UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

UNITED STATES OF AMERICA

vs. **Case No. 3:10-cr-126-J-32JRK**

TERRY ALONZA BROWN
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BROWN'S SENTENCING MEMORANDUM IN SUPPORT OF APPLICATION OF THE FAIR SENTENCING ACT OF 2010[1]

TERRY ALONZA BROWN ("Defendant" OR "Brown"), by and through the undersigned counsel, respectfully submits this sentencing memorandum in support of his request for sentencing subject to the five year minimum mandatory penalty for offenses involving 280 grams or less of crack cocaine pursuant to the Fair Sentencing Act of 2010, Pub.L. No. 111-220, 124 Stat. 2372 ("FSA"). Brown's offense involves less than 200 grams of crack cocaine and his sentencing will take place after the effective date of the FSA.

[1] The memorandum of law contained herein was freely adapted from a sentencing memorandum prepared by the Office of the Public Defender for the Middle District of Florida for use in similar cases. As of the filing date of this memorandum of law there have been no reported district court opinions addressing the issue presented by this case.

I. Introduction

Brown appeared before Magistrate Judge James Klindt Wednesday, August 18, 2010 for the purpose of pleading guilty pursuant to a written plea agreement under which he was to plead guilty to the offense of conspiracy to possess with intent to distribute 50 grams or more of crack cocaine (the stipulated quantity for relevant conduct sentencing purposes being less than 200 grams) in violation of 21 U.S.C. § 846. During the plea colloquy it became apparent that there was a difference in understanding between Brown and the Government as to the application, *vel non*, of the FSA to Brown's sentencing, which is anticipated to take place sometime after November 1, 2010. Brown informed the Magistrate Judge that his understanding was that the applicable minimum mandatory sentence would be five years; the Government stated that the position of the Department of Justice is that in such cases the pre-FSA law governs sentencings after its enactment for offenses which were committed prior to its enactment. At that point the Magistrate Judge kindly permitted the proceedings to adjourn for further deliberation and this matter to be brought to the attention of the District Court at the status conference set for Monday, August 23, 2010.

Brown's guideline range under the current guidelines is 108-135 months, based on a Criminal History Category III and Total Offense Level 29 (base level 32 for less

than 200 grams crack cocaine, minus 3 levels for acceptance of responsibility). Under the Fair Sentencing Act of 2010 ("FSA"), it is anticipated that the guideline range will be reduced two levels, to a Total Offense Level 27, Category III, for a range of 87-108 months. It is Brown's position that this Court has the discretion to sentence him at or below that range. Under the Anti-Drug Abuse Act of 1986 ("1986 law"), however, this Court's discretion is curtailed by the minimum mandatory penalties that have been restructured by the FSA. Because Brown's case was pending when the FSA was enacted, he qualifies for application of the amended provisions therein, which would reduce the minimum mandatory sentence from ten to five years.

"The general rule is that a new statute should apply to cases pending on the date of its enactment unless manifest injustice would result or there is a statutory directive or legislative history to the contrary." *United States v. Kolter,* 849 F.2d 541, 543-44 (11th Cir. 1988). The most common exception to this general rule is the statutory directive in the form of the general savings statute found at 1 U.S.C. § 109. The savings statute prohibits the retroactive application of a new statute to "release or extinguish any penalty, forfeiture, or liability" incurred under a prior statute. 1 U.S.C. § 109.

The savings statute has exceptions just as the general rule does. For present purposes, the primary exception to the savings statute, which is not only an exception

in an of itself, but also is a common theme throughout the other exceptions in this particular case, is that the Fair Sentencing Act did not release or extinguish the penalty for crack cocaine; it restructured and redefined the classes of persons to whom the minimum mandatories apply to remedy the defects in the 1986 law. "In 1986, Congress linked mandatory minimum penalties to different drug quantities, which were intended to serve as proxies for identifying offenders who were 'serious' traffickers (managers of retail drug trafficking) and 'major' traffickers (manufacturers or the kingpins who headed drug organizations)." Floor Proceedings, Page: H6199, Finding No. 4, H.R. 265.[2] Congress redefined "serious" and "major" traffickers by amending the proxies it set for those terms from 5 and 50 grams to 28 and 280 grams, respectively. Congress candidly admitted that it did this to correct its original error in the structure of the 1986 law that mistakenly swept low-level dealers into the same minimum mandatory net as higher-level dealers. *See* Floor Proceedings, Page: H6200, Finding No. 10(E), H.R. 265; *see also* Statement of Congresswoman Sheila Jackson Lee, Floor Proceedings, Page: H6199.

The savings clause is thus predominantly remedial and procedural, which keys in with the "redefinition of a term" exception and is a separate exception. *United*

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[2] The Floor Proceedings on the Fair Sentencing Act of 2010 in the House of Representatives on July 28, 2010 are referenced herein as "Floor Proceedings."

States v. Blue Sea Line, 553 F.2d 445, 448-50 (5th Cir.1977). The FSA simply restructures the 1986 law to remedy the well-known and publicly-acknowledged defects in the 1986 law by redefining the proxies for "serious" and "major" traffickers. As such, it does not *save* the unjust, discriminatory, disparate 1986 law from abatement. 2 J. Sutherland, *Statutes and Statutory Construction* § 41:11 (Norman J. Singer and J.D. Shambie Singer ed., 7th ed. 2010).

Another exception to the savings statute occurs when the "legislative intent expressly or impliedly indicates retroactive application is desirable." Sutherland, *Statutes and Statutory Construction* § 41:4. The FSA's legislative history establishes that it was long awaited and widely supported. There is no indication that Congress intended to leave anyone behind. To the contrary, the legislative history indicates that Congress intended to apply this remedial measure to prevent any further sentencing discrimination and errors. This legislative history exception to the savings statute therefore applies herein as well.

A final exception to § 109 that may require a statute's retroactive application is "the parties' reasonable expectations." The parties should expect a just and reasonable sentence, based on due process, equal protection, and fundamental fairness. These are the basic concepts upon which the FSA is founded and the 1986 law is lacking. Indeed, the legislative history is replete with congressional

condemnation of the "oppressive sentencing structure"[3] of the 1986 law as "reflect[ing] such a high degree of discriminatory application[,]"[4] "counterproductive and unjust[,]"[5] and "contrary to our fundamental principles of equal protection under the law."[6] To continue to apply 1986 law would runs afoul of the purposes of sentencing, as set forth in 18 U.S.C. § 3553(a) and results in a manifest injustice.

II. Factual Background of this Case.

Brown's offense was committed February to March 2010. The indictment was returned May 13, 2010. The FSA was enacted August 3, 2010. The indictment alleged 50 grams or more of crack cocaine. The Government has agreed to stipulate for relevant conduct purposes that the amount of crack cocaine was less than 200 grams. Thus the drug quantity the Government has stipulated to is below the new 280 gram threshold quantity required for a ten year minimum mandatory sentence under the FSA and now qualifies only for a five year minimum mandatory sentence. Brown himself is a black male, a member of a racially protected class whom Congress determined had been discriminated against by the irrational 100:1 ratio of the old

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[3] Congresswoman Sheila Jackson Lee, Floor Proceedings, Page: H6198.

[4] House Majority Whip James E. Clyburn, July 28, 2010 press release.

[5] Statement of Congressman Hoyer, Majority Leader of the House, Floor Proceedings, Page: H6203.

[6] Statement of Congressman Clyburn, Floor Proceedings, Page: H6197.

crack cocaine minimum mandatory penalties.

III. Memorandum of Law

> The general rule is that a new statute should apply to cases pending on the date of its enactment unless manifest injustice would result or there is a statutory directive or legislative history to the contrary.

United States v. Kolter, 849 F.2d 541, 543-44 (11th Cir. 1988) (citing *Bradley v. School Board of Richmond*, 416 U.S. 696, 711-14, 94 S. Ct. 2006, 2016-17 (1974); *United States v. Fernandez-Toledo*, 749 F.2d 703, 705 (11th Cir.1985); *Central Freight Lines, Inc. v. United States*, 669 F.2d 1063, 1069 (5th Cir.1982); *Corpus v. Estelle*, 605 F.2d 175, 180 (5th Cir.1979)). The instant case was pending on the date the Fair Sentencing Act of 2010 ("FSA") was enacted, August 3, 2010. Said Act therefore applies herein unless one of the exceptions is applicable, *i.e.*, there is a statutory directive, legislative history to the contrary, or manifest injustice. Each of these exceptions is addressed below. Additionally, there are constitutional and policy reasons that militate in favor of application of the FSA herein. Those reasons are addressed as well.

A. Statutory Directive: Savings Statute

A savings statute is a legislative enactment that is created for the limited purpose of countering the common-law doctrine of abatement. "To understand the intended limited scope of the savings provisions, it is necessary also to understand the

abatement doctrine and its application." S. David Mitchell, *In with the New, Out with the Old: Expanding the Scope of Retroactive Amelioration*, 37 Am. J. Crim. L. 1, 24 (Fall 2009).

1. The Common Law Abatement Doctrine

> At common law, the repeal of a criminal statute abated all prosecutions which had not reached final disposition in the highest court authorized to review them. *See Bell v. Maryland*, 378 U.S. 226, 230, 84 S. Ct. 1814, 1817, 12 L. Ed.2d 822 (1964); *Norris v. Crocker*, 13 How. 429, 14 L. Ed. 210 (1852). Abatement by repeal included a statute's repeal and re-enactment with different penalties. *See* 1 J. Sutherland, *Statutes and Statutory Construction* s 2031 n. 2 (3d ed. 1943). And the rule applied even when the penalty was reduced. *See, e.g., The King v. M'Kenzie*, 168 Eng.Rep. 881 (Cr.Cas.1820); *Beard v. State*, 74 Md. 130, 21 A. 700 (1891).

Bradley v. United States, 410 U.S. 605, 607-08, 93 S. Ct. 1151, 1154 (1973).

The fundamental premise for the abatement doctrine is that "any legislative change without an express saving clause is equivalent to the statute having never existed." Mitchell, 37 Am. J. Crim. L. at 26 (citing *Yeaton v. United States*, 9 U.S. (5 Cranch) 281, 283 (1809) ("The court is . . . of opinion, that this cause is to be considered as if no sentence had been pronounced; and if no sentence had been pronounced, it has been long settled, on general principles, that after the expiration or repeal of a law, no penalty can be enforced, nor punishment inflicted, for violations

of the law committed while it was in force.")).

2. The General Savings Statute, 1 U.S.C. § 109

In 1871, the federal general savingsstatute, 1 U.S.C. § 109, was enacted "to prevent the triggering of the common-law doctrine of abatement." Mitchell, 37 Am. J. Crim. L. at 32. It was construed to prevent the "technical abatement" of a pending prosecution. *See Hamm v. City of Rock Hill*, 379 U.S. 306, 314-15 (1965) ("[T]he Civil Rights Act works no such technical abatement. It substitutes a right for a crime. So drastic a change is well beyond the narrow language of amendment and repeal. It is clear, therefore, that if the convictions were under a federal statute they would be abated.").

Section 109 provides:

> 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.

1 U.S.C. § 109.[7]

There are several recognized exceptions to the savings statute warranting retroactivity that apply herein: (a) the statutory change redefines a term; (b) the statutory change is remedial or curative; (c) the legislative intent indicates retroactivity is desirable; or (d) the "reasonable expectations" of the parties require it. *Kolter*, 849 F.2d at 543-44; *United States v. Blue Sea Line*, 553 F.2d 445, 448-50 (5th Cir.1977); *United States v. Mechem*, 509 F.2d 1193 (10th Cir. 1975); 2 J. Sutherland, *Statutes and Statutory Construction* § 41:4 (Norman J. Singer and J.D. Shambie Singer ed., 7th ed. 2010).

(a) The statutory change redefines a term

The *Kolter* Court discussed the general savings clause because there was no specific savings clause in 18 U.S.C. § 921(a)(20), which was enacted after the defendant's offense conduct, but before he was tried and convicted. *Kolter*, 849 F.2d at 543. At the time the defendant committed the offense, he was considered a convicted felon because Supreme Court precedent dictated that the term "convicted felon" be defined in accordance with federal law, and federal law in effect at the time

[7] This general statute should be narrowly applied because it contravenes fundamental precepts of the common law. *See Imbler v. Pachtman*, 424 U.S. 409, 417-18, 96 S. Ct. 984, 988 (1976); *United States v. Rogers*, 461 U.S. 677, 716, 103 S. Ct. 2132, 2154 (1983) (Blackmun, J., concurring in part and dissenting in part).

provided that "the restoration of Kolter's civil rights would not bar his federal conviction as it did not alter the historical fact of his state felony conviction." *Id.* (citing *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 111-12, 114-15, 103 S. Ct. 986, 991, 992-93 (1983)). The amendment to § 920(a)(20) rejected the Supreme Court precedent and redefined the term "conviction . . . in accordance with the law of the jurisdiction in which the proceedings were held." *Id*. (quoting 18 U.S.C. § 920(a)(20)). The new statute further provided: "Any conviction . . . for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter unless such . . . restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms." *Id*. (quoting 18 U.S.C. § 920(a)(20)). Under the new law, therefore, the defendant "would not be a 'convicted felon' as the restoration of his civil rights was not qualified by a firearms restriction." *Id*. The issue in *Kolter* was thus whether the new law applied to the defendant.

The government argued that under the general savings clause the old law applied, not the new one. *Id*. at 544. The Eleventh Circuit disagreed, stating:

> We agree with the government that § 109 applies to this case insofar as prosecutions under § 1202(a), the statute under which Kolter was convicted, are saved even though § 1202(a) has been repealed. However, in enacting § 921(a)(20), Congress did not repeal a statute – it changed

> the rule announced in *Dickerson v. New Banner Institute*, which had interpreted a statute. Because § 921(a)(20) did not repeal a statute but **merely changed *Dickerson* 's definition** of a "convicted felon," **§ 109 does not save the old definition**.
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> Moreover, even if § 921(a)(20) had repealed a statute, § 109 would not apply as the redefinition of"convicted felon" did not "release or extinguish any penalty, forfeiture, or liability." "Penalty, forfeiture, or liability" is synonymous with punishment. The redefinition of "convicted felon" did not affect the punishment provided **but merely altered the class of persons for whom the specified conduct is prohibited.**

Id. (internal citations and footnote omitted; emphasis added).

This reasoning applies with equal force in the case at bar. The FSA does not " release or extinguish any penalty" set forth in 21 U.S.C. § 841(b)(1)(A)(iii) or (B)(iii).[8] The statutory penalties remain 10 years to life and 5 to 40 years' imprisonment, respectively. Instead, what the Act does is redefine the offenders who are "serious" and "major" traffickers because those offenders are the ones to whom the minimum mandatories were targeted. *See* Floor Proceedings, Page: H6199, Finding No. 4, H.R. 265 ("In 1986, Congress linked mandatory minimum penalties

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[8] Sections 841(b)(1)(A)(iii) and 960(1)(C) of title 21, United States Code, are treated the same, just as § 841(b)(1)(B)(iii) and § 960(2)(C) are. Therefore, for ease of reference therefore, whatever is said about § 841(b)(1)(A)(iii) applies equally to § 960(1)(C), and whatever is said about § 841(b)(1)(B)(iii) applies equally to § 960(2)(C).

to different drug quantities, which were intended to serve as proxies for identifying offenders who were 'serious' traffickers (managers of retail drug trafficking) and 'major' traffickers (manufacturers or the kingpins who headed drug organizations).''). The FSA merely changed the definition of "serious" traffickers to offenders who traffic in 28 grams or more of crack, and "major" traffickers to offenders who traffic in 280 grams or more of crack. Congress did this because it realized that by including persons who were involved with between 5 and less than 28 grams in the serious traffickers definition it was "sweep[ing] . . . low-level crack cocaine users and dealers" into the net that it had meant to catch what it considered more "serious" dealers. Floor Proceedings, Page: H6200, Finding No. 10(E), H.R. 265; *see also* Statement of Congresswoman Lee, Floor Proceedings, Page: H6199. Congress further found that "[a]s a result of the low-level drug quantities that trigger lengthy mandatory minimum penalties for crack cocaine, the concentration of lower level Federal offenders is particularly pronounced among crack cocaine offenders, more than half of whom were street level dealers in 2005." Floor Proceedings, Page: H6200, Finding No. 14, H.R. 265. This was more than enough justification for Congress to modify the definitions of "serious" and "major" traffickers upon which it based the drug quantities that triggered the minimum mandatory penalties. Thus, like the statute at issue in *Kolter*, the FSA merely changed a previous definition and

"altered the class of persons for whom the specified conduct is prohibited" – here the conduct of trafficking in a certain quantity of crack. *Kolter*, 849 F.2d at 544.

(b) The statutory change is remedial or curative

Further support for finding that the general savings statute does not apply to the FSA is found in *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 94 S. Ct. 2532 (1974). The holding in that case does not apply herein, but the exception noted by the Court does.[9] Specifically, the Court noted that "the general saving clause does not ordinarily preserve discarded remedies or procedures[.]" *Id*. at 661, 94 S. Ct. at 2537 (citing *Hertz v. Woodman*, 218 U.S. 205, 218, 30 S. Ct. 621, 624 (1910); *United States v. Obermeier*, 186 F.2d 243, 253 (2d Cir. 1950)). *See also United States v. Vanella*, 619 F.2d 384, 386 (5th Cir. 1980) (applying the rule that "statutory changes that are procedural or remedial in nature apply retroactively"); *Turner v. United States*, 410 F.2d 837, 842 (5th Cir. 1969) ("changes in statute law relating only to procedure or remedy are usually held immediately applicable to pending cases, including those on appeal from a lower court"); Sutherland, *Statutes and Statutory Construction* § 41:11 ("A curative act is a statute passed to cure defects in prior law. . . . Generally, curative acts are made necessary by inadvertence or error in

[9] The *Marrero* Court held that § 109 barred "the Board of Parole from considering respondent for parole under 18 U.S.C. s 4202." 417 U.S. at 659, 94 S. Ct. at 2536.

the original enactment of a statute. . . . [and] can be given retroactive effect if it is designed merely to carry out or explain the intent of the original legislation.") (footnotes omitted). The FSA is procedural and curative/remedial.

The procedural versus substantive dichotomy was at issue in *United States v. Blue Sea Line*, 553 F.2d 445 (5th Cir.1977), where the Court explained:

> Although the distinction between procedure and substance tends to confuse more than clarify, courts have employed it to determine whether a given statutory change supercedes the prior law in cases arising from acts that occurred before the legislation's effective date. **If a statutory change is primarily procedural, it will take precedence over prior law in such cases**; if the change affects a penalty, the saving clause preserves the pre-repeal penalty.

Id. at 448 (emphasis added).

Because the difference between procedure and substance is difficult to discern in this context, the *Blue Sea Line* Court looked to other case law for guidance. It found two principles announced in *United States v. Mechem*, 509 F.2d 1193 (10th Cir. 1975), persuasive.

> First, [*Mechem*] suggests a role for **reasoning by inference from the statutory language and the legislative history**. . . . Where the question is whether a statutory change affects "penalty" or "procedure," however, the inquiry is preliminary to application of the general saving clause. In the course of this inquiry, *Mechem* properly indicates that **statutory language and legislative intent may be consulted in search of implications that Congress was either making a procedural change**

> or reassessing the substance of criminal liability or punishment.
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> Second, *Mechem* recognized that cases will arise in which it may fairly be said that a statutory change both alters a penalty and modifies a procedure. In determining whether such a statute applies to all proceedings pending at its effective date, a court may inquire into the **predominant purpose** of the change procedural modification or penal reassessment.

Blue Sea Line, 553 F.2d at 449-50 (emphasis added).

The Court in *Blue Sea Line* then turned to the specifics of the case before it, which involved the Shipping Act of 1916, 46 U.S.C. §§ 801, *et seq*. In 1972, after the alleged violations, but prior to the return of the indictment in that case, Congress repealed the criminal penalties in that Act and replaced them with civil ones. The issue on appeal was whether the government could prosecute the defendants criminally under the repealed statute for pre-repeal conduct. *Id*. at 446. The Court held that the 1972 amendments, which replaced the criminal penalties with civil penalties, "was predominantly a procedural and remedial change." *Id*. at 450. The Court noted that "Congress was clearly not engaged in ameliorating criminal punishment in adopting the 1972 amendments. On the contrary, its concern was to tighten enforcement of the existing monetary sanctions. The chosen mechanism was a shift in 'forum'[.]" *Id*. Of course, the amendment was not totally a "procedural modification" as opposed to a "penal reassessment." *Id*. It did repeal the criminal

penalties. But focusing on the legislative intent of "improving the means of enforcing existing monetary sanctions" and on the "predominant purpose of the change" the Court concluded that the amendment was "procedural in nature, hence applicable to the proceedings at bar." *Id*. In other words, the savings clause did not save the old statute because the amendment "was predominantly a procedural and remedial change." *Id*. at 450.[10]

Similarly, in the case at bar, the legislative intent indicates that the FSA is predominantly a procedural and remedial change. Its predominant purpose is not to change the penalties. It simply restructures how they are applied to ensure that its original goal of punishing the higher-level dealers more severely than the lower-level dealers was enforced.

Granted, the low-level dealers reap some benefit from the new law, just as there was some beneficial effect from the statute in *Blue Sea Line*, *i.e.*, the new statute in *Blue Sea Line* repealed the criminal penalties. But that was not the predominant

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[10] In *Statutes and Statutory Construction*, Sutherland explains: "Retroactive application is particularly appropriate where a procedural rule is changed after a suit arises, because rules of procedure regulate secondary rather than primary conduct." Sutherland, § 41:4. The example given was *Bailey v. State*, 854 So. 2d 783 (Fla. 5th DCA 2003), wherein violation of the single-subject rule by a mandatory minimum sentencing statute for drug trafficking was cured by the legislature's subsequent re-enactment of the statute in later legislation and this re-enactment applied retroactively.

purpose of the new law there or here. Congress had several bills relating to crack pending at the same time. If Congress's goal was simply to reduce the penalties for crack, it could have passed one of the other bills. *See, e.g.,* H.R. 1459, "Fairness in Cocaine Sentencing Act of 2009" (amending 21 U.S.C. § 841(b)(1)(A) by striking clause (iii), which would treat 50 grams of crack the same as 50 grams of other forms of cocaine, and amending 21 U.S.C. § 841(b)(1)(B) by striking clause (iii), which would treat 5 grams of crack the same as 5 grams of other forms of cocaine); H.R. 2178, "Crack Cocaine Equitable Sentencing Act of 2009" (same as H.R. 1459 in this regard); H.R. 3245, "Fairness in Cocaine Sentencing Act of 2009" (same as 1459 in this regard). None of these bills, however, were passed. Instead, Congress passed a bill that effectuated its goal of remedying the structural defects in the penalty section of the 1986 Act caused by the false assumptions upon which that Act was based, that is, redefining "serious" and "major" traffickers based on the quantity of crack they trafficked in, which was then linked to the mandatory minimum penalties. *See* Floor Proceedings, Page: H6199, Finding No. 4, H.R. 265. By so doing, Congress was able to maintain the appropriate punishment for the "serious" and "major" traffickers, while not "sweep[ing] in low-level crack cocaine users and dealers." Floor Proceedings, Page: H6200, Finding No. 10(E), H.R. 265. Indeed, as one Congressman put it, the FSA "will enhance, not diminish prosecution, and it will lead to better

justice in America while at the same time making sure that we penalize and hold accountable those who would addict our children and our fellow citizens." Statement of Congressman Hoyer, Majority Leader of the House, Floor Proceedings, Page: H6203.

To understand the remedial/curative nature of the change, some background is necessary. Under 1986 law, a 100-to-1 ratio was applied to crack versus powder cocaine. The statutory maximum penalties for crack and powder cocaine were the same under 21 U.S.C. § 841(b)(1)(A) and § 841(b)(1)(B), that is, life and 40 years' imprisonment, respectively. The minimum mandatory penalties, however, reflected the 100-to-1 ratio. Specifically, under § 841(b)(1)(A)(iii), the 10-year minimum mandatory penalty for crack cocaine was triggered by 50 grams, while the same minimum mandatory required 5 kilograms of powder cocaine (100 time 50 grams). Likewise, under § 841(b)(1)(B)(iii), 5-year minimum mandatory penalty for crack cocaine was triggered by 5 grams, while the same minimum mandatory required 500 grams of powder cocaine (100 times 5 grams).

As explained during the Floor Proceedings on the Fair Sentencing Act of 2010 in the House of Representatives on July 28, 2010, instead of using the terms "serious" traffickers and "major" traffickers in 21 U.S.C. § 841(b)(1)(A)(iii) and § 841(b)(1)(B)(iii), Congress chose to use different drug quantities as proxies for those

terms -- "serious" traffickers, or managers of retail drug trafficking, are involved in 5 grams; "major" traffickers, or manufacturers or the kingpins who headed drug organizations, are involved in 50 grams). It then linked the mandatory minimum penalties to different drug quantities in lieu of the actual terms. Floor Proceedings, Page: H6199, Finding No. 4, H.R. 265.

Congress chose those specific quantities, 5 and 50 grams, based on the 100-to-1 crack-to-powder cocaine ratio. That ratio, however, was not based on any evidentiary foundation. In fact, the "oppressive sentencing structure"[11] that resulted from the 100-to-1 crack-to-powder ratio had no evidentiary basis at all. As explained by Congressman Daniel E. Lungren of California:

> [The conclusion] that there is a basis for treating crack and powder differently is in no way a justification for the 100-to-1 sentencing ratio contained in the 1986 drug bill. **We initially came out of committee with a 20-to-1 ratio. By the time we finished on the floor, it was 100-to-1. We didn't really have an evidentiary basis for it, but that's what we did**, thinking we were doing the right thing at the time.

Floor Proceedings, Page: H6202 (emphasis added) . *See also* Statement of Congressman Robert C. "Bobby" Scott, Chairman of the House Judiciary Subcommittee on Crime, Terrorism and Homeland Security, Floor Proceedings, Page: H6202 ("We are not blaming anybody for what happened in 1986, but we have had

[11] Statement of Congresswoman Lee, Page: H61998.

years of experience and have determined that **there is no justification for the 100-to-1 ratio**.") (emphasis added).

Not only was the 100-to-1 penalty structure unjustified, it was also based on a series of assumptions that Congress determined to be unfounded based on a series of studies. *See* Floor Proceedings, Page: H6200, Finding No. 9, H.R. 265 ("Most of the assumptions on which the current penalty structure was based have turned out to be unfounded."); *see also* Congressman Clyburn, Floor Proceedings, Page: H6198 ("Twenty years of experience has taught us that many of our initial beliefs were wrong."); Statement of Congresswoman Lee, Floor Proceedings, Page: H6199 ("This disparity made no sense when it was initially enacted, and makes absolutely no sense today[.]"). These findings, which were addressed during the Floor Proceedings, included:

> [S]tudies have shown. . . **[t]he current 100 to 1 penalty structure undermines various congressional objectives set forth in the Anti-Drug Abuse Act of 1986.** Data collected by the United States Sentencing Commission show that Federal resources have been targeted at offenders who are subject to the mandatory minimum sentences, which sweep in low-level crack cocaine users and dealers.

Floor Proceedings, Page: H6200, Finding No. 10(E), H.R. 265 (emphasis added); *see also* Statement of Congresswoman Lee, Floor Proceedings, Page: H6199.

As a result of the low-level drug quantities that trigger lengthy

> mandatory minimum penalties for crack cocaine, the concentration of lower level Federal offenders is particularly pronounced among crack cocaine offenders, more than half of whom were street level dealers in 2005.

Floor Proceedings, Page: H6200, Finding No. 14, H.R. 265.

To remedy these defects in the 1986 law and carry out the original intent of that legislation, Congress passed Senate Bill 1789, the Fair Sentencing Act of 2010. The stated purpose of the new law is "[t]o restore fairness to Federal cocaine sentencing." S. 1789. The relevant portions of the FSA do not change the statutory minimum mandatory or maximum penalties under 21 U.S.C. §§ 841(b)(1)(A)(iii) or (B)(iii). *See* Statement of Congressman Scott, Floor Proceedings, Page: H6203 ("[T]his bill does not reduce the disparity from 100-to-1 to 1-to-1. It does not eliminate the mandatory minimums[.]"). Indeed, the penalties for § 841(b)(1)(A)(iii) remain 10 years to life imprisonment, and the penalties for § 841(b)(1)(B)(iii) remain 5 to 40 years.[12] Instead of repealing or amending the "penalties" for crack cocaine, the new law simply effects a structural modification by redefining the class of persons to whom the minimum mandatory penalties apply. Whereas, under the old law a serious or major trafficker (*i.e.*, an offender warranting a 5-year or 10-year minimum mandatory

[12] These are the unenhanced penalties. The new law does not address the enhancements (*e.g.*, if death or serious bodily harm results) or the associated penalties.

sentence) was an offender involved with 5 or 50 grams of crack cocaine, respectively; under the new law, a serious or major trafficker is redefined as an offender involved with 28 or 280 grams of crack cocaine.[13]

As explained by Senator Jeff Sessions, Ranking Member of the Senate Judiciary Committee and a lead co-author of the compromise that was reached on S. 1789 on a bipartisan basis with other Committee members:

> **The long-awaited passage of these bipartisan reforms brings needed fairness to our sentencing laws while empowering law enforcement with the tools they need to target the worst offenders** . . . .From the beginning of this debate, it was clear we needed to strike a balance in measuring these reforms. . . .Under this legislation, serious drug offenders are subject to more serious penalties. . . . At the same time, the disparity between crack and powder cocaine sentencing has now been significantly reduced to better and more strategically target federal resources at those who distribute wholesale quantities of narcotics.

Senator Jeff Sessions, July 28, 2010 press statement (emphasis added).

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[13] In relevant part of the FSA states:

> 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".

S. 1789.

Congress was thus faced with an oppressive sentencing structure that was not based on any evidentiary foundation, and what assumptions it was based on were admittedly unfounded. In fact, the 100-to-1 structure, upon which the minimum mandatory penalties were based, actually undermined the congressional objectives set forth in the Anti-Drug Abuse Act of 1986. Instead of changing the minimum mandatory penalties, Congress decided to remedy the error in the original enactment of the statute by changing the drug quantities, which were intended to serve as proxies for identifying serious or major traffickers, and were linked mandatory minimum penalties. *See* Floor Proceedings, Page: H6199, Finding No. 4, H.R. 265. As such, the FSA a textbook example of Sutherland's definition of a curative act: "a statute passed to cure defects in prior law. . . . Generally, curative acts are made necessary by inadvertence or error in the original enactment of a statute . . . [and] can be given retroactive effect if it is designed merely to carry out or explain the intent of the original legislation." Sutherland, *Statutes and Statutory Construction* § 41:11 (footnotes omitted).

(c) The legislative intent indicates retroactivity is desirable and necessary

A third exception to the non-retroactivity principle occurs when legislative intent, implicitly or explicitly, indicates the desirability of retroactivity. *See*

Sutherland, *Statutes and Statutory Construction* § 41:4. This exception dovetails into the explanation of the exception to the general rule. *See Kolter,* 849 F.2d at 543-44 ("The general rule is that a new statute should apply to cases pending on the date of its enactment unless . . . there is . . . legislative history to the contrary.").

There is no explicit legislative history stating that Congress specifically intended the FSA to be applied retroactively or prospectively. But the legislative history does indicate that Congress intended the Act to apply as quickly as possible and leave no one behind because it was long overdue, and the 1986 structure was unjust, unfair, and wreaking of unconstitutionality.

As stated by Senator Durbin when he introduced the Senate bill, the Fair Sentencing Act of 2009, to the Senate Committee on the Judiciary on October 15, 2009:

> I have cast thousands of votes as a Member of the House of Representatives and the Senate. Most of those votes are kind of lost in the shadows of history. Some were historic, relative to going to war and impeachment issues, and you never forget those.
>
> But there was one vote I cast more than 20 years ago which I regret. It was a vote that was cast by many of us in the House of Representatives, when we were first informed about the appearance of a new narcotic on the streets. It was called crack cocaine. It was so cheap it was going to be plentiful, and it was so insidious – or at least we were told that 20 years ago – we were advised to take notice and do something dramatic and we did.

> More than 20 years ago, I joined many Members of Congress from both political parties in voting for the Anti-Drug Abuse Act of 1986. It established the Federal cocaine sentencing framework that is still in place today.
>
> * * *
>
> **It is time to right this wrong. We have talked about the need to address the crack-powder disparity for long enough. Now, it's time to act.** I urge my colleagues to join me in supporting the Fair Sentencing Act of 2009.

Statement of Senator Durbin, S. 1789, *A Bill to Restore Fairness to Federal Cocaine Sentencing Before the Committee on Judiciary*, 111th Cong. S.10490-10492 (Oct. 15, 2009) (emphasis added).

In a March 11, 2010 press release, following the passage of S. 1789 in the Senate, Senator Leahy stated:

> **Congress has waited more than 20 years to fix this problem. While we fail to act, thousands of men and women serve in prison for years and years, while those who are more privileged serve much shorter sentences for essentially the same crime. This is unfair, and we need to fix it now.**
>
> Senator Durbin has worked hard on this compromise. This solution is far from perfect, but it offers an opportunity to get this done and make an important and **bipartisan change in this policy this year**, **one that will move us closer to achieving fairness in our sentencing laws**.

(Emphasis added).

Several months later, the bill passed with overwhelming bipartisan support, after which Congressman Hoyer commented:

> In the words of a letter signed by a bipartisan group with sponsors on the Senate Judiciary . . . "**Congress has debated the need to address the crack powder disparity for too long**. . . ."

Statement of Majority Leader of the House Hoyer, Floor Proceedings, Page: H6203 (emphasis added). *See also* Senator Sessions, July 28, 2010 press statement (discussing the "long-awaited passage" of the "reform").

Certainly, the only inference that can be drawn from such comments is that the legislative intent was to apply the FSA to everyone – not just persons whose conduct occurred after the Act was signed into law. To rule otherwise is to perpetuate the what Congress has admitted is discriminatory, unjust, and unfounded damage done by the 1986 crack law.

Another important indicator of legislative intent is Congress's choice to not include a specific savings clause in S. 1789. The importance of this choice is revealed by examining the other bills pending before Congress at the time it chose to pass S. 1789. The bill introduced by Congresswoman Lee, H.R. 265 ("Drug Sentencing Reform and Cocaine Kingpin Trafficking Act of 2007"), which was read into the record during the floor proceedings on S. 1789, contained a specific savings clause. In fact, section 11 ("Effective Date") of H.R. 265 specifically provides:

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

H.R. 265, sec. 11.[14]

"By inserting an express saving clause, the legislature makes a clear and unequivocal statement that the amended statute shall not have any effect on either the status or prosecution of prior conduct." Mitchell, 37 Am. J. Crim. L. at 24. The Fair Sentencing Act of 2010 contains no such language. Significance should be attached to the fact that Congress did not see fit to append such a savings clause to the bill it actually passed.[15]

(d) The "reasonable expectations" of the parties require retroactivity

The fourth and final exception to the general savings statute applicable herein

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[14] The last activity on that H.R. 265 was on February 9, 2009, when it was referred to the Subcommittee on Crime, Terrorism, and Homeland Security.

[15] In *Bradley v. United States*, 410 U.S. 605, 93 S. Ct. 1151 (1973), the Supreme Court held that narcotic offenses committed prior to effective date of the Comprehensive Drug Abuse Prevention and Control Act of 1970 were to be punished according to the law in force at time of the offense notwithstanding that sentencing occurred after effective date of the Act. The Court's ruling, however, was based on the fact that the new Act contained a specific savings clause in section 1103(a) that provided: **"**Prosecutions for any violation of law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (it) . . . or abated by reason thereof." *Id.* at 608, 93 S. Ct at 1154. Finding that "prosecutions" include "sentencing," the Court ruled that the savings clause contained in the new Act applied in that case. *Id.* at 611, 93 S. Ct. at 1155.

concerns the reasonable expectations of the parties. *See* Sutherland, *Statutes and Statutory Construction* § 41:4 ("fulfillment of the parties' reasonable expectations may require the statute's retroactive application"); *see also* Millard H. Ruud, *The Savings Clause--Some Problems in Construction and Drafting*, 33 Tex. L. Rev. 285, 286 (1955) ("The function of the savings clause is to express the legislative intention to preserve the designated expectancies, rights or obligations from immediate destruction or interference."). Like the previous exception to the non-retroactivity principle, this exception also relates to an exception to the general rule, and favors application of the general rule. *See Kolter*, 849 F.2d at 543-44 ("The general rule is that a new statute should apply to cases pending on the date of its enactment unless manifest injustice would result . . . .").

The exception to the general rule can be quickly disposed of because the legislative history clearly demonstrates that there would be no manifest injustice by applying the FSA to pending cases. There would, however, be a manifest injustice if the parties' reasonably expected a statute to apply to them, and it did not. Alternatively, if the parties did not reasonably expect the new law to apply to them, and it did a manifest injustice would occur. As is established below, not just Defendants across the country, but Congress, Judicial organizations, the Department of Justice, law enforcement organizations, and the general public have supported the

reforms brought about by the Fair Sentencing Act of 2010. It would be a travesty of justice not to apply these reforms herein in the face of the blatant discrimination and injustice that Congress has conceded prompted the reforms.

The two predominant problems with the structure of the1986 law were:

1. "[T]he higher penalties for very small amounts of crack have the **bizarre effect of punishing those lower in the drug distribution chain much more severely than the drug kingpins** in the chain who distribute the larger amounts of powder from which the crack is produced" and
2. "The differences in penalties for crack and powder cocaine also have a **disparate racial impact**. More than 80% of people convicted in federal court for crack offenses are African American, while only 27% of those convicted of powder cocaine offenses are African American."

Congressman Scott, July 28, 2010 press statement (emphasis added).

The disparate racial impact of the 1986 law was addressed by Congress as a significant motivation for structuring the law. For example, Congresswoman Lee remarked:

> It is time for us to realize that the only real difference between these two substances [crack and powder cocaine] is that a disproportionate number of the races flock to one or the other. It follows that more whites use cocaine, and more African Americans use crack cocaine. **The**

> **unwarranted sentencing disparity not only overstates the relative harmfulness of the two forms of the drug and diverts federal resources from high-level drug traffickers, but it also disproportionately affects the African-American community.** According to the U.S. Sentencing Commission's May 2007 Report, 82 percent of Federal crack cocaine offenders sentenced in 2006 were African-American, while 8 percent were Hispanic and 8 percent were white.

Floor Proceedings, Page: H6198 (emphasis added); *see also* Senator Cardin, July 28, 2010 press statement (commenting that the Act "moves us closer to eliminating the **gross racial disparity inherent to our sentencing laws for crack cocaine**") (emphasis added); Statement of Congressman Lungren, Floor Proceedings, Page: H6202 ("**When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don't think we can simply close our eyes**.") (emphasis added).

In a similar vein, House Majority Whip James E. Clyburn stated:

> Equally troubling is the enormous growth in the prison population, especially among minority youth. The current drug sentencing policy is the single greatest cause of the record levels of incarceration in our country. One in every 31 Americans is in prison or on parole or on probation, including one in 11 African Americans. **This is unjust and runs contrary to our fundamental principles of equal protection under the law.**

Statement of Congressman Clyburn, Floor Proceedings, Page: H6197 (emphasis

added); *see also* Congressman Clyburn, July 28, 2010 press release ("What remains are the unwarranted lengthy sentences for crack cocaine that are **devastating to African American communities**. Although the majority of crack offenders are white, eighty percent of convictions fall on the shoulders of African Americans. **A law that reflects such a high degree of discriminatory application needs to be fixed**." (emphasis added)); Statement of Congressman Hoyer, Majority Leader of the House, Floor Proceedings, Page: H6203 ("**It has long been clear that 100-to-1 disparity has had a racial dimension as well, helping to fill our prisons with African Americans disproportionately put behind bars for longer.**").

The FSA was designed to combat this racial discrimination, bring balance and fairness to sentencing, and restore our fundamental principles of equal protection under the law. Congressman Hoyer recognized that "[t]he 100-to-1 disparity is counterproductive and unjust." He then stated that this was not just his opinion but the opinion held by a number of judicial, prosecutorial, and law enforcement organizations, including the "U.S. Sentencing Commission, the Judicial Conference of the United States, the National District Attorneys Association, the National Association of Police Organizations, the Federal Law Enforcement Officers Association, the International Union of Police Associations, and dozens of former Federal judges and prosecutors." Statement of Congressman Hoyer, Floor

Proceedings, Page: H6203. Congressman Hoyer continued to explain that these groups "have seen firsthand the damaging effects of our unequal sentencing guidelines up close, and they understand the need to change them. **That's what this is about**." *Id.* (emphasis added).

Likewise, Senate Judiciary Committee Chairman Patrick Leahy stated in a press release on March 11, 2010: "I strongly support the 1:1 ratio in Senator Durbin's original bill, and I believe that comprehensive change **would truly restore a sense of justice to federal drug enforcement and help to restore faith in the system in many communities where that faith has been lost**." (emphasis added) . *See also* Congressman Lungren, Floor Proceedings, Page: H6202 (describing the FSA as serving "the ends of justice and fairness."); Senator Jeff Sessions, July 28, 2010 press statement ("The **long-awaited passage of these bipartisan reforms brings needed fairness** to our sentencing laws while empowering law enforcement with the tools they need to target the worst offenders") (emphasis added); Senator Benjamin Cardin, member of the Senate Judiciary Crime and Drugs Subcommittee, July 28, 2010 press statement ("The American drug epidemic is a serious problem that we must address, but our drug laws must be smart, fair and rational. I applaud the House of Representatives for taking action today that moves us closer to eliminating the **gross racial disparity** inherent to our sentencing laws for crack cocaine") (emphasis

added); Speaker Nancy Pelosi, July 28, 2010 press statement ("The Fair Sentencing Act strengthens the hand of law enforcement while bringing greater balance to our sentencing and criminal justice system.").

Clearly, the enactment of the FSA was a remedial reaction to the mistakes make in the 1986 law. But the bipartisan support given the bill and the timing of the enactment demonstrate that it was also a reaction to the reasonable expectations of the public. It is exceedingly rare, if not unheard of, that Congress makes a drug law, or any criminal measure for that matter, *less harsh* (at least for some) -- especially in an election year and *before the elections* no less. This can only demonstrate that the reasonable expectations of the public played a significant part in the enactment of the Fair Sentencing Act.

Obviously, Brown, like Defendants everywhere, reasonably expects to receive a just punishment, based on equal protection and fundamental fairness. The government should reasonably expect this as well. *See generally, Berger v. United States* , 295 U.S. 78, 88, 55 S. Ct. 629, (1935) (stating that the prosecutor's duty is "to use every legitimate means to bring about a just" conviction, and consequently, a just sentence). Indeed, Judges and Prosecutors have joined Defendants in taking issue with the unreasonableness of the minimum mandatory penalties under the 100-to-1 crack-to-powder ratio. *See, e.g.*, United States Sentencing Commission Survey

of United States District Judges, January 2010 through March 2010 (concluding 76% of the judges believe that the mandatory minimum sentences were too high in crack cocaine cases); April 29, 2009 Congressional Testimony Attorney General Lanny A. Breuer of the Criminal Division of the United States Department of Justice on "Restoring Federal Sentencing: Addressing the Crack Powder Disparity" ("[T]his Administration believes that the current federal cocaine sentencing structure fails to appropriately reflect the differences and similarities between crack and powder cocaine, the offenses involving each form of the drug, and the goal of sentencing serious and major traffickers to significant prison sentences. **We believe the structure is especially problematic because a growing number of citizens view it as fundamentally unfair. The Administration believes Congress's goal should be to completely eliminate the sentencing disparity between crack cocaine and powder cocaine.**") (emphasis added).

Proving "just punishment" is a goal of sentencing under 18 U.S.C. § 3553(a)(2), just as to reflecting "the seriousness of the offense" and promoting "respect for the law" are.[16] Congress has now re-examined the seriousness of crack

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[16] The purposes of sentencing, pursuant to which the court must impose a sentence sufficient, but not greater than necessary, are:

> (2) the need for the sentence imposed--
> (A) to reflect the seriousness of the offense, to

versus powder cocaine offenses and found, based on actual evidence, that the 1986 law was defective in the manner in which it structured the seriousness of the crack offenses. Congress expressed its intent regarding just sentences for certain drug quantities in the FSA. At the same time, Congress unequivocably stated that the 100-to-1 ratio represented by the 1986 minimum mandatory penalties do not represent just sentences. Nor do they "promote respect for the law" or "reflect the seriousness of the offense[.]"[17] 18 U.S.C. § 3553(a)(2)(A). *See, e.g.*, Statement of Congressman Clyburn, Floor Proceedings, Page: H6197 (stating that the 1986 crack sentencing

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> promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner[.]

18 U.S.C. 3553(a)(2)

[17] The retention of a prior penalty in light of an ameliorative change does not contribute to the moral condemnation expressed by society and may, in fact, detract from it. The ameliorative penalty reflects society's new views about the conduct being punished. When the legislature reduces the penalty, it represents a new social view about the conduct and how it should be punished-- specifically, that society no longer views it to be as serious and thus the penalty need not be as severe.
Mitchell, 37 Am. J. Crim. L. at 15.

policy "is unjust and runs contrary to our fundamental principles of equal protection under the law"); Senator Patrick Leahy, March 11, 2010 press release (stating that a "comprehensive change" from the 1986 law "would truly restore a sense of justice to federal drug enforcement and help to restore faith in the system in many communities where that faith has been lost"); Senator Cardin, July 28, 2010 press statement (commenting that the 1986 crack law is grossly racially disparate).

IV. Conclusion

The legislative history of the Fair Sentencing Act of 2010 makes abundantly clear that Congress thought every person sentenced under the old law was not afforded the same justice, fairness, and equal protection as is available under the FSA. The longer the 1986 law is applied, and the more people it is applied to, the longer a grave and manifest injustice continues. Failing to apply the FSA to all currently pending cases will frustrate congressional intent and continue the discriminatory practices of the old law. To continue to apply what Congress has acknowledged is a law riddled with racial inequities, fundamental unfairness, and even "equal protection" issues, when there are so many reasons not to apply it, and the public has cried out against it, would be a travesty of justice.

Wherefore, TERRY ALONZA BROWN respectfully requests that this Honorable Court apply the Fair Sentencing Act of 2010 in sentencing him to a

sentence at or below the low end of the anticipated guideline range of 87-108 months, but in any event below the former ten year minimum mandatory penalty applicable to offenses of more than 50 grams of crack cocaine.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 18, 2010, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

Chip Corsmeier, Esq.

s/William Mallory Kent
William Mallory Kent