UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA,

Appellee,

v.

JOHNNIE BUSH,

Defendant-Appellant.

Docket No. 10-4156

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MEMORANDUM OF LAW OF APPELLEE UNITED STATES OF AMERICA IN SUPPORT OF MOTION TO REMAND FOR RESENTENCING

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PRELIMINARY STATEMENT

Defendant-Appellant Johnnie Bush has appealed his conviction and sentence of 120 months imprisonment on two counts of possession with intent to distribute more than 5 grams of cocaine base (crack cocaine), in violation of 21 U.S.C. § 841(a)(1) and subject to the penalty provisions of 21 U.S.C. §841(b)(1)(B). In his brief filed with the Court on March 22, 2011, Bush contends that the provisions of the Fair Sentencing Act of 2010 ("FSA"), P.L. 111-220, 124 Stat. 2372 (2010), should apply retroactively to his case, and asks this Court to remand for resentencing. The government agrees with Bush that this matter should be remanded to the district court for resentencing under the FSA because Bush was sentenced after the effective date of the Act.

PROCEDURAL BACKGROUND

A. Indictment and Plea

On January 7, 2009, a federal grand jury in the Northern District of New York returned a two-count indictment against Bush. Count One charged that Bush knowingly received and possessed a firearm that had been transported in interstate commerce, in violation of Title 18 U.S.C.

§§ 922(g) and 924(a)(2). Count Two charged that Bush knowingly and intentionally possessed with intent to distribute more than 5 grams of crack cocaine, in violation of 21 U.S.C. § 841(a)(1) and subject to the penalty provisions of 21 U.S.C. § 841(b)(1)(B). A.11-12.[1]

On November 3, 2009, Bush entered into a plea agreement with the government in which he agreed to plead guilty to Count Two of the Indictment. A. 14-24. The plea agreement contained an appeal waiver, in which Bush waived his right to appeal or collaterally attack any sentence of imprisonment of 108 months or less. A. 23.

B. Sentencing Proceedings

The United States Probation Department completed a Presentence Investigation Report (PSR) on February 1, 2010,[2] which determined that Bush distributed and possessed a total of 7.604 grams of crack cocaine. PSR ¶ 12. The PSR calculated Bush's total offense level as 23 and his criminal history category as III, which would result in a range of 57 to 71 months imprisonment. PSR ¶¶ 19, 20, 25-29, 61. At the time Bush

[1] References to "A_" are to pages in the appendix for Bush.

[2] A copy of the PSR and other confidential sentencing submissions by both parties have been filed under seal with the Clerk of Court.

committed his offense, the mandatory minimum term of imprisonment for trafficking more than 5 grams, but less than 50 grams, of crack cocaine was 10 years, pursuant to 21 U.S.C. § 841(b)(1)(B), because Bush had a prior drug felony conviction.

Sentencing was initially set for March 8, 2010, but was adjourned a number of times as a result of, among other things, Bush's request for a continuance in light of Congress's pending legislation to change the mandatory minimum sentences applicable to crack offenses. Docket # 33, A.7. Prior to sentencing, in a letter to the court dated March 9, 2010 and submitted to the court under seal, the government moved for a one-level downward departure pursuant to U.S.S.G. § 5K1.1 and 18 U.S.C. § 3553(e). Gov't Letter, at 1.

The FSA became law on August 3, 2010. The FSA increased the quantities of crack cocaine that require application of the mandatory minimum sentences under 21 U.S.C. § 841(b)(1)(A) and (B). Under the FSA, the quantity of crack cocaine that triggers the statutory minimum of five years and the statutory maximum of forty years was increased from 5 grams to 28 grams.

Bush submitted a sentencing memorandum under seal on August 10,

2010, in which he noted that "it does not appear that [the FSA] will be applied retroactively to conduct which occurred before its passage," but nevertheless urged the Court to take the FSA into consideration in sentencing Bush below the mandatory minimum. Def. Mem., at 4. Bush also argued, *inter alia*, that he should receive an adjustment in his sentence for jail time served before his arrest. *Id.* at 6-7. On September 22, 2010, Bush submitted a supplemental sentencing memorandum, arguing that the FSA should be applied to his sentence because his case was not final. A. 58-59. He contended that Congress's intention to apply the FSA to defendants who had not yet been sentenced could be implied from the legislative history of the Act, its remedial aims, and Congress's decision not to include a savings clause in the Act itself. A. 59-64.

At sentencing on September 30, 2010, the district court refused to apply the provisions of the FSA. A. 69. The court adopted the facts in the PSR, and sentenced Bush primarily to 84 months imprisonment. A. 70-71. The court further ordered that the sentence begin from the time of his initial arrest. A. 71. The district court convened a resentencing hearing on October 8, 2010, because it determined that granting Bush credit for the time he served prior to his arrest would result in an illegal sentence.

A. 74. Instead, the district court granted a larger departure under U.S.S.G. § 5K1.1, and sentenced Bush primarily to 62 months imprisonment. Bush filed a timely notice of appeal on October 14, 2010. A. 79, 85.

C. Appellate Proceedings

The sole claim raised by Bush on appeal is that the provisions of the FSA should apply to his case because he was sentenced after the effective date of the Act. On this basis, he asks this Court to remand for resentencing. On June 8, 2011, the United States submitted a motion to dismiss Bush's appeal because he entered into a plea agreement that contained a waiver of his appellate rights. In the alternative, the United States moved for summary affirmance on the ground that the FSA could not be applied to Bush's case because his offense conduct predated the FSA, even though he was sentenced after the Act went into effect. On June 21, 2011, counsel for defendant submitted a response to the government's motion, conceding that the appeal should be dismissed as a result of Bush's appeal waiver.

On July 15, 2011, the United States Department of Justice issued new guidance to all federal prosecutors concerning retroactive application

of the FSA. *See* Memorandum of Eric Holder dated July 15, 2011 (Dosanjh Aff., Exh. 6). Although the Department continues to believe that the FSA cannot be applied retroactively to defendants who were sentenced *before* the Act went into effect, the Department's new position is that the FSA should be applied to defendants who were sentenced *on or after* the effective date of the Act, even if their offense conduct predated the Act. In accordance with this guidance, the United States waived reliance on Bush's appeal waiver and withdrew its motion for summary affirmance. The government now moves to remand for resentencing under the FSA.

LEGAL BACKGROUND

A. Crack Cocaine Sentencing Prior to the Fair Sentencing Act

As part of the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 ("1986 Act"), Congress adopted a 100-to-1 ratio between the quantities of powder cocaine and crack cocaine necessary to trigger the same mandatory minimum sentences. So, for example, it required 5 kilograms of cocaine powder versus only 50 grams of crack cocaine to trigger the 10-year mandatory minimum sentence under 21 U.S.C. § 841(b)(1)(A)(ii). Congress adopted this 100-to-1 ratio because it believed

that crack cocaine was significantly more dangerous to society, in that it was highly potent, was increasingly prevalent, and led to more violence than did other drugs. *See Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007); *United States v. Stevens*, 19 F.3d 93, 97 (2d Cir. 1994) (explaining that 100-to-1 ratio reflected the "greater dangers of crack cocaine" as a result of its "greater accessibility and addictiveness"); *United States v. Moore*, 54 F.3d 92, 98 (2d Cir. 1995) ("A careful analysis of the legislative history and background regarding the 100 to 1 ratio demonstrates Congress enacted the sentencing ratio for a valid, stated purpose.").

In the ensuing years, commentators began to question Congress's factual assumptions about the dangers of crack cocaine. *See United States v. Santana*, 761 F. Supp. 2d 131, 135-136 (S.D.N.Y. 2011) (collecting authorities). For example, the Sentencing Commission subsequently reported that "significantly less trafficking-related violence or systemic violence . . . is associated with crack cocaine trafficking offenses than previously assumed." U.S. Sent. Comm'n, *Report to the Congress: Cocaine and Federal Sentencing Policy* 100 (May 2002) ("2002 Report"). The Commission also concluded that the 100-to-1 ratio was inconsistent with the 1986 Act's goal of targeting major drug traffickers, because "major

traffickers generally deal in powder cocaine, which is then converted into crack by street-level sellers." *Kimbrough*, 552 U.S. at 98 (describing the Commission's 1995 Report to Congress on crack cocaine).

Moreover, commentators observed that the 100-to-1 ratio "fosters disrespect for and lack of confidence in the criminal justice system" because of "the widely-held perception that the current penalty structure for federal cocaine offenses promotes unwarranted disparity based on race." 2002 Report, at 103. As the Commission explained, that conclusion reflects the fact that "[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black." *Id.* at 102; *see* 156 Cong. Rec. S1680-S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin) ("[T]he heavy sentencing we enacted years ago took its toll primarily in the African-American community.").

B. Passage of the Fair Sentencing Act of 2010

Congress responded to these concerns in the Fair Sentencing Act. The Act's preamble clearly and unambiguously states its purpose: "To restore fairness to Federal cocaine sentencing." FSA, 124 Stat. at 2372. The Act does so in several related ways. First, it amends 21 U.S.C. § 841 to increase the crack thresholds for mandatory minimum sentences.

Specifically, the Act increases the crack threshold for the five-year mandatory minimum sentence from 5 grams to 28 grams, and it increases the crack threshold for the ten-year mandatory minimum sentence from 50 grams to 280 grams. FSA § 2, 124 Stat. at 2372.[3] By increasing those thresholds, the Act changes the ratio between powder and crack threshold quantities to approximately 18:1. *Id.*; *see* 21 U.S.C. § 841(b) (2011).

The Act also directs the Sentencing Commission to issue "such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." FSA § 8, 124 Stat. at 2374. Those amendments also must account for certain aggravating and mitigating circumstances in certain drug cases. *Id.* The FSA orders the Commission to issue those amendments "as soon as practicable"—and in any event within 90 days—under an "emergency authority" that allows the Commission to amend the guidelines without delayed effectiveness for congressional review. FSA § 8, 124 Stat. at 2374 (referencing Section

[3] The 28-gram threshold was designed to target "wholesale and mid-level traffickers," who "often trafficked in 1-ounce quantities." 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren). One ounce is approximately 28 grams. *Id.*

21(a) of the Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266); *see* 28 U.S.C. § 994(p).

In response to that mandate, the Commission issued a temporary, emergency guideline amendment effective on November 1, 2010. U.S. Sent. Comm'n, *Notice of a Temporary, Emergency Amendment to Sentencing Guidelines and Commentary*, 75 Fed. Reg. 66,188 (Oct. 27, 2010).[4] The amendment increases the quantities of crack cocaine that trigger the base offense levels in the Drug Quantity Table. Those increased quantities now correspond to FSA's thresholds and reflect the Fair Sentencing Act's 18-to-1 ratio. *See id.* at 66,191.

C. Decisions Concerning Retroactive Application of the Fair Sentencing Act to Defendants Sentenced *Before* the Effective Date of the Act

Immediately following the enactment of the Fair Sentencing Act, the government took the view that the Act's new threshold quantities for

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[4] As noted above, this temporary amendment has been reissued as a permanent amendment, to be effective on November 1, 2011. On June 30, 2011, the Sentencing Commission voted unanimously to apply this amendment retroactively. The retroactivity of the amendment will become effective on November 1, 2011 – the same day the proposed permanent amendment would take effect – unless Congress acts to disapprove the amendment. *See* http://www.ussc.gov/Legislative_and_Public_Affairs/Newsroom/Press_Releases/20110630_Press_Release.pdf.

mandatory minimum penalties apply only to offense conduct that occurred on or after the date of its enactment. That view was based on the general savings statute, 1 U.S.C. § 109, which provides that the repeal of a criminal statute does not extinguish liability for previous violations of that statute, unless the repealing law expressly so states. The Fair Sentencing Act has no express statement extinguishing existing liability under the old threshold quantities. Accordingly, the government concluded that the prior crack thresholds would continue to apply for all offense conduct that occurred before the date of enactment.

In accordance with this view, the government argued against application of the FSA in cases where the defendant had been sentenced prior to enactment, or where the defendant's appeal was pending at the time the Act went into effect. This Court, and numerous other federal Courts of Appeal, agreed and held that the FSA would not be applied retroactively in those situations. For example, in *United States v. Diaz*, 627 F.3d 930, 931 (2d Cir. 2010) (per curiam), the Court held that the FSA could not be applied to the defendant's sentence because he was "convicted and sentenced before the FSA was enacted." *See also, e.g.*, *United States v. Baptist*, No. 09–50315, – F.3d –, 2011 WL 2150993 (9th Cir. June 3,

2011) (per curiam) (refusing to apply FSA to defendant sentenced prior to enactment of FSA); *United States v. Reevey*, 631 F.3d 110, 114 (3rd Cir. 2010);*United States v. Gomes*, 621 F.3d 1343, 1346 (11th Cir. 2010); *United States v. Glover*, 398 F. App'x 677, 680 (2d Cir. 2010) (summary order); *United States v. Carradine*, 621 F.3d 575, 580 (6th Cir. 2010).

Similarly, this Court has held that the FSA cannot be applied to a defendant who was sentenced before the Act, even though his appeal was pending at the time of enactment. *United States v. Acoff*, 634 F.3d 200, 202 (2d Cir. 2011) (per curiam); *United States v. Robinson*, No. 08-3386, 2011 WL 2619238, at *3 (2d Cir. July 5, 2011) (summary order); *see also United States v. Bolden*, No. 10–60587, 2011 WL 1758728, *1 (5th Cir. May 6, 2011) (unpublished) (refusing to apply FSA to defendant whose appeal was pending when FSA enacted)*; United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011)*, reh'g en banc denied*, – F.3d –, 2011 WL 2022959 (7th Cir. May 25, 2011) (same).

D. Decisions Concerning Application of the Fair Sentencing Act to Defendants Sentenced *On or After* the Effective Date of the Act

This Court has not expressly decided whether the FSA should be applied to defendants who were sentenced on or after the Act went into

effect. To date, the three Courts of Appeal that have addressed this issue have reached varying conclusions. Most recently, the Eleventh Circuit held that the FSA should be applied to defendants who were sentenced after enactment of the law. *United States v. Rojas*, __ F.3d __, 2011 WL 2623579 (11th Cir. July 6, 2011). In *Rojas*, the Eleventh Circuit distinguished its earlier decision in *Gomes* , where it held that the general savings statute precluded retroactive application "because the FSA took effect . . . after [the defendant] committed his crimes." *Gomes*, 621 F.3d at 1346. The *Rojas* court concluded that *Gomes* was not controlling because the defendant in that case had been convicted and sentenced prior to the Act. *Rojas*, 2011 WL 2623579, at *2. Instead, the court found that the purpose and structure of the FSA clearly indicated that "the will of Congress was for the FSA to halt unfair sentencing practices immediately." *Id*. at *5. Accordingly, the Court concluded that the general savings statute, 1 U.S.C. § 109, did not bar application of the FSA to sentencings conducted after the effective date of the Act. *Id*. The First Circuit reached a similar conclusion in *United States v. Douglas*, __ F.3d __, 2011 WL 2120163, *2-4 (1st Cir. May 31, 2011). There, the court found that the FSA could be applied to sentencings that occurred after

November 1, 2010, the date by which Congress directed the Sentencing Commission to adopt emergency amendments to the Guidelines that conformed to the new powder-to-crack ratio in the FSA. *See* FSA § 8, 124 Stat. at 2374.

By contrast, the Seventh Circuit has concluded that the FSA does not apply where the offense conduct occurred before the Act went into effect on August 3, 2010, even if the defendant was sentenced after that date. *United States v. Hernandez*, 2011 WL 2580453, *1 (7th Cir. June 30, 2011) (summary order). In so holding, the Court relied on its conclusion in *Fisher* that "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Fisher*, 635 F.3d at 340; *see also United States v. Griffon,* – F.3d. –, 2011 WL 2938267, *8 (7th Cir. July 22, 2011) ("Because the FSA was signed into law on August 3, 2010, long after Griffin's underlying criminal conduct, it has no bearing on his sentence.").

ARGUMENT

THE FSA SHOULD BE APPLIED IN THIS CASE BECAUSE BUSH WAS SENTENCED AFTER THE EFFECTIVE DATE OF THE ACT.

In light of the differing conclusions reached by Circuit courts, and

the serious impact on the criminal justice system of continuing to impose unfair penalties for crack offenses, the government undertook a full reconsideration of the temporal reach of the Fair Sentencing Act. We concluded that our former analysis concerning the application of the FSA was incomplete. As the Supreme Court has explained, the general savings statute carries only the force of a law, and its demand of an express statement must yield to the clear intent of a subsequent Congress. If a repealing law shows Congress's clear intent to extinguish existing liability under a repealed penalty scheme, that intent must prevail even absent an express statement to that effect. *Great N. Ry. v. United States*, 208 U.S. 452, 465 (1907).

The government has concluded that the best reading of Congress's intent, considered in light of the structure and purpose of the Act and applicable legal principles, is that Congress intended that the new penalties would apply to all federal sentencings that take place on or after the Act's effective date, *i.e.*, August 3, 2010. That reading is most consistent with the Act's stated purpose: "To restore fairness to Federal cocaine sentencing." It also ensures that the law applicable in postenactment sentencings will be consistent with the conforming

amendments that Congress directed the Sentencing Commission to implement on an emergency basis. Given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the 100-to-1 ratio as unprincipled and unjust, there is no compelling reason Congress would want judges to continue to impose new sentences that are not fair over the next five years, while the statute of limitations runs.

To be sure, this Court's decisions in *Diaz* and *Acoff* may be read to rely on the same principle stated by the Seventh Circuit in *Fischer*, namely, that in the absence of an express statement of retroactivity by Congress, the date of the offense rather than the date of sentencing determines whether the Fair Sentencing Act applies to a particular defendant. In *Acoff*, for example, the Court noted that "'because the FSA took effect . . . after [the defendant] committed his crimes 1 U.S.C. § 109 bars the Act from affecting his punishment.'" *Acoff*, 634 F.3d at 202 (quoting *Gomes*, 621 F.3d at 1346)).[5] Nevertheless, for the reasons that follow, the government now believes that the Court should follow the

[5] In a case where the defendant was sentenced before the FSA went into effect, the Court has cited *Acoff* for the proposition that pre-FSA conduct must be sentenced in accordance with pre-FSA law. *See United States v. Nelson*, No. 09-2208-cr, 2011 WL 1313537 n.2 (2d Cir. Apr. 7, 2011) (summary order).

reasoning of the Eleventh Circuit in *Rojas*, and conclude that, although this Circuit's precedents clearly bar application of the FSA to defendants convicted and sentenced for crack cocaine offenses prior to the effective date of the Act, the remedial purposes and structure of the FSA warrant applying its provisions in sentencings on or after that date.

A. The General Saving Statute's Rule Of Construction Cannot Trump The Clear Intent Of Congress In A Later Repealing Law.

Congress enacted its first general savings statute in 1871, in response to the common-law presumption that the repeal of a criminal statute abated all prosecutions that had not yet become final on appeal. *Warden v. Marrero*, 417 U.S. 653, 660 (1974). That common-law rule applied when a statute was repealed and reenacted with different penalties, and it applied regardless of whether the penalties were increased or decreased. *Bradley v. United States*, 410 U.S. 605, 607-608 (1973); *see, e.g.*, *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 95 (1870).

To avoid such abatements, which were often the product of legislative inadvertence, Congress enacted a general savings statute. It provides in pertinent 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." 1 U.S.C. § 109. The phrase "penalty, forfeiture, or liability incurred" includes penal liability incurred when a person violates a criminal law. *United States v. Reisinger*, 128 U.S. 398, 402-403 (1888) (holding that the savings statute allowed defendant's prosecution under an indictment returned after the repeal of the criminal law under which he was charged). And the savings statute applies not just to the repeal of criminal prohibitions, but also to the repeal of sentencing provisions. *See Marrero*, 417 U.S. at 661 (explaining that the savings statute covers "application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense"). Thus, under the express-statement rule of the savings statute, the Fair Sentencing Act's revised statutory penalties would not apply in future sentencing proceedings involving preenactment offense conduct.

But the savings statute does not control when it contradicts the clear intent of Congress in a later repealing law. "[I]ts provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." *Great N. Ry.*, 208 U.S. at 465; *see Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall,

C.J.) ("[O]ne legislature cannot abridge the powers of a succeeding legislature.").

That holding follows from the principle that, "if possible, . . . effect be given to all parts of a law." *Great N. Ry.*, 208 U.S. at 465. A later, repealing enactment is part of the same body of law as the general savings statute. Therefore, if application of the savings statute is inconsistent with Congress's clear intent in the subsequent law, the more specific provisions of the later enactment must control over the general terms of the savings statute. *Id.*; *Hertz v. Woodman*, 218 U.S. 205, 218 (1910) (stating that, if a subsequent act "necessarily, or by clear implication, conflicts with the general [savings statute], the latest expression of the legislative will must prevail"); *cf. Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) ("[A]n express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute."); *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 348 (1998) ("[I]t is a commonplace of statutory construction that the specific . . . language in [statutory text] governs the general terms of the savings clause.") (internal quotation marks omitted).

Accordingly, the analysis turns on much more than the presence or

absence of an express statement extinguishing incurred liability. Even without an express statement, Congress may demonstrate its intent to apply a revised penalty scheme to future sentencings for even pre-repeal conduct. And the Fair Sentencing Act demonstrates that intent.

B. The Fair Sentencing Act Creates A Necessary Implication That The Revised Statutory Penalties Supersede The Old Penalty Scheme In All Future Sentencings.

1. The purpose of the Act supports the government's reading.

The Fair Sentencing Act clearly and forcefully states its purpose: "To restore fairness to Federal cocaine sentencing." 124 Stat. at 2372. The Act embodies Congress's broad agreement that the 100-to-1 ratio between crack and powder thresholds was unsound and unjust, leading to disturbing racial disparities in incarceration rates. *See Restoring Fairness to Federal Sentencing: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary*, 111th Cong., 1st Sess. 1-3 (2009) ("*Restoring Fairness*"); 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Leahy) ("This policy is wrong and unfair, and it has needlessly swelled our prisons, wasting precious Federal resources. Even more disturbingly, this policy has had a significantly disparate impact on

racial and ethnic minorities."). Senator Sessions crisply summarized that problem: "I definitely believe that the current system is not fair and that we are not able to defend the sentences that are required to be imposed under the law today." 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009); *see also, e.g.*, 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin) ("There is a bipartisan consensus that current cocaine sentencing laws are unjust.").

Given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much-criticized 100-to-1 ratio, there is no compelling reason Congress would have wanted judges "to *continue* to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs." *United States v. Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *aff'd*, *United States v. Douglas*, __ F.3d __, 2011 WL 2120163 (1st Cir. May 31, 2011); *see* 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Scott) (stating that the Fair Sentencing Act is designed to ensure that the defendant "is sentenced" for what he or she did, not the form of cocaine involved); 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin) ("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.").

By contrast, Congress may have been troubled by application of the Fair Sentencing Act to *past* sentences, imposed before the Act's effective date. Such retroactive application raises concerns about the administrative burden of reopening sentencing proceedings for a large number of defendants, as well as the logistical burden of ensuring defendants' presence at those resentencings. *See* Fed. R. Crim. P. 43 (defendant's right to be present at a resentencing); *Restoring Fairness* 11 (statement of Sen. Durbin) ("What are we to do with all the people who were sentenced over the last 23 years with this disparity of 100:1?"). Moreover, as Judge Lynch of this Court has observed, "Congress may well have decided that it is simply too difficult to rewind these cases to the beginning, unscramble all of the decisions that had been made, and reprosecute the cases." *Acoff*, 634 F.3d at 205 (Lynch, J., concurring). And, as a general matter, changes in statutory law do not undo past transactions. *Blodgett v. Holden*, 275 U.S. 142, 149 (1927) (opinion of Holmes, J.) (noting "the usual understanding that statutes direct themselves to future not to past transactions"). The Act thus provides no necessary implication that Congress intended its new statutory penalty

scheme to apply to past sentences. *See United States v. Powell*, __ F.3d __, 2011 WL 2712969 (7th Cir. July 13, 2011) ("[T]he Fair Sentencing Act does not apply retroactively to sentences imposed before that Act was signed into law. Every circuit to address this issue has reached the same conclusion.") (citation omitted); *cf. Landgraf v. USI Film Prods.*, 511 U.S. 244, 286 (1994) ("A legislator who supported a prospective statute might reasonably oppose retroactive application of the same statute.").

But there is no sound reason Congress would have wanted "to continue to require that courts impose unfair and unreasonable sentences on those offenders whose cases are still pending." *Acoff*, 634 F.3d at 205 (Lynch, J., concurring); *cf. Landgraf*, 511 U.S. at 269 ("A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment."). Those defendants still needed to be sentenced, so there would be no administrative burden in bringing them to court. For the same reason, there would be no burden in conducting a full sentencing proceeding for those defendants. There is no basis to impute to Congress an intention to "inflict[] punishment at a time when it can no longer further any legislative purpose." *Hamm v. City of Rock Hill*, 379 U.S. 304, 313 (1964). The natural understanding of

Congress's intent for future sentencing proceedings is that the revised statutory penalties would apply.

2. The structure of the Act also supports the government's reading.

The structure of the Fair Sentencing Act confirms Congress's intent that the new statutory penalties apply at all future sentencings. If Congress had intended the repealed crack thresholds to remain applicable in future sentencing proceedings, the Act's requirement that the Commission promptly issue "conforming amendments" to achieve consistency with "applicable law" would make little sense. Congress knew that 18 U.S.C. § 3553(a)(4) requires a sentencing court to apply the Sentencing Guidelines "in effect on the date the defendant is sentenced," irrespective of the date of the offense. And Congress ordered the Sentencing Commission to issue conforming guideline amendments without any delay for congressional review. FSA § 8, 124 Stat. at 2374. That authority means that the Commission could have issued guideline amendments on the Act's effective date, the following week, or any time before the 90-day deadline Congress imposed. *See Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) ("It is well established that, absent a clear

direction by Congress to the contrary, a law takes effect on the date of its enactment.").[6] Congress must have intended that, throughout that period, the Act's revised statutory penalties would provide the "applicable law" for the Commission to use in shaping its conforming amendments, and for courts to use at sentencing.

Any other interpretation would posit that the "applicable law" in future sentencings varies from case to case, depending on the date of the offense. But that makes little sense in the context of Congress's direction to the Commission. To our knowledge, the Commission has never issued guideline amendments that are effective in all future sentencings but whose directives turn on the date of the offense conduct. Reading the Fair Sentencing Act as itself providing the "applicable law" in future sentencing proceedings gives the Commission a clear, fixed standard for its "conforming amendments." FSA § 8, 124 Stat. at 2374.

Moreover, the view that Congress intended the repealed crack

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[6] The Fair Sentencing Act applies to events not only after the date of enactment, but also on the date of enactment. *Gozlon-Peretz*, 498 U.S. at 404; *cf., e.g.*, *United States v. Hutchins*, 818 F.2d 322, 329-330 (5th Cir. 1987) (holding that defendants should have been sentenced under amendments to 21 U.S.C. § 841 that were enacted on the date of the offense conduct).

thresholds to remain applicable in some future sentencings is in tension with the Act's requirement that the Commission issue guideline amendments on an emergency basis. Congress specifically ordered the Commission to put those amendments into effect "as soon as practicable" and, in any event, no later than 90 days after enactment. FSA § 8, 124 Stat. at 2374. But if the "applicable law" to which those guideline amendments must conform turns on the offense date, not the sentencing date, then the interest in such prompt amendments is greatly diminished. Almost all crack offenders sentenced in the days and weeks following the Fair Sentencing Act's effective date would be preenactment offenders, as very few drug-distribution cases are carried from crime to sentencing within 90 days.[7] And if the "applicable law" for those offenders remained the old 100-to-1 crack thresholds, then the "conforming amendments" rushed out by the Commission would afford those offenders no benefit at all. For those offenders, the amended guidelines would be the same as the old guidelines, as they would "conform" to the same governing law. It

[7] *See, e.g.*, Administrative Office of the United States Courts, *Judicial Business of the United States Courts* 270-271, tbl. D-10 (2010) (median time from *filing* to disposition for criminal defendants in United States district courts is 6.3 months for all offenses and 9.7 months for drug offenses).

seems unrealistic to assume that Congress directed the Commission to issue guideline amendments with all possible speed if the practical value of the Commission's haste would be so substantially limited.

There has long been a relationship between the applicability of a mandatory minimum sentence and events occurring after the offense, including events tied to the sentencing proceeding. For example, the government at sentencing may move for a substantial-assistance departure, which tempers "the purity of the mandatory minimum regime." *Douglas*, 2011 WL 2120163, at *4; *see* 18 U.S.C. § 3553(e). The applicability of a mandatory minimum sentence in effect on the date of the offense has never been inviolate. And here, the Fair Sentencing Act reflects Congress's clear intent that courts no longer be required to sentence defendants under the unfair crack thresholds so strongly rejected by Congress.

CONCLUSION

For the reasons explained above, the Court should hold that the revised statutory penalties of the Fair Sentencing Act apply to all sentencings conducted on or after the date of its enactment, August 3, 2010. Because Bush was sentenced after that date, this case should be remanded for resentencing.

Dated: July 25, 2011

Respectfully submitted,

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United States Attorney
Attorney for Appellee United States of America

By: /s/ *Rajit S. Dosanjh*
Rajit S. Dosanjh
Assistant U.S. Attorney

EXHIBIT

Office of the Attorney General
Washington, D. C. 20530

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr.
Attorney General

SUBJECT: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus. Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "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?" *United States* v. *Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed*, *United States* v. *Douglas*, No.10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

EXHIBIT 1

In light of the differing court decisions—and the serious impact on the criminal justice system of continuing to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to "restore fairness in federal cocaine sentencing policy" but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the Act's central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme—defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law. That is what I direct you to undertake today.