APPEAL NUMBER 10-4271

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA,
Appellee

V.

KENNETH JACKSON,
Appellant

BRIEF FOR APPELLANT

Appeal From Order Entered in the United States District Court
For the Eastern District of Pennsylvania, at Criminal Number 07-cr-00535-1, on
November 4, 2010, by The Honorable Stewart Dalzell

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This case commenced with the prosecution of appellant, Kenneth Jackson, for violations of the laws of the United States. District courts have original jurisdiction over such prosecutions pursuant to 18 U.S.C. § 3231. Upon conviction, Mr. Jackson was sentenced to a putative mandatory-minimum sentence of 10 years' imprisonment, to be followed by five years of supervised release. (App. 4-5). He was also fined $1,000 and ordered to pay a special assessment of $100. (App. 7).

This is an appeal of the district court's judgment entered on November 4, 2010. (App. 3-8). This Court has jurisdiction under 28 U.S.C. § 1291, as an appeal from a final decision of a district court, and, more specifically, under 18 U.S.C. § 3742(a), as an appeal of a sentence imposed under the Sentencing Reform Act of 1984. A notice of appeal was timely filed on November 3, 2010, and was treated as filed on the date of entry of judgment pursuant to Federal Rule of Appellate Procedure 4(b)(2). (App. 1-2).

STATEMENT OF RELATED CASES AND PROCEEDINGS

This case has not previously been before the Court. Counsel is aware of no other case or proceeding—completed, pending or about to be presented to this Court or any other court or agency, state or federal—that is in any way related to this appeal.

STATEMENT OF THE ISSUE

Do the provisions of the Fair Sentencing Act of 2010 that raise the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b) apply to defendants who are sentenced after the effective date of the Act but whose offense conduct occurred before the effective date?

Preservation of Issue

Defense counsel urged application of the Fair Sentencing Act of 2010 at sentencing, but the district court ruled that the Act does not apply to conduct predating the Act's effective date. (App. 21, 33-34, 9).

STATEMENT OF THE CASE

Mr. Jackson was charged with one count of possession with intent to distribute 50 grams or more of cocaine base ("crack"), in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A). He pleaded guilty after acknowledging that the quantity of crack involved was 98.66 grams. On November 3, 2010, the district court sentenced Mr. Jackson to what it determined to be the mandatory-minimum punishment: 10 years' imprisonment and 5 years' supervised release. Mr. Jackson was also fined $1,000. (App. 4-5, 7). This appeal followed.

STATEMENT OF FACTS

This appeal raises a discrete and important legal issue regarding the applicability of certain provisions of the Fair Sentencing Act of 2010 ("FSA" or "the Act") to defendants who are sentenced *after* the Act's effective date but whose offense conduct occurred before that date. The underlying facts are not in dispute, and they are set forth below, together with the district court's ruling.

The offense conduct

On February 28, 2007, Mr. Jackson was pulled over by Philadelphia police officers for driving a car with a suspended license tag. *See* Presentence Investigation Report ("PSR") at ¶ 8. When Mr. Jackson was unable to produce a driver's license or proof of vehicle registration and insurance, the car was impounded and the officers began an on-the-scene inventory search. *Id.* at ¶¶ 9-11. They seized a total of 98.66 grams of cocaine base ("crack"), packaged for distribution, from various places in the passenger compartment of the car. *Id.* at ¶¶ 10-11, 13-14. While the inventory search was in progress, Mr. Jackson fled the scene but was apprehended after a brief chase. *Id.* at ¶ 12. He was arrested, and found to be in possession of $1,228. *Id.* at ¶ 13.

Enactment of the FSA

On August 3, 2010, President Obama signed the FSA into law. The Act, as pertinent to Mr. Jackson's case, amended the penalty provision of 21 U.S.C. § 841(b)(1)(A) to raise the quantity threshold triggering a 10-year mandatory-minimum sentence for crack offenses from 50 grams to 280 grams. *See* P.L. 111-220, § 2(a)(1), 124 Stat. 2372. Under the pre-amendment version of § 841(b)(1)(A), the amount of crack Mr. Jackson possessed—98.66 grams—triggers a mandatory-minimum sentence of 10 years. 21 U.S.C. § 841(b)(1)(A). Under the FSA, that amount triggers only a 5-year mandatory minimum. P.L. 111-220, § 2(a)(2), 124 Stat. 2372.

The FSA, of course, was enacted to ameliorate the 100-to-1 sentencing disparity between powder- and crack-cocaine offenses that had been enshrined into law in 1986. Both this Court and the Supreme Court have taken note of the long and racially-tinged history of the crack/powder disparity, a history that need not be repeated at length here. *See United States v. Gunter*, 462 F.3d 237, 239-43 (3d Cir. 2006) (detailing history); *Kimbrough v. United States*, 552 U.S. 85, 94-100 (2007) (same). Suffice it to say that the FSA's purpose is to "restore fairness to Federal cocaine sentencing," 124 Stat. 2372 (preamble to the Act)—an apparent step toward the ultimate goal, articulated by the Justice Department itself, of

"completely eliminat[ing] the sentencing disparity between crack cocaine and powder cocaine." Statement of Lanny A. Breuer, Assistant Attorney General, before the Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, "Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity," Apr. 29, 2009, at 9.

Several aspects of the FSA bear special emphasis for purposes of the issue on appeal. First, the Act contains no provision setting forth an effective date, which by default means that the Act took effect immediately upon signing by the President—on August 3, 2010. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1151 n.1 (3d Cir. 1989); *Arnold v. United States*, 13 U.S. (9 Cranch) 104, 119 (1815). Second, the Act contains no saving clause specifying whether penalties repealed by the FSA are still to be imposed after the Act's effective date to punish pre-August 3, 2010 conduct.

Third, Section 8 of the Act directs the United States Sentencing Commission to amend the U.S. Sentencing Guidelines "as soon as practicable, and in any event [within] 90 days" to make the drug guideline consistent with the FSA.[1] In full, Section 8 provides:

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[1] The 100-to-1 ratio set forth in the pre-FSA version of 21 U.S.C. § 841(b)(1)(A) was likewise embedded into § 2D1.1 of the Sentencing Guidelines. *See generally Gunter*, 462 F.3d at 241; *Kimbrough*, 552 U.S. at 96-97. In 2007,

> Sec. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.
>
> 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.

124 Stat. at 2374.

Fourth, Section 10 of the Act directs the Sentencing Commission to submit a report to Congress within five years detailing the "impact of the changes in Federal sentencing law" brought about by the FSA and the Guidelines amendments directed by the FSA. 124 Stat. at 2375. And finally, as noted above, the preamble of the Act states the purpose of the FSA to be "to restore fairness to Federal cocaine sentencing." *Id.*

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the Sentencing Commission amended that guideline to provide a less disparate ratio with regard to quantities above specified thresholds that themselves exceeded the statutory minimums. *See Kimbrough*, 552 U.S. at 100 & n.10.

Mr. Jackson's Sentencing

On November 3, 2010, three months after the FSA's enactment, Mr. Jackson was sentenced by the Honorable Stewart Dalzell. The only legal issue in dispute at sentencing was the applicability of the FSA—whether Mr. Jackson was facing a 5- or 10-year mandatory minimum sentence for his 2007 possession of crack. (App. 21, 30-31).[2] The government, following the Department of Justice's policy guidance, took the position that the FSA does not apply. (App. 21-22). Mr. Jackson urged application of the FSA given that he was being sentenced after the Act's effective date. (App. 25-27, 29-30).

The district court ruled the FSA inapplicable, finding itself bound by the Supreme Court's decision in *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974). (App. 32-34). In doing so, the court made perfectly clear that,

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[2] The PSR, the final version of which was prepared on October 18, 2010 and to which neither party objected, calculated Mr. Jackson's Guidelines range as 97-121 months (offense level 28, criminal history category III), which became 120-121 months in light of the PSR's determination that the 10-year mandatory minimum applied. *See* PSR at ¶¶ 65-66. In fact, the emergency amendments promulgated under the FSA became effective on November 1, 2010 (two days before Mr. Jackson's sentencing), and reduced Mr. Jackson's base offense level from 30 to 26—resulting in a Guidelines range of 63-78 months, assuming no other changes to the PSR. *See* U.S.S.G. § 2D1.1(c)(7) (Nov. 1, 2010). The reduction in Mr. Jackson's Guidelines range became immaterial at sentencing, however, since that range was below the 10-year mandatory minimum the district court ultimately held applicable.

had it not deemed *Marrero* controlling, it would have held the FSA applicable and would have sentenced Mr. Jackson to only 5 years' imprisonment, because a 10-year sentence is unjust in this case:

- "[I]t seems to me that given the authority in *Marrero*, * * * while every cell of my body wants to agree with [Mr. Jackson], I really don't think I can."

- "The Supreme Court may come to another conclusion, which I would certainly welcome—absolutely, I would welcome * * *. But I have to take it where the law goes and that's what I'm sworn to do."

- "Of course, [a 5-year sentence] would be appropriate. * * * I would really like to agree with you, and I'm rooting for you and Mr. Jackson in the Supreme Court of the United States, but I think I'm really stuck with *Marrero* here. * * * And I'd love to get this back and do what I think is justice, which is a 60-month sentence here."

(App. 29, 32, 33).

SUMMARY OF ARGUMENT

This case presents an issue of first impression: whether the provisions of the FSA that raise the quantity thresholds for triggering mandatory-minimum penalties for crack offenses apply to defendants sentenced *after* the Act's effective date, but whose offense conduct occurred before that date. This Court has previously held that the FSA does not apply to defendants sentenced *before* the Act's effective date. *See United States v. Reevey*, __ F.3d __, Nos. 10-1812 & 10-1834, 2010 WL 5078239 (3d Cir. Dec. 14, 2010). But, as the *Reevey* Court itself noted, the FSA's application at post-enactment sentencing proceedings presents another question altogether. *Id.* at *4 n.5.

Properly construed, the new mandatory-minimum quantity thresholds of the FSA apply to all defendants sentenced on or after August 3, 2010, regardless of when their offense conduct occurred. That is the rule under the common law, and applies unless the general saving statute, 1 U.S.C. § 109, requires otherwise. Section 109 does not save the harsher, pre-FSA mandatory-minimum penalties, because its default rule does not apply when a repealing statute provides for a different result, either expressly or by fair implication. *See Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n.10 (1974). Here, the FSA fairly implies that its

mandatory-minimum penalties apply to all defendants sentenced on or after August 3, 2010. That implication flows from the Act's requirement that the U.S. Sentencing Commission amend the crack guidelines on an emergency basis and report within five years on the impact of the FSA on cocaine sentencing, and the Act's stated purpose and Congressional intent to restore fairness to federal cocaine sentencing.

ARGUMENT

The provisions of the Fair Sentencing Act of 2010 that raise the quantities of crack cocaine required to trigger mandatory-minimum penalties under 21 U.S.C. § 841(b) apply to defendants who are sentenced after the effective date of the Act but whose offense conduct occurred before the effective date.

Standard of Review

Criminal sentences are reviewed for reasonableness, generally an abuse-of-discretion standard. *See United States v. Wise*, 515 F.3d 207, 217 (3d Cir. 2008). Where, as here, a challenge to the sentence involves a preserved issue of statutory interpretation, review is plenary. *See United States v. Reevey*, __ F.3d __, Nos. 10-1812 & 10-1834, 2010 WL 5078239 (3d Cir. Dec. 14, 2010).

Discussion

On August 3, 2010, after fifteen years of withering criticism from the U.S. Sentencing Commission, judges, academics, and the public, the law mandating sentences up to six times longer for offenders convicted of crack-cocaine offenses—85 percent of whom are African American—than for those convicted of powder-cocaine offenses was repealed by a nearly unanimous vote of Congress. *See* Fair Sentencing Act of 2010, P.L. 111-220, § 2(a)(1), 124 Stat. 2372 ("FSA" or "the Act").

The Anti-Drug Abuse Act of 1986 had established 5- and 10-year mandatory-minimum penalties for drug manufacturing and distribution offenses involving certain controlled substances of various weights. *See* P.L. 99-570, tit. I, subtit. A, § 1002, 100 Stat. 3207 (Oct. 27, 1986). The sentencing disparity between crack- and powder-cocaine sentences was effectuated by adoption of a 100-to-1 ratio in the weights of powder and crack cocaine, respectively, that triggered the mandatory minimums. Thus, 500 grams of powder, but only 5 grams of crack, triggered the 5-year mandatory minimum. Similarly, 5,000 grams of powder, but only 50 grams of crack, triggered the 10-year mandatory minimum. *See* 21 U.S.C. § 841(b)(1)(B)(ii) & (b)(1)(A)(ii) (2009). The 100-to-1 weight ratio was separately embedded in the U.S. Sentencing Guidelines through the Drug Quantity Table, which sets the weights of various controlled substances triggering each base offense level under the drug guideline. *See* U.S.S.G. § 2D1.1(c) (2006).

For many years, the U.S. Sentencing Commission decried the disparity in crack- and powder-cocaine sentences as unwarranted. *See generally Kimbrough v. United States*, 552 U.S. 85, 97-99 (2007) (summarizing history of criticism). After in-depth study and analysis, the Commission in a series of reports concluded that the 100-to-1 ratio rests on false assumptions about the relative harmfulness of crack and powder cocaine, results in minor drug traffickers being sentenced more

severely than major drug traffickers, and fosters disrespect for the law given the resulting unwarranted sentencing disparities between African-American and white offenders. *Id.*

The FSA ameliorated federal cocaine sentencing disparity by replacing the 100-to-1 ratio with a new weight ratio of 18-to-1. *See* FSA § 2(a)(1)-(2) (raising crack cocaine threshold for 5-year mandatory minimum from 5 to 28 grams, and for 10-year mandatory minimum from 50 to 280 grams). The issue in this appeal is whether the old, discredited, and repealed weight thresholds for the mandatory-minimum penalties for crack must nonetheless continue to be applied at future sentencing hearings for up to five more years, as defendants continue to be indicted and sentenced based on conduct that occurred before the FSA's August 3, 2010 effective date.[3]

This Court has already ruled that defendants sentenced *before* August 3, 2010 cannot have their pre-FSA sentences vacated. *See United States v. Reevey*, __ F.3d __, Nos. 10-1812 & 10-1834, 2010 WL 5078239 (3d Cir. Dec. 14, 2010).[4]

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[3] Due to the five-year statute of limitations for federal controlled substance offenses, 18 U.S.C. § 3282(a), pre-FSA conduct will be indictable until August 1, 2015.

[4] *Reevey* involved defendants who were sentenced in March 2010, but whose appeals were pending (and whose convictions were therefore not final) when the FSA was enacted. 2010 WL 5078239, at *1.

Other courts of appeals have held similarly.[5] But no court of appeals has yet addressed the question presented here: should district courts apply the FSA's mandatory-minimum provisions in sentencing proceedings held *after* August 3, 2010, regardless of whether the offense conduct occurred before that date? The answer is yes.

A. *Reevey* and the general saving statute, 1 U.S.C. § 109.

In *Reevey*, the Court held that the general saving statute, 1 U.S.C. § 109, prevents defendants who were already sentenced by the time the FSA became effective from benefitting from the Act's ameliorative mandatory-minimum provisions. 2010 WL 5078239, at *3-4. Section 109, in pertinent part, provides as follows:

> 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.

1 U.S.C. § 109. The statute, enacted in 1871, changes the common-law rule that

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[5] *See United States v. Diaz*, 627 F.3d 930, 931 (2d Cir. 2010); *United States v. Doggins*, __ F.3d __, No. 09-40925, 2011 WL 438935 (5th Cir. Feb. 9, 2011); *United States v. Carradine*, 621 F.3d 575, 580 (6th Cir. 2010); *United States v. Bell*, 624 F.3d 803, 814-15 (7th Cir. 2010); *United States v. Brewer*, 624 F.3d 900, 909 n. 7 (8th Cir. 2010); *United States v. Lewis*, 625 F.3d 1224, 1228 (10th Cir. 2010); *United States v. Gomes*, 621 F.3d 1343, 1346 (11th Cir. 2010).

the repeal of a criminal statute results in the abatement of all prosecutions thereunder that had not yet reached final disposition at the time of repeal. *See Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 660 (1974).

The *Reevey* Court recognized that § 109, where applicable, requires a sentencing court to apply the criminal penalty in effect at the time the offense was committed, even when that penalty has subsequently been ameliorated by statutory amendment. 2010 WL 5078239, at *3. The Court reasoned that the defendants in that case, who were sentenced five months before the FSA was enacted, were not entitled to the Act's lesser penalty because the FSA neither expressly states that its ameliorative provisions are to be applied retrospectively, "nor does it provide that those sentenced before the FSA's effective date are to be re-sentenced." *Id.*

The *Reevey* Court thus recognized that a different result may be required when the defendant is sentenced *after* the FSA's effective date, as Mr. Jackson was here. Indeed, the Court expressly reserved that question for future decision:

> The Appellants' reliance on *United States v. Douglas*, __ F. Supp. 2d __, Crim. No. 09-202, 2010 WL 4260221 (D. Me. Oct. 27, 2010), is misplaced and unpersuasive. In *Douglas*, the court held that the FSA retroactively applied to a defendant who had yet to be "sentenced, but who engaged in crack cocaine trafficking and pleaded guilty under the previous harsher regime." *Id.* at *1. *Douglas* is easily distinguishable from the present appeals. Here, both Reevey and Williams committed their crimes *and* were sentenced before the FSA was signed into law.

2010 WL 5078239, at *4 n.5.

B. Section 109 does not bar application of the FSA's ameliorative provisions to Mr. Jackson, because the fair implication of the FSA as a whole is that Congress intended those provisions to apply to all defendants sentenced on or after August 3, 2010.

Section 109 does not bar application of the FSA's ameliorative provisions to Mr. Jackson, because the fair implication of the FSA as a whole is that Congress intended those provisions to apply to all defendants sentenced on or after August 3, 2010.

1. *Section 109 does not apply when a repealing statute provides for a different result, either expressly or by fair implication.*

A casual reading of § 109 suggests that there is a stringent, bright-line rule for when penalties are saved: always, unless the repealing statute "expressly provide[s]" otherwise. 1 U.S.C. § 109. Thus, there might seem to be a strict requirement that the text of a repealer have an express provision extinguishing the penalty for pre-repeal conduct before § 109's default saving rule will not control. On this view, an analysis applying § 109's saving rule is rather simple: an exception to § 109 must be express; the repealer does not include such express provision; *ergo*, the penalty or liability is saved. Some courts, including this Court on one occasion, have engaged in such syllogistic analysis. *See United States v.*

Jacobs, 919 F.2d 10, 13 (3d Cir. 1990).[6]

But it has been recognized for over 100 years that § 109 does not work that way. In 1908, the Supreme Court made clear that because § 109 is only a statute, and not a constitutional provision,[7] it cannot thwart the intent of a subsequent Congress to effect the repeal of a statute or to determine the extent to which a repealer is to apply retroactively—whether that intent is embodied in an express provision, or instead appears by implication from the enactment as a whole. As the Court put it then:

> As the section of the Revised Statutes in question [predecessor to § 109] 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. But, while this is true, the provisions of [§ 109] are to be treated as if incorporated in and as a part of subsequent enactments, and therefore under the general principles of construction requiring, if possible, that effect be given to all parts of a law, *[§ 109] must be enforced unless, either by*

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[6] Some of the courts of appeals to have addressed the applicability of the FSA's ameliorative provisions to defendants sentenced before the Act became effective, *supra* note 5, have reasoned in this fashion. *See, e.g.*, *Carradine*, 621 F.3d at 581; *Brewer*, 624 F.3d at 909 n.7. Notably, this Court in *Reevey* did not so reason, instead noting that the FSA neither contains an express exception to § 109 "nor does it provide that those sentenced before the FSA's effective date are to be re-sentenced." 2010 WL 5078239, at *3.

[7] Section 109 was modeled on earlier, State saving provisions. Some States, unlike Congress, chose to effectuate a general saving rule through constitutional provision rather than statutory law. *See, e.g.*, Fla. Const. art. 10, § 9; N.M. Const. art. 4, § 33; Okla. Const. art. 5, § 54.

> *express declaration or 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 provisions of [§ 109].*

Great Northern Ry. Co. v. United States, 208 U.S. 452, 465 (1908) (emphasis added).

In more modern parlance, "an express-reference or express-statement [requirement] cannot nullify the unambiguous import of a subsequent statute." *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring). This principle virtually defines Congress's lawmaking authority, because "unlike the Constitution, a legislative Act is 'alterable when the legislature shall please to alter it.'" *Id.* at 147 (quoting *Marbury v. Madison*, 1 Cranch 137, 177 (1803)). Therefore, as Justice Scalia has summarized:

> A subsequent Congress . . . may exempt itself from such [express-statement] requirements by "fair implication"—that is, *without* an express statement. To be sure, legislative express-reference or express-statement requirements may function as background canons of interpretation of which Congress is presumptively aware. * * * [But w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other "magical password."

Id. at 148-49 (emphasis in original, citations omitted).

This rule has been consistently followed by the Supreme Court in an unbroken line of cases, and is, of course, binding on this Court.[8] *See Great Northern Ry. Co.*, 208 U.S. at 465; *Hertz v. Woodman*, 218 U.S. 205, 217-18 (1910); *Allen v. Grand Central Aircraft Co.*, 347 U.S. 535, 554 (1954); *Marrero*, 417 U.S. at 659 n.10; *Lockhart*, 546 U.S. at 148-49 (Scalia, J., concurring). *Cf. Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (refusing to give effect to express-statement requirement in Administrative Procedure Act).

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[8] *Jacobs* did not hold to the contrary. There, the Court held that ineligibility for probation is a type of "penalty" within the meaning of § 109, and therefore concluded that § 109 saved this penalty for a defendant whose offense was reclassified from a Class B to a Class C felony (such that he would have become eligible for probation) by virtue of an amendment to 18 U.S.C. § 3559(a). 919 F.2d at 12 ("Because we find that ineligibility for probation is a type of penalty, we hold that section 109 applies to amendments of statutory classifications that render a defendant eligible for probation."). In rejecting the defendant's argument from the legislative history of the *repealed* law, the Court explained that under § 109 the appropriate point of reference is "the repealing statute." *Id.* at 13. Inasmuch as this bears on the "fair implication" rule at all, it does not appear that this was a basis for the Court's holding, and it may therefore fairly be described as *dictum*.

Even if *Jacobs* were to be read as holding that § 109's express-statement requirement is binding upon subsequent Congresses, thereby precluding analysis of Congress' intent in repealing a statute, such a holding would not be binding on this Court as it is plainly contrary to Supreme Court precedent (*Great Northern Ry. Co.* and its progeny) that was not addressed by, or apparently brought to the attention of, the *Jacobs* Court. *See Jaguar Cars, Inc. v. Royal Oaks Motor Car Co.*, 46 F.3d 258, 266 n.6 (3d Cir. 1995).

2. *The FSA fairly implies that its new mandatory-minimum thresholds apply to all defendants sentenced on or after August 3, 2010.*

Once the limitations of the express-statement requirement are recognized, it is perfectly clear that the ameliorative provisions of the FSA should be applied to Mr. Jackson and to all other defendants sentenced on or after August 3, 2010. Under the "terms of the law as a whole," *Great Northern Ry. Co.*, 208 U.S. at 465, the fair implication and "plain import," *Lockhart*, 546 U.S. at 149 (Scalia, J., concurring), of the FSA is that its ameliorative provisions are to apply prospectively to all defendants sentenced on or after August 3, 2010—regardless of when their offense conduct occurred.

The FSA does not contain a provision expressly addressing when or to whom its ameliorative provisions are to apply.[9] But that does not mean the FSA is silent on the point. Two critical sections of the Act, Sections 8 and 10, provide a clear indication that Congress intended the FSA's ameliorative provisions to apply at all post-enactment sentencing proceedings. That reading of the FSA comports

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[9] The FSA became effective immediately upon being signed by the President. *See Hays & Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 885 F.2d 1149, 1151 n.1 (3d Cir. 1989); *Arnold v. United States*, 13 U.S. (9 Cranch) 104, 119 (1815). That fact sheds no light, however, on whether the Act's ameliorative provisions were intended to apply to conduct that occurred on an earlier date. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 257 (1994).

with the Act's stated purpose to restore fairness to federal cocaine sentencing and with the legislative history of the Act, which uniformly demonstrates that Congress intended urgent and immediate amelioration.

Sections 8 and 10 of the FSA direct the Sentencing Commission to, respectively, amend the U.S. Sentencing Guidelines "as soon as practicable, and in any event [within] 90 days" in order to make the drug guideline consistent with the FSA, and submit a report to Congress within five years detailing the "impact of the changes in Federal sentencing law" brought about by the FSA and the Guidelines amendments. Section 8 provides:

> Sec. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.
>
> 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.

124 Stat. at 2374.

Section 10 provides:

> Sec. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.
>
> Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission . . . shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.

124 Stat. at 2375.

Under the Sentencing Reform Act of 1984, it has always been the rule that the Guidelines to be applied at any sentencing are those in effect at the time of sentencing, even when a harsher Guideline existed at the time of the offense. *See* 18 U.S.C. § 3553(a)(4)(A)(ii).[10] Thus, Section 8 of the FSA directed the adoption of new guidelines that would apply at all sentencings, beginning no later than November 1, 2010 (90 days after the effective date of the Act). The Commission complied with that mandate by the promulgation of amendments published on October 27, 2010, and effective November 1, 2010. *See* United States Sentencing Commission, Notice of Temporary, Emergency Amendment to Sentencing Guidelines and Commentary, 75 Fed. Reg. 66,188, 66,191 (Oct. 27, 2010).

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[10] While ameliorative Guidelines amendments therefore apply to pre-amendment conduct, the Ex Post Facto Clause prevents application to a defendant of harsher Guidelines than existed at the time of his offense conduct. *See United States v. Bertoli*, 40 F.3d 1384, 1403 (3d Cir. 1994).

In directing the adoption of new guidelines, Section 8 further directed that the guidelines and amendments be "conforming" as "the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." FSA § 8(2), 124 Stat. at 2374. The Commission recognized that the "applicable law" must include the newly reduced powder-to-crack ratio. It did so by embodying in the amended § 2D1.1(c) the same 18-to-1 ratio embodied in the FSA.[11] Thus, pursuant to the rule of 18 U.S.C. § 3553(a)(4)(A)(ii) providing for application of the Guidelines in effect as of sentencing, the 18-to-1 ratio keyed to the FSA's revised mandatory-minimum thresholds is now used in calculating all defendants' Guidelines ranges. That is, these ranges now apply at every sentencing of a crack-cocaine offense in the federal courts—as Congress well understood they would. *See Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing

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[11] *See* Notice of Temporary, Emergency Amendment, 75 Fed. Reg. at 66,191 ("[U]sing the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26 [like powder cocaine offenses involving at least 500 grams], offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32 [like powder cocaine offenses involving at least 5,000 grams], and other offense levels are established by extrapolating upward and downward."); U.S.S.G. § 2D1.1(c) (2010 Supp.).

law pertinent to the legislation it enacts.").[12]

The Sentencing Commission has thus effectively deemed the FSA to be the "applicable law" at sentencings after August 3, 2010—and rightly so. If Congress had intended the Act's ameliorative provisions to apply only at sentencings for post-August 3, 2010 *conduct*, there would have been no reason to grant emergency amendment authority to the Commission. First of all, if the old mandatory-minimum thresholds continue to apply at post-August 3, 2010 sentencings for pre-FSA conduct, the Guidelines amendments will be meaningless for the large number of defendants whose Guidelines sentencing ranges are below the mandatory minimum. *See* U.S.S.G. § 5G1.1(b) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guidelines range, the statutorily required minimum sentence shall be the guideline sentence.").

Second, criminal defendants need not be indicted until 30 days after their arrest, *see* 18 U.S.C. § 3161(b), and the median time from the filing of an

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[12] Arguably, Section 8 demonstrates an intent to have the law apply once the conforming Guidelines amendments were promulgated. If that date is fixed at the latest time permitted by the FSA—November 1, 2010—then the reduced mandatory minimum still applies in this case, because Mr. Jackson was sentenced on November 3. That said, it seems arbitrary to treat the law's operation as contingent upon how long it took the Commission to discharge its statutory obligation. Congress charged the Commission with amending the Guidelines "as soon as practicable." The evident intent is to have the reduced mandatory minimums apply without delay.

indictment to sentencing in a federal criminal case is seven months. *See* Federal Court Management Statistics, Administrative Office of the U.S. Courts, *available at* <<http://www.uscourts.gov/viewer.aspx?doc=/cgi-bin/cmsd2010Sep.pl>> (reporting statistics for 12-month period ending September 30, 2010). The very first crack-cocaine defendants committing offenses after August 3, 2010 are therefore not likely to come before sentencing courts until many months after November 1, 2010.

Section 10's directive to the Commission to produce a report on the FSA's impact on cocaine sentences within five years drives home the point. Presumably, Congress believed five years' time was enough to gauge the FSA's impact. Yet, if the Act's ameliorative provisions apply only to post-August 3, 2010 conduct, many defendants over the next five years will continue to be sentenced under the pre-FSA mandatory-minimum thresholds—indeed, the statute of limitations for indicting pre-FSA conduct extends to precisely the date the Commission's report on the FSA's impact is due. *See* 18 U.S.C. § 3282(a). The continued application of the pre-FSA mandatory minimums in a significant share of cases would frustrate the Commission's ability to ascertain the *full* effect of the change in the law within the period prescribed by Congress.

It makes no sense for Congress to have ordered Guidelines amendments on an emergency basis, or a report on the FSA's impact during a period in which its ameliorative provisions would often not be applied. Rather, the plain import of Sections 8 and 10 is that they demonstrate Congress's intent that the FSA's ameliorative provisions apply prospectively to all defendants sentenced on or after August 3, 2010—regardless of when their offense conduct occurred.

It is no surprise, then, that many district courts across the country have deemed the FSA's ameliorative provisions applicable to defendants who are sentenced after August 3, 2010, but whose offense conduct occurred before that date.[13] Importantly, that result is perfectly consistent with *Reevey* and the other

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[13] *See, e.g.*, *United States v. Douglas*, __ F. Supp. 2d __, Crim. No. 09-202, 2010 WL 4260221 (D. Me. Oct. 27, 2010); *United States v. Ross*, No. 10-cr-10022, 2010 WL 5168794 (S. D. Fla. Dec. 17, 2010); *United States v. White*, No. 6:10-cr-247 (D.S.C. Feb. 9, 2011); *United States v. McKenzie*, No. 2:10-cr-79 (E.D. Wash. Feb. 9, 2011); *United States v. Jackson*, No. 1:10-cr-20 (N.D. Fla. Feb. 7, 2011); *United States v. Robinson*, No. 1:10-cr-66 (E.D. Tenn. Feb. 4, 2011); *United States v. Rolle*, No. 6:09-cr-103 (M.D. Fla. Feb. 4, 2011); *United States v. Elder*, No. 1:10-cr-132 (N.D. Ga. Jan. 26, 2011); *United States v. Francis*, No. 08-cr-271 (M.D. Fla. Jan. 26, 2011); *United States v. Duncan*, 2:10-cr-89 (E.D. Wash. Jan. 26, 2011); *United States v. Vreen*, No. 6:10-cr-119 (M.D. Fla. Jan. 10, 2011); *United States v. Green*, No. 6:08-cr-270 (M.D. Fla. Jan. 17, 2011); *United States v. Watts*, No. 09-cr-30030 (D. Mass. Jan. 5, 2011); *United States v. Jones*, No. 4:10-cr-233 (N.D. Ohio Jan. 3, 2011); *United States v. English*, No. 10-cr-53 (S.D. Iowa. Dec. 30, 2010); *United States v. Gillam*, No. 1:10-cr-181-2 (W.D. Mich. Dec. 3, 2010); *United States v. Spencer*, No. 09-cr-400 (N.D. Cal. Nov. 30, 2010); *United States v. Favors*, No. 10-cr-00384-LY-1 (W.D. Tex. Nov. 23, 2010); *United States v. Carter*, No. 08-cr-299 (N.D.N.Y. Nov. 22,

appellate decisions declining to apply the FSA retroactively to defendants sentenced before August 3, 2010. Congress's directive for emergency Guidelines amendments and an impact study clearly indicate (and certainly fairly imply) an intent to have the FSA's ameliorative provisions given effect at all sentencings following enactment—while not suggesting that Congress intended to affect sentences that had already been imposed.[14] Mr. Jackson and others sentenced after August 3, 2010 are therefore entitled to the benefits of the FSA, even assuming that *Reevey* was correctly decided.

2010); *United States v. Garcia*, No. 09-cr-1054 (S.D.N.Y. Nov. 15, 2010); *United States v. Johnson*, No. 3:10-cr-138 (E.D. Va. Dec. 7, 2010); *United States v. Shelby*, No. 2:09-cr-00379-CJB (E.D. La. Nov. 10, 2010); *United States v. Angelo*, No. 1:10-cr-10004-RWZ-1 (D. Mass. Oct. 27, 2010); *United States v. Dixson*, No. 8:08-cr-00360-VMC (M.D. Fla. Aug. 24, 2010); *United States v. Gutierrez*, No. 4:06-cr-40043 (D. Mass. Dec. 17, 2010); *United States v. Curl*, No. 09-734-ODW (C.D. Cal. Dec. 22, 2010); *United States v. Whitfield*, No. 2:10-cr-00013-MPM (N.D. Miss. Dec. 21, 2010); *United States v. Holloway*, No. 3:04-cr-90 (S.D. W. Va. Dec. 20, 2010); *United States v. Jones*, No. 10-cr-233 (N.D. Ohio Jan. 3, 2011); *United States v. Cox*, No. 10-cr-85 (W.D. Wis. Jan. 11, 2011).

[14] Congress may have reasoned that providing for application of the FSA in all future sentencings would in no way strain judicial resources, whereas permitting defendants to challenge previously imposed sentences would be present substantial challenges both in terms of logistics and resources.

3. *The FSA's stated purpose and legislative history confirm that its new mandatory-minimum thresholds apply to all defendants sentenced on or after August 3, 2010.*

Congress's intent in this regard is confirmed by the stated purpose of the FSA to "restore fairness to Federal cocaine sentencing," 124 Stat. 2372 (preamble), and the Act's legislative history. The FSA is no garden-variety ameliorative sentencing law. Given the scourge of the racial disparities in sentencing caused by the 100-to-1 ratio, the Sentencing Commission's 15-year campaign to mitigate or eliminate the ratio, and the wide recognition that the ratio was based on incorrect assumptions, *see Kimbrough*, 552 U.S. at 97-100, the FSA holds a unique place among the few major enactments to have ameliorated criminal penalties.

Sponsors of the FSA repeatedly emphasized the importance of acting quickly. Senator Richard Durbin, a leading sponsor of the legislation, 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 (Mar. 17, 2010). "[T]he stakes are simply too high to let reform in this area wait any longer," added Senator Patrick Leahy, another leading sponsor. *Id.* at S1683. Senator Leahy noted that Attorney General Eric Holder had made the same point in testimony before the Senate Judiciary

Committee. *Id.*[15]

The sense of urgency reflected in the sponsors' statements is also evident in their own and other members' discussion of the discriminatory impact of the 1986 Act. The "current system is not fair" and "we are not able to defend the sentences that are required to be imposed under the law today," Senator Jeff Sessions stated. 155 Cong. Rec. S10492 (Oct. 15, 2009). Representative Jackson Lee put it

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[15] Former Philadelphia Police Commissioner John F. Timoney likewise testified before Congress in favor of the FSA, and put need for urgent action particularly (and characteristically) bluntly:

> I am here today to lend my voice to the chorus pleading with Congress to right a wrong. I have no idea if the original reasons for establishing this dichotomy that somehow crack cocaine was more powerful and, therefore, deserved a stiffer sentence—I did not know if they were right or wrong. I have heard the arguments on both sides. But what I can tell you from a practitioner's perspective is that the results or the unintended consequences—and I do not think the consequences were ever intended in this situation. But the results have been one unmitigated disaster. * * *
>
> If I arrest a guy carrying 5 grams of crack cocaine—that is less than a fifth of an ounce—I figure this guy is a low-level street corner dealer, or maybe he just has a good amount of crack for personal consumption. But if I arrest a guy with 500 grams of powder cocaine—and that is about half a kilo—I assume that this individual is a serious trafficker in narcotics. The notion that both of these guys are equal and deserve the same sentence is just ludicrous on its face.

Hearing Before the Subcommittee on Crime and Drugs of the Committee of the Judiciary, United States Senate, at 25-26 (S. Hrg. 111-559, 111th Cong., 1st Sess.) (Apr. 29, 2009).

plainly:

> [T]he only real difference between these two substances [crack and powder cocaine] is that a disproportionate number of the races flock to one or the other.... According to the U.S. Sentencing Commission's May 2007 Report, 82 percent of Federal crack cocaine offenders sentenced in 2006 were African-American, while 8 percent were Hispanic and 8 percent were white.

156 Cong. Rec. H6198 (July 28, 2010). Senator Durbin emphasized that it was "time to do away" with this disparity because "[w]hen one looks at the racial implications of the crack-powder disparity, it has bred disrespect for our criminal justice system. It has made the job of those ... in law enforcement more difficult." 155 Cong. Rec. S10491 (Oct. 15, 2009). *See also id.* at S10592 (statement of Sen. Leahy) ("the criminal justice system has unfair and biased cocaine penalties that undermine the Constitution's promise of equal treatment for all Americans"); 156 Cong. Rec. H6197 (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"). Congress's recognition of the old law's discriminatory impact echoed the Sentencing Commission's own findings to this effect, which the Commission had repeatedly communicated to Congress in successive reports. *See* U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997) at 8; U.S. Sentencing Commission, *Special Report*

to Congress: Cocaine and Federal Sentencing Policy at 103 (May 2002).

Members of Congress likewise made clear their concern that there had *never* been any foundation for the 1986 crack penalty structure, thus demonstrating their view that the law should be discarded immediately. "This disparity made no sense when it was initially enacted, and makes absolutely no sense today," urged Representative Lee. 156 Cong. Rec. H6199 (July 28, 2010). "We didn't really have an evidentiary basis for it," Representative Daniel E. Lungren agreed. *Id.* at H6202. *See also id.* at H6202 (statement of Rep. Robert C. (Bobby) Scott) ("there is no justification for the 100-to-1 ratio"); H6200 (Finding No. 9, H.R. 265) ("Most of the assumptions on which the current penalty structure was based have turned out to be unfounded."). Legislators' recognition that there had never been any reason for the 100-to-1 ratio cannot be reconciled with any intent other than the immediate abolition of that ratio.

Sponsors Durbin and Leahy reiterated Congress's intent several months after the enactment in a letter to Attorney General Eric Holder. *See* Ltr. to Hon. Eric Holder from Sens. Richard Durbin and Patrick J. Leahy dated Nov. 17, 2010, *available at* <<http://www.fd.org/pdf_lib/fair-sentencing-act-ag-holder-letter-111710[1].pdf>>. The senators urged the Attorney General "to apply [the FSA's] modified mandatory minimums to all defendants who have not yet been sentenced,

including those whose conduct predates the legislation's enactment." Their "goal in passing the Fair Sentencing Act," as set forth in the legislation's preamble, "was to restore fairness to Federal cocaine sentencing as soon as possible." *Id.* The senators explained that it was the urgent need for reform that prompted Congress to "require[] the U.S. Sentencing Commission to promulgate an emergency amendment to the Sentencing Guidelines." *Id.* The senators continued:

> 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.

Id.

In sum, legislators' recognition that the 1986 Act had given rise to racial disparity and was premised all along on unsound assumptions confirms Congress's intent to have the Fair Sentencing Act apply to defendants who are sentenced after August 3, 2010, but whose offense conduct occurred before that date.

4. *Applying the FSA's ameliorative provisions at all sentencings after August 3, 2010 is necessary to avoid odd and clearly unintended results.*

"In construing statutes, we consider the statute's overall object and policy, and avoid constructions that produce 'odd' or 'absurd' results or that are 'inconsistent with common sense.'" *OFC Comm Baseball v. Markell*, 579 F.3d 293, 304 (3d Cir. 2009). That basic canon of construction compels application of the FSA's ameliorative provisions at all sentencings after August 3, 2010.

As discussed above, the emergency Guidelines amendments mandated by the FSA apply at all sentencings conducted on or after November 1, 2010, and set sentencing ranges according to an 18-to-1 ratio of powder to crack cocaine. *See supra* at 24-26. If the old mandatory minimums continue to apply at the same time as the new Guidelines, there is a perverse result. Defendants whose offense conduct predated August 3, 2010, will benefit from the FSA only inasmuch as they trafficked in a large enough quantity of crack for their new sentencing range to remain above the *old* mandatory minimum, such that the 18-to-1 ratio controls. For defendants whose pre-August 3 conduct involved small enough quantities of crack to place the § 2D1.1 range below that minimum, the 18-to-1 ratio cannot control. In other words, low-level crack defendants will be denied the benefit of the FSA while high-level crack defendants will receive it. That result is patently

inconsistent with the purpose and intent of the FSA, and is certainly a result that is "odd," "absurd," or otherwise "inconsistent with common sense." *Markell*, 579 F.3d at 304.

Mr. Jackson's is a case in point. The effect of the emergency amendments was to lower his Guidelines range from 97-121 to 63-78 months' imprisonment. *See* PSR at ¶¶ 65-66; U.S.S.G. § 2D1.1(c)(7) (Nov. 1, 2010). But because 63-78 months is below the old, 10-year mandatory minimum, the amended range is meaningless to him. *See* U.S.S.G. § 5G1.1(b) (when mandatory minimum is greater than Guidelines range, mandatory minimum becomes Guidelines range). Had Mr. Jackson been a more serious, culpable offender—*i.e.*, had his offense involved more crack, or had he had a more extensive criminal history—his amended Guidelines range would have been above the 10-year mandatory minimum, and he would have reaped the benefits of the 18-to-1ratio.

5. Marrero *does not even suggest, yet alone compel, a different result.*

The district court struggled mightily to find a way to impose the FSA's lower mandatory minimum in order to avoid having to impose upon Mr. Jackson the "unjust" sentence of 10 years' imprisonment. (App. 29, 32, 33). Ultimately, the court believed itself bound by *Warden, Lewisburg Penitentiary v. Marrero*,

417 U.S. 653 (1974) to do an injustice here.

But *Marrero* does not even suggest, yet alone compel, the application of the old mandatory-minimum thresholds to defendants sentenced after August 3, 2010 whose offense conduct occurred before that date. As material here, *Marrero* stands for nothing more than the proposition that ameliorative sentencing statutes (like all other statutes) are subject to a saving analysis under 1 U.S.C. § 109. 417 U.S. at 661.[16] That is undisputed by Mr. Jackson. *See also Reevey*, 2010 WL 5078239, at *3.

What is more important about *Marrero* in the present case is that the Supreme Court there reiterated the long-standing rule of *Great Northern Ry. Co.* that § 109's default saving rule can be overcome by the "fair implication" of the repealing statute. *See Marrero*, 417 U.S. at 659 n.10. For the reasons discussed above, the fair implication and "plain import," *Lockhart*, 546 U.S. at 149 (Scalia, J., concurring), of the FSA is that its ameliorative provisions are to apply prospectively to all defendants sentenced on or after August 3, 2010—regardless

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[16] *Marrero*'s only holding with respect to § 109 is that a prohibition of parole eligibility constitutes a "penalty, forfeiture, or liability" as those terms are used in § 109. 417 U.S. at 660 ("The determinative question is thus whether the prohibition of 26 U.S.C. § 7237(d) against the offender's eligibility for parole under 18 U.S.C. § 4202 is a 'penalty, forfeiture, or liability' saved from release or extinguishment by 1 U.S.C. § 109."), 664 ("[W]e hold that the nonparole provision of § 7237(d) is a 'penalty, forfeiture, or liability' saved by § 109.").

of when their offense conduct occurred.

C. To the extent any doubt exists as to the applicability of the FSA's ameliorative provisions at post-August 3, 2010 sentencings for pre-FSA conduct, it should be resolved in Mr. Jackson's favor under the rule of lenity and the avoidance canon.

For the reasons set forth above, the plain import of the FSA is that its ameliorative provisions apply to all defendants sentenced on or after August 3, 2010, regardless of when their offense conduct occurred. To the extent there remains any doubt on this point, it should be resolved in Mr. Jackson's favor under the rule of lenity and the avoidance canon of statutory construction.

"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. Flemming*, 617 F.3d 252, 269 (3d Cir. 2010). It has special force in the context of mandatory-minimum sentencing provisions, since "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 similar to, perhaps close to, the statutory sentence even if that sentence (because of the court's interpretation of the statute) is not legislatively *required*." *Dean v. United States*, 129 S. Ct. 1849, 1860-61 (2009) (Breyer, J., dissenting). Here, at the very least, lenity compels a

ruling in Mr. Jackson's favor, although in fact the plain import of the FSA requires the same result.

Under the avoidance canon, "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," the court's duty "is to adopt the latter." *Jones v. United States*, 526 U.S. 227, 239 (1999). Serious constitutional questions are implicated by the continued application of the 100-to-1 ratio in light of the FSA.

1. *Guarantee of equal protection*

Application of the 1986 Act based arbitrarily on the date of the offense raises serious questions under the Equal Protection Clause, as embodied in the Fifth Amendment with respect to federal criminal defendants. *See United States v. Pollard*, 326 F.3d 397, 406 (3d Cir. 2003) (confirming equivalence of protection afforded by Fifth Amendment). The guarantee of equal protection requires that "a law must bear a rational relationship to a legitimate governmental purpose." *Romer v. Evans*, 517 U.S. 620, 635 (1996). That standard, while generally a forgiving one, cannot be met here for three reasons.

First, no rational relationship to a legitimate governmental purpose appears in continuing to apply to some but not all defendants a 100-to-1 ratio that "made

no sense when it was initially enacted, and makes absolutely no sense today." 156 Cong. Rec. H6199 (July 28, 2010) (statement of Rep. Lee).

Second, it appears the height of irrationality for defendants engaged in more serious crack-cocaine trafficking to receive the benefit of the new law (because their lower Guidelines ranges reflect the 18-to-1 ratio), while defendants involved in less serious crack-cocaine offenses do not get the benefit of the lower ratio (because the statutory minimum controls over the Guidelines).

Third, it would raise serious equal-protection concerns to continue to apply a statute that results in unwarranted racial disparities when it is now clear to all (legislators and Sentencing Commission alike) that defendants are not dissimilarly situated simply because their offenses involved crack- rather than powder-cocaine. Precedent uninformed by that consensus is antiquated. *See United States v. Alton*, 60 F.3d 1065, 1068-70 (3d Cir. 1995).

2. *The bar on cruel and unusual punishments*

Continued application of the 1986 Act likewise raises grave constitutional questions under the Eighth Amendment's Cruel and Unusual Punishment Clause. Embodied in the Constitution's ban on cruel and unusual punishments is the "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Weems v. United States*, 217 U.S. 349, 367 (1910).

The Eighth Amendment bar on cruel and unusual punishment looks to whether "the challenged sentencing practice serves legitimate penological goals," which have been identified as "retribution, deterrence, incapacitation, and rehabilitation." *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010); *id.* at 2028. "A sentence lacking any legitimate penological justification is by its nature disproportionate to the offense." *Id.* at 2028.

Just as it has been recognized that the 100-to-1 ratio lacked any rational basis, it has become clear that the disparate penalty structure failed to serve any of the legitimate functions of punishment. Indeed, for well over a decade, the Sentencing Commission had urged Congress to reform the law precisely because it did not comport with these basic purposes. The lack of proportion may have been particularly detrimental to punishment's deterrent function by creating a public perception of unfairness. For this reason, failure to give Mr. Jackson the benefit of the reduced mandatory minimum is also constitutionally doubtful under the Eighth Amendment's prohibition against cruel and unusual punishment.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be vacated and this case remanded for resentencing.

Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

It is hereby certified that Brett G. Sweitzer is a member of the bar of the Court of Appeals for the Third Circuit.

BRETT G. SWEITZER

DATE: 2/22/11

CERTIFICATION

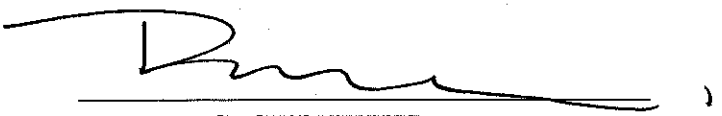
I, Brett G. Sweitzer, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that the electronic version of the attached brief sent by e-mail to the Court was automatically scanned by Symantec AntiVirus Corporate Edition, version 8.00, and found to contain no known viruses. I further certify that the text in the electronic copy of the brief is identical to the text in the paper copies of the brief filed with the Court.

BRETT G. SWEITZER

DATE: 2/22/11

CERTIFICATE OF COMPLIANCE

I, Brett G. Sweitzer, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that appellant's brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 9,160 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect for Windows 12.0 word count software in font size 14, type style Times New Roman.



BRETT G. SWEITZER

Attorney for Kenneth Jackson

Dated: 2/22/11

CERTIFICATE OF SERVICE

I, Brett G. Sweitzer, Assistant Federal Defender, Federal Community Defender Office for the Eastern District of Pennsylvania, hereby certify that I have filed this same day, both in electronic through the Third Circuit Court of Appeals' Electronic Case Filing (ECF) system and paper form, the Brief for Appellant and served two (2) copies of the Brief and one (1) copy of the Joint Appendix upon Assistant United States Attorney Joseph T. Labrum, III, by first class U.S. mail to his office located at Suite 1250, 615 Chestnut Street, Philadelphia, Pennsylvania 19106.

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