UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

NO. 11-11336

UNITED STATES OF AMERICA
Plaintiff-Appellee,

v.

TERRY ALONZA BROWN
Defendant-Appellant.

A DIRECT APPEAL OF A CRIMINAL CASE
FROM THE UNITED STATES DISTRICT COURT FOR
THE MIDDLE DISTRICT OF FLORIDA

BRIEF OF APPELLANT

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NO. 11-11336

United States v. Terry Alonza Brown

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Eleventh Circuit Rule 26.1-1, I hereby certify that the following named persons are parties interested in the outcome of this case:

1. Patricia D. Barksdale, Appellate counsel for the Government
2. Thomas Bell - District Court counsel for Co-Defendant Sheppard
3. Terry Alonza Brown - Defendant/Appellant
4. Honorable Timothy J. Corrigan - United States District Court Judge
5. Arnold B. Corsmeier - Assistant United States Attorney
6. William Mallory Kent - District Court and Appellate Counsel for Brown
7. Honorable James R. Klindt - United States Magistrate Judge
8. David Rhodes - Appellate Chief, Office of the United States Attorney
9. Roosevelt Sheppard - Co-Defendant

STATEMENT REGARDING ORAL ARGUMENT

Brown requests oral argument. The majority of arguments advanced by Brown in support of the application of the Fair Sentencing Act ("FSA") to his case (his crime was committed prior to enactment of the FSA, but his sentencing took place after the effective date of the FSA), have not been addressed by any published decision of this Court.

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STATEMENT OF JURISDICTION

This Court has jurisdiction over the appeal in this cause under 28 U.S.C. § 1291, which provides for an appeal from a final order of a district court, and under 18 U.S.C. § 3742, which provides for sentencing appeals. This appeal was timely filed within fourteen days of entry of judgment and sentencing.

STATEMENT OF THE ISSUE

WHETHER THE FAIR SENTENCING ACT ("FSA") APPLIES TO AN OFFENSE COMMITTED PRIOR TO ENACTMENT OF THE FSA WHEN THE SENTENCING OCCURED AFTER THE EFFECTIVE DATE OF THE FSA.

STATEMENT OF THE CASE

On August 18, 2010 Terry Alonza Brown ("Brown"), pled guilty to a six count drug indictment, three counts of which alleged a drug quantity of 50 grams or more of cocaine base (crack cocaine). [R52; R1] On August 3, 2010, two weeks prior to Brown's plea President Obama had signed into law the Fair Sentencing Act of 2010 ("FSA"), which reduced the minimum mandatory sentence on 50 grams or more of crack cocaine from a mandatory minimum of ten years down to a mandatory minimum of five years. Brown argued at sentencing that he was entitled to application of the new, lower minimum mandatory penalty provision of the FSA. [R51, 82, 92, 96, 97] The Government argued that the FSA only applied to offenses committed after the enactment of the FSA. [R66, 79, 89, 93] After both parties fully briefed the issue the District Judge, Timothy Corrigan, sentenced Brown under the old law ten year minimum mandatory, concluding that the FSA did not apply to offenses committed before its effective date. Judge Corrigan made clear at sentencing that had the FSA applied, he would have imposed a lower sentence. [R96, 99] This appeal followed in a timely manner. [R102]

STANDARD OF REVIEW

This Court reviews *de novo* the application of law to sentencing issues. *United States v. Alexander*, 609 F.3d 1250, 1253 (11th Cir.2010), cert. denied, (U.S. Mar. 28, 2011) (No. 10–7690).

SUMMARY OF ARGUMENT

WHETHER THE FAIR SENTENCING ACT ("FSA") APPLIES TO AN OFFENSE COMMITTED PRIOR TO ENACTMENT OF THE FSA WHEN THE SENTENCING OCCURED AFTER THE EFFECTIVE DATE OF THE FSA.

The Fair Sentence Act applies to offenses committed prior to its enactment but sentenced after the effective date of the act.

ARGUMENT

WHETHER THE FAIR SENTENCING ACT ("FSA") APPLIES TO AN OFFENSE COMMITTED PRIOR TO ENACTMENT OF THE FSA WHEN THE SENTENCING OCCURED AFTER THE EFFECTIVE DATE OF THE FSA.

A. 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 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 crack cocaine minimum mandatory penalties.

B. INTRODUCTION TO THE ARGUMENT

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 before the FSA was 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"), the guideline range was reduced two levels, based on emergency guideline amendments, to a Total Offense Level 27, Category III, for a range of 87-108 months. It was Brown's

position that the District Court had the discretion to sentence him at or below that range.

Under the Anti-Drug Abuse Act of 1986 ("1986 law"), however, the Court's discretion was curtailed by the minimum mandatory penalties that have been restructured by the FSA. Because Brown's case was pending when the FSA was enacted, Brown argued that he qualified for application of the amended provisions, which would have reduced 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.[1] 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 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

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[1]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."

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

C. GENERAL LEGAL OVERVIEW AND ARGUMENTS

> 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)). Brown's case was pending on the date the

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

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

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

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

Fair Sentencing Act of 2010 was enacted, August 3, 2010. The FSA therefore applies to Brown 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.

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).

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.")).

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.[6]

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.

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[6]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).

Sutherland, *Statutes and Statutory Construction* § 41:4 (Norman J. Singer and J.D. Shambie Singer ed., 7th ed. 2010).

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 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**.
>
> 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). 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 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.

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.[7] 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

[7]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.

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 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.
>
> 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.[8]

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

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[8]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.

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 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"[9] 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

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

> 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 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.[10] 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 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.[11]

As explained by Senator Jeff Sessions, Ranking Member of the Senate

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[10]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.

[11]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.

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).

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).

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.[12]

"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

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[12]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.

to the fact that Congress did not see fit to append such a savings clause to the bill it actually passed.[13]

THE "REASONABLE EXPECTATIONS" OF THE PARTIES REQUIRE RETROACTIVITY

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

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[13]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.

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 all Defendants in federal court, reasonably expected 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.[14] Congress has now re-examined the seriousness of crack versus powder cocaine offenses and found, based on actual evidence, that the 1986

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[14] 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 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)

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[.]"[15] 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 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

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[15] 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.

(commenting that the 1986 crack law is grossly racially disparate).

D. DISTINGUISHING *GOMES*

Brown is aware of the Eleventh Circuit's decision in *United States v. Gomes*, 621 F.3d 1343 (11th Cir. 2010), as well as the subsequent unpublished Eleventh Circuit decisions which have applied *Gomes*. In *dicta Gomes* stated that 1 U.S.C. § 109 (the "Savings Statute") barred the application of the FSA to Gomes because his crime was committed before the August 2010 effective date of the FSA. *Gomes*, 621 F. 3d at 1346.

However, the procedural posture of this case is distinguishable from *Gomes*. In *Gomes*, the defendant was sentenced prior to the effective date of the FSA and the district court judge had applied the law as it existed at the time of the defendant's sentencing (and for this reason alone the language in *Gomes* concerning application of the FSA is *dicta*). In contrast, in Brown's case, Brown had not been sentenced by the effective date of the FSA. More importantly, as will be discussed in greater detail below, Brown was sentenced *after* the emergency amendment of the United States Sentencing Guidelines pursuant to the directive provided by Congress in the FSA.[16]

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[16] As in the decisions from the Eleventh Circuit, cases in other circuits that have refused to apply the more lenient mandatory minimum sentences of the Fair Sentencing Act to criminal conduct that occurred before the date of the FSA's enactment, with one exception, all involve defendants who had already been

Additionally, while the Eleventh Circuit relied upon the Savings Statute in *Gomes* to preclude the application of the FSA to a defendant whose crime was committed prior to August 2010, *Gomes* did not explore whether Congress *intended* to have the reduced mandatory sentencing minimums established by the FSA applied to individuals who are sentenced following the effective date of the Act.[17] If the intent of Congress is to have the new sentencing structure created by the FSA applied to

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sentenced before August 3, 2010. See *e.g., United States v. Bell*, 624 F.3d 803, 814 (7th Cir.2010); [*Gomes*, 641 F.3d at 1346]; *United States v. Carradine*, 621 F.3d 575, 579-81 (6th Cir.2010). Those cases are inapposite. Whether the FSA can or should be applied to cases pending "in the pipeline" is a different question. The issue presented here is not the "retroactive" application of a new statute. The issue is whether it is patently unfair to sentence a defendant who has not been convicted at the time the FSA was enacted to penalties that Congress has abrogated finding them arbitrary, unfair and discriminatory.

United States v. Holland, No. 8:10CR48, 2011 WL 98313, at *9 n. 4 (D. Neb. Jan. 10, 2011); see also *United States v. Cox*, No. 10-cr-85-wmc, 2011 WL 92071, at *1 (W.D.Wis. Jan.11, 2011) (noting that all circuits to address the question of the applicability of the FSA have concluded that the general Federal Savings Statute operates to bar the retroactive application of the FSA, but no circuit has examined its applicability to a defendant who has not yet been sentenced (citing *Bell*; *Carradine*; *United States v. Brewer*, 624 F.3d 900, 900 n. 7 (8th Cir.2010); *United States v. Lewis*, 625 F.3d 1224, 1228 (10th Cir.2010); *Gomes*; *United States v. Glover*, 2010 WL 4250060, *2 (2d Cir. October 27, 2010))).

[17] Other circuits have similarly not considered the intent of Congress. See *e.g., Cox*, 2011 WL 92071, at *2 (noting that Seventh Circuit in *Bell* did not consider whether Congress's intent was to apply the FSA's mandatory minimums to those defendants awaiting sentencing for crack cocaine offenses).

defendants sentenced after the effective date of the FSA, then the Savings Statute should not be applied to negate the intent of Congress. See *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465, 28 S.Ct. 313, 52 L.Ed. 567 (1908) (noting that the predecessor to the Savings Statute "must be enforced unless, either by express declaration or necessary implication, arising from the terms of the law as a whole, it results that the legislative mind will be set at naught ...").

Several courts have found that not applying the new sentencing structure to a defendant sentenced after the FSA's enactment, would be contrary to the intent of Congress. See *United States v. Cox*, No. 10-cr-85-wmc, 2011 WL 92071, at *2 (W.D.Wis. Jan.11, 2011) ("this court is persuaded that the structure, language and context of the FSA is sufficiently strong to find Congress intended for the reduced mandatory minimum sentencing provisions to be applied to offenders yet to be sentenced"); *United States v. Holland*, No. 8:10CR48, 2011 WL 98313, at *11 (D.Neb. Jan.10, 2011) ("Based upon the language and structure, legislative history, and motivating policies of the Fair Sentencing Act and the Sentencing Reform Act of 1984, the court finds Congress did not want federal judges to continue to impose harsher sentences after the enactment of the FSA merely because the criminal conduct occurred before the enactment."); *United States v. English*, --- F.Supp.2d ----, No. 3:10-CR-53, 2010 WL 5397288 (S.D.Iowa Dec.30, 2010) (finding "direct evidence

that Congress intended the [FSA] to apply to all sentences after the date of enactment"); *United States v. Whitfield*, No. 2:10CR13, 2010 WL 5387701, at *2 (N.D.Miss. Dec.21, 2010) ("This court finds that applying the [FSA] is consistent with congressional intent and in harmony with the language, or lack thereof, in the Act itself."); *United States v. Ross*, --- F.Supp.2d ----, No. 10-CR-10022, 2010 WL 5168794, at *2 (S.D.Fla. Dec.17, 2010) (noting that not applying FSA to Defendant would arrive "at a sentence the Congress believes to be totally unfair"); *United States v. Gillam*, ---, F.Supp.2d ----, No. 1:10-cr-181-2, 2010 WL 4906283, at *7 (W.D.Mich. Dec.3, 2010) ("because Congress clearly meant to reduce the scope and impact of the disparity between crack and powder offenses, the government's arguments to limit the applicability of the new statute seem to me to be less than compelling"); *United States v. Douglas*, --- F.Supp.2d ----, No. 09-202-P-H, 2010 WL 4260221 (D.Me. Oct.27, 2010) ("I conclude, based upon the context of the Act, its title, its preamble, the emergency authority afforded to the Commission, and the Sentencing Reform Act of 1984, that Congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before enactment.").[18] Other district courts, however, have

[18] The Court in *Cox* notes that the defendant in that case cites a growing list of district courts around the country finding that the new, reduced mandatory minimum

found no such intent on the part of Congress. See *United States v. Dickey*, ---F.Supp.2d ----, No. 3:2009-34, 2011 WL 49585 (W.D.Pa. Jan.4, 2011); *United States v. Johnson*, No. 09-373, 2011 WL 39090 (E.D. La. Jan 4, 2011); *United States v. Patterson*, No. 10 Cr. 94(JSR), 2010 WL 5480838 (S.D.N.Y. Dec. 30, 2010); *United States v. Lightfoot*, No. 3:10CR42-HEH, 2010 WL 5300890 (Dec. 22, 2010 E.D.Va..); *United States v. Crews*, ---F.Supp.2d ----, No. 06-418, 2010 WL 5178017 (W.D.Pa. Dec.20, 2010); *United States v. Ohaegbu*, No. 6:92-cr-35-Orl-19, 2010 WL 3490261 (M.D.Fla. Aug.31, 2010). Considering the arguments on both sides of the question, the better and more logically and legally persuasive argument is that Congress intended the FSA to apply to individuals whose actions preceded the Act, but who had not yet been sentenced.

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for crack cocaine should be applicable to any defendant sentenced after the enactment date of the FSA. See, e.g., *United States v. Johnson*, 08-cr-270-Orl-31 KRS (M.D. FL Jan. 4, 2011) (Presnell, J.); *United States v. Favors*, 1:10-cr-384-LY1, Doc. No. 34 (W.D. TX Nov. 23, 2010) (Yeakel, J.); *United States v. Johnson*, 3:10-CR-138, Doc. No. 26 (E.D. Va Dec. 7, 2010) (Payne, J.); [Douglas, (D.Me.)]; *United States v. Angelo*, 1:10-cr10004-RWZ (D. Ma Oct. 29, 2010) (Zobel, J.); *United States v. Shelby*, 2:09-cr-0379-CJB Doc. No. 49 (E.D. La Nov. 10, 2010) (Barbee, J.); *United States v. Roscoe*, 1:10-cr-126-JTN (W.D.MI) (Neff, J.); [Whitfield, (N.D.Miss .)].

2011 WL 92071, at *2. See also *United States v. Dixson*, No. 8:08-CR-360-T-33AEP, Doc. No. 33 (M.D.Fla. August 24, 2010) (applying FSA to sentencing of defendant whose crime occurred prior to the FSA's enactment).

E. *DOUGLAS* AND *HOLLAND*

Judge Hornby's decision in *Douglas* and Chief Judge Bataillon's decision in *Holland* are particularly well reasoned and Brown will quote liberally from the two opinions as well as from the district court decision of Judge Richard Story in *United States v. Elder*, 2011 WL 294507 (N.D. Ga. January 27, 2011) (Case number 1:10-cr-132) in the following section of this brief.

As noted by Judge Hornby, "[t]he Fair Sentencing Act of 2010 says nothing directly about the categories of offenders to whom it applies (those who have not yet offended; offenders not yet convicted; offenders convicted but not yet sentenced; offenders already sentenced)." *Douglas*, 2010 WL 4260221, at *1. This raises the question of "how to determine Congress's will on that subject in the absence of any explicit direction." Id. The primary argument against applying the FSA to those defendants awaiting sentencing is that the Act is silent on this matter, and in light of the Savings Statute, this silence is conclusive. The Savings Statute states:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109 (emphasis added). However, the Supreme Court has held that the

predecessor to the Savings Statute need not be enforced if, "either by express declaration or necessary implication arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving [it] effect." *Great N. Ry. Co.*, 208 U.S. at 465. The Savings Statute is to be construed "in order to give effect to the will and intent of Congress." *Hertz v. Woodman*, 218 U.S. 205, 217, 30 S.Ct. 621, 54 L.Ed. 1001 (1910). The Court concludes that by "necessary implication arising from the terms of the law as a whole," not applying the FSA to defendants that have not yet been convicted and sentenced would negate the will of Congress. In addition to the text and context of the Act, cases interpreting the savings clause, the Sentencing Commissions emergency guidelines, and the Sentencing Reform Act of 1984 support such a finding of Congress's intent.

F. THE GUIDELINE AMENDMENTS

The Public Law that created the FSA is titled an act "[t]o restore fairness to Federal cocaine sentencing," and followed several years of debate over the harsh crack penalties in the Anti-Drug Abuse Act of 1986. *Holland*, 2011 WL 98313, at *4 (citations omitted). In the Act, Congress provided the Sentencing Commission with emergency authority "to make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law" as "soon as practicable, and in

any event not later than 90 days after the date of enactment of this Act .” Fair Sentencing Act, Pub.L. 111-220, § 8, 124 Sta. 2373, 2374. As noted by Judge Bataillon:

> Pursuant to that authority, the Sentencing Commission issued temporary emergency amendments effective November 1, 2010. See Notice of a Temporary Emergency Amendment to Sentencing Guidelines and Commentary, 75 Fed.Reg. 66188-02, 66191, 2010 WL 4218801 (F.R.) (Oct. 27, 2010) (noting that to account for statutory changes, “the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, i.e., the base offense levels for crack cocaine are set in the Drug Quantity so that the statutory minimum penalties correspond to levels 26 and 32,” and other offense levels are established by extrapolating upward and downward). The Commission noted that “[c]onforming to this approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.” Id.

Holland, 2011 WL 98313, at *4. As Judge Hornby notes,

> the new Guidelines cannot be “conforming” and “achieve consistency” (Congress's express mandate) if they are based upon statutory minimums that cannot be effective to a host of sentences over the next five years until the statute of limitations runs on pre-August 3, 2010 conduct.
>
> What is more, for years the Sentencing Reform Act of 1984 has directed expressly that the governing Guidelines are those in effect on the day a defendant is sentenced. The Guideline commentary refers to this statutory provision as “Congress's directive to apply the sentencing guidelines in effect at the time of sentencing.” Thus, during the past two decades of the Guidelines' existence, whenever the Commission has adopted Guideline amendments, those amendments have applied to all defendants sentenced thereafter, regardless of when the crime was

> committed. That is what will happen to the new Guidelines' alterations of the base offense levels for various quantities of crack: the new Guidelines will apply to all future sentencings after November 1, 2010, even if the criminal conduct occurred before the Fair Sentencing Act's effective date. Congress "expressly" required that outcome by ordering the emergency amendments within 90 days. Thus, many pre-August 3, 2010 offenders will benefit from the changed crack offense levels, at least if the mandatory minimums do not apply to them. Congress instructed the Commission to make such changes and make them immediately, under an existing statutory structure that makes them apply to those who have already offended but who have not yet been sentenced. It would be a strange definition of "conforming" and "consistency" to have these new amended Guidelines go into effect while the old and therefore inconsistent statutory minimums continue.

Douglas, 2010 WL 4260221, at *4-5. Not applying the FSA to Defendants would result in mandatory sentences that fail to conform with the applicable sentencing guideline ranges.

G. ABSURD RESULTS

Additionally, even absent express language negating the application of the Savings Statute, exceptions may be implied "where essential to prevent 'absurd results' or consequences obviously at a variance with the policy of the enactment as a whole." *United States v. Rutherford*, 442 U.S. 544, 552, 99 S.Ct. 2470, 61 L.Ed.2d 68 (1979). The Supreme Court imputes 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, 308, 85 S.Ct.

384, 13 L.Ed.2d 300 (1965); *United States v. Chambers*, 291 U.S. 217, 222-23, 54 S.Ct. 434, 78 L.Ed. 763 (1934); *Massey v. United States*, 291 U.S. 608, 54 S.Ct. 532, 78 L.Ed. 1019 (1934); see also *United States v. Mechem*, 509 F.2d 1193, 1196 (10th Cir.1975) (finding that the stated purpose of a congressional enactment to avoid prosecution of juveniles as criminals and the enactment's recognition of a need for "immediate and comprehensive action," furnished the basis for the conclusion that "Congress did not intend the ordinary criminal process to continue, through the saving statute, to reach juveniles not yet tried."). Congress's intent to apply a statute to pending cases does not have to be expressed in explicit language of the statute itself, but may be revealed by studying the context of the statute as a whole. See *Lindh v. Murphy*, 521 U.S. 320, 326, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997); see also *Abbott v. United States*, --- U.S. ----, 131 S.Ct. 18, 178 L.Ed.2d 348 (finding strong contextual support for its interpretation of a statutory provision and stressing that a contrary reading "would result in sentencing anomalies Congress surely did not intend").

H. RULE OF LENITY

Where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant. *United States v. Bass*, 404 U.S. 336, 348, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971) (describing the "rule of lenity"). The "rule of lenity" principle of statutory

construction applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose. *Bifulco v. United States*, 447 U.S. 381, 387, 100 S.Ct. 2247, 65 L.Ed.2d 205 (1980). Statutory interpretative principles should "give the rule of lenity special force in the context of mandatory minimum provisions," because an interpretive error on the side of leniency still permits the sentencing judge to impose a sentence that will serve all other sentencing goals set forth by Congress in other statutory provisions. *Dean v. United States*, --- U.S. ----, ---- - ----, 129 S.Ct. 1849, 1860-61, 173 L.Ed.2d 785 (2009) (Breyer, J., concurring); see also *Leocal v. Ashcroft*, 543 U.S. 1, 11 n. 8, 125 S.Ct. 377, 160 L.Ed.2d 271, (2004) (ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor). *Holland*, 2011 WL 98313, at *7-8.

As the Court has noted, exceptions to a statute are appropriate to avoid "absurd results." *Rutherford,* 442 U.S. at 552. For the Court to continue to impose sentences that are contrary to the statute that Congress itself described as "An Act to restore fairness to Federal cocaine sentencing" would be an absurd result. Fair Sentencing Act of 2010, Pub.L. No. 111-220, Preamble, 124 Stat. 2372.

Application of the savings clause under these circumstances would have the result of setting the legislative mind "at naught." Such action would frustrate the expressed congressional goals of remedying racially discriminatory impact, ensuring

that more culpable offenders are punished more harshly, and achieving consistency with the Guidelines. *Holland*, 2011 WL 98313, at *11.

Therefore, "it is clear in the text and structure of the Fair Sentencing Act, in conjunction with the other congressional enactments that establish the overall federal criminal sentencing scheme, that Congress intended the Act to apply to cases pending at the time of the enactment." Id. at *9. In light of the foregoing, an application of the Savings Statute to the FSA would contradict the will of Congress, and such an outcome is to be avoided. *Great N. Ry. Co.*, 208 U.S. at 465.

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[19] 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

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[19] Under the Due Process and Equal Protection Clauses of the United States Constitution

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.

Appellant Brown respectfully requests this honorable Court vacate his judgment and sentence and remand his case for resentencing in light of and in conformity with the sentencing arguments above, that is, that he be resentenced under the Fair Sentencing Act subject to its lesser minimum mandatory penalty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing have been furnished to Patricia D. Barksdale, Esquire, Assistant United States Attorney, Office of the United States Attorney, 300 North Hogan Street, Suite 700, Jacksonville, Florida 32202-4204, by United States Postal Service, first class mail, postage prepaid, this May 23, 2011.

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William Mallory Kent

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(c), the undersigned counsel certifies that this brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief contains approximately 12,838 words.

CERTIFICATE OF TYPE SIZE AND STYLE

Counsel for Appellant Brown certifies that the size and style of type used in this brief is 14 point Times New Roman.