No. 11-5721

In The Supreme Court of the United States

COREY A. HILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the district court erred in not sentencing Petitioner pursuant to the Fair Sentencing Act of 2010 ("the FSA"), where Petitioner was sentenced on December 2, 2010, after the effective date of the FSA and the amendments to the Sentencing Guidelines mandated by the FSA?

LIST OF PARTIES

There are no additional parties to the proceeding other than those listed in the caption.

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The opinion of the United States Court of Appeals for the Seventh Circuit is reported at *United States v. Hill*, 417 Fed. App'x 560 (7th Cir. 2011), and is reproduced at JA 97. The judgment of the United States District Court for the Northern District of Illinois is unreported and is reproduced at JA 83.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 3, 2011. JA 4. Petitioner timely filed his petition for a writ of certiorari on July 11, 2011. This Court granted the petition on November 28, 2011. JA 100. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), is reproduced in the appendix to this brief at App. 1. The Fair Sentencing Act amended certain provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act and issued related directives to the United States Sentencing Commission.

Relevant portions of 21 U.S.C. § 841(a) and (b), both before and after their amendment by the Fair

Sentencing Act, are reproduced in the appendix to this brief at App. 10 and App. 23.

Relevant portions of the Sentencing Guidelines, U.S.S.G. § 2D1.1, both before and after their amendment pursuant to the Fair Sentencing Act, are reproduced in the appendix to this brief at App. 36 and App. 60.

The Saving Statute, 1 U.S.C. § 109, is reproduced in the appendix to this brief at App. 88.

STATEMENT OF THE CASE

This case presents the question whether thousands of defendants charged with crack-cocaine offenses nationwide will be subject to repealed mandatory minimum sentences that Congress has declared to be unfair. Its resolution depends on a proper interpretation of the Fair Sentencing Act of 2010 (the "FSA" or the "Act"), a watershed bipartisan response to mounting criticism of the 100:1 crack-to-powder ratio that was 25 years in the making. Born of a desire to restore fairness and eliminate potentially racially disparate sentences, the Act reduces the crack-to-powder ratio to 18:1 by increasing the amounts of crack that trigger mandatory minimum terms, and urgently directs the Commission to promulgate

conforming Guidelines.[1] As demonstrated by its text, purpose, and legislative history, the FSA applies immediately to all sentencing proceedings following its enactment.

Petitioner Corey Hill was sentenced after the effective dates of both the FSA and the amended Guidelines that implemented it. JA 56. While the Act would have required him to receive a mandatory minimum sentence of 5 years, the district court doubled his sentence to 10 years based on the mandatory minimum provisions of the repealed law. JA 69. The Seventh Circuit, bound by its earlier precedent, affirmed. JA 98-99. Ignoring the clear mandate of the FSA, the court determined that the amendments made by Congress to make sentencing more fair did not apply because Petitioner's offense conduct occurred prior to the passage of the Act. JA 98-99. The court erroneously concluded that the Saving Statute, 1 U.S.C. § 109, required the continued application of the repealed law by default, even though all indications were that Congress intended to supplant that law immediately. JA 98-99.

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[1] The crack-to-powder ratio compares the amount of crack versus powder cocaine necessary to trigger a mandatory minimum sentence. Under prior law, the sale of 5 grams of crack resulted in the same mandatory minimum sentence (5 years) as 500 grams of powder cocaine, hence the 100:1 ratio. Under the FSA, the same mandatory minimum for the sale of 500 grams of powder cocaine now requires the sale of 28 grams of crack, for a ratio of 18:1.

The issues presented in this case arise in the wake of *Kimbrough v. United States*, 552 U.S. 85 (2007), which confirmed that district judges had authority to vary from the 100:1 crack-to-powder ratio contained in the Guidelines of that time based solely on a disagreement with the policy underlying that ratio. The Court traced the decades-long criticism of the 100:1 ratio, which originated in the mandatory minimum provisions of the Anti-Drug Abuse Act of 1986, echoing the reasons articulated by the Sentencing Commission in a series of research reports to Congress. The Court explained that sentencing judges were not bound to impose the uniquely severe sentences for crack offenses reflected in those Guidelines, because they (1) rested on assumptions about the relative harmfulness of crack versus powder cocaine that more recent research no longer supported; (2) resulted in sentencing disparities between crack- and powder-cocaine offenders that were inconsistent with the goal of punishing major drug traffickers more severely than low-level dealers; and (3) fostered disrespect for and lack of confidence in the criminal justice system because of a widely held perception that the ratio had a racially discriminatory impact. *Id.* at 97-98; *see also Spears v. United States*, 555 U.S. 261, 265-66 (2009).

This case presents the next chapter after *Kimbrough*. In the face of withering criticism of the 100:1 ratio, Congress in the FSA addressed the need for more just sentencing by imposing an 18:1 ratio for mandatory minimum sentences, and directed the

Commission to issue new conforming Guidelines to achieve consistency immediately. The application of the repealed mandatory minimums to Petitioner and other similarly situated offenders undoes Congress's effort to remedy the very problems identified in *Kimbrough*.

1. On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010 (Pub. L. No. 111-220, 124 Stat. 2372 (2010)), the stated purpose of which was to "restore fairness to Federal cocaine sentencing." *Id.* To achieve that purpose, the FSA amended certain provisions of the Controlled Substances Act and the Controlled Substances Import and Export Act and issued several related directives to the Sentencing Commission. App. 1-9. Congress passed those amendments in the Senate by unanimous consent and in the House by a voice vote. 156 Cong. Rec. H6197 (daily ed. July 28, 2010) (statement of Rep. Scott).

In a section entitled "Cocaine Sentencing Disparity Reduction," the FSA increased the threshold quantities of crack that trigger application of certain mandatory minimum terms of imprisonment. FSA § 2, 124 Stat. at 2372. It raised the amount of crack that triggers a mandatory 120-month minimum term of imprisonment from 50 grams to 280 grams (21 U.S.C. § 841(b)(1)(A)(iii)) and the amount that triggers a 60-month minimum term of imprisonment from 5 grams to 28 grams (*id.* § 841(b)(1)(B)(iii)). App. 1. The effect of these increases was to change the weight ratio of

cocaine powder to crack, for the purpose of imposing mandatory minimum sentences, from 100:1 to 18:1.

The FSA also recalibrated the sentencing scheme for drug-trafficking offenders to distinguish among the relative culpabilities of crack offenders overall. The FSA increased monetary fines for major drug traffickers (FSA § 4, 124 Stat. at 2372-73), and directed the Commission to account for certain aggravating factors, such as for a violent offender acting as an organizer who sells crack to a minor or the elderly (FSA § 6, 124 Stat. at 2373-74). At the same time, it eliminated the mandatory minimum sentence for simple possession of crack (FSA § 3, 124 Stat. at 2372), and directed the Commission to account for certain mitigating factors, such as for an offender with a minimal role who is motivated by fear or a family relationship to sell for no compensation (FSA § 7, 124 Stat. at 2374). App. 2-7.

The directives to the Commission were accompanied by a grant of "emergency authority" and a mandate to do the following:

> (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.

FSA § 8, 124 Stat. at 2374. App. 7.

Section 21(a) of the Sentencing Act of 1987 granted the Commission the authority to promulgate a temporary Guideline or amendment to an existing Guideline when the need to do so is "urgent and compelling." 28 U.S.C. § 994 note. That authority, unless otherwise resurrected by Congress, expired on May 1, 1988. *Id*. The procedure outlined in the 1987 Act contrasts sharply with the procedures that the Commission must ordinarily follow to amend the Guidelines. The latter require the submission of the amendments promulgated by the Commission to Congress, along with a statement of the reasons therefor, to take effect no sooner than 180 days later. 28 U.S.C. § 994(p).

Pursuant to § 8 of the FSA, the Commission drafted an emergency, temporary amendment to six Guidelines provisions, effective November 1, 2010. U.S.S.G. App. C, Amend. 748. Consistent with § 2 of the FSA, the temporary amendment increased the quantities of crack cocaine enumerated in the Drug Quantity Table, U.S.S.G. § 2D1.1(c), to reflect the increased quantities codified in 21 U.S.C. § 841(b)(1)(A)(iii) and (B)(iii) pursuant to the FSA. *Id*. The Commission then conformed the Guidelines to reflect the new 18:1

ratio proporionately throughout the Drug Quantity Table, as well as the aggravating and mitigating factors identified by Congress. It later re-promulgated this portion of the temporary amendment, without change, as a permanent amendment, effective November 1, 2011. U.S.S.G. App. C, Amend. 750.[2] App. 60.

The Commission was also directed to prepare a report to Congress regarding the impact of FSA no later than five years after the date of its enactment. FSA § 10, 124 Stat. at 2375. App. 9.

2. Petitioner was arrested on June 19, 2008, and charged with one count of distributing more than 50 grams of crack on or about March 28, 2007. JA 6. On April 22, 2009, following a jury trial, he was found guilty of the charged offense. JA 1. His sentencing, however, did not occur until after the FSA was signed into law on August 3, 2010. JA 56.

3. On December 2, 2010 – almost four months after passage of the FSA, and one month after the new "conforming" Guidelines took effect – Petitioner was sentenced. JA 56. The main legal question before the district court was the applicability of the FSA. JA 59-68.

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[2] On June 30, 2011, the Commission voted unanimously to apply this portion of the amendment retroactively to all eligible individuals previously sentenced under § 2D1.1 for a crack-cocaine offense. U.S.S.G. App. C, Amend. 759. That rule took effect on November 1, 2011.

At an earlier proceeding, the district court had determined that it was appropriate to apply the Guidelines to Petitioner as if the crack-to-powder ratio were 1:1. JA 49. The court adopted its rationale from another case, in which it had expressed numerous reasons for rejecting the 100:1 ratio then in effect in favor of a 1:1 ratio: (1) the 100:1 ratio was the result of a "legislatively enacted weight-driven scheme rather than the Commission's usual empirical approach"; (2) the 100:1 ratio depended on assumptions about the relative harmfulness of crack and cocaine powder "that are no longer supported by the evidence"; (3) the 100:1 ratio is inconsistent with punishing major drug traffickers, who deal with powder cocaine, more severely, and low-level crack dealers, who convert cocaine powder into crack, less severely; and (4) the disproportionate impact on black offenders resulting from the use of the 100:1 ratio "fosters disrespect for and lack of confidence in the criminal justice system." *United States v. Rollins*, No. 08-cr-1014-5 (N.D. Ill. 2010) (citing *United States v. Gully*, 619 F. Supp. 2d 633, 638-39 (N.D. Iowa 2009)). JA 52-53.

The district court found that the amount of crack involved in Petitioner's offense was 53.3 grams. Applying the 1:1 ratio, it determined that Petitioner had an offense level of 16 and a criminal history category of V, resulting in an advisory Guidelines range of 41-51 months. JA 58-59. The district court announced that if it had the discretion to do so, it

would have sentenced Petitioner at the high end of that Guidelines range. JA 69.

The district court then considered the impact of the FSA. JA 59-60. At sentencing, the government argued that the Saving Statute, 1 U.S.C. § 109, required the continued imposition of the now-repealed mandatory minimum term because Petitioner's offense conduct occurred prior to the FSA's passage, and the date of that conduct controlled which penalty applied. JA 61. Relying on the Seventh Circuit's decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), *cert. denied,* 131 S. Ct. 2121 (2011), the district court agreed. JA 62-63. Notwithstanding the much lower sentence it considered to be "sufficient, but not greater than necessary," based on its consideration of the relevant sentencing factors under 18 U.S.C. § 3553(a), the district court held it was required to apply the old mandatory minimum sentence under the pre-FSA version of 21 U.S.C. § 841(b), and it accordingly imposed a sentence of 120 months. JA 78.

4. In a short per curiam opinion, decided on the briefs without oral argument, the Seventh Circuit affirmed. JA 97-99. Adhering to its earlier decisions, the Seventh Circuit held that the FSA did not apply to Petitioner because his offense conduct predated the passage of the Act, even though his sentencing did not occur until months after. *Id.* (citing *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011), *cert. denied*, ___ S. Ct. ___, 2011 WL 3812692 (U.S. Nov. 28, 2011)).

5. A few months later, while Petitioner's petition for a writ of certiorari was pending before this Court, the Justice Department changed its position on the applicability of the FSA to cases where the sentencing occurs after passage of the Act. App. 93. While contending that the Saving Statute precludes application of the new mandatory minimum provisions to defendants already sentenced before the enactment of the FSA, the Justice Department concluded that those provisions should apply to all sentencings that occur on or after August 3, 2010, regardless of when the underlying offense conduct took place.[3] The Attorney General explained in a written memorandum that "[t]he goal of the [FSA] was to rectify a discredited policy," and that "Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law." App. 96. As a result, the United States confessed error in this case and indicated that it would file a brief supporting reversal.

6. In the wake of the Justice Department's about-face, the Seventh Circuit considered whether it

[3] Thereafter, numerous United States Attorney's Offices filed "Notices of Changed Position" in pending cases and appeals in which the United States had previously taken the position that the FSA's amendments did not apply to conduct that occurred prior to August 3, 2010, even if the sentencings in those cases and appeals occurred on or after August 3. The Notice stated that the government now believed that the FSA should apply to those defendants.

should revisit its decision on the applicability of the FSA to cases where sentencing had not yet occurred at the time of its enactment. Five judges voted to rehear one such case en banc, while another five voted against, with each side producing one or more lengthy opinions. *See United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011) (denying petition for rehearing).

Writing for the five judges who opposed rehearing, Chief Judge Easterbrook focused on the effect of the Saving Statute. *Id*. at 446. Although he acknowledged that § 109, which was passed in 1871, could not bind a later Congress, he found no implication in the FSA that Congress intended for it to apply in a case like Petitioner's in which the offense conduct occurred prior to the FSA's passage. *Id*. at 448. Chief Judge Easterbrook conceded that there was "no satisfactory answer" as to why Congress would have decided that a 100:1 ratio is excessive, but then left in place the minimum and maximum sentences for persons whose crimes predate August 3, 2010, other than that "legislation is an exercise in compromise." *Id*. He did not identify any evidence that such a compromise over the effective date occurred.

Writing for the other five judges in dissent, Judge Williams argued that the purpose, the structure, and the text of the FSA indicate that it must apply to all post-enactment sentencings. In particular, she emphasized Congress's unusual grant of emergency authority to the Commission to promulgate amendments to the Guidelines "to achieve consistency" with

"applicable law," meaning the new statutory minimums. *Id*. (Williams, J., dissenting from denial of rehearing en banc). In her view, it would make no sense for Congress to will that the amended Guidelines take effect immediately in sentencings, even for crimes committed before the Act, if those same defendants would be subject to pre-FSA mandatory minimum provisions. She relied on the rule that courts "are required to interpret statutes in a way that does not lead to nonsensical results." *Id*. at 456 (citing *United States v. Rutherford*, 442 U.S. 544, 552 (1979)).[4] More broadly, she questioned why Congress would have wanted sentencing judges to continue to impose sentences that it had already declared to be unfair. *Id.*

While joining Judge Williams's opinion in full, Judge Posner wrote a separate dissent emphasizing the "perverse" and "gratuitously silly" results that would follow if the FSA were construed to apply only to offenders whose conduct occurred after the FSA's passage. *Holcomb*, 657 F.3d at 462-63 (Posner, J., dissenting from denial of rehearing en banc). Judge Posner illustrated those results by presenting, in

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[4] Judge Williams also cited the statement by Sen. Durbin, the FSA's co-sponsor, on the date it passed the Senate:

> Every day that passes without taking action to solve the problem is another day that people are being sentenced under a law that virtually everyone agrees is *unjust*. . . . If this bill is enacted into law, it will *immediately* ensure that every year, thousands of people are treated more fairly in our criminal justice system.

Holcomb, 657 F.3d at 454 (emphasis added).

tabular form, examples of mandatory minimum sentences before and after the FSA's amendments and the contemporaneous "conforming" Guidelines ranges for different quantities of crack. In one example, an individual convicted of a pre-enactment crime involving 50 grams of crack would incur a mandatory minimum sentence of 120 months under the old law, even though his sentencing range under FSA-consistent Guidelines would be only 70 to 87 months. *Id.* at 462. As Judge Posner explained, unless the FSA's revised mandatory minimum sentences are also applicable to such defendants, they will receive sentences far in excess of the Guidelines that Congress intended would apply as soon as possible no matter when the offense conduct occurred. *Id.*

SUMMARY OF ARGUMENT

Congress passed the FSA to "restore fairness" to federal crack sentencing. It acted unanimously to repeal the widely criticized mandatory minimum sentencing structure that formerly applied to crack offenses and to replace it with penalties that more closely resembled those in effect for powder cocaine. The Seventh Circuit held that these efforts were intended to benefit only defendants who committed their offenses after the enactment. But the text, legislative history, and purpose of the FSA all compel the conclusion that once Congress completed its historic overhaul of crack sentencing policy, it wanted those amendments to apply immediately.

The text of the statute plainly supports this interpretation. The FSA contained an urgent directive to the Sentencing Commission to issue "as soon as practicable, and in any event, not later than 90 days" Guidelines that would "conform" to and be "consistent" with that law, including the new mandatory minimums. The clear implication of the statutory language was that the new mandatory minimums should take effect rapidly so that the Guidelines would have a model against which to "conform" and be consistent. The Commission fulfilled its obligation and issued amended Guidelines that took effect on November 1, 2010, which implemented those minimums. Congress thereafter did nothing to suggest that the Commission misunderstood its proper mandate.

The FSA's legislative history and purpose reinforce the conclusion that the statute was intended to apply immediately. That legislative history contains repeated references to the need to change the former mandatory minimum sentencing provisions immediately so as to avoid the continued imposition of unjust sentences. Legislators critiqued the old differential between penalties for powder cocaine and crack cocaine as unwarranted, potentially discriminatory, and even divorced from the proper goals of punishment. Those interests leave little room for an interpretation of the FSA that would force district courts to keep carrying out a discredited sentencing policy. Indeed, while earlier versions of crack sentencing reform bills expressly forbade retroactive application, the FSA did

not. Legislative silence on this point speaks volumes about Congress's intentions.

Finally, the Saving Statute, 1 U.S.C. § 109, does not support a different result. As this Court has explained, no "magical passwords" are required to be spoken by Congress to avoid the application of that default rule. Here, the text, legislative history, and purpose of the FSA provide more than a "fair implication" that Congress intended the FSA to have immediate effect, which is sufficient to blunt any impact of § 109. But even if there were any doubt on that point, two other canons of construction favor the position that the FSA's new mandatory minimums took effect immediately. The rule of lenity requires any ambiguity as to the FSA's temporal scope to be resolved in favor of Petitioner. And the doctrine of Constitutional avoidance counsels in favor of an interpretation that lessens concerns about whether the statute violates equal protection.

ARGUMENT

I. CONGRESS INTENDED THE FSA TO APPLY TO ALL INITIAL SENTENCING PROCEEDINGS OCCURRING AFTER ITS ENACTMENT.

The text, legislative history, and purpose of the FSA demonstrate that Congress intended its provisions to apply immediately to all sentencing proceedings occurring after its passage. Congress ordered the

Commission to act with great urgency to issue amended Guidelines that would "conform" to the provisions of the Act. App. 7. The unusual emphasis on speed of implementation, and the accompanying statutory directive that the Guidelines must "achieve consistency" with the FSA, strongly imply that Congress intended the FSA to take effect immediately. The urgency in applying the FSA also follows from the stated purpose of the Act, which was to "restore fairness to Federal cocaine sentencing," and is corroborated by a variety of statements by members of Congress who believed that the old law was unnecessarily harsh, even racially discriminatory, and should not be applied a day longer.

A. Immediate Application Of The FSA Is Consistent With Its Statutory Text.

This Court has explained that legislative intent to apply a statute to pending cases may be revealed by the express language of the statute. *Graham v. Goodcell*, 282 U.S. 409, 419-20 (1931). In this case, the text of the FSA demonstrates that its ameliorative provisions were designed to have immediate effect.

1. The FSA Applies At Least To Defendants Sentenced On Or After August 3, 2010.

The FSA ordered the Commission to make "conforming amendments" to the Guidelines in order to

"achieve consistency" with other Guideline provisions and "applicable law." FSA § 8, 124 Stat. at 2374. App. 7. Here, "applicable law" plainly includes the FSA itself, including its revised mandatory minimums for crack offenders, because prior statutes would have already been addressed by the Commission and would not have required any new Guidelines to implement them. All three of these statutory phrases – "conforming amendments," "applicable law," and "achieve consistency" – compel the conclusion that Congress intended the new mandatory minimums to be effective immediately, especially when viewed in the light of two other significant features of the FSA and the Guidelines.

First, the FSA required the Commission to act with extraordinary speed. In its normal amendment cycle, the Commission promulgates amendments to the Guidelines and submits them for review to Congress with a formal statement of the reasons for the changes. 28 U.S.C. § 994(p). The amendments take effect on a date specified by the Commission, but no earlier than 180 days after their submission, and are subject to Congressional disapproval. *Id.* Here, by contrast, Congress suspended the normal rulemaking process by forgoing its power of disapproval altogether. It also greatly shortened their time for promulgation.[5] Congress's explicit direction to the

[5] To our knowledge, Congress has directed the Commission to implement new Guidelines within 90 days under its emergency authority only three other times in over two decades. *See*

(Continued on following page)

Commission to issue "conforming" amendments "as soon as practicable, and in any event not later than 90 days," FSA § 8, 124 Stat. at 2374, made plain its desire for the new Guidelines to take effect as quickly as possible.

Second, the statutory rule is that all Guidelines amendments apply immediately. That is, a defendant is sentenced under the Guidelines in effect on the day of sentencing, regardless of when his offense took place. *See* 18 U.S.C. § 3553(a)(4)(ii); U.S.S.G. § 1B1.11. When it passed the Sentencing Reform Act that originally authorized the creation of the Guidelines, Congress emphasized the importance of this principle to promote consistency in punishment. *See* S. Rep. No. 225, 98th Cong., 1st Sess. 77-78 (1983) ("To impose a sentence under outmoded Guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.").[6]

Emergency and Disaster Assistance Fraud Penalty Enhancement Act of 2007, Pub. L. No. 110-179, § 5(c); Intelligence Reform and Terrorism Prevention Act of 2004, Pub. L. No. 108-458, § 6703(b); Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, § 314(c)(2). In each of those cases, Congress required the Commission to promulgate Guidelines that would either create or *increase* penalties. We are not aware that Congress has ever previously required the Commission to act with such extraordinary speed in order to *decrease* penalties.

[6] Likewise, this Court has consistently held that factual and legal developments subsequent to defendant's offense conduct should be considered by the court at the time of sentencing to ensure that sentencing determinations are just and effective. *See, e.g.*, *Pepper v. United States*, 131 S. Ct. 1229, 1242 (2011)

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Even after the Guidelines have become advisory, the rule remains the same. The amended Guidelines implementing the FSA – which lowered the crack offense levels according to an 18:1 ratio – therefore applied to defendants who were sentenced from that day forward.

Against the backdrop of these rules, when Congress required the Commission to implement conforming Guidelines "as soon as practicable" in order to achieve consistency with the new mandatory minimums, it knew that those Guidelines could be issued and take effect on virtually any day. Congress must have intended, therefore, that the new mandatory minimums would already be in effect – else the requirement that the Guidelines must "conform" to those statutory provisions would be empty and pointless. Worse, in that scenario, far from "achiev[ing]

("a court's duty is always to sentence the defendant as he stands before the court on the day of sentencing") (quoting *United States v. Bryson*, 229 F.3d 425, 426 (2d Cir. 2000)); *United States v. Dunnigan*, 507 U.S. 87, 96-98 (1993) (upholding increased sentences for conviction offense based on defendant's subsequent untruthful trial testimony); *Wasman v. United States*, 468 U.S. 559, 569 (1984) (explaining that it "would have been inappropriate" for a judge at a resentencing to fail to consider a new distinct criminal conviction obtained in the interim between an original sentencing and a sentencing after retrial). *Cf.* 18 U.S.C. § 3661 (codifying long-standing principle that there should be no limitations on the information concerning an offender or his offense that a district court may receive and consider for the purpose of imposing an appropriate sentence).

consistency" with the FSA, the amended Guidelines would actually promote *inconsistency*, as they would be based on an 18:1 ratio even as the former mandatory minimums that prescribed a 100:1 ratio would still apply. The urgency of Congress's directive strongly implies that it expected the new mandatory minimums would already govern.

Indeed, the realities of the criminal process undercut any contrary interpretation. All defendants sentenced on August 4, 2010 – and for many months thereafter – committed their offenses before August 3, when the higher mandatory minimums were in effect.[7] As Judge Posner observed, the urgency of Congress's direction to the Commission to act as soon as practicable makes no sense if none of those

[7] Lengthy delays often occur between the commission of an offense and sentencing. Initially, the five-year statute of limitations for drug offenses allows for delays between the offense and the filing of charges. 18 U.S.C. § 3282(a). The median time between the indictment and the sentencing for most federal drug offenses other than marijuana is over 11 months. Admin. Office of the U.S. Courts, *Judicial Business of the United States Courts* 272, tbl. D-10 (2010), *available at* http://www.uscourts.gov/Statistics/JudicialBusiness/JudicialBusiness2010.aspx (last visited Jan. 24, 2012). If a defendant exercises his right to a trial, the median time between the indictment and the sentencing increases to almost 17 months. *Id.* Indeed, in Petitioner's own case, the total delay between his offense and sentencing spanned almost four years. Assuming the same pace of proceedings, a defendant who committed his offense immediately upon the FSA's enactment would not be sentenced until sometime in 2014.

defendants would enjoy the benefits of the reduced Guidelines. *Holcomb*, 657 F.3d at 462-63 (Posner, J., dissenting from denial of rehearing en banc). Courts are "disinclined to say that what Congress imposed with one hand . . . it withdrew with the other." *Abbott v. United States*, 131 S. Ct. 18, 27 (2010) (internal quotation marks omitted). And interpretations of statutes that produce absurd results should be avoided. *See Johnson v. United States*, 529 U.S. 694, 706 n.9 (2000) (recognizing that "nothing is better settled than that statutes should receive a sensible construction, such as will effectuate the legislative intention, and, if possible, so as to avoid an unjust or an absurd conclusion" (internal quotation marks omitted)). As this Court recently confirmed, courts must avoid reading a mandatory minimum provision in a way that "undercut[s] that same bill's primary objective," benefits the "worst offenders," and "result[s] in sentencing anomalies Congress surely did not intend." *Abbott*, 131 S. Ct. at 27.

If there were any doubt that the amended Guidelines properly implemented Congress's directive to "achieve consistency" with the FSA, Congress's acquiescence in the Commission's approach during the next year resolves it. The temporary amended Guidelines were promulgated on October 15, 2010, became effective on November 1, 2010, and remained in effect for 12 months. U.S.S.G. App. C, Amend. 748. In the interim, the Commission began the process of promulgating the permanent amended Guidelines, which it submitted to Congress on April 28, 2011, according

to the usual process. The permanent Guidelines went into effect November 1, 2011, without Congressional disapproval. U.S.S.G. App. C, Amend. 750. This demonstrates that the Commission's reading of the FSA as providing the "applicable law" was exactly what Congress had intended. *See Kimbrough*, 552 U.S. at 106 (observing that Congress gave "tacit acceptance" to the Commission's work when it "failed to act on a proposed amendment to the Guidelines in a high-profile area in which it had previously exercised its disapproval authority under 28 U.S.C. § 994(p)").

There are other textual indications that Congress did not want to delay the application of the mandatory minimum provisions of the FSA. Congress directed the Commission to promulgate sentencing enhancements for drug trafficking offenders where certain aggravating factors are present, such as the use of violence or the sale of drugs to minors. FSA § 6, 124 Stat. at 2373. App. 4-6. Likewise, it mandated sentencing reductions for offenders where certain mitigating factors exist, such as when a family relationship supplies the motive to sell drugs for no compensation. FSA § 7, 124 Stat. at 2374. App. 6-7. The Commission complied within the 90-day window. U.S.S.G. App. C, Amend. 748. Like the other Guideline amendments, these went into effect immediately and applied to all sentencings from that day forward.

Congress's objective of tailoring the drug trafficking Guidelines to reflect more accurately a defendant's

actual culpability undercuts the view that Congress intended the old mandatory minimums to remain in effect for defendants not yet sentenced as of August 3, 2010. Congress desired to impose less severe penalties on the least serious crack offenders and more severe penalties on the most serious offenders. *See* 156 Cong. Rec. S10491-92 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) (noting that the crack amendments intend to "return the focus of Federal cocaine sentencing policy to drug kingpins, rather than street level dealers"). The persistence of the old mandatory minimums disrupts this goal. Mandatory minimums undermine, rather than advance, the goal of individualized punishment, because they interfere with the ability of the sentencing judge "to consider every convicted person as an individual and every case as . . . unique." *Koon v. United States*, 518 U.S. 81, 113 (1996); *see Harris v. United States*, 536 U.S. 545, 570-71 (2002) (Breyer, J., concurring) (noting that mandatory minimums "rarely reflect an effort to achieve sentencing proportionality – a key element of sentencing fairness that demands that the law punish a drug 'kingpin' and a 'mule' differently"). It makes far more sense to assume that all of the initiatives contained in the FSA point in the same direction – namely, to promote sentences for crack defendants that appropriately reflect the seriousness of their crimes through the consideration of relevant factors other than the weight of crack involved alone.

Finally, immediate application of the FSA may be inferred from its directive to the Commission to prepare a report to Congress regarding the impact of the FSA five years hence. FSA § 10, 124 Stat. at 2375. App. 9. If the pre-FSA mandatory minimum sentences continued to apply to the large class of defendants whose offense conduct preceded the effective date of the Act, then during much of the time period in which the Commission would be studying the effects of the FSA, the Act's changes to the Guidelines would be inapplicable to many low-level offenders whose revised Guidelines ranges would be trumped by the old mandatory minimum terms. That result would undermine Congress's goal to compile useful data about the FSA's impact on federal sentencing. Moreover, it would require the Commission to assume the heavy administrative burden of tracking which of the many thousands of defendants sentenced after the FSA committed their offenses before its enactment. It is highly unlikely that Congress had such a plan in mind.

2. The FSA Undoubtedly Applies To Defendants Sentenced On Or After November 1, 2010.

Even if this Court concludes that Congress did not intend the FSA's amendments to mandatory minimum sentences to have immediate effect upon enactment, at a minimum these amendments must apply to defendants like Petitioner who were sentenced on or after November 1, 2010. Whatever Congress's

expectation of how long it would take the Commission to issue its "conforming" Guidelines, it directed (and therefore knew) that it would occur no later than November 1. Hence, for the reasons given above, Congress must have intended that defendants sentenced on or after November 1, 2010 would enjoy the benefits of the recalibrated crack Guidelines – meaning that the new, lower mandatory minimums would have to take effect by then.

B. Immediate Application Of The FSA Is Consistent With Its Legislative History And Purpose.

The FSA's legislative history and purpose further support the conclusion that Congress desired for the FSA to have immediate impact.

Members of Congress spoke directly to the need for an immediate and ameliorative change in federal crack-cocaine sentencing. In urging his colleagues to support the FSA, Senator Dick Durbin stated that Congress had discussed the need to address the crack-powder disparity for far too long, and 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. S1680-81 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin). He continued: "If this bill is enacted into law, it will *immediately* ensure that every year, thousands of people are treated more fairly in our criminal justice system."

Id. at S1681 (emphasis added). Corroborating the need for the FSA's urgent application, Senator Arlen Specter noted that the Deputy Attorney General and two district judges had "testified in favor of an *immediate* reduction or elimination of [the sentencing] disparity." 155 Cong. Rec. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter). Statements by other members of Congress were to the same effect. *See, e.g.,* 156 Cong. Rec. S1683 (Mar. 17, 2010) (statement of Sen. Leahy) ("Attorney General Holder also reminded us that the stakes are simply too high to let reform in this area wait any longer" (internal quotation marks omitted)). To our knowledge, no member of Congress expressed any other view about the temporal applicability of the FSA.

Numerous bills that were precursors to the FSA contained provisions expressly precluding their retroactive application. *See* H.R. 265 § 11, 111th Cong. (2009); H.R. 4545 § 11, 110th Cong. (2007); S. 1383 § 204(b), 110th Cong. (2007); S. 1711 § 11, 110th Cong. (2007). Each of those prior versions stated: "There shall be no retroactive application of any portion of this act." *Id.* Tellingly, the FSA does not include any such limitation. Congress's omission of this limiting language in the FSA is further evidence that it intended the statute to apply immediately upon its enactment. *See United States v. Yermian*, 468 U.S. 63, 72 (1984) (changes from the prior version of a bill vetoed by the President provided "convincing evidence" of the statute's meaning); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress

included limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended.").

The various expressions of Congressional purpose in passing the FSA also support the conclusion that Congress wanted the FSA to apply immediately. One of Congress's primary considerations was to end the perception that the 100:1 ratio inherent in the old law was racially discriminatory. In a rare showing of bipartisan unity, Republicans and Democrats alike expressed concern that the old law treated similarly situated offenders differently, with black crack offenders receiving significantly harsher sentences than white offenders trafficking in cocaine powder. Senator Patrick Leahy, one of the lead sponsors of the FSA, stated that the 100:1 ratio "is wrong and unfair, and it has needlessly swelled our prisons, wasting precious Federal resources. These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under the law." 156 Cong. Rec. S1683 (daily ed. Mar. 17, 2010). Other members of Congress expressed similar concerns. *See, e.g.,* 156 Cong. Rec. H6203 (daily ed. July 28, 2010) (statement of Rep. Hoyer) ("The 100-to-1 disparity is counterproductive and unjust."); 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Sessions) ("I definitely believe that the current system is not fair and that we are not able to defend the sentences that are required to be imposed under the law today"). Some legislators stated that the old

mandatory minimums simply served no legitimate penal interests. 156 Cong. Rec. H6197 (daily ed. July 28, 2010); 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009).

Members of Congress also commented that the imposition of sentences under the 100:1 ratio undermined confidence in the criminal justice system and weakened law enforcement efforts. *See, e.g.*, 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) ("[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 of us in law enforcement more difficult. . . . [I]t is time to do away with that disparity") (statement of Sen. Durbin, citing testimony of Attorney General Eric Holder before the Senate Judiciary Committee).[8]

[8] *See also* 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Leahy) (stating that the 100:1 ratio "has had a significantly disparate impact on racial and ethnic minorities. . . . It is no wonder this policy has sparked a nationwide debate about racial bias and undermined citizens' confidence in the justice system"); 155 Cong. Rec. S10493 (daily ed. Oct. 15, 2009) (statement of Sen. Specter) ("These sentencing disparities undermine the confidence in the criminal justice system. Our courts and our laws must be fundamentally fair; just as importantly, they must be perceived as fair by the public. I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does."); 155 Cong. Rec. S10491 (daily ed. Oct. 15, 2009) ("[u]nder the current disparity, the credibility of our entire drug enforcement system is weakened") (statement of Sen. Durbin, quoting testimony of Asa Hutchinson, former head of the DEA under President George W. Bush).

Even worse, the old law failed to satisfy its primary goal, which was to target major drug traffickers. *See* 155 Cong. Rec. S10492 (daily ed. Oct. 15, 2009) (statement of Sen. Leahy) (explaining that the primary purpose of the 1986 Act "was to punish the major traffickers and drug kingpins who were bringing crack into our neighborhoods," but in practice, "more than half of Federal crack cocaine offenders [we]re low-level street dealers and users, not the major traffickers Congress intended to target").

Given the nature of these legislative purposes, it defies reason to suppose that Congress intended that courts would continue to apply the old mandatory minimums or that it would want such application to depend on the date of each defendant's offense. In interpreting the FSA, this Court should "imput[e] to Congress an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." *Hamm v. City of Rock Hill*, 379 U.S. 306, 313 (1964). Congress's interests in "restor[ing] fairness" and avoiding the appearance of racially disparate results suggest strongly that it wanted the FSA's immediate application, especially when such application carried no collateral costs in the case of defendants who had not yet been sentenced.

Contrary to the suggestion by Chief Judge Easterbrook, even if the FSA was the result of some "legislative compromise," *Holcomb*, 657 F.3d at 450-51, there is no evidence that it was a compromise as to its temporal scope. Nothing in the legislative

history of the Act even hints that members of Congress bargained over whether an old law fraught with problems should continue to apply at sentencing.[9] To the contrary, the legislative record is replete with statements that the old law no longer served a valid purpose and should be replaced as soon as possible. Where the evident reason for repeal of a law is the belief that it is unfair – indeed, perhaps even discriminatory – there is a strong inference that Congress wanted the repeal to take effect immediately. *Cf. Hamm*, 379 U.S. at 315 (holding that the Civil Rights Act of 1964 immediately abated a prior penalty for sit-in demonstrations targeting black protestors, including those held long before the Act's passage, because it was intended to "obliterate the effect of a distressing chapter of our history").

II. THE SAVING STATUTE DOES NOT CONTROL BECAUSE CONGRESS FAIRLY IMPLIED THAT THE FSA APPLIES IMMEDIATELY.

The Saving Statute, 1 U.S.C. § 109, does nothing to disturb the conclusion that the FSA was meant to operate immediately. As this Court has emphasized many times, § 109 is merely a default rule intended to save a prior penalty when Congress has not signaled to the contrary. Here, the Act's statutory text,

[9] Chief Judge Easterbrook asserted that members of Congress who supported a higher ratio favored no retroactivity, but he provided no basis for that claim.

legislative history, and purpose demonstrate that Congress has at least "fairly implied" that immediate application is required. Nothing more is needed to overcome § 109's default rule, even assuming that statute is interpreted to be applicable in this context. *See* Br. of Petitioner Dorsey, No. 11-5683 (arguing additional reasons why § 109 might not apply in the first place).

This Court has held that a later statute need not use specific language to exempt itself from § 109's reach. Section 109 is no more than a rule of statutory construction, which is "to be read and construed as a part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress." *Hertz v. Woodman*, 218 U.S. 205, 217 (1910). It reflects an early rule that originally served the limited purpose of preventing the complete abatement of a criminal prosecution, and was enacted in derogation of the common-law presumption favoring the application of current law. *United States v. Tynen*, 78 U.S. 88 (1870). Simply put, § 109 controls only if and when Congress does not indicate otherwise.

Thus, in *Great N. Railway Co. v. United States*, the Court clarified that § 109 has no force if by "necessary implication" applying it would "set the legislative mind at naught." 208 U.S. 452, 465 (1908); *see United States v. St. Louis, S.F. & T.R. Co.*, 270 U.S. 1, 3 (1926). Invoking similar language, the Court in other cases has stated that a later statute may supplant § 109 by "plain," "clear," *Hertz*, 218 U.S. at 217,

or "fair," *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 569-60 n.10 (1974), implication.[10] Whatever the precise formulation, when the import of a later statute directly contradicts § 109 by implication, no express statement is required to give effect to that statute.

The reason Congress need not use specific language to avoid the effect of § 109 is that one legislature is competent to repeal any law that a former one was competent to pass. As Chief Justice Marshall explained more than two centuries ago, Congress's legislative power under Article I of the Constitution is circumscribed by the principle that "one legislature cannot abridge the powers of a succeeding legislature." *Fletcher v. Peck*, 10 U.S. 87, 135 (1810). Among the powers of a legislature that a prior legislature cannot abridge is the power to alter legislative acts by contradicting them in any way it deems appropriate. *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring).

In a similar context, this Court has outlined the framework for finding a fair implication when a statute contains its own saving clause. In *Marcello v. Bonds*, 349 U.S. 302 (1955), this Court interpreted the Immigration and Nationality Act to exempt

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[10] In Judge Posner's view, by changing the standard from "necessary" implication to a "fair" implication in more recent cases, this Court has "reduced the force" of § 109. *Holcomb*, 657 F.3d at 461 (Posner, J., dissenting from denial of rehearing en banc).

deportation hearings from the procedures of the Administrative Procedure Act ("APA"), despite a saving clause in the APA stating that "[n]o subsequent legislation shall be held to supersede or modify the provisions of this Act except to the extent that such legislation shall do so expressly." *Id.* at 310. The Court concluded that the Immigration and Nationality Act superseded the APA's requirements because to hold otherwise would render Congress's painstaking efforts to adapt the APA to the particular needs of the deportation process meaningless. 349 U.S. at 309-10. In giving effect to the clear intent of Congress, as evidenced by the new law's text and its legislative history, the Court refused to require Congress to use "magical passwords" to create an exemption from the APA. *Id.* at 310.

As the Court observed, it was apparent from the statutory language of the new law that Congress intended to establish a specialized administrative procedure applicable to deportation hearings specifically. The framework of the Immigration and Nationality Act drew liberally from analogous provisions of the APA but made clear that the APA was being used only as a general guide. *Id.* at 308. Not only did the same legislators sponsor the Immigration and Nationality Act and the APA, the legislative history of the new law indicated that the new procedures were meant to be exclusive. *Id.* at 308-10. This Court explained that in light of Congress's laborious adaptation of the APA to the deportation process, the recognition in the legislative history of this adaptive

technique and of the particular deviations, and the direction in the new law that the methods therein prescribed shall be the sole and exclusive procedure for deportation proceedings, Congress intended to exempt deportation proceedings from the default APA rule. *Id.* at 310.

Applying the same analysis to the FSA, the indications of Congressional intent in passing the Act discussed above are more than sufficient to supply a fair implication that the FSA applies immediately upon its enactment. The urgency of Congress's directive to the Commission to issue "conforming" Guidelines with "applicable law" indicates that Congress intended the FSA's new mandatory minimum thresholds to apply to all new sentencings right away – and certainly to those occurring after November 1, 2010, the effective date of the amended Guidelines. Congress's mandate to the Commission to issue a report within five years of the FSA's enactment, if it was to be meaningful, suggests that the report would cover sentences following the FSA's passage that would encompass pre-enactment conduct. Moreover, Congress's goal to ameliorate unjust and racially discriminatory sentencing disparities provides further support for its immediate application.[11]

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[11] The rule laid down by this Court in *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), is consistent with the FSA's immediate application. In *Landgraf*, the Court held that a petitioner could not benefit from more favorable damages provisions in the Civil Rights Act of 1991 that became effective while her

(Continued on following page)

Even if § 109 did apply here, its force would be outweighed by the effects of two other rules of statutory construction: the rule of lenity, and the canon of Constitutional avoidance.

First, the rule of lenity provides guidance in reading a fair implication from the FSA in favor of its immediate application. The rule of lenity is a canon of statutory construction that requires courts to interpret statutes in a manner that avoids imposing harsher punishments absent clear Congressional intent. *Ladner v. United States*, 358 U.S. 169, 178 (1958). This Court has held that when faced with an ambiguous text or legislative history, the ambiguity must be resolved in the defendant's favor. *United States v. Granderson*, 511 U.S. 39, 41-54 (1994). The doctrine ensures that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner*, 358 U.S. at 178; *see United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (noting that the doctrine is rooted in "the instinctive distaste against men languishing in prison unless the

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case was on appeal. The FSA, by contrast, is not a statute that "would impair rights a party possessed when he acted, increase a party's liability for past conduct, or impose new duties with respect to transactions already completed." *Landgraf*, 511 U.S. at 280. Nor would its application raise any Constitutional concerns, as a higher penalty in a criminal case otherwise might.

lawmaker has clearly said they should" (quoting H. Friendly, Benchmarks 196, 209 (1967))).

In interpreting the application of a mandatory minimum sentencing provision in *Simpson v. United States*, 435 U.S. 6 (1978), this Court explained that the rule of lenity has special force in light of a justifiable "reluctance to increase or multiply punishments absent a clear and definite legislative directive." 435 U.S. at 15. As Justice Breyer similarly observed in *Dean v. United States*, 129 S. Ct. 1849 (2009), the rule of lenity tips the balance in favor of the defendant in this context because an interpretation that errs on the side of leniency does not require the automatic reduction of a sentence, but rather affords a sentencing judge the opportunity to impose a sentence that best serves the goals of punishment. *Id.* at 1860-61 (Breyer, J., dissenting). Application of the FSA here and in similar cases would not necessarily require district judges to impose sentences that are lower or unduly lenient; rather, it would afford them the opportunity to give full effect to the amended Guidelines without the former unfair and rigid statutory mandates. It would also allow them in more cases to consider all of the circumstances surrounding the offense and the offender to impose a sentence that is "sufficient, but not greater than necessary," to achieve the goals of sentencing identified by Congress. 18 U.S.C. § 3553(a)(2).

When Congress does not speak expressly to the temporal scope of a new criminal statute and courts

struggle to sort out competing inferences as to its application, the rule of lenity supplies the tie-breaking vote for the defendant. Accordingly, even assuming that an ambiguity persists regarding when the FSA is meant to take effect, that ambiguity should be resolved in favor of immediate application.

Second, the doctrine of Constitutional avoidance provides additional support for the FSA's immediate application. Sentencing defendants on the basis of pre-FSA mandatory sentencing terms should be avoided because it raises serious Constitutional arguments implicating the guarantee of equal protection. As this Court has explained, when a statute is susceptible to two constructions, one of which raises doubtful Constitutional questions, and the other of which avoids such questions, the court's duty is to adopt the latter. *Jones v. United States*, 526 U.S. 227, 239 (1999). This canon of statutory construction, which is a tool for choosing between competing plausible interpretations of a statutory text, "is thus a means of giving effect to congressional intent, not of subverting it." *Clark v. Martinez*, 543 U.S. 371, 382 (2005).

As discussed above, members of Congress expressly noted that the old 100:1 ratio was "contrary to our fundamental principles of equal protection under the law." *See, e.g.,* 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn). Some of these members stated that the old mandatory minimums no longer served any legitimate penal interests, and that they were "not able to defend the

sentences that are required to be imposed under the law today." 155 Cong. Rec. S10492 (Oct. 15, 2009) (statement of Sen. Sessions). Application of the FSA to cases not yet final is required to avoid a conflict with the Equal Protection Clause and, as explained above, give effect to Congress's intent to remedy the injustices resulting from the old law.

CONCLUSION

For the foregoing reasons, the judgment below should be vacated and the case remanded for resentencing in accordance with the FSA.

January 25, 2012

Respectfully submitted,

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FAIR SENTENCING ACT OF 2010

S. 1789

One Hundred Eleventh Congress
of the
United States of America

AT THE SECOND SESSION

Begun and held at the City of Washington
on Tuesday, the fifth day of January,
two thousand and ten

An act

To restore fairness to Federal cocaine sentencing.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Fair Sentencing Act of 2010".

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

(a) CSA. – Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)(1)) is amended –

(1) in subparagraph (A)(iii), by striking "50 grams" and inserting "280 grams"; and

(2) in subparagraph (B)(iii), by striking "5 grams" and inserting "28 grams".

(b) IMPORT AND EXPORT ACT. – Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended –

(1) in paragraph (1)(C), by striking "50 grams" and inserting "280 grams"; and

(2) in paragraph (2)(C), by striking "5 grams" and inserting "28 grams".

SEC. 3. ELIMINATION OF MANDATORY MINIMUM SENTENCE FOR SIMPLE POSSESSION.

Section 404(a) of the Controlled Substances Act (21 U.S.C. 844(a)) is amended by striking the sentence beginning "Notwithstanding the preceding sentence,".

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

(a) INCREASED PENALTIES FOR MANUFACTURE, DISTRIBUTION, DISPENSATION, OR POSSESSION WITH INTENT TO MANUFACTURE, DISTRIBUTE, OR DISPENSE. – Section 401(b)(1) of the Controlled Substances Act (21 U.S.C. 841(b)) is amended –

(1) in subparagraph (A), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in subparagraph (B), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

(b) INCREASED PENALTIES FOR IMPORTATION AND EXPORTATION. – Section 1010(b) of the Controlled Substances Import and Export Act (21 U.S.C. 960(b)) is amended –

(1) in paragraph (1), by striking "$4,000,000", "$10,000,000", "$8,000,000", and "$20,000,000" and inserting "$10,000,000", "$50,000,000", "$20,000,000", and "$75,000,000", respectively; and

(2) in paragraph (2), by striking "$2,000,000", "$5,000,000", "$4,000,000", and "$10,000,000" and inserting "$5,000,000", "$25,000,000", "$8,000,000", and "$50,000,000", respectively.

SEC. 5. ENHANCEMENTS FOR ACTS OF VIOLENCE DURING THE COURSE OF A DRUG TRAFFICKING OFFENSE.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure that the guidelines provide an additional penalty increase of at least 2 offense levels if the defendant used violence, made a credible threat to use violence, or

directed the use of violence during a drug trafficking offense.

SEC. 6. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN AGGRAVATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines to ensure an additional increase of at least 2 offense levels if –

(1) the defendant bribed, or attempted to bribe, a Federal, State, or local law enforcement official in connection with a drug trafficking offense;

(2) the defendant maintained an establishment for the manufacture or distribution of a controlled substance, as generally described in section 416 of the Controlled Substances Act (21 U S.C. 856); or

(3)(A) the defendant is an organizer, leader, manager, or supervisor of drug trafficking activity subject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating factors:

(i) The defendant –

(I) used another person to purchase, sell, transport, or store controlled substances;

(II) used impulse, fear, friendship, affection, or some combination thereof to involve such person in the offense; and

(III) such person had a minimum knowledge of the illegal enterprise and was to receive little or no compensation from the illegal transaction

(ii) The defendant –

(I) knowingly distributed a controlled substance to a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual;

(II) knowingly involved a person under the age of 18 years, a person over the age of 64 years, or a pregnant individual in drug trafficking;

(III) knowingly distributed a controlled substance to an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct; or

(IV) knowingly involved an individual who was unusually vulnerable due to physical or mental condition, or who was particularly susceptible to criminal conduct, in the offense.

(iii) The defendant was involved in the importation into the United States of a controlled substance.

(iv) The defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense.

(v) The defendant committed the drug trafficking offense as part of a pattern of criminal conduct engaged in as a livelihood.

SEC. 7. INCREASED EMPHASIS ON DEFENDANT'S ROLE AND CERTAIN MITIGATING FACTORS.

Pursuant to its authority under section 994 of title 28, United States Code, the United States Sentencing Commission shall review and amend the Federal sentencing guidelines and policy statements to ensure that –

(1) if the defendant is subject to a minimal role adjustment under the guidelines, the base offense level for the defendant based solely on drug quantity shall not exceed level 32; and

(2) there is an additional reduction of 2 offense levels if the defendant –

(A) otherwise qualifies for a minimal role adjustment under the guidelines and had a minimum knowledge of the illegal enterprise;

(B) was to receive no monetary compensation from the illegal transaction; and

(C) was motivated by an intimate or familial relationship or by threats or fear when the defendant was otherwise unlikely to commit such an offense.

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.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

(a) IN GENERAL – Not later than 1 year after the date of enactment of this Act, the Comptroller General of the United States shall submit to Congress a report analyzing the effectiveness of drug court programs receiving funds under the drug court grant program under part EE of title I of the Omnibus Crime Control and Safe Streets Act of 1968 (42 U.S.C. 3797-u et seq.).

(b) CONTENTS. – The report submitted under subsection (a) shall –

(1) assess the efforts of the Department of Justice to collect data on the performance of federally funded drug courts;

(2) address the effect of drug courts on recidivism and substance abuse rates;

(3) address any cost benefits resulting from the use of drug courts as alternatives to incarceration;

(4) assess the response of the Department of Justice to previous recommendations made by the Comptroller General regarding drug court programs; and

(5) make recommendations concerning the performance, impact, and cost-effectiveness of federally funded drug court programs.

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, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, 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

Speaker of the House of Representatives.

Vice President of the United States and President of the Senate.

RELEVANT PORTIONS OF 21 U.S.C. § 841 BEFORE ENACTMENT OF THE FSA

PART D OFFENSES AND PENALTIES

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine,

ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this

subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to

exceed the greater of that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for

purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or

suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at

least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release

of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any

person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION. –

(A) IN GENERAL. – Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION. – For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation

in or communicate unwillingness to participate in conduct is administered to the individual.

* * *

RELEVANT PORTIONS OF 21 U.S.C. § 841 AFTER ENACTMENT OF THE FSA

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers

> or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence

of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving –

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of –

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1- (2-phenylethyl) -4- piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N- phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to

exceed the greater of that authorized in accordance with the provisions of title 18 or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for

purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the

sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction,

impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release

of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any

person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed –

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use –

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION. –

(A) IN GENERAL. – Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION. – For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation

in or communicate unwillingness to participate in conduct is administered to the individual.

* * *

RELEVANT PORTIONS OF SENTENCING GUIDELINES BEFORE ENACTMENT OF THE FSA

November 1, 2009

PART D – OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. <u>Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy</u>

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C.

§ 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible

vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(3) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(4) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B 1.2 (Mitigating Role), increase by **2** levels.

(5) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

(6) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

(7) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

(8) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

(9) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.

(10) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment, storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If –

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(11) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or

maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*	**Base Offense Level**
(1) • 30 KG or more of Heroin; • 150 KG or more of Cocaine;	**Level 38**

- 4.5 KG or more of Cocaine Base;
- 30 KG or more of PCP, or 3 KG or more of PCP (actual);
- 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice";
- 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual);
- 300 G or more of LSD;
- 12 KG or more of Fentanyl;
- 3 KG or more of a Fentanyl Analogue;
- 30,000 KG or more of Marihuana;
- 6,000 KG or more of Hashish;
- 600 KG or more of Hashish Oil;
- 30,000,000 units or more of Ketamine;
- 30,000,000 units or more of Schedule I or II Depressants;
- 1,875,000 units or more of Flunitrazepam.

(2) • At least 10 KG but less than 30 KG of Heroin; **Level 36**
- At least 50 KG but less than 150 KG of Cocaine;
- At least 1.5 KG but less than 4.5 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);

- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3) • At least 3 KG but less than 10 KG of Heroin; **Level 34**
- At least 15 KG but less than 50 KG of Cocaine;
- At least 500 G but less than 1.5 KG of Cocaine Base;
- At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual);
- At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice";
- At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual);
- At least 30 G but less than 100 G of LSD;

- At least 1.2 KG but less than 4 KG of Fentanyl;
- At least 300 G but less than 1 KG of a Fentanyl Analogue;
- At least 3,000 KG but less than 10,000 KG of Marihuana;
- At least 600 KG but less than 2,000 KG of Hashish;
- At least 60 KG but less than 200 KG of Hashish Oil;
- At least 3,000,000 but less than 10,000,000 units of Ketamine;
- At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;
- At least 187,500 but less than 625,000 units of Flunitrazepam.

(4) • At least 1 KG but less than 3 KG of Heroin; **Level 32**
- At least 5 KG but less than 15 KG of Cocaine;
- At least 150 G but less than 500 G of Cocaine Base;
- At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual);
- At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice";
- At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual);
- At least 10 G but less than 30 G of LSD;
- At least 400 G but less than 1.2 KG of Fentanyl;

- At least 100 G but less than 300 G of a Fentanyl Analogue;
- At least 1,000 KG but less than 3,000 KG of Marihuana;
- At least 200 KG but less than 600 KG of Hashish;
- At least 20 KG but less than 60 KG of Hashish Oil;
- At least 1,000,000 but less than 3,000,000 units of Ketamine;
- At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;
- At least 62,500 but less than 187,500 units of Flunitrazepam.

(5) • At least 700 G but less than 1 KG of Heroin; **Level 30**
- At least 3.5 KG but less than 5 KG of Cocaine;
- At least 50 G but less than 150 G of Cocaine Base;
- At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual);
- At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice";
- At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual);
- At least 7 G but less than 10 G of LSD;
- At least 280 G but less than 400 G of Fentanyl;
- At least 70 G but less than 100 G of a Fentanyl Analogue;

- At least 700 KG but less than 1,000 KG of Marihuana;
- At least 140 KG but less than 200 KG of Hashish;
- At least 14 KG but less than 20 KG of Hashish Oil;
- At least 700,000 but less than 1,000,000 units of Ketamine;
- At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;
- 700,000 or more units of Schedule III Hydrocodone;
- At least 43,750 but less than 62,500 units of Flunitrazepam.

(6) • At least 400 G but less than 700 G of Heroin; **Level 28**
- At least 2 KG but less than 3.5 KG of Cocaine;
- At least 35 G but less than 50 G of Cocaine Base;
- At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual);
- At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice";
- At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual);
- At least 4 G but less than 7 G of LSD;
- At least 160 G but less than 280 G of Fentanyl;
- At least 40 G but less than 70 G of a Fentanyl Analogue;

- At least 400 KG but less than 700 KG of Marihuana;
- At least 80 KG but less than 140 KG of Hashish;
- At least 8 KG but less than 14 KG of Hashish Oil;
- At least 400,000 but less than 700,000 units of Ketamine;
- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7) • At least 100 G but less than 400 G of Heroin; **Level 26**
- At least 500 G but less than 2 KG of Cocaine;
- At least 20 G but less than 35 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;

- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;
- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(8) • At least 80 G but less than 100 G of Heroin; **Level 24**
- At least 400 G but less than 500 G of Cocaine;
- At least 5 G but less than 20 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;

- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;
- At least 1.6 KG but less than 2 KG of Hashish Oil;
- At least 80,000 but less than 100,000 units of Ketamine;
- At least 80,000 but less than 100,000 units of Schedule I or II Depressants;
- At least 80,000 but less than 100,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 6,250 units of Flunitrazepam.

(9) • At least 60 G but less than 80 G of Heroin; **Level 22**
- At least 300 G but less than 400 G of Cocaine;
- At least 4 G but less than 5 G of Cocaine Base;
- At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual);
- At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice";
- At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual);
- At least 600 MG but less than 800 MG of LSD;
- At least 24 G but less than 32 G of Fentanyl;
- At least 6 G but less than 8 G of a Fentanyl Analogue;

- At least 60 KG but less than 80 KG of Marihuana;
- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

(10) • At least 40 G but less than 60 G of Heroin; **Level 20**
- At least 200 G but less than 300 G of Cocaine;
- At least 3 G but less than 4 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;

- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11) • At least 20 G but less than 40 G of Heroin; **Level 18**
- At least 100 G but less than 200 G of Cocaine;
- At least 2 G but less than 3 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);
- At least 200 MG but less than 400 MG of LSD;
- At least 8 G but less than 16 G of Fentanyl;

- At least 2 G but less than 4 G of a Fentanyl Analogue;
- At least 20 KG but less than 40 KG of Marihuana;
- At least 5 KG but less than 8 KG of Hashish;
- At least 500 G but less than 800 G of Hashish Oil;
- At least 20,000 but less than 40,000 units of Ketamine;
- At least 20,000 but less than 40,000 units of Schedule I or II Depressants;
- At least 20,000 but less than 40,000 units of Schedule III Hydrocodone;
- At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 1,250 but less than 2,500 units of Flunitrazepam.

(12) • At least 10 G but less than 20 G of Heroin; **Level 16**
- At least 50 G but less than 100 G of Cocaine;
- At least 1 G but less than 2 G of Cocaine Base;
- At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual);
- At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine (actual), or at least 500 MG but less than 1 G of "Ice";
- At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual);
- At least 100 MG but less than 200 MG of LSD;
- At least 4 G but less than 8 G of Fentanyl;

- At least 1 G but less than 2 G of a Fentanyl Analogue;
- At least 10 KG but less than 20 KG of Marihuana;
- At least 2 KG but less than 5 KG of Hashish;
- At least 200 G but less than 500 G of Hashish Oil;
- At least 10,000 but less than 20,000 units of Ketamine;
- At least 10,000 but less than 20,000 units of Schedule I or II Depressants;
- At least 10,000 but less than 20,000 units of Schedule III Hydrocodone;
- At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 625 but less than 1,250 units of Flunitrazepam.

(13) • At least 5 G but less than 10 G of Heroin; **Level 14**
- At least 25 G but less than 50 G of Cocaine;
- At least 500 MG but less than 1 G of Cocaine Base;
- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;

- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam.

(14)
- Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
- Less than 500 MG of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD;
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;

	• At least 50 G but less than 100 G of Hashish Oil; • At least 2,500 but less than 5,000 units of Ketamine; • At least 2,500 but less than 5,000 units of Schedule I or II Depressants; • At least 2,500 but less than 5,000 units of Schedule III Hydrocodone; • At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone); • At least 156 but less than 312 units of Flunitrazepam; • 40,000 or more units of Schedule IV substances (except Flunitrazepam).	
(15)	• At least 1 KG but less than 2.5 KG of Marihuana; • At least 200 G but less than 500 G of Hashish; • At least 20 G but less than 50 G of Hashish Oil; • At least 1,000 but less than 2,500 units of Ketamine; • At least 1,000 but less than 2,500 units of Schedule I or II Depressants; • At least 1,000 but less than 2,500 units of Schedule III Hydrocodone; • At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone); • At least 62 but less than 156 units of Flunitrazepam; • At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).	**Level 10**

(16)	• At least 250 G but less than 1 KG of Marihuana; • At least 50 G but less than 200 G of Hashish; • At least 5 G but less than 20 G of Hashish Oil; • At least 250 but less than 1,000 units of Ketamine; • At least 250 but less than 1,000 units of Schedule I or II Depressants; • At least 250 but less than 1,000 units of Schedule III Hydrocodone; • At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone); • Less than 62 units of Flunitrazepam; • At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam); • 40,000 or more units of Schedule V substances.	**Level 8**
(17)	• Less than 250 G of Marihuana; • Less than 50 G of Hashish; • Less than 5 G of Hashish Oil; • Less than 250 units of Ketamine; • Less than 250 units of Schedule I or II Depressants; • Less than 250 units of Schedule III Hydrocodone; • Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone); • Less than 4,000 units of Schedule IV substances (except Flunitrazepam); • Less than 40,000 units of Schedule V substances.	**Level 6**

*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a

form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. Provided, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".

(G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols

(as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(25)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

RELEVANT PORTIONS OF SENTENCING GUIDELINES AFTER ENACTMENT OF THE FSA

November 1, 2011

PART D – OFFENSES INVOLVING DRUGS AND NARCO-TERRORISM

1. UNLAWFUL MANUFACTURING, IMPORTING, EXPORTING, TRAFFICKING, OR POSSESSION; CONTINUING CRIMINAL ENTERPRISE

§2D1.1. <u>Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy</u>

(a) Base Offense Level (Apply the greatest):

(1) **43**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(2) **38**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), (b)(1)(B), or (b)(1)(C), or 21 U.S.C. § 960(b)(1), (b)(2), or (b)(3), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(3) **30**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C.

§ 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance and that the defendant committed the offense after one or more prior convictions for a similar offense; or

(4) **26**, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(E) or 21 U.S.C. § 960(b)(5), and the offense of conviction establishes that death or serious bodily injury resulted from the use of the substance; or

(5) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if (A) the defendant receives an adjustment under §3B1.2 (Mitigating Role); and (B) the base offense level under subsection (c) is (i) level **32**, decrease by **2** levels; (ii) level **34** or level **36**, decrease by **3** levels; or (iii) level **38**, decrease by **4** levels. If the resulting offense level is greater than level **32** and the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a), decrease to level **32**.

(b) Specific Offense Characteristics

(1) If a dangerous weapon (including a firearm) was possessed, increase by **2** levels.

(2) If the defendant used violence, made a credible threat to use violence, or

directed the use of violence, increase by **2** levels.

(3) If the defendant unlawfully imported or exported a controlled substance under circumstances in which (A) an aircraft other than a regularly scheduled commercial air carrier was used to import or export the controlled substance, (B) a submersible vessel or semi-submersible vessel as described in 18 U.S.C. § 2285 was used, or (C) the defendant acted as a pilot, copilot, captain, navigator, flight officer, or any other operation officer aboard any craft or vessel carrying a controlled substance, increase by **2** levels. If the resulting offense level is less than level **26**, increase to level **26**.

(4) If the object of the offense was the distribution of a controlled substance in a prison, correctional facility, or detention facility, increase by **2** levels.

(5) If (A) the offense involved the importation of amphetamine or methamphetamine or the manufacture of amphetamine or methamphetamine from listed chemicals that the defendant knew were imported unlawfully, and (B) the defendant is not subject to an adjustment under §3B1.2 (Mitigating Role), increase by **2** levels.

(6) If the defendant is convicted under 21 U.S.C. § 865, increase by **2** levels.

(7) If the defendant, or a person for whose conduct the defendant is accountable under § 1B1.3 (Relevant Conduct), distributed a controlled substance through mass-marketing by means of an interactive computer service, increase by **2** levels.

(8) If the offense involved the distribution of an anabolic steroid and a masking agent, increase by **2** levels.

(9) If the defendant distributed an anabolic steroid to an athlete, increase by **2** levels.

(10) If the defendant was convicted under 21 U.S.C. § 841(g)(1)(A), increase by **2** levels.

(11) If the defendant bribed, or attempted to bribe, a law enforcement officer to facilitate the commission of the offense, increase by **2** levels.

(12) If the defendant maintained a premises for the purpose of manufacturing or distributing a controlled substance, increase by **2** levels.

(13) (Apply the greatest):

(A) If the offense involved (i) an unlawful discharge, emission, or release into the environment of a hazardous or toxic substance; or (ii) the unlawful transportation, treatment,

storage, or disposal of a hazardous waste, increase by **2** levels.

(B) If the defendant was convicted under 21 U.S.C. § 860a of distributing, or possessing with intent to distribute, methamphetamine on premises where a minor is present or resides, increase by **2** levels. If the resulting offense level is less than level **14**, increase to level **14**.

(C) If –

(i) the defendant was convicted under 21 U.S.C. § 860a of manufacturing, or possessing with intent to manufacture, methamphetamine on premises where a minor is present or resides; or

(ii) the offense involved the manufacture of amphetamine or methamphetamine and the offense created a substantial risk of harm to (I) human life other than a life described in subdivision (D); or (II) the environment,

increase by **3** levels. If the resulting offense level is less than level **27**, increase to level **27**.

(D) If the offense (i) involved the manufacture of amphetamine or methamphetamine; and (ii) created a

substantial risk of harm to the life of a minor or an incompetent, increase by **6** levels. If the resulting offense level is less than level **30**, increase to level **30**.

(14) If the defendant receives an adjustment under §3B1.1 (Aggravating Role) and the offense involved 1 or more of the following factors:

(A) (i) the defendant used fear, impulse, friendship, affection, or some combination thereof to involve another individual in the illegal purchase, sale, transport, or storage of controlled substances, (ii) the individual received little or no compensation from the illegal purchase, sale, transport, or storage of controlled substances, and (iii) the individual had minimal knowledge of the scope and structure of the enterprise;

(B) the defendant, knowing that an individual was (i) less than 18 years of age, (ii) 65 or more years of age, (iii) pregnant, or (iv) unusually vulnerable due to physical or mental condition or otherwise particularly susceptible to the criminal conduct, distributed a controlled substance to that individual or involved that individual in the offense;

(C) the defendant was directly involved in the importation of a controlled substance;

(D) the defendant engaged in witness intimidation, tampered with or destroyed evidence, or otherwise obstructed justice in connection with the investigation or prosecution of the offense;

(E) the defendant committed the offense as part of a pattern of criminal conduct engaged in as a livelihood, increase by **2** levels.

(15) If the defendant receives the **4**-level ("minimal participant") reduction in §3B1.2(a) and the offense involved all of the following factors:

(A) the defendant was motivated by an intimate or familial relationship or by threats or fear to commit the offense and was otherwise unlikely to commit such an offense;

(B) the defendant received no monetary compensation from the illegal purchase, sale, transport, or storage of controlled substances; and

(C) the defendant had minimal knowledge of the scope and structure of the enterprise, decrease by **2** levels.

(16) If the defendant meets the criteria set forth in subdivisions (1)-(5) of subsection (a) of §5C1.2 (Limitation on Applicability of Statutory Minimum Sentences in Certain Cases), decrease by **2** levels.

[Subsection (c) (Drug Quantity Table) is set forth on the following pages.]

(d) Cross References

(1) If a victim was killed under circumstances that would constitute murder under 18 U.S.C. § 1111 had such killing taken place within the territorial or maritime jurisdiction of the United States, apply §2A1.1 (First Degree Murder) or §2A1.2 (Second Degree Murder), as appropriate, if the resulting offense level is greater than that determined under this guideline.

(2) If the defendant was convicted under 21 U.S.C. § 841(b)(7) (of distributing a controlled substance with intent to commit a crime of violence), apply §2X 1.1 (Attempt, Solicitation, or Conspiracy) in respect to the crime of violence that the defendant committed, or attempted or intended to commit, if the resulting offense level is greater than that determined above.

(e) Special Instruction

(1) If (A) subsection (d)(2) does not apply; and (B) the defendant committed, or

attempted to commit, a sexual offense against another individual by distributing, with or without that individual's knowledge, a controlled substance to that individual, an adjustment under §3A1.1(b)(1) shall apply.

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity*		Base Offense Level
(1)	• 30 KG or more of Heroin; • 150 KG or more of Cocaine; • 8.4 KG or more of Cocaine Base; • 30 KG or more of PCP, or 3 KG or more of PCP (actual); • 15 KG or more of Methamphetamine, or 1.5 KG or more of Methamphetamine (actual), or 1.5 KG or more of "Ice"; • 15 KG or more of Amphetamine, or 1.5 KG or more of Amphetamine (actual); • 300 G or more of LSD; • 12 KG or more of Fentanyl; • 3 KG or more of a Fentanyl Analogue; • 30,000 KG or more of Marihuana; • 6,000 KG or more of Hashish; • 600 KG or more of Hashish Oil; • 30,000,000 units or more of Ketamine; • 30,000,000 units or more of Schedule I or II Depressants; • 1,875,000 units or more of Flunitrazepam.	**Level 38**
(2)	• At least 10 KG but less than 30 KG of Heroin;	**Level 36**

- At least 50 KG but less than 150 KG of Cocaine;
- At least 2.8 KG but less than 8.4 KG of Cocaine Base;
- At least 10 KG but less than 30 KG of PCP, or at least 1 KG but less than 3 KG of PCP (actual);
- At least 5 KG but less than 15 KG of Methamphetamine, or at least 500 G but less than 1.5 KG of Methamphetamine (actual), or at least 500 G but less than 1.5 KG of "Ice";
- At least 5 KG but less than 15 KG of Amphetamine, or at least 500 G but less than 1.5 KG of Amphetamine (actual);
- At least 100 G but less than 300 G of LSD;
- At least 4 KG but less than 12 KG of Fentanyl;
- At least 1 KG but less than 3 KG of a Fentanyl Analogue;
- At least 10,000 KG but less than 30,000 KG of Marihuana;
- At least 2,000 KG but less than 6,000 KG of Hashish;
- At least 200 KG but less than 600 KG of Hashish Oil;
- At least 10,000,000 but less than 30,000,000 units of Ketamine;
- At least 10,000,000 but less than 30,000,000 units of Schedule I or II Depressants;
- At least 625,000 but less than 1,875,000 units of Flunitrazepam.

(3)	• At least 3 KG but less than 10 KG of Heroin; • At least 15 KG but less than 50 KG of Cocaine; • At least 840 G but less than 2.8 KG of Cocaine Base; • At least 3 KG but less than 10 KG of PCP, or at least 300 G but less than 1 KG of PCP (actual); • At least 1.5 KG but less than 5 KG of Methamphetamine, or at least 150 G but less than 500 G of Methamphetamine (actual), or at least 150 G but less than 500 G of "Ice"; • At least 1.5 KG but less than 5 KG of Amphetamine, or at least 150 G but less than 500 G of Amphetamine (actual); • At least 30 G but less than 100 G of LSD; • At least 1.2 KG but less than 4 KG of Fentanyl; • At least 300 G but less than 1 KG of a Fentanyl Analogue; • At least 3,000 KG but less than 10,000 KG of Marihuana; • At least 600 KG but less than 2,000 KG of Hashish; • At least 60 KG but less than 200 KG of Hashish Oil; • At least 3,000,000 but less than 10,000,000 units of Ketamine; • At least 3,000,000 but less than 10,000,000 units of Schedule I or II Depressants;	**Level 34**

	• At least 187,500 but less than 625,000 units of Flunitrazepam.	
(4)	• At least 1 KG but less than 3 KG of Heroin; • At least 5 KG but less than 15 KG of Cocaine; • At least 280 G but less than 840 G of Cocaine Base; • At least 1 KG but less than 3 KG of PCP, or at least 100 G but less than 300 G of PCP (actual); • At least 500 G but less than 1.5 KG of Methamphetamine, or at least 50 G but less than 150 G of Methamphetamine (actual), or at least 50 G but less than 150 G of "Ice"; • At least 500 G but less than 1.5 KG of Amphetamine, or at least 50 G but less than 150 G of Amphetamine (actual); • At least 10 G but less than 30 G of LSD; • At least 400 G but less than 1.2 KG of Fentanyl; • At least 100 G but less than 300 G of a Fentanyl Analogue; • At least 1,000 KG but less than 3,000 KG of Marihuana; • At least 200 KG but less than 600 KG of Hashish; • At least 20 KG but less than 60 KG of Hashish Oil; • At least 1,000,000 but less than 3,000,000 units of Ketamine; • At least 1,000,000 but less than 3,000,000 units of Schedule I or II Depressants;	**Level 32**

	• At least 62,500 but less than 187,500 units of Flunitrazepam.	
(5)	• At least 700 G but less than 1 KG of Heroin; • At least 3.5 KG but less than 5 KG of Cocaine; • At least 196 G but less than 280 G of Cocaine Base; • At least 700 G but less than 1 KG of PCP, or at least 70 G but less than 100 G of PCP (actual); • At least 350 G but less than 500 G of Methamphetamine, or at least 35 G but less than 50 G of Methamphetamine (actual), or at least 35 G but less than 50 G of "Ice"; • At least 350 G but less than 500 G of Amphetamine, or at least 35 G but less than 50 G of Amphetamine (actual); • At least 7 G but less than 10 G of LSD; • At least 280 G but less than 400 G of Fentanyl; • At least 70 G but less than 100 G of a Fentanyl Analogue; • At least 700 KG but less than 1,000 KG of Marihuana; • At least 140 KG but less than 200 KG of Hashish; • At least 14 KG but less than 20 KG of Hashish Oil; • At least 700,000 but less than 1,000,000 units of Ketamine; • At least 700,000 but less than 1,000,000 units of Schedule I or II Depressants;	**Level 30**

	• 700,000 or more units of Schedule III Hydrocodone; • At least 43,750 but less than 62,500 units of Flunitrazepam.	
(6)	• At least 400 G but less than 700 G of Heroin; • At least 2 KG but less than 3.5 KG of Cocaine; • At least 112 G but less than 196 G of Cocaine Base; • At least 400 G but less than 700 G of PCP, or at least 40 G but less than 70 G of PCP (actual); • At least 200 G but less than 350 G of Methamphetamine, or at least 20 G but less than 35 G of Methamphetamine (actual), or at least 20 G but less than 35 G of "Ice"; • At least 200 G but less than 350 G of Amphetamine, or at least 20 G but less than 35 G of Amphetamine (actual); • At least 4 G but less than 7 G of LSD; • At least 160 G but less than 280 G of Fentanyl; • At least 40 G but less than 70 G of a Fentanyl Analogue; • At least 400 KG but less than 700 KG of Marihuana; • At least 80 KG but less than 140 KG of Hashish; • At least 8 KG but less than 14 KG of Hashish Oil; • At least 400,000 but less than 700,000 units of Ketamine;	**Level 28**

- At least 400,000 but less than 700,000 units of Schedule I or II Depressants;
- At least 400,000 but less than 700,000 units of Schedule III Hydrocodone;
- At least 25,000 but less than 43,750 units of Flunitrazepam.

(7) • At least 100 G but less than 400 G of Heroin; **Level 26**
- At least 500 G but less than 2 KG of Cocaine;
- At least 28 G but less than 112 G of Cocaine Base;
- At least 100 G but less than 400 G of PCP, or at least 10 G but less than 40 G of PCP (actual);
- At least 50 G but less than 200 G of Methamphetamine, or at least 5 G but less than 20 G of Methamphetamine (actual), or at least 5 G but less than 20 G of "Ice";
- At least 50 G but less than 200 G of Amphetamine, or at least 5 G but less than 20 G of Amphetamine (actual);
- At least 1 G but less than 4 G of LSD;
- At least 40 G but less than 160 G of Fentanyl;
- At least 10 G but less than 40 G of a Fentanyl Analogue;
- At least 100 KG but less than 400 KG of Marihuana;
- At least 20 KG but less than 80 KG of Hashish;
- At least 2 KG but less than 8 KG of Hashish Oil;

- At least 100,000 but less than 400,000 units of Ketamine;
- At least 100,000 but less than 400,000 units of Schedule I or II Depressants;
- At least 100,000 but less than 400,000 units of Schedule III Hydrocodone;
- At least 6,250 but less than 25,000 units of Flunitrazepam.

(8) • At least 80 G but less than 100 G of Heroin; **Level 24**
- At least 400 G but less than 500 G of Cocaine;
- At least 22.4 G but less than 28 G of Cocaine Base;
- At least 80 G but less than 100 G of PCP, or at least 8 G but less than 10 G of PCP (actual);
- At least 40 G but less than 50 G of Methamphetamine, or at least 4 G but less than 5 G of Methamphetamine (actual), or at least 4 G but less than 5 G of "Ice";
- At least 40 G but less than 50 G of Amphetamine, or at least 4 G but less than 5 G of Amphetamine (actual);
- At least 800 MG but less than 1 G of LSD;
- At least 32 G but less than 40 G of Fentanyl;
- At least 8 G but less than 10 G of a Fentanyl Analogue;
- At least 80 KG but less than 100 KG of Marihuana;
- At least 16 KG but less than 20 KG of Hashish;

	• At least 1.6 KG but less than 2 KG of Hashish Oil; • At least 80,000 but less than 100,000 units of Ketamine; • At least 80,000 but less than 100,000 units of Schedule I or II Depressants; • At least 80,000 but less than 100,000 units of Schedule III Hydrocodone; • At least 5,000 but less than 6,250 units of Flunitrazepam.	
(9)	• At least 60 G but less than 80 G of Heroin; • At least 300 G but less than 400 G of Cocaine; • At least 16.8 G but less than 22.4 G of Cocaine Base; • At least 60 G but less than 80 G of PCP, or at least 6 G but less than 8 G of PCP (actual); • At least 30 G but less than 40 G of Methamphetamine, or at least 3 G but less than 4 G of Methamphetamine (actual), or at least 3 G but less than 4 G of "Ice"; • At least 30 G but less than 40 G of Amphetamine, or at least 3 G but less than 4 G of Amphetamine (actual); • At least 600 MG but less than 800 MG of LSD; • At least 24 G but less than 32 G of Fentanyl; • At least 6 G but less than 8 G of a Fentanyl Analogue; • At least 60 KG but less than 80 KG of Marihuana;	**Level 22**

- At least 12 KG but less than 16 KG of Hashish;
- At least 1.2 KG but less than 1.6 KG of Hashish Oil;
- At least 60,000 but less than 80,000 units of Ketamine;
- At least 60,000 but less than 80,000 units of Schedule I or II Depressants;
- At least 60,000 but less than 80,000 units of Schedule III Hydrocodone;
- At least 3,750 but less than 5,000 units of Flunitrazepam.

(10) • At least 40 G but less than 60 G of Heroin; **Level 20**
- At least 200 G but less than 300 G of Cocaine;
- At least 11.2 G but less than 16.8 G of Cocaine Base;
- At least 40 G but less than 60 G of PCP, or at least 4 G but less than 6 G of PCP (actual);
- At least 20 G but less than 30 G of Methamphetamine, or at least 2 G but less than 3 G of Methamphetamine (actual), or at least 2 G but less than 3 G of "Ice";
- At least 20 G but less than 30 G of Amphetamine, or at least 2 G but less than 3 G of Amphetamine (actual);
- At least 400 MG but less than 600 MG of LSD;
- At least 16 G but less than 24 G of Fentanyl;
- At least 4 G but less than 6 G of a Fentanyl Analogue;

- At least 40 KG but less than 60 KG of Marihuana;
- At least 8 KG but less than 12 KG of Hashish;
- At least 800 G but less than 1.2 KG of Hashish Oil;
- At least 40,000 but less than 60,000 units of Ketamine;
- At least 40,000 but less than 60,000 units of Schedule I or II Depressants;
- At least 40,000 but less than 60,000 units of Schedule III Hydrocodone;
- 40,000 or more units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 2,500 but less than 3,750 units of Flunitrazepam.

(11) • At least 20 G but less than 40 G of Heroin; **Level 18**
- At least 100 G but less than 200 G of Cocaine;
- At least 5.6 G but less than 11.2 G of Cocaine Base;
- At least 20 G but less than 40 G of PCP, or at least 2 G but less than 4 G of PCP (actual);
- At least 10 G but less than 20 G of Methamphetamine, or at least 1 G but less than 2 G of Methamphetamine (actual), or at least 1 G but less than 2 G of "Ice";
- At least 10 G but less than 20 G of Amphetamine, or at least 1 G but less than 2 G of Amphetamine (actual);

	• At least 200 MG but less than 400 MG of LSD; • At least 8 G but less than 16 G of Fentanyl; • At least 2 G but less than 4 G of a Fentanyl Analogue; • At least 20 KG but less than 40 KG of Marihuana; • At least 5 KG but less than 8 KG of Hashish; • At least 500 G but less than 800 G of Hashish Oil; • At least 20,000 but less than 40,000 units of Ketamine; • At least 20,000 but less than 40,000 units of Schedule I or II Depressants; • At least 20,000 but less than 40,000 units of Schedule III Hydrocodone; • At least 20,000 but less than 40,000 units of Schedule III substances (except Ketamine or Hydrocodone); • At least 1,250 but less than 2,500 units of Flunitrazepam.	
(12)	• At least 10 G but less than 20 G of Heroin; • At least 50 G but less than 100 G of Cocaine; • At least 2.8 G but less than 5.6 G of Cocaine Base; • At least 10 G but less than 20 G of PCP, or at least 1 G but less than 2 G of PCP (actual); • At least 5 G but less than 10 G of Methamphetamine, or at least 500 MG but less than 1 G of Methamphetamine	**Level 16**

	(actual), or at least 500 MG but less than 1 G of "Ice"; • At least 5 G but less than 10 G of Amphetamine, or at least 500 MG but less than 1 G of Amphetamine (actual); • At least 100 MG but less than 200 MG of LSD; • At least 4 G but less than 8 G of Fentanyl; • At least 1 G but less than 2 G of a Fentanyl Analogue; • At least 10 KG but less than 20 KG of Marihuana; • At least 2 KG but less than 5 KG of Hashish; • At least 200 G but less than 500 G of Hashish Oil; • At least 10,000 but less than 20,000 units of Ketamine; • At least 10,000 but less than 20,000 units of Schedule I or II Depressants; • At least 10,000 but less than 20,000 units of Schedule III Hydrocodone; • At least 10,000 but less than 20,000 units of Schedule III substances (except Ketamine or Hydrocodone); • At least 625 but less than 1,250 units of Flunitrazepam.	
(13)	• At least 5 G but less than 10 G of Heroin; • At least 25 G but less than 50 G of Cocaine; • At least 1.4 G but less than 2.8 G of Cocaine Base;	**Level 14**

- At least 5 G but less than 10 G of PCP, or at least 500 MG but less than 1 G of PCP (actual);
- At least 2.5 G but less than 5 G of Methamphetamine, or at least 250 MG but less than 500 MG of Methamphetamine (actual), or at least 250 MG but less than 500 MG of "Ice";
- At least 2.5 G but less than 5 G of Amphetamine, or at least 250 MG but less than 500 MG of Amphetamine (actual);
- At least 50 MG but less than 100 MG of LSD;
- At least 2 G but less than 4 G of Fentanyl;
- At least 500 MG but less than 1 G of a Fentanyl Analogue;
- At least 5 KG but less than 10 KG of Marihuana;
- At least 1 KG but less than 2 KG of Hashish;
- At least 100 G but less than 200 G of Hashish Oil;
- At least 5,000 but less than 10,000 units of Ketamine;
- At least 5,000 but less than 10,000 units of Schedule I or II Depressants;
- At least 5,000 but less than 10,000 units of Schedule III Hydrocodone;
- At least 5,000 but less than 10,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 312 but less than 625 units of Flunitrazepam.

(14) • Less than 5 G of Heroin; **Level 12**
- Less than 25 G of Cocaine;
- Less than 1.4 G of Cocaine Base;
- Less than 5 G of PCP, or less than 500 MG of PCP (actual);
- Less than 2.5 G of Methamphetamine, or less than 250 MG of Methamphetamine (actual), or less than 250 MG of "Ice";
- Less than 2.5 G of Amphetamine, or less than 250 MG of Amphetamine (actual);
- Less than 50 MG of LSD;
- Less than 2 G of Fentanyl;
- Less than 500 MG of a Fentanyl Analogue;
- At least 2.5 KG but less than 5 KG of Marihuana;
- At least 500 G but less than 1 KG of Hashish;
- At least 50 G but less than 100 G of Hashish Oil;
- At least 2,500 but less than 5,000 units of Ketamine;
- At least 2,500 but less than 5,000 units of Schedule I or II Depressants;
- At least 2,500 but less than 5,000 units of Schedule III Hydrocodone;
- At least 2,500 but less than 5,000 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 156 but less than 312 units of Flunitrazepam;
- 40,000 or more units of Schedule IV substances (except Flunitrazepam).

(15) • At least 1 KG but less than 2.5 KG of Marihuana; **Level 10**
- At least 200 G but less than 500 G of Hashish;
- At least 20 G but less than 50 G of Hashish Oil;
- At least 1,000 but less than 2,500 units of Ketamine;
- At least 1,000 but less than 2,500 units of Schedule I or II Depressants;
- At least 1,000 but less than 2,500 units of Schedule III Hydrocodone;
- At least 1,000 but less than 2,500 units of Schedule III substances (except Ketamine or Hydrocodone);
- At least 62 but less than 156 units of Flunitrazepam;
- At least 16,000 but less than 40,000 units of Schedule IV substances (except Flunitrazepam).

(16) • At least 250 G but less than 1 KG of Marihuana; **Level 8**
- At least 50 G but less than 200 G of Hashish;
- At least 5 G but less than 20 G of Hashish Oil;
- At least 250 but less than 1,000 units of Ketamine;
- At least 250 but less than 1,000 units of Schedule I or II Depressants;
- At least 250 but less than 1,000 units of Schedule III Hydrocodone;
- At least 250 but less than 1,000 units of Schedule III substances (except Ketamine or Hydrocodone);

- Less than 62 units of Flunitrazepam;
- At least 4,000 but less than 16,000 units of Schedule IV substances (except Flunitrazepam);
- 40,000 or more units of Schedule V substances.

(17)
- Less than 250 G of Marihuana; **Level 6**
- Less than 50 G of Hashish;
- Less than 5 G of Hashish Oil;
- Less than 250 units of Ketamine;
- Less than 250 units of Schedule I or II Depressants;
- Less than 250 units of Schedule III Hydrocodone;
- Less than 250 units of Schedule III substances (except Ketamine or Hydrocodone);
- Less than 4,000 units of Schedule IV substances (except Flunitrazepam);
- Less than 40,000 units of Schedule V substances.

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*Notes to Drug Quantity Table:

(A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

(B) The terms "PCP (actual)", "Amphetamine (actual)", and "Methamphetamine (actual)" refer to the weight of the controlled substance, itself, contained in the mixture or substance. For example, a mixture weighing 10 grams containing PCP at 50% purity contains 5 grams of PCP (actual). In the case of a mixture or substance containing PCP, amphetamine, or methamphetamine, use the offense level determined by the entire weight of the mixture or substance, or the offense level determined by the weight of the PCP (actual), amphetamine (actual), or methamphetamine (actual), whichever is greater.

The term "Oxycodone (actual)" refers to the weight of the controlled substance, itself, contained in the pill, capsule, or mixture.

(C) "Ice," for the purposes of this guideline, means a mixture or substance containing d-methamphetamine hydrochloride of at least 80% purity.

(D) "Cocaine base," for the purposes of this guideline, means "crack." "Crack" is the street name for a form of cocaine base, usually prepared by processing cocaine hydrochloride and sodium bicarbonate, and usually appearing in a lumpy, rocklike form.

(E) In the case of an offense involving marihuana plants, treat each plant, regardless of sex, as equivalent to 100 G of marihuana. *Provided*, however, that if the actual weight of the marihuana is greater, use the actual weight of the marihuana.

(F) In the case of Schedule I or II Depressants (except gamma-hydroxybutyric acid), Schedule III substances, Schedule IV substances, and Schedule V substances, one "unit" means one pill, capsule, or tablet. If the substance (except gamma-hydroxybutyric acid) is in liquid form, one "unit" means 0.5 ml. For an anabolic steroid that is not in a pill, capsule, tablet, or liquid form (*e.g.*, patch, topical cream, aerosol), the court shall determine the base offense level using a reasonable estimate of the quantity of anabolic steroid involved in the offense. In making a reasonable estimate, the court shall consider that each 25 mg of an anabolic steroid is one "unit".

(G) In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

(H) Hashish, for the purposes of this guideline, means a resinous substance of cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabinol, cannabidiol, or cannabichromene, and (iii) fragments of plant material (such as cystolith fibers).

(I) Hashish oil, for the purposes of this guideline, means a preparation of the soluble cannabinoids derived from cannabis that includes (i) one or more of the tetrahydrocannabinols (as listed in 21 C.F.R. § 1308.11(d)(30)), (ii) at least two of the following: cannabinol, cannabidiol, or

cannabichromene, and (iii) is essentially free of plant material (*e.g.*, plant fragments). Typically, hashish oil is a viscous, dark colored oil, but it can vary from a dry resin to a colorless liquid.

SAVING STATUTE, 1 U.S.C. § 109

§ 109. Repeal of statutes as affecting existing liabilities

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. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute 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.

LETTER FROM SENATORS DURBIN AND LEAHY TO ATTORNEY GENERAL, NOVEMBER 17, 2010

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

November 17, 2010

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

Dear Attorney General Holder:

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

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

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

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

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

As you know, Judge D. Brock Hornby, an appointee of President George H.W. Bush, recently held that the Fair Sentencing Act's reduced mandatory minimums apply to defendants who have not yet been sentenced. In his opinion, Judge Hornby wrote, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs? . . . I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair." We wholeheartedly agree with Judge Hornby.

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

Regardless of the legal merits of this position, the Justice Department has the authority and responsibility to seek sentences consistent with the Fair Sentencing Act as a matter of prosecutorial discretion. This is consistent with your view that reforming the sentencing disparity "cannot wait any longer." It is also consistent with the Justice Department's mission statement, which states that the Department should "seek just punishment for those guilty of unlawful behavior" and "ensure fair and impartial

administration of justice for all Americans." As you said in your May 19, 2010 Memorandum to All Federal Prosecutors on Department Policy on Charging and Sentencing, "The reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws." Indeed, it is the Justice Department's obligation not simply to prosecute defendants to the full extent of the law, but to seek justice. In this instance, justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair.

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

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

Sincerely,

/s/ Dick Durbin
Dick Durbin

/s/ Patrick Leahy
Patrick J. Leahy

ATTORNEY GENERAL'S MEMORANDUM, JULY 15, 2011

[SEAL] **Office of the Attorney General**
Washington, D. C. 20530

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr. [/s/ Eric H. Holder Jr.]
Attorney General

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

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

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most

serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

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

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

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the

Act's central goals of promoting public safety and public trust – and ensuring a fair and effective criminal justice system – justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the Federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme – defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

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