken together, reflect Congress' intent, either expressly or impliedly, to apply the FSA to pending cases as soon as possible: Congress's instruction to the U.S. Sentencing Commission to amend the guidelines on an emergency basis, the Commission's promulgation of new guidelines consistent with the 18:1 ratio calibrated in the FSA, the default rule of application of new guidelines to pending cases, the expressed desire "to achieve consistency" between the new guidelines and the FSA, and the fundamental goal of the FSA to ensure that the least serious crack offenders are not categorically subject to the most severe sentencing terms.

This interpretation of the language and operative structure of the FSA is further supported by its legislative context. Congress's avowed goal in promulgating and passing the new sentencing provisions of the FSA was clearly to correct past injustices and to ensure that various

qualitative aggravating offense factors like role in the offense and use of violence receive more consideration and that the single quantitative factor of drug weight be given relatively less emphasis. For instance, when the Senate passed the amendment, Senator Patrick Leahy stated that the FSA "reduces the disparities that leave some in jail for years while their more privileged counterparts go home after relatively brief sentences. Today, that compromise means we are one step closer to fixing this decades-old injustice." Congressional Record (111th Congress), S 1683. Indeed, a review of the entirety of the record, both from the Senate and House, shows that Congress: (1) recognized the problems in the (then) current law, (2) recognized the harmful effect of those currently imprisoned under such a problematic law, and (3) wanted to take steps to immediately address these problems. This legislative history further supports the notion that Congress intended the amended sentencing provisions of the FSA to apply not only to those defendants who committed a crack offense after the enactment date, but also as soon as possible to cases currently pending, and especially to those cases which have not yet involved even an initial sentencing. Therefore, this Court can and should find that the FSA applies to this pending case.

II. IF CONGRESSIONAL INTENT IS UNCLEAR, THE RULE OF LENITY AND THE CONSTITUTIONAL DOUBT CANON OF STATUTORY CONSTRUCTION CALL FOR THE FSA TO BE APPLIED TO PENDING CASES AS SOON AS POSSIBLE

As the Third Circuit has recently reiterated, the "rule of lenity provides that when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant." *United States v. Fleming*, 617 F.3d 252, 269 (3d Cir. 2010) (internal quotation omitted). And the Second Circuit, in applying the rule of lenity to determine the reach of recently reduced crack guidelines, has further explained that "the meaning of language is inherently contextual and the Supreme Court has always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." *United States v. McGee*, 553 F.3d 225, 229 (2d Cir. 2009) (internal quotation omitted).

As suggested in Part I *supra*, I firmly believe that the "language and structure, legislative history, and motivating policies" of the Fair Sentencing Act all call for its new crack sentencing provisions to be applied to pending cases as soon as possible. But, if a reasonable doubt persists on this score, this interpretive ambiguity should be resolved in favor of the defendant in accord with the rule of lenity. Indeed, as Justice Breyer has recently explained, sound statutory interpretative principles should "give the rule of lenity special force in the context of mandatory minimum provisions," because "an interpretation that errs on the side of exclusion (an interpretive error on the side of leniency) still permits the sentencing judge to impose a sentence" that will still serve all other sentencing goals set forth by Congress in other statutory provisions. *United States v. Dean*, 129 S. Ct. 1849, 1860-61 (2009). Critically, finding that the sentencing provisions of the FSA apply to this pending case will not *require* this Court to impose a lower or

unjust sentence, rather it will simply *permit* this Court to impose a fitting and just sentence that is "sufficient but not greater than necessary" under the term of 18 U.S.C. § 3553(a) without the rigid restrictions previously imposed by the now-amended sentencing statutes.

In addition, as the motion papers already filled in this case highlight, there are serious constitutional arguments — implicating both the Fifth Amendment guarantee of Equal Protection and the Eighth Amendment prohibition on cruel and unusual punishment — which would follow from a decision to sentence defendants based on a now-amended and thus defunct severe mandatory minimum sentencing term. This fact, in turn, further supports applying the Fair Sentencing Act to pending cases as soon as possible, even if congressional intent were thought unclear, in order to avoid serious constitutional questions.

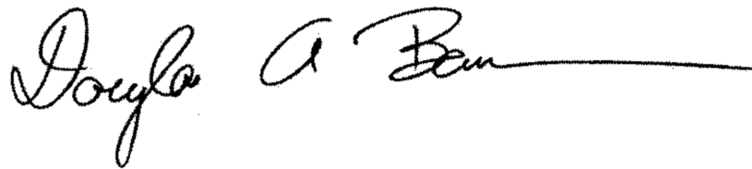
As the Supreme Court has explained, when a statute is susceptible to two constructions, one of which raises grave and doubtful constitutional questions, and the other which avoids such questions, the court's duty is to adopt the latter. *See Jones v. United States*, 526 U.S. 227, 239 (1999). The avoidance canon of statutory construction "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). It "is a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

Just as an ameliorative change in the judicial interpretation of a criminal statute is applied to all cases on direct review, it should as a matter of equal justice apply here to an ameliorative change to the drug quantities that trigger a mandatory minimum. As discussed earlier, Congress enacted the Fair Sentencing Act to correct the disparate impact of the 100-to-1 crack-cocaine powder ratio. Indeed, members of Congress expressly noted that the old ratio was "contrary to our fundamental principles of equal protection under the law." *See, e.g.* 156 Cong. Rec. H6196-01 (daily ed. July 28, 2010) (Statement of Rep. Clyburn). Application of the Fair Sentencing Act to cases not yet final will also avoid a potential conflict with the Eighth Amendment. The constitutional protection against cruel and unusual punishment requires that a sentence serve at least one of the purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation. In serving those purposes, the punishment should be "graduated and proportioned" to the offense. *Weems v. United States*, 217 U.S. 349, 367 (1910). Continued application of the disproportionately harsh pre-FSA law cannot easily be justified as a matter of retribution, deterrence, incapacitation, rehabilitation or proportionality, especially given that, for well over a decade, the U.S. Sentencing Commission had urged Congress to reform this law because it did not effectively comport with these purposes and failed to reflect the relative culpability of drug offenders. *See* U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995); U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997); U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002).

In sum and as explained above, I believe Congress revealed its intent for the FSA to apply to pending cases as soon as possible through key provisions of the statute itself and through comments by key legislators in the Congressional Record. Moreover, even if this Court

finds congressional intent to be unclear, both the rule of lenity and the constitutional doubt canon of statutory construction call for the FSA to be so applied. I thank the Court for considering this submission. If my appearance at oral argument would be of any assistance, I would be happy to attend.

Sincerely,



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November 30, 2010

The Honorable Kenneth M. Karas
United States District Judge
Southern District of New York
United States Courthouse
300 Quarropas Street, Room 533
White Plains, New York 10601-4150

Re: United States v. Elvis Santana, et al.,
09 Cr. 1022 (KMK)

Dear Judge Karas:

Prompted by the Government's filed opposition, I write in further support of the pending motions to apply the terms of the Fair Sentencing Act of 2010 (hereafter "FSA") during the upcoming sentencing of cases in which the offense behavior took place before the FSA became law. I write to highlight some undisputed legal realities that in part account for my belief that the only sensible reading of the FSA and congressional intent calls for applying the amended statutory penalty provisions of 21 U.S.C. § 841 in a case of this nature.

To begin, it is undisputed that all defendants still to be sentenced for any major drug offense involving large quantities of crack, including those who committed their major crack offenses before the enactment of the FSA, will get the benefit of the new crack/powder 18:1 quantity ratio that is reflected in the newly amended and now operative federal sentencing guidelines. This is so — and only so — because Congress in the FSA expressly ordered the U.S. Sentencing Commission to "promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act" and to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." Thus, it is also undisputed that if the defendants in this case were more serious offenders who had committed crimes involving larger quantities of crack (and whose guideline sentences would, therefore, be above the applicable mandatory minimums), they would benefit from the FSA's new reduced crack/powder sentencing ratio which Congress enacted into law and which Congress expressly directed the Sentencing Commission to immediately incorporate into the guidelines "as soon as practical" to serve to the FSA's stated goal in its preamble to "restore fairness to Federal cocaine sentencing."

In addition, it is undisputed that a chief reason Congress decided to reduce the crack/powder quantity ratio through the FSA — i.e., one key aspect of the Act's design to "restore fairness" to federal drug sentencing — was to ensure that minor crack offenders would

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not be punished more severely than the major cocaine dealers who should be the chief target of federal prosecutions. One of the chief architects of the FSA, Senator Jeff Sessions of Alabama, emphasized this point upon passage of the Act by the House of Representatives:

> The long-awaited passage of these bipartisan reforms [in the FSA] brings needed fairness to our sentencing laws while empowering law enforcement with the tools they need to target the worst offenders...
>
> Under this legislation, serious drug offenders are subject to more serious penalties, including tough new sentencing enhancements — helping to disrupt the drug trafficking operations that claim so many innocent victims. At the same time, the disparity between crack and powder cocaine sentencing has now been significantly reduced to better and more strategically target federal resources at those who distribute wholesale quantities of narcotics.

News Release, Office of Senator Jeff Session, *Congress Approves Landmark Drug Reform Compromise from Sessions and Judiciary Colleagues* (July 28, 2010), *at* http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=1a65bdfb-e4b4-53d1-f86c-e845c43ff542

Yet, while it is undisputed that the sentence reductions Congress adopted through the FSA are now benefitting not-yet-sentenced major crack offenders, and while it is undisputed that the FSA was designed to restore "fairness"in part by making sure "serious drug offenders are subject to the more serious penalties," the Government here contends that minor crack offenders — and only minor crack offender — must be denied the benefits of the FSA's new crack/powder 18:1 quantity ratio. This reading of the FSA is not only inconsistent with the language of the FSA and the context of the statute as a whole — which expressly seeks to greater sentencing "fairness" and "consistency" — it is also patently unsound and illogical. Indeed, because it is hard to envision a rational reason, let alone a good reason, to justify denying application of the FSA only in the sentencing of minor offenders, the Government's proposed construction of the FSA itself raises serious constitutional questions under any equal protection standard of constitutional scrutiny. *Cf. United States v. Douglas*, No. 09-4955 (2d Cir. Nov. 23, 2010) (rejected a proposed interpretation of a federal criminal statute because it "would be ignoring Congress' objective" in the statute and "would be an illogical result').

Critically, the Government seeks to obscure the important and sensible distinction between applying the FSA retrospectively to defendants *who had been already sentenced* as of its enactment date, and applying the FSA prospectively to defendants *not yet sentenced* as of its enactment date. It is reasonable and sensible to suggest that Congress concluded that offenders who were sentenced before the FSA became law should not be able to demand a return to court for a complete "redo" — with all the added expense and uncertainty of the resentencing process — based on the FSA's new sentencing provisions and its ordered revision of the federal sentencing guidelines. But it is neither reasonable nor sensible to suggest that Congress concluded that only minor crack offenders who have not yet been sentenced should be subject to harsher (now-amended) sentencing laws while all major crack offenders who have not yet been sentenced should get the benefits of the amended sentencing provisions of the FSA.

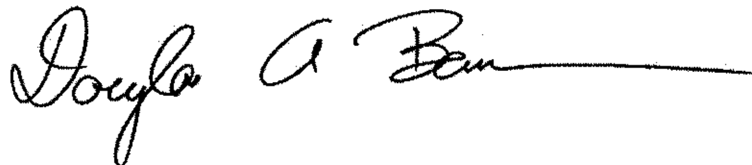
Stated slightly differently, it is reasonable to assume and conclude that concerns about finality and judicial economy may have kept Congress from wanting to enable *already sentenced* defendants from reopening and relitigating the sentences they received before the FSA became law. But it is not sensible to assume or conclude that concerns about finality and judicial economy may have kept Congress from wanting to enable *not-yet-sentenced* defendants from being initially sentenced pursuant to the FSA's new sentencing structure. In fact, judicial economy is better served by making the terms of the FSA's sentencing structure applicable to all not-yet-sentenced defendants: a simple, straight-forward rule applying the FSA to pending cases would prevent sentencing judges in many cases from having now to figure out (1) whether a defendant's offense conduct took place before or after the FSA enactment, and/or (2) whether and how a defendant's sentence should be governed by the new crack sentencing guidelines or the old crack sentencing statute. Indeed, though it is easy to understand how Congress's interest in sentencing fairness, consistency and judicial economy supports application of the FSA to all not-yet-sentenced defendants, it is hard to understand or even to identify any valid congressional interest that would be served by continuing to apply the older (and now amended) crack sentencing provisions to only not-yet-sentenced minor crack offenders.

As detailed in my initial letter, if there is any uncertainty as to whether of the FSA was intended to be applied to pending cases as soon as possible, this interpretive ambiguity should be resolved in favor of the defendant in accord with the rule of lenity. As the Second Circuit has made clear, the rule of lenity resolves statutory interpretation disputes in "those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." *United States v. McGee*, 553 F.3d 225, 229 (2d Cir. 2009) (internal quotation omitted).

As suggested above, I firmly believe that the "language and structure, legislative history, and motivating policies" of the FSA make clear that Congress wanted its revised sentencing provisions to apply to all pending cases as soon as possible. But, even if this Court is moved by the Government's claims that congressional intent here is unclear, the rule of lenity (as well as the constitutional doubt canon of statutory construction) call for the FSA to be so applied.

I thank the Court once again for considering my submissions.

Sincerely,



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