UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

UNITED STATES OF AMERICA :

- v. - :

09 Cr. 1022 (KMK)

ELVIS SANTANA, et al., :

Defendants. :

- -X

REPLY MEMORANDUM OF DEFENDANT
WILLIAM ANDERSON CONCERNING THE FAIR SENTENCING ACT OF 2010

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TABLE OF CONTENTS

Introduction 1

The Savings Statute Should Become a Factor Only
When There Is No Evidence of Congressional Intent 2

The Language and Legislative History
of the FSA Reflects Congress's Clear Intent
to Have it Applied to Not-Yet-Sentenced Defendants 9

The Court Should Rule, in the Alternative,
That the Ten-Year Mandatory Minimum is Unconstitutional 15

Conclusion 15

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Introduction

"[I]n light of the Saving Statute, the FSA is unambiguous on the issue of retroactivity."

Gov't Mem. at 11.

That tautological statement by the government reveals the fundamental flaw in its opposition to the pending motions. The Savings Statute was enacted to fill a gap when there is no other evidence about when Congress intended new legislation to take effect. The government turns that around, suggesting that the Savings Statute renders all congressional intent about the effective date of a statute irrelevant unless it has been expressly stated in the statute itself.

It cites cases that require courts to examine congressional intent before applying the Savings Statute but essentially insists that, in doing that, they must ignore legislative history, one of the most basic tools for that type of inquiry. Instead, the government creates a type of novel, statutory, parole-evidence rule: If the effective date for legislation isn't set forth in the legislation itself, it claims, the General Savings Statute precludes the examination of any other evidence about when Congress intended it to take effect.

It has to take that extreme position because it could not realistically hope to persuade the Court that the legislative history here reflected anything other than Congress's intent that the FSA's remedial provisions be applied as quickly as possible. It insists the tail must wag the dog, however, and the Savings Statute must control, because Congress did not write that unmistakable intent into the statute itself. Thus, it must frame the issue as an artificially narrow one, whether the FSA itself was clear on an effective date, when the real issue is the broader one of whether Congress was sufficiently clear about its intent on that point. Under that test, the government loses because the legislative history of the FSA could not be more clear that Congress intended it to apply immediately.

The Savings Statute Should Become a Factor Only
When There Is No Evidence of Congressional Intent

The Savings Statute was enacted in 1871 to prevent potentially absurd results that Congress did not intend when it enacted legislation in the criminal arena. As the Supreme Court has explained:

> Congress enacted its first general saving provision to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of "all prosecutions which had not reached final disposition in the highest court authorized to review them." Common-law abatements resulted not only from unequivocal statutory repeals, but also from repeals and re-enactments with different penalties, whether the re-enacted legislation increased or decreased the penalties. To avoid such abatements--often the product of legislative inadvertence--Congress enacted 1 U.S.C. § 109, the general saving clause . . . .

Warden v. Marrero, 417 U.S. 653, 660, 94 S. Ct. 2532, 2536 (1974) (citations omitted); see Hamm v. City of Rock Hill, 379 U.S. 306, 319, 85 S. Ct. 384 (1964) (the purpose of General Savings Statute "is plain on its face--it was to prevent courts from imputing to Congress an intent which Congress never entertained") (Black, J., dissenting); United States v. Blue Sea Line, 553

F.2d 445, 447 (11th Cir. 1977) ("[I]mporting the common law abatement doctrine meant that legislative inadvertence could result in a haven from prosecution for an occasional offender . . . . To eliminate from the federal system the pitfalls of abatement, Congress passed a general saving clause . . . .").

Despite the government's suggestion to the contrary, the Savings Statute has always been subordinate to congressional intent. "As the section of the [General Savings Statute] in question has only the force of a statute, its provisions cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." Great Northern Railway v. United States, 208 U.S. 452, 465, 28 S. Ct. 313 (1908); see Hertz v. Woodman, 218 U.S. 205, 218, 30 S. Ct. 621 (1910). This is especially true when the application of the Savings Statute would "set the legislative mind at naught." Great Northern Railway, 208 U.S. at 465, 28 S. Ct. 313.

Thus, before applying the Savings Statute, a court must first examine Congress's intent as to the effective date of a statute. See Lindh v. Murphy, 521 U.S. 320, 326, 117 S. Ct. 2059 (1997) ("In determining a statute's temporal reach generally, our normal rules of construction apply."); Martin v. Hadix, 527 U.S. 343, 353-54, 119 S. Ct. 1998 (1999) (evaluating possible retroactive effect of statute through statutory structure and legislative history). Only if that intent is unclear should resort be made to the Savings Statute. See, e.g., United States v. Olin Corp., 107 F.3d 1506, 1512-13 (11th Cir. 1997) ("even absent explicit statutory language mandating retroactivity, laws may be applied retroactively if courts are able to discern clear congressional intent favoring such a result"); United States v. Blue Sea Line, 553 F.2d 445, 450 (5th Cir. 1977) (determining, on the basis of Congressional intent, that statute should be applied

retroactively owing to procedural provisions in statute); United States v. Mechem, 509 F.2d 1193, 1196 (10th Cir. 1975) (concluding on the basis of legislative history that Congress intended an amendment to criminal statute to have procedural as well as substantive effect, therefore avoiding application of the Savings Statute).

Many cases seeking to determine the effective date of legislation mention the General Savings Statute but, in most, the decision turns on a simple determination of congressional intent or, in some cases, on the existence of a savings clause within the newly-enacted legislation itself. This includes the four cases the government cites in support of its technically correct, but flawed-by-omission, contention that the Second Circuit has "repeatedly applied the Savings Statute to preserve the application of laws that were later repealed or amended where the new law contained no express contrary provision," Gov't Mem. at 7. By omitting any mention of congressional intent, the government misses the point of why these cases came out the way they did.

In two, the newly-enacted laws simply included their own savings provisions, which straightforwardly precluded their retrospective application. See United States v. Kirby, 176 F.2d 101, 104 (2d Cir. 1949) (cited in Gov't Mem. at 7); United States v. Ross, 464 F.2d 376, 379 (2d Cir. 1972) (cited in Gov't Mem. at 8). There can be no more conclusive evidence of congressional intent than that and having the outcome in these cases dictated by a savings clause in the newly-enacted statutes themselves itself trivializes their significance.

While there was no internal savings provision in the other two, neither was there even a hint that Congress had enacted the statutes at issue to redress an injustice and to do that quickly, as it indicated when it passed the FSA. See United States v. Smith, 354 F.3d 171 (2d

Cir. 2003); United States v. Klump, 536 F.3d 113 (2d Cir. 2008). Indeed, in Klump, the mandatory minimum had simply expired due to a sunset provision, 536 F.3d at 120, utterly unlike the circumstances surrounding passage of the FSA, when Congress took intervening action to condemn the prior law as manifestly unjust, unfair, unfounded and biased.

There isn't any daylight between the government's position and that of the defense when it asserts the Savings Statute should be invoked when Congress is completely silent on a statute's effective date. To the extent that it suggests the Savings Statute can trump evidence of Congress's intent, however, it is ignoring the well-settled principle that congressional intent is supreme, no matter which way it cuts. See, e.g., United States v. Taylor, 123 F. Supp. 920, 922 (S.D.N.Y. 1954) (Weinfeld, J.) (noting that "it is well settled that absent a contrary Congressional intent an amendment operating as a substitute for an earlier statute falls within the purview of the general saving statute" and concluding that "[w]hile the legislative history and debates furnish little direct information on the subject, one thing is crystal-clear--that the primary Congressional purpose was not to ameliorate the penalty provisions of the narcotics laws, but, on the contrary, to strengthen them").

The government also relies heavily on Warden v. Marrero, 417 U.S. 653, 94 S. Ct. 2532 (1974), but the legislation in that case contained its own savings provision and the case is simply another example of circumstances in which granting retrospective relief would do violence to Congress's expressed intent. Id., 417 U.S. at 656 n.4, 94 S. Ct. at 2534 n.4.; see United States v. Douglas, 2010 WL 4260221 at *4 n.37 (D. Me. Oct. 27, 2010). In Marrero, a defendant filed a habeas challenge to the denial of his request for parole after the passage of law creating the right to parole for previously-ineligible drug defendants. 417 U.S. at 654-55, 94 S.

Ct. at 2534. In his collateral attack to his previously-imposed sentence, Marrero was trying to gain a spectacular windfall. If he prevailed, he could receive a two-thirds reduction in a sentence imposed by a court which certainly believed he would never become eligible for parole when it originally determined his sentence. See Douglas, 2010 WL 4260221 at *4 n.37.[1]

Given that Congress took the step of specifically including a savings clause intended to preclude the very relief Marrero was seeking (and considering that any potential windfall could not be addressed at a resentencing since the sentencing judge would not have any role in the parole process), the result in Marrero is utterly unremarkable. Although the majority included its additional view of why it believed the General Savings Statute also applied, the result would have been the same without it, rending the discussion of that provision completely unnecessary.[2] As the Second Circuit observed when it distinguished another longstanding decision that had similarly been accorded misplaced weight in the years following it, Marrero's

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[1] Similar concerns appear to have animated Senator Klobuchar's observations about potential windfalls if the FSA were applied fully "retroactively" to previously-sentenced defendants. See Memorandum of William Anderson Regarding the Fair Sentencing Act of 2010, dated Oct. 8, 2010, at 13 n.4. Unlike the defendant in Marrero, however, even if defendants with non-final sentences were granted "retroactive" relief under the FSA, they would face their sentencing judges again and they would have the opportunity to fashion appropriately adjusted sentences. As the pending motions concern only non-yet-sentenced defendants, the Court does not need to consider whether this class of procedurally-distinct defendants should be eligible for retroactive relief, despite the Second Circuit's indications to the contrary in a recent summary order. See United States v. Glover, No. 09-1725-cr, 2010 WL 4250060 (2d Cir. Oct. 27, 2010) (discussed infra).

[2] The majority's invoking of the General Savings Statute prompted Justices Blackmun, Douglas and Marshall to complain in their dissent that it "has never been applied by this Court other than to prevent technical abatement of a prosecution." 417 U.S. at 665, 94 S. Ct. at 2539. See also Hamm v. City of Rock Hill, 379 U.S. 306, 314 (1964) (the General Savings Statute "was meant to obviate mere technical abatement"). But see United States v. Ross, 464 F.2d 376, 380 (2d Cir. 1972) (noting that the General Savings Statute was not exclusively concerned with technical abatement).

"broad language appears to have contributed to confusion over the scope of the [decision] . . . [and] simply confirms that 'dicta are not always ticketed as such, and one does not recognize them always at a glance.'" Landau v. Vallen, 895 F.2d 888, 896 (2d Cir. 1990) (discussing The Lottawanna, 87 U.S. (20 Wall.) 201 (1873) and quoting B. Cardozo, The Nature of the Judicial Process 30 (1921)).

As other defendants have noted, the government further but incorrectly contends that the Second Circuit's decision in United States v. Glover, No. 09-1725-cr, 2010 WL 4250060 (2d Cir. Oct. 27, 2010), resolved the issue now before this Court, adding that "numerous federal courts, including four Courts of Appeal in five separate opinions, have likewise rejected the arguments made by the defendants here." Gov't Mem. at 5. Putting aside the fact that Glover was not even a per curium opinion but only a non-precedential summary order--entered after only cursory Rule 28(j) briefing and no oral argument[3]--it and all of the other cases upon which the Government relies are distinguishable because the defendants in them had already been sentenced. See Gov't Mem. at 5-7.[4]

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[3] This according to an oral report provided to the undersigned by Glover's appellate counsel.

[4] See United States v. Carradine, No. 08-3220, 2010 WL 3619799, at *12-13 (6th Cir. Sep. 20, 2010) (sentence appeal); United States v. Gomes, No. 10-11225, 2010 WL 3810872, at *2 (l1th Cir. Oct. 1, 2010) (same); United States v. Bell, Nos. 09-3908, 09-3914, 2010 WL 4103700, at *10 (7th Cir. Oct. 20, 2010) (same); United States v. Brewer, No. 09-3909, 2010 WL 4117368, at *1 (8th Cir. Oct. 21, 2010) (same); United States v. Brown, No. 10-1791, 2010 WL 3958760, at *1 (8th Cir. Oct. 12, 2010) (unpublished opinion) (same); United States v. Hughes, Nos. 07-CR-33-BBC, 1O-CV-570-BBC, 2010 WL 3982138 (W.D. Wis. Oct. 8, 2010) (request for resentencing); United States v. Steglich, No. 3:00CR00063, 2010 WL 3810631 (W.D. Va. Sept. 28, 2010) (motion for reduction of sentence); Deleston v. Warden, No. Civ.A. 6:1O-2036-DCN, 2010 WL 3825399 (D.S.C. Sept. 8, 2010) (request to set aside sentence pursuant to 28 U.S.C. § 2241); United States v. Ohaegbu, No. 6:92-CR-35ORL-19, 2010 WL (continued...)

Thus far, Mr. Anderson is aware of only three district courts that have confronted the issue of retrospective application to non-yet-sentenced defendants in pending cases, and none has adopted the position advanced by the government in this case. See United States v. Douglas, Crim. Docket No. 09-202, 2010 WL 4260221 (D. Me. Oct. 27, 2010) (applying the FSA to a pending case); United States v. Watson, 2010 WL 4507374 (E.D. Ark. Nov. 2, 2010) (delaying sentence in pending case to allow further briefing on possible retrospective application of the FSA); United States v. Jeannette Garcia, 09 Cr. 1054 (SAS), 11/15/10 Sent. Tr. at 12-13 ("Jeannette Garcia Sent. Tr.") (applying the FSA to a pending case) (attached as an exhibit to the 11/20/10 reply submission of defendant Canon).

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[4](...continued)
3490261 (M.D. Fla. Aug. 31, 2010) (request to resentence); United States v. King, No. 6:40-CR46-0RL-19GJK, 2010 WL 3490266 (M.D. Fla. Aug. 31, 2010) (motion for reduction of sentence); Coleman v. Owen, No. CIV.A. 0:10-2151-SB, 2010 WL 3842381 (D.S.C. Aug. 30, 2010) (request for reduction of sentence pursuant to § 2241); United States v. Miller, No. 4:89-CR-120 (JMR), 2010 WL 3119768, at *2 n.2 (D. Minn. Aug. 6, 2010) (request for reduction of sentence); Joyner v. United States, Nos. 2:07-CR-16-01-F, 2:08-CV-34-F, 2010 WL 3063282, at *1 (E.D.N.C. Aug. 4, 2010) (same); see also United States v. Trice, No. 06-20364-BC, 2010 WL 3504546 (E.D. Mich. Sept. 7, 2010) (motion to vacate sentence in which the court acknowledges that "if defendant were to be convicted and sentenced today, the ten-year minimum may not apply ..." even though "the statute did not [] explicitly make those changes retroactive").

The one exception is United States v. Watson, No. 10-CR-30323, 2010 WL 3272934, *3 n.1 (E.D. Mich. Aug. 12, 2010), an appeal to a district court of a magistrate judge's order releasing a pretrial defendant. In that "detention order," the court makes a passing reference to the FSA in a footnote, noting, without citations or analysis, it would not impact the applicable 10-year mandatory minimum because "the offense occurred prior to the new law's enactment and the new statute was not made retroactive." Id. at *3 n.1. The government's good fortune in unearthing a lone, superficially supportive, footnote in an appeal of a magistrate's bail decision, which was issued only nine days after the FSA's enactment, Mr. Anderson submits, is not enough to carry the day.

The importance of the finality associated with the imposition of a sentence cannot be overstated. The Honorable D. Brock Hornby, author of the Douglas opinion, recognized this when he decided United States v. Butterworth, Crim. Docket No. 06-62, 2010 WL 4362859 (D. Me. Oct. 27, 2010), on the same day he decided Douglas, holding that defendants who had already been sentenced cannot receive the benefit of the ameliorative changes of the FSA. Id. Sentencing is the concluding event in any criminal action at the district court level and results in a judgment. See Fed. R. Crim. P. 32(b); Fed. R. App. P. 4(b). Fully retroactive application of laws like the FSA to sentenced defendants could create a potential flood of petitions by defendants who are serving prison sentences, burdening judicial and prosecutorial resources and undercutting the finality according to all judgments generally, and criminal judgments in particular. None of those concerns apply to not-yet-sentenced defendants.

The Language and Legislative History
of the FSA Reflects Congress's Clear Intent
to Have it Applied to Not-Yet-Sentenced Defendants

Without a doubt, the prospect of fully retroactive application of the FSA to sentenced defendants concerned some members of Congress. During subcommittee hearings there was some concern over increasing federal judges' caseload if prisoners sought to obtain fully retroactive relief, something that is obviously not a factor for retrospective applications. See Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the Subcomm. on Crime and Drugs of the S. Comm. on the Judiciary, 111th Cong. at 16-18 (testimony of Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Commission). Even Senator Sessions, who initially opposed an 80% change in the crack-cocaine ratio and who was vital in crafting the 18:1 compromise legislation, stated: "I will not favor alterations that

massively undercut the sentencing we have in place, but I definitely believe 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. S10488, 10492 (daily ed. Oct. 15, 2009) (statement of Sen. Sessions) (emphasis added).

Deeply-felt positions such as those of Senator Sessions undoubtedly prompted the plainly retrospective language in the FSA's preamble: "To restore fairness to Federal cocaine sentencing." Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 at 1 (2010) (emphasis added). As the Supreme Court reiterated only two weeks ago, statutory preambles are vital evidence in determining congressional intent. See Abbott v. United States, 2010 WL 4569898 at *2 (U.S. Nov. 15, 2010). Those positions also undoubtedly underlay the FSA's commands to the Sentencing Commission to prepare emergency guideline amendments as soon as possible.[5] Pub. L. No. 111-220, § 8, 124 Stat. 2374.

Furthermore, as Mr. Anderson discussed at length in his initial memorandum, in passing the FSA, Congress indisputably regarded the 100:1 ratio as an abhorrent civil rights violation and a public policy catastrophe. Senator Durbin, for example, cast the 100:1 sentencing disparity as a human-rights crisis. 155 Cong. Rec. S10488, 10491 (daily ed. Oct. 15, 2009) ("These are issues of fundamental human rights and justice our country must face.") (statement of Sen. Durbin); see 156 Cong. Rec. H6196, 6202 (daily ed. Jul. 28, 2010) ("There

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[5] The government argues that congress simply wanted the Sentencing Commission to conform the guidelines to the FSA as quickly as possible, Gov't Mem. at 14, but this would not require an emergency authorization, since sentencing courts are required by 18 U.S.C. § 3553(a)(4)(A)(i) to incorporate any changes to the guidelines dictated by congressional action even before the Sentencing Commission has amended the guidelines to incorporate them.

are thousands of people, literally thousands of people, who may get a real chance at life because of a mistake in their drug cases, because of this law.") (statement of Rep. Ellison).[6]

It is difficult to imagine after Congress's unanimous[7] and generational efforts to correct an issue of "fundamental human rights and justice" that it would possibly countenance five additional years' of unfair sentencing owing to the government's stubborn and myopic disregard of Congress's clear intent to abandon its misguided, previous, legislation as quickly as possible. That could not be any more clear now that the FSA's lead sponsors, Senators Durbin and Leahy, have written Attorney General Holder to reiterate that their intent was to have the FSA to apply to all defendants who had not yet been sentenced.[8]

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[6] In light of the ample evidence already included in previous submissions it seems almost gilding the lily to provide more proof that Congress recognized the 100:1 ratio had no rational basis, but there is more. See, e.g., 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."); 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. H6202 (daily ed. July 28, 2010) (statement of Rep. Lungren) ("We initially came out of committee with a 20-to-l ratio. By the time we finished on the floor, it was 100-to-l. We didn't really have an evidentiary basis for it[.]").

[7] The only representative to speak against the legislation was Rep. Lamar Smith (R-Texas), who claimed that the bill would hurt minorities. See The Huffington Post, Lamar Smith Derides Reduction of Crack-Cocaine Sentencing Disparity as Damaging to Minorities, July 30, 2010, available at http://www.huffingtonpost.com/2010/07/30/lamar-smith-derides-reduc_n_665046.html.

[8] The senators sharply criticized the Department of Justice for continuing to advocate application of the 100:1 ratio in pending cases:

> [D]efendants will continue to be sentenced under a law that Congress has determined is unfair for the next five years . . . . This absurd result is obviously inconsistent with the purpose of the Fair Sentencing Act. . . . Justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair.

(continued...)

The government notes that the FSA did not include any language specifying that it would apply to pending cases. Yet, the same could be said about the absence of any savings provision in the FSA denying retrospective application. As can be seen from the cases cited above, Congress often includes such clauses in legislation when it wants to preclude retrospective application. The absence of such a savings provision in the FSA is particularly significant because the House elected not to include a savings provision like those in similar crack-ratio-reduction bills that were pending when it settled on the FSA.[9] If Congress wanted to preserve the 100:1 ratio for another five years, it was well aware that it could accomplish that by including a savings provision in the FSA itself. It did not, of course, because that would have been completely at odds with the immediate remedial impact it intended that legislation to have.

The fact that the FSA was the product of support from diverse groups is meaningful as well. Noting that "[t]he 100-to-l disparity is counterproductive and unjust," 156 Cong. Rec. H6203 (daily ed. Jul. 28, 2010) (statement of Majority Leader Hoyer), Congressman

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[8](...continued)
Letter from Senators Dick Durbin and Patrick Leahy to Attorney General Eric Holder, dated November 17, 2010, at 1-2 (copy attached).

[9] For example, the bill introduced by Representative Jackson Lee, H.R. 265 ("Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2009"), which was read into the record during the House Floor Proceedings on the FSA, contained a specific saving clause, which specifically provided:

> The amendments made by this Act shall apply to any offense committed on or after 180 days after the date of enactment of this Act. There shall be no retroactive application of any portion of this Act.

H.R. 265, sec. 11. Moreover, Congress was surely aware that many crack-cocaine sentences were being held in abeyance while the FSA was approaching passage. It did not say that these pending cases had to comply with the old rules.

Hoyer explained that this was not only his opinion but was also that of a number of judicial, prosecutorial, and law enforcement organizations, including the "U.S. Sentencing Commission, the Judicial Conference of the United States, the National District Attorneys Association, the National Association of Police Organizations, the Federal Law Enforcement Officers Association, the International Union of Police Associations, and dozens of former Federal judges and prosecutors." Id.[10]

With such broad-based support amongst the public and rarely-seen bipartisan cooperation in Congress, continuing the unfair practices that stirred that and the public's outcry would violate all those group's respective interests in ending a shameful period in our history and doing so quickly. "[F]ulfillment of the parties' reasonable expectations may require the statute's retroactive application." Sutherland Statutes and Statutory Construction § 41:4; see United States v. Chambers, 291 U.S. 217, 226, 54 S. Ct. 434 (1934) (following constitutional amendment repealing prohibition, Court rejected government's effort to apply General Savings Statute to illegal-liquor convictions not yet final, explaining that "[t]he law here sought to be applied was deprived of force by the people themselves as the inescapable effect of their repeal of the Eighteenth Amendment . . . [and] neither the Congress nor the courts can assume the right to continue to exercise it"); Hamm v. City of Rock Hill, 379 U.S. 306, 313-14, 85 S. Ct. 384

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[10] See also 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) ("There is widespread and growing agreement that the Federal cocaine and sentencing policy in the United States today is unjustified and unjust."); United States Sentencing Commission, Survey of United States District Judges January 2010 through March 2010 (June 2010) (concluding 76% of judges surveyed believe that mandatory minimum sentences were too high in crack cocaine cases); Restoring Fairness to Federal Sentencing Hearing at 10 (statement of Lanny A. Breuer) ("We believe the structure is especially problematic because a growing number of citizens view it as fundamentally unfair . . . .")

(1964) (refusing to apply savings clauses to state prosecutions initiated under racially-discriminatory laws after the conduct at issue was legalized by the Civil Rights Act of 1964, to avoid "inflicting punishment at a time when it can no longer further any legislative purpose").

If all of this legislative history establishes to the Court's satisfaction that Congress had at least some intent to implement the FSA as quickly as possible but leaves it uncertain as to the depth or scope of that intent, the rule of lenity would require the FSA to be applied retrospectively. See Muscarello v. United States, 524 U.S. 125, 138, 118 S. Ct. 1911 (1998) (rule of lenity applies when the courts must "guess as to what Congress intended"); Moskal v. United States, 498 U.S. 103, 108 (1990) ("we have 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"). As demonstrated above, the General Savings Statute would come into play if, and only if, the Court could not glean any intent whatsoever.

In the end, there is an irreconcilable tension between the government's strained interpretation of the General Savings Statute and Congress's instructions to district courts to fashion sentences that are "sufficient but not greater than necessary," 18 U.S.C. § 3553(a), to achieve the goals of sentencing and "to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct," id. § 3553(a)(7). A decision requiring defendants sentenced today to serve sentences twice as long as sentences that, under the government's approach, will start to be imposed under the remedial FSA in just a few months would be in serious conflict with those goals. Accordingly, Mr. Anderson respectfully submits, any doubts about whether Congress intended the FSA to have retrospective application should be resolved with these broader principles in mind.

The Court Should Rule, in the Alternative,
That the Ten-Year Mandatory Minimum is Unconstitutional

If the Court determines that the General Savings Statute precludes application of the FSA to him, Mr. Anderson respectfully requests that it find that the ten-year mandatory-minimum sentence that would otherwise be applicable unconstitutional because it would violate, among other provisions in the constitution, the separation of powers, due-process and equal-protection clauses. He recognizes that controlling authority precludes this Court from granting this alternative basis for eliminating the ten-year mandatory minimum but includes it to preserve the issue for possible appellate review.

Conclusion

For the above reasons and those in all the prior submissions on this issue, including those submitted by the other moving defendants, the Court should declare the Fair Sentencing Act of 2010 applicable to Mr. Anderson.

Dated: New York, New York
November 30, 2010

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

November 17, 2010

The Honorable Eric Holder
Attorney General
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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