RECORD NO. 11-4244

In The

United States Court Of Appeals

For The Fourth Circuit

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

JAKARI BARNETT,

Defendant – Appellant.

_____

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF MARYLAND

(The Honorable Catherine C. Blake, District Judge)

_____

APPELLANT'S BRIEF

_____

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Jurisdiction in the District Court was based on 18 U.S.C. § 3231 in that the Defendant-Appellant, Jakari Barnett, was prosecuted for offenses against the United States under 21 U.S.C. § 841(a)(1). District Court Case Number 1:09-cr-00244-CCB, Indictment; Joint Appendix, Volume One ("J.A.") at 11.

Jurisdiction in this Court is based on 18 U.S.C. § 3742 and 28 U.S.C. § 1291 in that Mr. Barnett appeals the final decision of the District Court as to his sentencing. The Judgment of the District Court was entered on February 14, 2011. (J.A. 77). On February 18, 2018, Mr. Barnett filed a timely Notice of Appeal (J.A. 96).

ISSUE PRESENTED FOR REVIEW

The issue in this case is whether the new provisions of the Fair Sentencing Act of 2010, which raised the amount of crack cocaine necessary to trigger mandatory sentences, applies to defendants who were not sentenced when it was enacted, but who engaged in crack cocaine trafficking and pled guilty under the previous harsher sentencing regime.

This issue was specifically left open by this Court in *United States v. Bullard*, ___Fed 3d. ___, 2011 U.S. App. LEXIS 9307, 28 n. 5 (4th Cir. 2011).

STATEMENT OF THE CASE

A. NATURE OF THE CASE

This is an appeal from the Judgment of the District Court imposing a 10 year minimum mandatory sentence pursuant to 21 USC § 841(b)(1)(A).

B. COURSE OF PROCEEDINGS AND DISPOSITION IN THE DISTRICT COURT

On May 5, 2009, Jakari Barnett (Barnett) was charged, by Indictment, with conspiracy to distribute 50 grams or more of crack cocaine. (JA 11-12). A Superseding Incitement was filed on September 29, 2009. (JA 13-16). The Superseding Indictment alleged that Barnett and others conspired to distribute crack cocaine from 2008 through April 2009. It also sought forfeiture of his property. *Id.*

On June 15, 2010, a Second Superseding Incitement was filed. (JA 17-29). Count One of the Second Superseding Indictment alleged that Barnett and others conspired to distribute crack cocaine from 2008 through May 2009. Barnett was also charged with various acts of distribution of 50 grams or more of crack cocaine in Counts Two, Three, Four and Five. *Id.*

On July 19, 2010, Barnett pled guilty to aiding and abetting the possession with the intent to distribute 50 grams or more of crack cocaine. (Count Four Second Superseding Indictment, JA 20, 39). Earlier that morning Barnett had entered into a plea agreement with the Government. (JA 61). In that agreement the

parties stipulated and agreed, pursuant to Federal Rule of Criminal Procedure11(c)(l)(C), that the appropriate sentence would be 120 months imprisonment in the custody of the Bureau of Prisons. *Id*.

On September 12, 2010, Barnett submitted objections to the initial Presentence Report (PSR). (JA 70). His principal objection was that he was "entitled to be sentenced under the Fair Sentencing Act of 2010. (JA 71-72). On October 29, 2010, a Revised Presentence Report (PSR) was submitted. The PSR concluded that, pursuant to 21 USC § 841(b)(1)(A), Barnett should be sentenced to a minimum term of imprisonment of 10 years. (JA, Vol. II at 111).

Barnett appeared for sentencing on February 11, 2011, although his guideline range was determined to be 70 to 87 months, he was sentenced to a 10 year minimum mandatory sentence. (JA 127). The Judgment and Commitment Order was entered on February 14, 2011. (JA Vol. II at 131). Barnett filed a timely Notice of Appeal on February 18, 2018. (J.A. 96).

STATEMENT OF FACTS

The facts relative to Burnett's criminal conduct are not in dispute. From 2008 through April 2009, he conspired with other persons to distribute and possess with the intent to distribute crack cocaine and powder cocaine in Hagerstown, Maryland and the surrounding areas. Barnett would obtain the narcotics from various suppliers and would sell the narcotics to his own customers, some of whom

would in turn sell the drugs themselves. During 2008, agents of the Drug Enforcement Administration (DEA) and the Washington County Narcotics Task Force (WCNTF) conducted an investigation into the drug activities of Barnett. (JA 68, JA, Vol. II at 114-15).

During April and May 2008, DEA and WCNTF worked with a confidential informant to make controlled purchases of crack cocaine from associates of Barnett. On May 16, 2008, DEA and WCNTF arranged to have the confidential informant contact Barnett to see whether an associate of Barnett's would provide crack cocaine, Barnett contacted his associate and made arrangements to have the associate to bring more than 50 grams of crack cocaine to the cooperating informant. As such, Barnett aided and abetted another person in the distributing of that crack cocaine. *Id*.

Beginning in September 2008 and continuing until October 2008, law enforcement agents monitored Barnett's phone conversations pursuant to a court-authorized wiretap order. During that wiretap, agents monitored Barnett engaging in and planning drug transactions with other conspirators, and making arrangements to obtain cocaine and crack cocaine from his own suppliers. *Id*.

On September 15, 2008, in response to requests from a customer (who was actually working as a DEA confidential informant) for three ounces of crack cocaine, Barnett met a supplier in the supplier's car in the street near Barnett's

home in Hagerstown. Law enforcement officers watched the meeting, detained Barnett and the supplier. In a subsequent search of the supplier's vehicle the officers recovered approximately three ounces of crack cocaine (approximately 90 grams). *Id*. On May 5, 2009, Barnett was charged with conspiracy to distribute 50 grams or more of crack cocaine. (JA 11-12).

On July 19, 2010, his scheduled trial date, Barnett pled guilty to aiding and abetting the possession with the intent to distribute 50 grams or more of crack cocaine. (JA 20). According the agreed statement of facts, supporting the plea, his criminal activity, during the course of the conspiracy, involved 140 grams of crack cocaine. (JA 68, JA, Vol. II at 114-15). Because the weight of crack cocaine was over 50 grams *on the date of the plea agreement* he was subject to a 10 minimum mandatory sentence and a base offence level of 32. (JA 39, 63). With an anticipated 3 point downward adjustment the resulting offence level would have been 29. (JA 39, 64). (Emphasis supplied). After accepting Barnett's plea Judge Blake set a sentencing date of November 5, 2010. (JA 58).

On August 3, 2010, sixteen days after Barnett pled guilty; President Obama signed the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, (2010) ("FSA") (ADD at 1). In part the FSA raised the amount of crack cocaine needed to trigger a 10 minimum mandatory sentence from 50 grams to 280 grams. 21 U.S.C. § 841(b)(1)(A)(2010).

On September 12, 2010, Barnett objected to the initial Presentence Report (PSR). Central to his objections was the point that he was entitled to be sentenced under the FSA. (JA 71). Specifically his trial counsel, Peter Ward, argued:

> Mr. Barnett asserts that he is entitled to be sentenced under the Fair Sentencing Act of 2010 (S. 1789, 111th Cong. 2D Session) enacted March 17, 2010, 'To restore fairness to Federal Cocaine sentencing.'
>
> Section 2.(a)(1) of the Act amends 21 U.S.C. §841(b)(1)(A)(iii) by 'striking '50 grams' and inserting '280 grams;'
>
> Furthermore, Section 2.(a)(2) amends 21 U.S.C.§841(b)(1)(B)(iii) by 'striking '5 grams' and inserting '28 grams'.'
>
> The enactments significantly affect Mr. Barnett's Offense Level Computations, since his 'criminal activity involved 140 grams of cocaine base' according to the Base Offense Level computations stated in Paragraph 14 of this Report.

Id.

On October 29, 2010, a Revised Presentence Report was submitted. (JA 111). The report concluded that as a result of the Sentencing Commissions Updated Guidelines, which would be in effect on the sentencing date, Barnett's, base offence level, was 28. This base offence level, was adjusted downward, for acceptance of reasonability to level 25. (JA , Vol. II at 114, 116). Barnett's criminal history was determined to be category III. (JA , Vol. II at 118). Based on all of this his guideline range was determined to be 70 to 87 months. Much to Barnett's dismay, the report concluded, that because Barnett faced a 10 year minimum mandatory sentence, pursuant to 21 USC § 841(b)(1)(A), his guideline range was 120 months pursuant to U.S.S.G. § 5G1.1. (JA, Vol. II at 119).

On November 1, 2011, less than ninety (90) days after President Obama signed the FSA, the Sentencing Commission enacted emergency amendments to those sections of the Federal Sentencing Guidelines that were affected by the FSA. *See* U.S.S.G. Amend. 748 (Nov. 1, 2010); U.S. Sentencing Guidelines Manual supp. (2010). These amendments[1], among other things, adjusted the Drug Quantity Table in USSG § 2D1.1 to account for the FSA's reduction of the crack to powder cocaine ratio from 100:1 to 18:1. *Id*.

On November 17, 2010, the lead sponsors of the FSA, Senators Richard Durbin and Patrick Leahy, in the letter to Eric Holder, Attorney General, United States Department of Justice, urged the Attorney General to instruct federal prosecutors "to seek sentences consistent with the Fair Sentencing Act's reduced mandatory minimums for defendants who have not yet been sentenced, regardless of when their conduct took place." (ADD at 6-7).

At Barnett's, February 11, 2011, sentencing hearing, Judge Blake determined that the guideline "range would be 70 to 87 months. However, in light of the quantity of crack, there is a ten year minimum mandatory" sentence. (JA 75). With respect to the applicability of the FSA, Judge Blake pointed out:

> It was, one of the reasons for agreeing to the ten years here, even if there were some challenge to the Fair Sentencing Act and the mandatory minimum of ten years, nonetheless, the government refrained from filing a notice of enhancement under 851 and could

[1] The PSR based its calculations on these anticipated amendments.

> have, because of his prior drug conviction, put Mr. Barnett in a position of facing a 20-year mandatory minimum rather than a ten-mandatory minimum. It is my understanding that's a part of what went into the negotiations in this case.

(JA 75-76). Judge Blake declined to rule on the applicability of the FSA stating:

> Okay. I will certainly, for purposes of this sentencing, for the advisory Guideline issue just assume that the 120-month mandatory minimum is correct and *not rule on any possible challenge to Fair Sentencing Act* that might be raised at a later time.

(JA 76). (Emphasis supplied). Judge Blake went on to impose the 120-month sentence. Judge Blake made the sentence concurrent with the 132 month sentence that was imposed on Barnett in a West Virginia Case[2]. (JA 84-85).

On April 6, 201, the U.S. Sentencing Commission announced that it promulgated permanent amendments to the sentencing guidelines in accordance with the requirements of the Fair Sentencing Act. (ADD 8-10).

SUMMARY OF ARGUMENTS

The provisions of the Fair Sentencing Act of 2010, which raised the amount of crack cocaine necessary to trigger mandatory sentences, applies to defendants who were not sentenced when it was enacted, but who engaged in crack cocaine trafficking and pleaded guilty under the previous harsher sentencing regime. This is so, because of Congress' express and implied desire to restore fairness to Federal

[2] In the United States District Court for the Northern District of West Virginia at Martinsburg, under Case # 0424-3 : 3:10-cr-00005-JPB-DJJ-1. This case is on appeal and is presently pending in this Court under Docket #: 11-4123.

crack cocaine sentencing on an accelerated basis; and, to impose mandatory sentences that conform to the applicable sentencing guideline ranges on the date a sentence is imposed.

To the extent that Congressional intentions are unclear, under the rule of lenity, the Fair Sentencing Act of 2010 must be construed in favor of the accused and it provisions applied to defendants who had not been sentenced when it was enacted.

STATEMENT OF APPLICABLE STANDARD OF REVIEW

This Court reviews questions of law relating to sentencing decisions *de novo*. Legal determinations made by a district court, in the process of interpreting a statute, are subject to *de novo* review. *See, United States v. Blake*, 81 F.3d 498, 503 (4th Cir. 1996).

ARGUMENT

THE TRIAL COURT ERRED WHEN IT FAILED TO SENTENCE BARNETT UNDER THE FAIR SENTENCING ACT OF 2010.

1. The Fair Sentencing Act of 2010 Applies to Defendants Sentenced After its Enactment.

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), (codified at 21 U.S.C. § 841 (2010)) (FSA), (ADD 1), amended the Sentencing Act of 1986, by raising the amount of crack cocaine necessary to trigger mandatory five- and ten-year sentences for defendants engaged in crack

cocaine trafficking. *Id.* When Congress enacted the FSA it expressed a desire to "restore fairness to Federal cocaine sentencing." Preamble, FSA, Pub. L. No. 111-220[3]. (ADD 2). Congress did this several ways. In Section 2, by increasing the quantity of crack cocaine necessary to trigger a sentence of 5 to 40 years from 5 grams to 28 grams and the quantity that triggers a sentence of 10 years to life from 50 grams to 280 grams. In Section 3 eliminated the mandatory minimum sentences for simple possession of crack. In Section 8, by granting the Sentencing Commission, emergency authority to accelerate the creation of new and conforming sentencing guidelines. *Id*.

As the Court will see the FSA should apply to defendants who has not yet been sentenced, but who engaged in crack cocaine trafficking and plead guilty under the previous harsher sentencing regime. Indeed the First and Eleventh Circuits have held as much. *See, United States v. Douglas*, No. 10-2341, 2011 U.S. App. LEXIS 10922, 2011 WL 2120163 (1st Cir. May 31, 2011); *United States v. Rojas*, No. 10-14662, 2011 U.S. App. LEXIS 13677, ___ WL ____ (11th Cir. July 6, 2011). *But see, United States v. Fisher*, 635 F.3d 336, *rehearing denied*,

[3] The "United States Sentencing Commission has consistently reported to Congress that crack cocaine convictions are statistically higher among African-Americans, and that the previous law resulted in a marked racial disparity in federal drug sentencing." *See, United States v. Douglas*, 746 F. Supp. 2d 220, 222 (D. Me. 2010), *aff'd*, 2011 U.S. App. LEXIS 10922, 2011 WL 2120163 (1st Cir. May 31, 2011) (citations omitted). Mr. Barnett is an African-American. (JA. Vol. 2 113).

2011 U.S. App. LEXIS 10561[4] (7th Cir. 2011), (where the Seventh Circuit, after refusing to apply the FSA, confessed that "relief may be available to a defendant whose criminal conduct straddles August 3, 2010"). *Id* at 340.

Many District Courts are in accord with the First and Eleventh Circuits. *See e.g.*, *United States v. Fowlkes*, 2011 U.S. Dist. LEXIS 75591 (C.D. Cal., July 1, 2011); *United States v. Watts*, 2011 U.S. Dist. LEXIS 37211 (D. Mass April 5, 2011); *United States v. Ross*, 755 F. Supp. 2d 1261 (S.D. Fla. 2010); *United States v. Elder*, No. 1:10-cr-132-RWS/AJB, 2011 U.S. Dist. LEXIS 8343, 2011 WL 294507, at * 5 (N.D. Ga. Jan. 27, 2011); *United States v. Holloman*, 765 F. Supp. 2d 1087 (C.D. Ill. 2011); *Douglas, supra*, 746 F. Supp. 2d at 229; *United States v. Whitfield*, No. 10-13, 2010 U.S. Dist. LEXIS 135860 (N.D. Miss., Dec. 21, 2010); *United States v. Brown*, 2011 U.S. Dist. LEXIS 64222 (W.D. Pa. June 16, 2011) *United States v White*, No. 10-00247,2011 U.S. Dist. LEXIS 13352 (D.S.C. February 9, 2011); *United States v. Cox*, No. 10-85, 2011 U.S. Dist. LEXIS 2730 (W.D. Wis., Jan. 11, 2011)[5].

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[4] The Panel denying the Petition for Rehearing *En Banc* was split 3 to 2. Judge Williams and Judge Hamilton, filed a blistering dissenting opinion from the denial of rehearing *en banc*. *Fisher, supra*, 2011 U.S. App. LEXIS 10561.

5 Of course, other District Courts have taken a different view. *See, e.g.*, *United States v. Holmes*, No. 10-110, 2010 U.S. Dist. LEXIS 126927 (E.D. Va., Dec. 1, 2010); *United States v. Burgess*, No. 09-150, 2010 U.S. Dist. LEXIS 136433 (W.D. Pa. Dec. 27, 2010); *United States v. Dickey*, No. 09-34, 2011 U.S. Dist. LEXIS 474 (W.D. Pa., Jan. 4, 2011; *United States v. Santana*, No. 09-1022, 2011

2. The General Saving Statute, of 1 U.S.C. § 109, Does Not Apply.

When this Court held that FSA should not be interpreted to apply retroactively to cases pending on direct appeal, *Ballard, supra,* it began its analysis with an eye on the General Savings Statute (the "Savings Statute"), 1 U.S.C. § 109. The Savings Statute provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty . . . 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 . . . .

1 U.S.C. § 109. (Emphasis supplied). The Saving Statute is a "rule of construction . . . to be read and construed as part of all subsequent repealing statutes, in order *to give effect to the will and intent of Congress*." *Hertz v. Woodman*, 218 U.S. 205, 217 (1910). (Emphasis supplied). Applying this rule of construction to the FSA it is clear that the Savings Statute does not "save" the now-repealed unfair penalties of the 1986 Act for defendants sentenced after its enactment.

The Supreme Court has long held that the "express-statement" requirement does not require an explicit reference to the Savings Statute or a special retroactivity provision. Consequently, the Savings Statute may be overridden "either by express declaration or necessary implication," *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). In other words Congress cannot use an

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U.S. Dist. LEXIS 9636(S.D.N.Y., Jan. 20, 2011); *United States v Peterson*, Case No. 3:09-cr-89-01, 2011 U.S. Dist. LEXIS 26704 (D. N.D. March 1, 2011).

"express-statement provision," such as the one contained in the Savings Statute, to "nullify the unambiguous import of a subsequent statute." *Lockhart v. United States*, 546 U.S. 142, 145 (2005) (Scalia, J., concurring).

The same is true when a new statute "can be said by fair implication or expressly to conflict with Section 109," *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653, 659 n.10 (1974); *Lockhart*, *supra*. Thus, "[w]hen the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other 'magical password.'" *Id*.

Exceptions to the Savings Statute may also 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 (1979). In addition, to avoiding "absurd results" such as imposing mandatory sentences that fail to conform to the applicable sentencing guideline range in force on the date of sentencing. There are numerous other reasons from which this Court can determine, either expressly or by fair implication that Congress intended to apply the FSA, at the latest, to those sentenced after November 1, 2011.

First; Congress granted emergency authority to the United States Sentencing Commission and ordered it to make conforming amendments to the Federal sentencing guidelines "as soon as practical" but "not later than 90 days after

enactment." Sec. 8. If Congress intended the lower guideline ranges to be trumped by the old minimum mandatory sentences, until the statute of limitations[6] expires on August 2, 2015, what was its this sense of urgency? How can this be reconciled with the Congressional intent to "restore fairness"? The simple answer is that it cannot. Nor does it make sense to accelerate the creation of ameliorative guidelines only to have them rendered meaningless by minimum mandatory sentences that the FSA abolished.

Second; Congress specifically ordered, that within "five years after the date of the enactment of this act "the Sentencing Commission" submit "a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act." Sec. 10. If Congress contemplated that the existing minimum mandatory sentences would continue in effect for the next five years, until the statute of limitations expired, there would be no need for a report since nothing would change during the interim. Moreover "such a report would be incomplete, at best, and incomprehensible, at worst, if the FSA were not yet being uniformly applied until after the report was due." *Brown*, 2011 U.S. Dist. LEXIS 64222 at *8.

Third, it would frustrate Congress' purpose to impose mandatory sentences that fail conform to the sentencing guideline ranges that track them. For example

[6] 18 U.S.C.§ 3282.

the base offense levels for crack cocaine, in the Guidelines' Drug Quantity Table, have historically been based upon the minimum sentence-triggering crack amounts in 21 U.S.C. § 841. *See* U.S.S.G. § 2D1.1, cmt. (backg'd) (2010). Because courts should apply guidelines "in effect on the date the defendant is sentenced" 18 U.S.C. § 3553(a)(4)(A)(ii); USSG § 1B1.11(a), the failure to apply the FSA, after November 1, 2010, "to Defendants would result in mandatory sentences that fail to conform with the applicable sentencing guideline ranges." *Elder,* 2011 U.S. Dist. LEXIS 8343, at * 9. (Citing *United States v. Cox*, No. 10-cr-85-wmc, 2011 U.S. Dist. LEXIS 2730, 2011 WL 92071, at *2 (W.D. Wis. Jan. 11, 2011).

Fourth, given Congress' expressed desire to "restore fairness to Federal cocaine sentencing" there is no doubt that Congress "by implication" intended the ameliorative changes in the Fair Sentencing Act to apply to defendants not yet sentenced, *Douglas, 746* F.Supp.2d at 228-31. Indeed, as Judge D. Brock Hornby pointed out, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs?" *Douglas,* 746 F. Supp. 2d at 229. In fact not applying FSA to defendants, like Barnett, would result in the imposition of "a sentence the Congress believes to be totally unfair." *Ross, supra,* 755 F. Supp. 2d at 1262.

Fifth, the application of the FSA is the prospective application of current law, not a retroactive exercise that would be barred by the Saving Statute. *Holloman, supra*. In his opinion in *Holloman* Judge Richard Mills reasoned:

> Here, the purpose of the FSA is to regulate sentencing, not to "regulate primary conduct."
>
> . . .
>
> Furthermore, "it is clear that drug type and quantity are not elements of the offense," but rather are sentencing factors. *United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002). The same is true of previous convictions. See *Almendarez-Torres v. United States*, 523 U.S. 224, 244, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998).
>
> When the FSA changed the applicability of mandatory minimum sentences, it did not alter the penalty for committing the offense. A mandatory minimum merely cabins the discretion of the sentencing judge.
>
> . . .
>
> Therefore, the relevant retroactivity event is the sentencing date, not the date the offense was committed, because the application of a mandatory minimum is a sentencing factor, not an element of the offense.

Holloman, 765 F. Supp. 2d at 1087-88.

Sixth, Congress expressly indicated it wanted the new guidelines to apply to defendant's yet to be sentenced. A week after the amended sentencing guidelines went into effect, the lead Congressional sponsors of the FSA, urged the Attorney General to implement the Act's reduced mandatory minimums for defendants who have not yet been sentenced, "regardless of when their conduct took place." (ADD at 6).

Finally, the following analysis of the application of the new and old sentencing regime clearly demonstrates why the FSA should be applied to defendants who are sentenced after it became law. Clearly such an application comports with name of the Act, the intent of the Act, as well as the express and implied intent of Congress to make Crack cocaine sentencing fair, if not on the date it was enacted, then at the latest on the date the updated sentencing guidelines went into effect.

On the date Barnett plead guilty the base offence level was 32. With an anticipated 3 point downward adjustment for acceptance of reasonability the resulting offence level would have been 29. Although there was no agreement as to Barnett's criminal history it could be anticipated he was in category III. Thus at the time of his plea, the parties contemplated Barnett's guideline range would be 108 to 135 months. Of course the 120 month minimum mandatory sentence was squarely in the middle of the guideline range. If he had been sentenced that day he would have no grounds to complain. *Bullard, Supra*.

On the date of Barnett's sentencing, under the new guidelines, his base offence level was 28. After a 3 point downward adjustment, for acceptance of reasonability, the resulting offence level was reduced to 25. When Barnett's criminal history was determined to be in category III, his resulting guideline range was 70 to 87 months. Had the FSA's new five-year mandatory minimum been

applied the resulting 70 month minimum mandatory sentence would have been in the guideline range.

Thus under the version of § 841(b)(1)(A) that was in effect when Barnett pleaded guilty, he was subject to a ten-year mandatory minimum sentence. Under the FSA, that was in effect when he was sentenced he was subject to a five-year mandatory minimum. Under the facts of this case it would be abundantly unfair (and frustrate Congress desires when it enacted the FSA) to sentence Barnett under the old law. This is so because of a clear Congressional intent - to apply the guidelines "in effect on the date [Barnett was] sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii); USSG § 1B1.11(a); *Elder, supra*. Therefore Barnett should have been sentenced to a 70 month minimum mandatory sentence under the FSA.

3. The Rule of Lenity Requires That Any Statutory Ambiguity, in Congressional Intent, be Resolved in Favor of the Defendant.

Assuming *arguendo,* the discussion above does not convince this Court that Congress, either expressly or implicitly, intended the FSA to apply to defendants not yet sentenced, it at least makes its intent unclear. To the extent Congressional intentions are ambiguous, under the rule of lenity; the FSA must be construed in favor of the accused. *United States v. Bass*, 404 U.S. 336, 347-48 (1971); *Bifulco v. United States*, 447 U.S. 381 (1980).

When the "text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the

ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994). The High Court stated this tenet another way in *Scheidler v. National Organization for Women, Inc.*, 537 U.S. 393 (2003), "[W]hen there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *Id* at 409.

The rule of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco*, 447 U.S. at 387. It ensures that "the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Id*. It reflects an "instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *United States v. Bass*, 404 U.S. 336, 348 (1971).

The rule of lenity may be viewed as particularly apt in the context of mandatory minimum sentencing provisions. As Justice Breyer stated in *Dean v. United States*, 129 S.Ct. 1849 (2009) (dissenting), "an interpretation that errs on the side of *exclusion* (an interpretive error on the side of leniency) still *permits* the sentencing judge to impose a sentence similar to, perhaps close to, the statutory sentence even if that sentence (because of the court's interpretation of the statute)

is not legislatively *required*." *Id* at 1860-61 (Emphasis in the original). Therefore, to the extent Congress's FSA intentions as to when defendants should begin to be sentenced under the FSA, is ambiguous, under the rule of lenity it must be construed to apply to those who are sentence if not on the date it was enacted, then at the latest on the date the updated sentencing guidelines went into effect.

CONCLUSION

The Fair Sentencing Act of 2010 applies to cases pending sentencing at the time of its enactment, and, therefore, the district court's drug quantity findings do not support application of the 10-year mandatory minimum sentence in this case. Accordingly, remand is required.

STATEMENT REGARDING ORAL ARGUMENT

Defendant-Appellant, Jakari Barnett, respectfully requests oral argument in this matter, as he believes at this time that argument would assist the Court in analyzing the issues raised in this appeal and the rather unusual circumstances of the case.

Respectfully Submitted
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By and through counsel

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,352 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6). Because this brief has been prepared in a proportional spaced typeface using 14 Point Times New Roman in Microsoft Word.

/s/ Richard Winelander
Counsel for Appellant
Dated: July 27, 2011

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 27, 2011, I electronically filed the foregoing brief with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF user:

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/s/ Richard Winelander
Counsel for Appellant

ADDENDUM

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FAIR SENTENCING ACT OF 2010

Public Law 111–220
111th Congress

An Act

Aug. 3, 2010
[S. 1789]

To restore fairness to Federal cocaine sentencing.

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

Fair Sentencing Act of 2010.
21 USC 801 note.

SECTION 1. SHORT TITLE.

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

SEC. 2. COCAINE SENTENCING DISPARITY REDUCTION.

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

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

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

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

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

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

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

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

SEC. 4. INCREASED PENALTIES FOR MAJOR DRUG TRAFFICKERS.

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

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

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

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

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

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

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

Review.
28 USC 994 note.

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

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

Review.
28 USC 994 note.

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

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

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

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

(B) the offense involved 1 or more of the following superaggravating factors:

(i) The defendant—

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

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

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

(ii) The defendant—

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

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

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

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

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

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

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

Review.
28 USC 994 note.

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

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

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

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

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

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

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

28 USC 994 note.

SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.

The United States Sentencing Commission shall—

Deadline.

(1) promulgate the guidelines, policy statements, or amendments provided for in this Act as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act, in accordance with the procedure set forth in section 21(a) of the Sentencing Act of 1987 (28 U.S.C. 994 note), as though the authority under that Act had not expired; and

(2) pursuant to the emergency authority provided under paragraph (1), make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law.

SEC. 9. REPORT ON EFFECTIVENESS OF DRUG COURTS.

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

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

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

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

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

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

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

SEC. 10. UNITED STATES SENTENCING COMMISSION REPORT ON IMPACT OF CHANGES TO FEDERAL COCAINE SENTENCING LAW.

Not later than 5 years after the date of enactment of this Act, the United States Sentencing Commission, pursuant to the authority under sections 994 and 995 of title 28, United States Code, and the responsibility of the United States Sentencing Commission to advise Congress on sentencing policy under section 995(a)(20) of title 28, United States Code, shall study and submit to Congress a report regarding the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act.

Approved August 3, 2010.

LEGISLATIVE HISTORY—S. 1789:

CONGRESSIONAL RECORD, Vol. 156 (2010):
Mar. 17, considered and passed Senate.
July 28, considered and passed House.

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

November 17, 2010

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

Dear Attorney General Holder:

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

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

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

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

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

As you know, Judge D. Brock Hornby, an appointee of President George H.W. Bush, recently held that the Fair Sentencing Act's reduced mandatory minimums apply to defendants who have not

yet been sentenced. In his opinion, Judge Hornby wrote, "what possible reason could there be to want judges to continue to impose new sentences that are not 'fair' over the next five years while the statute of limitations runs? ... I would find it gravely disquieting to apply hereafter a sentencing penalty that Congress has declared to be unfair." We wholeheartedly agree with Judge Hornby.

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

Regardless of the legal merits of this position, the Justice Department has the authority and responsibility to seek sentences consistent with the Fair Sentencing Act as a matter of prosecutorial discretion. This is consistent with your view that reforming the sentencing disparity "cannot wait any longer." It is also consistent with the Justice Department's mission statement, which states that the Department should "seek just punishment for those guilty of unlawful behavior" and "ensure fair and impartial administration of justice for all Americans." As you said in your May 19, 2010 Memorandum to All Federal Prosecutors on Department Policy on Charging and Sentencing, "The reasoned exercise of prosecutorial discretion is essential to the fair, effective, and even-handed administration of the federal criminal laws." Indeed, it is the Justice Department's obligation not simply to prosecute defendants to the full extent of the law, but to seek justice. In this instance, justice requires that defendants not be sentenced for the next five years under a law that Congress has determined is unfair.

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

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

Sincerely,

Dick Durbin

Patrick J. Leahy

U.S. Sentencing Commission
One Columbus Circle NE
Washington, DC 20002-8002

NEWS RELEASE

For Immediate Release
April 6, 2011

Contact: Michael Courlander
Public Affairs Officer
(202) 502-4597

U.S. SENTENCING COMMISSION PROMULGATES PERMANENT AMENDMENT TO THE FEDERAL SENTENCING GUIDELINES COVERING CRACK COCAINE, OTHER DRUG TRAFFICKING OFFENSES

Also promulgates amendments regarding firearms and other offenses

WASHINGTON, D.C.— Today the United States Sentencing Commission promulgated amendments to the federal sentencing guidelines covering drug trafficking offenses, firearms offenses, and other federal offenses.

The Commission promulgated a permanent amendment implementing the provisions of the Fair Sentencing Act of 2010 (Pub. L. No. 111–220). The Fair Sentencing Act, signed by the President on August 3, 2010, among other things, reduced the statutory mandatory minimum penalties for crack cocaine trafficking and eliminated the mandatory minimum sentence for simple possession of crack cocaine. Specifically, the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by raising the quantities required to trigger statutory mandatory minimum terms of imprisonment — from 5 grams to 28 grams for a five-year mandatory minimum and from 50 to 280 grams for a 10-year mandatory minimum. The Act also contained directives to the Commission to review and amend the federal sentencing guidelines to account for certain aggravating and mitigating circumstances in drug trafficking cases to better account for offender culpability.

Commission chair, Judge Patti B. Saris (District of Massachusetts) said, "The Fair Sentencing Act was among the most significant pieces of criminal justice legislation passed by Congress in the last three decades. For over 15 years, the Commission has advocated for changes to the statutory penalty structure for crack cocaine offenses. The Commission applauds Congress and the Administration for addressing the sentencing disparity between crack cocaine and powder cocaine offenders."

No crack cocaine offender will see his or her sentence increase based solely on the quantity thresholds the Commission set today in the federal sentencing guidelines. As a result of today's action, the federal sentencing guidelines will focus more on offender culpability by placing greater emphasis on factors other than drug quantity.

Based on an analysis of the most recent sentencing data, the Commission estimates that crack cocaine offenders sentenced after November 1, 2011, will receive sentences that are approximately 25 percent lower on average as a result of the changes made to the federal sentencing guidelines today. Moreover, the Commission estimates that these changes may reduce the cost of incarceration for crack cocaine offenders in the federal prison system in the future.

Today's vote by the Commission will set the triggering quantities of crack cocaine for the five and 10-year mandatory minimum penalties (28 grams and 280 grams, respectively) at base offense levels 26 and 32, which correspond to a sentencing range of 63-78 months and 121-151 months, respectively, for a defendant with little or no criminal history. This action maintains proportionality with other drug types insofar as the quantity of illegal drugs, including crack cocaine, required to trigger the five- and ten-year statutory mandatory minimum penalties is subject to the same base offense level no matter the drug type.

Pursuant to statute, the Commission must consider whether its amendment to the federal sentencing guidelines implementing the Fair Sentencing Act should apply retroactively. The Commission plans to hold a hearing on June 1, 2011, to consider retroactivity, and voted today to seek public comment on the issue.

The Commission also voted to promulgate an amendment to increase penalties for certain firearms offenses. For example, the Commission voted to provide increased penalties for certain "straw purchasers" of firearms and for offenders who illegally traffic firearms across the United States border. Judge Saris stated, "Firearms trafficking across our borders is a national security issue. The Commission is aware of the view by some that firearms trafficking is fueling drug violence along our southwest border. We sincerely appreciate all of the public input we received from criminal justice stakeholders on this very important issue. The Commission's decision to increase penalties for these offenses will promote public safety and deterrence."

In addition, the Commission voted to promulgate amendments implementing the Patient Protection and Affordable Care Act of 2010 (Pub. L. No. 111–148), the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Pub. L. No. 111–203), and the Secure and Responsible Drug Disposal Act of 2010 (Pub. L. No. 111–273). More information regarding these amendments, and other amendments promulgated today, will be forthcoming on the Commission's website at www.ussc.gov.

The Commission must submit its 2010-2011 amendment package to Congress by May 1, 2011. Congress has 180 days to review the amendments submitted by the Commission. The amendments have a designated effective date of November 1, 2011, unless Congress acts affirmatively to modify or disapprove them.

The United States Sentencing Commission, an independent agency in the judicial branch of the federal government, was organized in 1985 to develop national sentencing policy for the federal courts. The resulting sentencing guidelines structure the courts' sentencing discretion to help ensure that similar offenders who commit similar offenses receive similar sentences.

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