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Reply to: Jacksonville, FL

July 21, 2011

John Ley, Clerk
Clerk's Office - Appeal No. 11-11336-GG
U.S. Court of Appeals - Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

Re: United States v. Terry Alonza Brown
Appeal No. 11-11336-GG
Concession of Error

Dear Mr. Ley:

After the United States filed its brief and supplemental authority letters in this appeal, the United States Attorney General sent the attached memorandum to all federal prosecutors revising the United States' view of the applicability of the Fair Sentencing Act. As explained in the memorandum, and in accordance with this Court's recent decision in United States v. Rojas, No. 10-14662, 2011 WL 2623579 (11th Cir. July 6, 2011) (to be published), the FSA applies to all defendants—including appellant Brown—sentenced on or after the FSA's effective date (August 3, 2010).

The United States agrees with Brown that his sentence, imposed under pre-FSA law, is erroneous. We ask this Court to vacate his sentence and remand for resentencing under the FSA.

John Ley, Clerk
Page 2
July 21, 2011

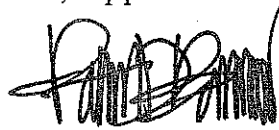
The United States is providing a copy of this letter by mail delivery to William Mallory Kent, Esq., 1932 Perry Pl., Jacksonville, Florida 32207-3443, counsel for the appellant.

Very truly yours,

ROBERT E. O'NEILL
United States Attorney

DAVID P. RHODES
Assistant United States Attorney
Chief, Appellate Division

By:



PATRICIA D. BARKSDALE
Assistant United States Attorney
Appellate Division


Attachment



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

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr. 
Attorney General

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

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

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

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

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.