CA No. 12-50061

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. YALE AUGUSTINE, Defendant-Appellant.	(D.Ct. CR 07-402-AHM)

APPELLANT'S OPENING BRIEF

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

HONORABLE A. HOWARD MATZ
United States District Judge

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I.

STATEMENT OF ISSUE PRESENTED

DO THE CONGRESSIONAL GOALS OF CONSISTENCY, AVOIDING DISPARITY, AND ELIMINATING UNFAIRNESS THAT *DORSEY V. UNITED STATES* HELD ESTABLISH A "FAIR IMPLICATION" THAT CONGRESS INTENDED THE FAIR SENTENCING ACT MANDATORY MINIMUMS TO APPLY RETROACTIVELY IN ORIGINAL SENTENCING PROCEEDINGS ALSO FAIRLY IMPLY THAT CONGRESS INTENDED THE FAIR SENTENCING ACT MANDATORY MINIMUMS TO APPLY RETROACTIVELY IN ANY 18 U.S.C. 3582(c)(2) SENTENCE MODIFICATION PROCEEDINGS THAT ARE BASED ON THE FAIR SENTENCING ACT GUIDELINES?

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION.

This appeal is from the partial denial of a motion for reduction of sentence under 18 U.S.C. § 3582(c)(2). Mr. Augustine was sentenced on October 10, 2007, ER 3-9, and the motion for reduction of sentence was denied in pertinent part on February 6, 2012, ER 10-16.

The district court had original jurisdiction under 18 U.S.C. § 3231 and jurisdiction over the motion under 18 U.S.C. § 3582(c)(2). This Court has jurisdiction under 28 U.S.C. § 1291. A timely notice of appeal was filed on February 9, 2012. ER 21.

B. COURSE OF PROCEEDINGS.

On May 11, 2007, the government filed a one-count information charging Mr. Augustine with possession with intent to distribute cocaine base, in violation of 21 U.S.C. § 841(a)(1). ER 1-2. On June 6, 2007, Mr. Augustine pled guilty to the information, CR 21, and on October 10, 2007, he was sentenced, ER 3-9. The sentence imposed was 121 months. ER 3.

On December 22, 2011, Mr. Augustine filed a Motion to Reduce Sentence Pursuant to 18 U.S.C. § 3582(c)(2). CR 28. The motion was based on the November 1, 2011 amendment to the crack cocaine guideline which the

Sentencing Commission made retroactive effective that same date. CR 28; *see also* U.S.S.G. App. C, amend. 759. The motion sought a reduction in sentence to 70 months. CR 28, at 3, 19.

On January 26, 2012, the government filed an opposition to the motion, in which it opposed any reduction below 120 months. CR 34. That same day, the defense filed a reply to the opposition. CR 35. On February 6, 2012, the district court denied the motion for a reduction to 70 months and reduced the sentence to the 120 months which was not opposed by the government. ER 13, 16.

C. BAIL STATUS OF DEFENDANT.

Mr. Augustine is presently in custody serving the 120-month sentence. His current projected release date is December 27, 2015.

III.

STATEMENT OF FACTS

A. THE 2007 SENTENCING HEARING.

On October 10, 2007, the district court sentenced Mr. Augustine to 121 months in prison. ER 3. Because his offense involved more than 50 grams – specifically 83.2 grams – of a mixture or substance containing a detectable amount of crack cocaine, *see* ER 1-2, he was subject under then-existing law to a mandatory minimum term of 10 years, *see* 21 U.S.C. § 841(b)(1)(A)(iii) (2006). If

his offense had involved powder cocaine rather than crack cocaine, he would not have been subject to any mandatory minimum sentence, *see* 21 U.S.C. § 841(b)(1) (2006), and would have been subject to far lower sentencing guidelines, *see* U.S.S.G. § 2D1.1 (2006).

B. THE FAIR SENTENCING ACT OF 2010 AND THE UNITED STATES SENTENCING COMMISSION RESPONSE.

In 2010, Congress acknowledged that the 100-to-1 disparity between crack and powder cocaine in the federal cocaine sentencing laws had been a mistake. It enacted the Fair Sentencing Act of 2010, with the express purpose of "restor[ing] fairness to Federal cocaine sentencing." Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010) (hereinafter "Fair Sentencing Act" or "FSA"). Congress did not eliminate the disparity completely, but did reduce it to a ratio of approximately 18-to-1, by increasing the amount of crack cocaine required to trigger the mandatory minimum sentences. *See* FSA, § 2. It increased the quantity of crack cocaine necessary to trigger a 5-year mandatory minimum under 21 U.S.C. § 841(b)(1)(B) from 5 grams to 28 grams and increased the quantity of crack cocaine necessary to trigger a 10-year mandatory minimum under 21 U.S.C. § 841(b)(1)(A) from 50 grams to 280 grams. *See* FSA, § 2.

Congress also provided "emergency authority" to the Sentencing Commission to amend the sentencing guidelines, FSA, § 8; directed that the Commission promulgate amendments "as soon as practicable, and in any event not later than 90 days after the enactment of this Act," FSA, § 8(1); and directed that

the amendments be "such conforming amendments . . . as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." FSA, § 8(2). The Sentencing Commission responded by promulgating emergency temporary amendments effective November 1, 2010 and making those amendments permanent effective November 1, 2011. *See* U.S.S.G. App. C, amends. 748, 750. The amendments were designed to make the "conforming changes to the guidelines . . . necessary to achieve consistency with other guideline provisions and applicable law." U.S.S.G. App. C, amend. 748 (Reason for Amendment). More specifically, the Commission amended the Drug Quantity Table in § 2D1.1 "to account for the changes in the statutory penalties made in section 2 of the [Fair Sentencing] Act." *Id.* It did this by substituting the 28-gram and 280-gram quantities where the guidelines had previously used 5 grams and 50 grams and then proportionally extrapolating upward and downward. *See id.*

On June 30, 2011, the Commission voted to make the permanent amendments to the Drug Quantity Table retroactive. 76 Fed. Reg. 41332-01. Because Congress took no action to modify or reject either the permanent amendment or the retroactivity decision, they both became effective November 1, 2011. U.S.S.G. App. C, amends. 750, 759.

C. MR. AUGUSTINE'S MANDATORY MINIMUM AND GUIDELINE RANGE UNDER THE FAIR SENTENCING ACT.

The Fair Sentencing Act and the guidelines change both the statutory

mandatory minimum sentence and the guideline range for the 83.2-gram quantity of crack cocaine which Mr. Augustine possessed. The mandatory minimum for this quantity drops from 10 years to 5 years, because the threshold quantity of crack cocaine for the 10-year mandatory minimum increases from 50 grams to 280 grams. And the guideline range drops correspondingly. The base offense level for 83.2 grams of crack cocaine under the retroactive Fair Sentencing Act guidelines is 26, compared to 32 when Mr. Augustine was sentenced in 2007.[1] *Compare* U.S.S.G. § 2D1.1(c)(4) (2006), *with* U.S.S.G. § 2D1.1(c)(7)(2011). The corresponding total offense levels after the 3-level reduction for acceptance of responsibility agreed to in the plea agreement, *see* CR 15, at 7, are 23 under the Fair Sentencing Act guidelines and 29 under the guidelines which applied when Mr. Augustine was sentenced. The guideline ranges these offense levels produce when combined with Mr. Augustine's criminal history category of IV are 70-87 months under the Fair Sentencing Act guidelines and 121-151 months under the guidelines which applied when Mr. Augustine was sentenced. *See* U.S.S.G. Ch. 5, Pt. A (sentencing table).

D. MR. AUGUSTINE'S MOTION TO REDUCE SENTENCE AND THE DISTRICT COURT'S RULING.

After the Sentencing Commission made the guideline amendments

[1] Part of this reduction actually took place November 1, 2007, when the offense level for 83.2 grams of crack cocaine was lowered to 30. *Compare* U.S.S.G. § 2D1.1(c)(4) (2006) *with* U.S.S.G. § 2D1.1(c)(5) (2007).

retroactive, Mr. Augustine filed a motion to reduce his sentence under 18 U.S.C. § 3582(c)(2). CR 28. He argued that he was entitled to the benefit of both the new statutory mandatory minimum and the new guidelines and sought a reduction in sentence to the low end of the new guideline range, i.e., 70 months. CR 28. The government did not oppose a 1-month reduction to the old statutory mandatory minimum of 120 months, but opposed any reduction below that old mandatory minimum, arguing that it was only the new guidelines, not the new mandatory minimum, that applied. CR 34.

The district court agreed with the government and granted just a 1-month reduction, but with the caveat that it would have liked to do more. It explained:

> THE COURT: . . . I grant the motion but only to the extent of reducing the sentence to the [old] mandatory minimum, which remains 120 months.
>
> I authorize counsel to express to his client my regret that I could not go below that because I think fairness requires if it were only an issue of fairness and not legality, that the sentence be reduced further.
>
> That's my order.
>
> MR. GUNN: And for the record, would it be correct to say Your Honor would give less if Your Honor thought you had the power to do so?
>
> THE COURT: Yes.

ER 16. *See also* ER 13-14 (court describing conclusion as "regrettable," describing itself as "unhappy with this result," and stating that it "echo[es]" and "ascribe[s] to" "the adjectives and [com]plaints of other judges").

IV.

SUMMARY OF ARGUMENT

The Supreme Court held in *Dorsey v. United States*, 132 S. Ct. 2321 (2012)

that new mandatory minimum sentence thresholds for crack cocaine offenses adopted in the Fair Sentencing Act of 2010 apply retroactively to any offense for which a defendant is sentenced after passage of the Act. The Court based its holding on six considerations. First, it made clear that despite the language of the federal saving statute purporting to require an "express statement," congressional intent that a statute apply retroactively may be established simply by the "plain import," or "fair implication," of the statute. Second, the Court observed that the general principle of non-retroactivity suggested by the general saving statute was offset by a more specific, different background sentencing principle in the Sentencing Reform Act; that principle requires courts to apply the guidelines in effect at the time of sentencing regardless of when the offense was committed. Third, the Court pointed out provisions in the Fair Sentencing Act itself which suggested Congress wanted the Act's new mandatory minimums to apply. Those included the directive that the Sentencing Commission promulgate guideline amendments as soon as practicable, that those amendments be "conforming," and that the amendments be aimed at achieving "consistency" with the Fair Sentencing Act.

Fourth, the Court noted that applying the pre-Act mandatory minimums to post-Act sentencings would create disparities of the very kind the new Act and the original Sentencing Reform Act were intended to prevent. Fifth, the Court noted that not applying the new Act retroactively would make sentences even more disproportionate. Finally, the Court noted there were no strong countervailing considerations. It did acknowledge that some disparity would remain as to those sentenced before the Fair Sentencing Act took effect but noted that that is a

problem which exists whenever Congress enacts a new law changing sentences. The Court then added a qualifier – the option of reopening prior sentencing proceedings – and cited the very statute which authorizes the Sentencing Commission to do just that and which is the basis for this appeal – 18 U.S.C. § 3582(c)(2).

The same six considerations that led the Supreme Court to conclude that the Fair Sentencing Act statutory mandatory minimums go with the Fair Sentencing Act guidelines in the original sentencing context at issue in *Dorsey* compel the conclusion that the Fair Sentencing Act statutory mandatory minimums go with the Fair Sentencing Act guidelines in the § 3582(c)(2) context. First, the same "fair implication" standard applies, so there need be no "express statement." Second, there is an even stronger background principle of retroactivity in this context; where retroactive application was simply an indirect result of the statutory provision which the Court considered in *Dorsey*, retroactive application is the whole purpose of § 3582(c)(2). Third, the Congressional desire for "conforming" guidelines and "consistency" between the guidelines and the statutory provisions suggest that Congress would want the new statutory provisions to go with the new guidelines here just as they did in the original sentencing context.

Fourth and fifth, failing to apply the new statutory provisions with new guidelines here would create the very same sorts of disparities between defendants bringing § 3582(c)(2) motions that would result from non-retroactivity in the original sentencing context. Finally, countervailing considerations are lacking here just as they were in *Dorsey*. In fact, retroactive application in § 3582(c)(2) proceedings will have an affirmatively salutary effect. It will eliminate – at least

largely – the one small countervailing consideration which the Supreme Court did acknowledge in *Dorsey*, namely, the disparate sentences of defendants sentenced before the Fair Sentencing Act took effect.

Several additional, more general principles of statutory construction also support retroactive application here. One is the principle that remedial legislation should be construed broadly to effectuate its purposes. The second is the well established rule of construction that statutes should not be read to produce absurd results; here, it would be absurd to reopen sentencing proceedings for the sole purpose of applying new guidelines and then not apply the statutory provisions which are the basis for the new guidelines. A third principle of construction is triggered by the fact that Congress had before it and chose not to adopt an alternative bill which expressly precluded retroactive application; such rejections of alternative language are presumed to be deliberate.

There are also two fairness principles of construction to consider. One is a concern for fairness which another court of appeals has noted is suggested by some of the Supreme Court's prior cases declining to apply the general saving statute. The other is to be found in the more general rule of lenity, which the Supreme Court has described as embodying the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should.

Two Ninth Circuit cases cited by the government and relied upon by the district court below – *United States v. Baptist*, 646 F.3d 1225 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1053 (2012), and *United States v. Sykes*, 658 F.3d 1140 (9th Cir. 2011) – are distinguishable. In neither of those cases was the district court put in the odd position of having to apply the old Fair Sentencing Act statutory

provisions while applying the new Fair Sentencing Act guidelines; the courts were instead applying *old* guidelines with the old statutory provisions. As a result, those cases did not implicate the concerns about guideline and statutory conformity and consistency and the concerns about disparity which drove the result in *Dorsey*. The present case does implicate those concerns, and they should drive the result here just as they did in *Dorsey*.

V.

ARGUMENT

A. REVIEWABILITY AND STANDARD OF REVIEW.

The defense argued in the district court that the statutory mandatory minimum provisions which applied to Mr. Augustine's 18 U.S.C. § 3582(c)(2) motion based on the Fair Sentencing Act guidelines were the same Fair Sentencing Act mandatory minimum provisions upon which the guidelines are based. *See* CR 28. The district court rejected the argument and ruled it could not reduce Mr. Augustine's sentence below the pre-Act mandatory minimum of 10 years. ER 13. Such rulings based on interpretation of 18 U.S.C. § 3582(c)(2) and the Fair Sentencing Act are subject to de novo review. *See, e.g., United States v. Baptist*, 646 F.3d 1225, 1227 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1053 (2012); *United States v. Wesson*, 583 F.3d 728, 730 (9th Cir. 2009).

B. IN *DORSEY V. UNITED STATES,* THE SUPREME COURT HELD THAT CONGRESS'S GOALS OF CONSISTENCY, AVOIDING DISPARITY, AND ELIMINATING UNFAIRNESS ESTABLISH A "FAIR IMPLICATION" THAT CONGRESS INTENDED THE FAIR SENTENCING ACT MANDATORY MINIMUMS TO APPLY IN ANY SENTENCING AFTER THE ACT TOOK EFFECT.

In *Dorsey v. United States*, 132 S. Ct. 2321 (2012), the United States Supreme Court held that the Fair Sentencing Act mandatory minimums apply to any defendant sentenced after the Act was signed into law, regardless of when the defendant committed the offense. Analyzing the "language, structure, and basic objectives" of the Fair Sentencing Act, *id.* at 2326, the Court determined that the "plain import," or "fair implication," of the Act's language was that its more lenient penalties were to apply immediately, *id.* at 2335. The Court rested its conclusion "primarily upon the fact that a contrary determination would (in respect to relevant groups of drug offenders) produce sentences less uniform and more disproportionate than if Congress had not enacted the Fair Sentencing Act at all." *Id.* at 2326.

The Court set forth "six considerations" that, "taken together, convince[d it] that Congress intended the Fair Sentencing Act's more lenient penalties to apply to those offenders whose crimes preceded August 3, 2010 [the date on which the Act was signed into law], but who were sentenced after that date." *Id.* at 2331. First, the Supreme Court rejected the argument that the 1871 federal saving statute, 1 U.S.C. § 109, requires an "express statement" for a criminal statute

amending a penalty scheme to apply retroactively. *See id.* at 2331-32. It held that it was sufficient that the "plain import" or "fair implication" of the statute be that it should apply retroactively. *Id.* at 2332. The Court acknowledged that the saving statute purported to require that subsequent Congresses expressly so state when they intended ameliorative criminal statutes to apply to offenses that occurred prior to the enactment of the statute, but noted that "statutes enacted by one Congress cannot bind a later Congress." *Id.* at 2331. Thus, the Court held that the saving statute is not a bar to retroactive application whenever courts can "assure themselves that ordinary interpretive considerations point clearly in that direction." *Id.* at 2332.

Second, the Court observed that the Sentencing Reform Act sets forth "a special and different background sentencing principle" than the saving statute does, namely, that defendants generally do get the benefit of ameliorative sentencing amendments. *Id.* In particular, 18 U.S.C. § 3553(a)(4)(A)(ii) provides that courts are to apply the guidelines that are in effect on the date of the initial sentencing. *Id.* Thus, "when the Commission adopts new, lower Guideline amendments, those amendments become effective to offenders who committed an offense prior to the adoption of the new amendments but are sentenced thereafter." *Id.* The Court "assume[d] that Congress was aware of this different background sentencing principle," and interpreted the Fair Sentencing Act in light of this background sentencing principle. *Id.*

Third, the Court explained that language in the Fair Sentencing Act implies that Congress intended to follow the different background principle set forth in the Sentencing Reform Act. *See id.* at 2332-33. It noted that Congress required the

Commission to promulgate "as soon as practicable" (and not later than 90 days after the Act took effect) "conforming" amendments to the guidelines that "achieve consistency with other guideline provisions and applicable law." *Id.* at 2332 (quoting FSA § 8). It further noted that "applicable law," "[r]ead most naturally," must "refer[ ] to the law as changed by the Fair Sentencing Act, including the provision reducing the crack mandatory minimums." *Id.* at 2332-33. It noted that the Commission had had the same understanding and so had used the 18-to-1 ratio created by the new mandatory minimum quantities to reduce the base offense levels for all crack quantities proportionally, including the base offense levels for smaller quantities not subject to mandatory minimums. *See id.* at 2333 (citing Fed. Reg. 66191). The Court then noted that, in accordance with the Sentencing Reform Act's different background principle, those conforming amendments applied to all offenders *sentenced* after their promulgation, regardless of when they had committed their offenses. *See id.* (citing U.S.S.G. § 1B1.11(a)).

Fourth, the Court observed that applying the pre-Act mandatory minimums to post-Act sentencings would create "disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent." *Id.* at 2333. Two individuals who were sentenced at the same time, at the same place, and even by the same judge would receive radically different sentences – for no reason other than the date of their offenses. *Id.* Requiring courts to apply pre-Act mandatory minimums at post-Act sentencings would also require courts to impose pre-Act sentences after "Congress had specifically found such a sentence was unfairly long." *Id.*

Fifth, the Court decried the fact that *not* applying the Fair Sentencing Act

retroactively, rather than restoring fairness to federal cocaine sentencing, would make sentences even more disproportionate. *See id.* at 2334. "It would create new anomalies – new sets of disproportionate sentences – not previously present." *Id.* This is because sentencing courts would be required to apply the 18-to-1 sentencing guidelines in conjunction with the 100-to-1 mandatory minimums – resulting in the 100-to-1 mandatory minimums trumping the 18-to-1 guidelines for some but not all defendants. *See id.* This would result in sentencing "cliffs" wherever a defendant was subject to a 100-to-1 mandatory minimum. *Id.* It would also result in sentencing valleys where defendants with substantially different conduct would be subject to the same sentence. *See id.* at 2337-38 (Appendix B).

Sixth, and finally, the Court explained that there were no strong countervailing considerations. *See id.* at 2335. It acknowledged different arguments which could be made about the statutory language, but concluded that "there is scant indication that this is what Congress *did* mean by the language in question nor that such was in fact Congress' motivation." *Id.* (emphasis in original). It recognized that application of the new minimums to pre-Act offenders sentenced after the Act's effective date would create "a new set of disparities" – between pre-Act offenders sentenced before the Act's effective date and those sentenced after. *Id.* But it noted that "those disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences" and that not applying the new law to those to whom it could still be applied would "make matters worse." *Id.* Interestingly, it also noted the possibility presented now that the Sentencing Commission has made its guideline amendments retroactive and which is the issue in this present appeal – of "Congress intend[ing]

reopening sentencing proceedings concluded prior to a new law's effective date." *Id.*

Taking these six considerations together, the Court concluded:

> Congress intended the Fair Sentencing Act's new, lower mandatory minimums to apply to the post-Act sentencing of pre-Act offenders. That is the Act's "plain import" or "fair implication."

Id.

C. CONGRESS'S GOALS OF CONSISTENCY, AVOIDING DISPARITY, AND ELIMINATING UNFAIRNESS ESTABLISH A "FAIR IMPLICATION" THAT CONGRESS INTENDED THE FAIR SENTENCING ACT MANDATORY MINIMUMS TO APPLY IN ANY § 3582(c)(2) PROCEEDINGS BASED ON THE FAIR SENTENCING ACT GUIDELINE AMENDMENTS.

It follows from the reasoning of *Dorsey* that the Fair Sentencing Act's more lenient mandatory minimums also apply in § 3582(c)(2) proceedings based on the retroactive Fair Sentencing Act guideline amendments. All six considerations set forth by the Court apply equally here, and so compel the same conclusion.

First, *Dorsey* unequivocally establishes the relevant standard to apply in deciding whether the Fair Sentencing Act applies retroactively in this additional context. There is not, as the government has argued, some rigid "express statement" requirement. It is enough that the "plain import" or "fair implication" of the Act is that Congress intended retroactive application. *Id.*, 132 S. Ct. at 2332.

Second, there is a "background principle" favoring retroactive application in

the present context that is even stronger than in the ordinary sentencing context that *Dorsey* considered. The provision considered in *Dorsey* – 18 U.S.C. § 3553(a)(4)(A)(ii) – provides for retroactive application of the sentencing guidelines not expressly but through a general command that the sentencing court apply the guidelines "in effect at the time of sentencing." This does lead in some cases to the retroactive application of the guidelines to conduct that predated the new law, but it is an indirect result – indeed, almost a side effect – of a more general provision. *Accord United States v. Douglas*, 644 F.3d 39, 41 (1st Cir. 2011) (characterizing § 3553(a)(4) as making guidelines changes retroactive only "in one limited sense").[2] In the present sentence modification motion context there are two provisions – 18 U.S.C. § 3582(c)(2) and the related provision in 28 U.S.C. § 994(u) – which are, in contrast to § 3553(a)(4)(A)(ii), expressly and solely about retroactivity. Retroactivity is not a "background principle" in these statutory provisions, but very much in the foreground.

It is also even more appropriate to assume that Congress was aware of this specific retroactivity provision. *Cf. supra* p. 13 (noting *Dorsey*'s assumption that Congress was aware of § 3553(a)(4)(A)(ii)'s requirement that courts must apply guidelines in effect at time of sentencing). That is because the authority conferred by the retroactivity provisions that are applicable here, in contrast to the provision noted in *Dorsey*, was expressly discussed and/or considered in Congressional proceedings and competing legislative proposals. This included hearings in which

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[2] *Douglas* – and the additional court of appeals opinion of *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011) which is cited and relied upon *infra* pp. 19, 23, 28-30 – are persuasive because they are the two cases in a pre-*Dorsey* circuit split with which the Supreme Court agreed. *See Dorsey*, 132 S. Ct. at 2330.

multiple members of Congress discussed the possibility of retroactivity and at least one, Senator Feinstein, expressly stated: "[I]t is my position that any change has to have retroactive consideration." *Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity: Hearing Before the S. Subcommittee on Crime and Drugs of the S. Committee on the Judiciary*, 111th Cong., at 19 (2009). *See also id.* at 10-22 (witnesses' discussion of guideline retroactivity).

There was also an original bill – introduced in the House of Representatives at the very commencement of the 111th Congress – which contained a non-retroactivity clause specifically providing that "[t]here shall be no retroactive application of any portion of this Act." H.R. 265, 111th Cong. § 11 (as introduced Jan. 7, 2009). This clause was subsequently disavowed by the bill's author, Representative Jackson Lee, however, at a hearing before a House subcommittee. Representative Jackson Lee acknowledged at that hearing that "there is something valid as we go forward in this legislation about the question of retroactivity," expressed concern about "the question of those incarcerated presently," and explained that "my legislation is now being reviewed to eliminate the language." *Unfairness in Federal Cocaine Sentencing: Is it Time to Crack the 100 to 1 Disparity?: Hearing on H.R. 1459, H.R. 1466, H.R. 265, H.R. 2178, and H.R. 18 Before the H. Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 111th Cong., at 18 (2009).

Third, the same language in the Fair Sentencing Act that suggested Congress intended to let the Sentencing Reform Act's principles control is apposite here. That is the Act's express directive that there be "consistency" between the guidelines and "applicable law," including, in particular, the Fair

Sentencing Act's statutory amendments. *Dorsey*, 132 S. Ct. at 2332 (quoting FSA § 8, 124 Stat. 2374). This was so important to Congress that it labeled the authority it was conferring in this section of the Act as "emergency authority," directed the Commission to act "as soon as practicable," and directed that the action be taken at least within 90 days. *Id.* The "fair implication" – indeed, only implication – of this desire for consistency is that Congress wanted the new guidelines to go with the new statute and the new statute to go with the new guidelines. *Accord United States v. Dixon*, 648 F.3d 195, 197 (3d Cir. 2011) (characterizing § 8 of Act as "[r]ecognizing the need to connect the new mandatory minimum penalties with the Sentencing Guidelines"). Just as "[i]t seems unrealistic to suppose that Congress strongly desired to put the 18:1 guidelines in effect by November 1 even for crimes committed before the FSA but balked at giving the same defendants the benefit of the newly enacted 18:1 mandatory minimums," *United States v. Douglas*, 644 F.3d at 44,[3] it seems unrealistic to suppose that Congress gave the Sentencing Commission discretion to make the 18:1 guidelines retroactive but without the benefit of the newly enacted 18:1 mandatory minimums with which the new guidelines were to be consistent. It was up to the Commission whether or not to apply the guidelines retroactively, but Congress's strong desire for consistency – which is also the best way to avoid illogical and unfair results, *see infra* pp. 23-24 – fairly implies that the statute was to go wherever the guidelines went.

Fourth, as in *Dorsey*, continuing to apply the pre-Act 100-to-1 mandatory

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[3] As noted *supra* p. 17 n.2, *Douglas* and *Dixon* are persuasive because they are the two cases in a pre-*Dorsey* circuit split with which the Supreme Court agreed. *See Dorsey*, 132 S. Ct. at 2330.

minimums to § 3582(c)(2) proceedings seeking application of the retroactive Fair Sentencing Act 18-to-1 guideline amendments would create the very sort of disparity Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. Two individuals with identical criminal histories, who engaged in the same criminal conduct involving the same amount of crack cocaine, and who sought § 3582(c)(2) reductions at the same time from the same judge, could receive radically different sentences – based solely on when their initial sentencings had occurred. For example, if Mr. Augustine – or another defendant just like him – had been initially sentenced under the pre-Act guidelines on the day after the Act was signed into law, he would indisputably be eligible for a 51-month sentence reduction to 70 months, because that sentence would be (1) within the amended guideline range, and (2) within the mandatory minimum that applied after the Act was signed into law. But because he was sentenced earlier, he is – according to the government – eligible for just a 1-month reduction to 120 months. This is precisely the sort of disparity that Congress enacted the Sentencing Reform Act to prevent and which is part of *Dorsey*'s rationale.

Fifth, not to apply the Fair Sentencing Act mandatory minimums in § 3582(c)(2) proceedings based on the retroactive Fair Sentencing Act sentencing guidelines would exacerbate disproportionate sentencing. All the examples of disproportionality the Supreme Court set forth in Appendix B to its opinion would occur in § 3582(c)(2) proceedings as well. A defendant in criminal history category I who had previously been sentenced to 51 months based on 4 grams of crack cocaine would have a new guideline range of 21-27 months and be eligible for a 30-month sentence reduction to a 21-month sentence, but a criminal history

category I defendant who had previously been sentenced to 63 months based on 5 grams of crack cocaine and had the same new guideline range of 21-27 months, *see* U.S.S.G. § 2D1.1(c)(10) (2011) (post-Act guidelines setting same offense level for 4-gram and 5-gram crack cocaine quantities), would be eligible for only a 3-month reduction to the old 60-month mandatory minimum. *See Dorsey*, 132 S. Ct. at 2338 (table comparing 1986 Drug Act minimums with Fair Sentencing Act guidelines for Category I offenders with no prior drug felonies). On the other side of the coin, a criminal history category I defendant with 50 grams of crack cocaine would be eligible for a reduction to only 120 months, despite having a new guideline range of 63-78 months, while a criminal history category I defendant with 500 grams – 10 times as much – would be eligible for a reduction to a sentence of 121 months – just one month longer. *See id.* Thus, as in *Dorsey*, application of the 100-to-1 mandatory minimums to defendants eligible for the 18-to-1 guidelines "would produce a crazy quilt of sentences, at odds with Congress' basic efforts to achieve more uniform, more proportionate sentences." *Id.* at 2334-35. "Congress, when enacting the Fair Sentencing Act, could not have intended any such result." *Id.* at 2335.

Finally, the Supreme Court in *Dorsey* found no sufficiently strong countervailing considerations. *Id.* at 2335. Similarly, there are no such considerations here. In fact, one of the countervailing considerations considered in *Dorsey* would be largely, if not completely, eliminated by retroactive application in § 3582(c)(2) proceedings. That is the concern about disparity between pre-Act offenders already sentenced at the time the Act became law and those pre-Act offenders not already sentenced at that time. *See supra* p. 15.

Eliminating that sort of disparity is the most basic purpose of 18 U.S.C. § 3582(c)(2), and retroactivity of the Fair Sentencing Act mandatory minimums in § 3582(c)(2) proceedings will advance that purpose even further, by letting even those pre-Act offenders who were sentenced earlier receive the benefit of the Act. *See Dorsey*, 132 S. Ct. at 2335 (recognizing that one way in which to eliminate such disparities would be "re-opening sentencing proceedings concluded prior to a new law's effective date"). Finding a Congressional intent that courts apply the Fair Sentencing Act mandatory minimums in § 3582(c)(2) proceedings thus *strengthens* and is *more* consistent with a Congressional intent that they apply retroactively in original sentencings.

In sum, Congress's goals of consistency, avoiding disparity, and eliminating unfairness establish a "fair implication" that Congress intended to apply the Fair Sentencing Act mandatory minimums in § 3582(c)(2) proceedings just as much – perhaps even more – than they establish such a "fair implication" in the original sentencing context. The Fair Sentencing Act mandatory minimums should go with the Fair Sentencing Act guidelines here just as they do at an original sentencing.

D. OTHER PRINCIPLES OF STATUTORY CONSTRUCTION ALSO SUPPORT A READING OF THE FAIR SENTENCING ACT TO APPLY RETROACTIVELY IN 18 U.S.C. § 3582(c)(2) PROCEEDINGS BASED ON THE FAIR SENTENCING ACT GUIDELINES.

Several other principles of construction also support reading the Fair Sentencing Act mandatory minimums to apply here. One of those is the principle

that remedial legislation should be construed liberally. *See Clark v. Capital Credit & Collection Services*, 460 F.3d 1162, 1176 (9th Cir. 2010) *and cases cited therein*. While the Fair Sentencing Act deals with penal provisions which are not traditionally viewed as remedial legislation, the Act was unquestionably intended to remedy what has come to be viewed as a horrible injustice.

Another general principle of construction to consider is the "well-accepted rule[ ] of statutory construction . . . that 'statutory interpretations which would produce absurd results are to be avoided.'" *Arizona State Board for Charter Schools v. U.S. Dept. of Education*, 464 F.3d 1003, 1008 (9th Cir. 2006) (quoting *Ma v. Ashcroft*, 361 F.3d 553, 558 (9th Cir. 2004)). Applying the Fair Sentencing Act guidelines – here in § 3582(c)(2) proceedings – without applying the Fair Sentencing Act mandatory minimums on which they are based and with which they were to be consistent, *see supra* pp. 13-14, would lead to absurd results in at least two ways. Initially, it would lead to what the Third Circuit's *Dixon* opinion, *see supra* pp. 17 n.2, 19 & n.3, described as "an incongruous result that puts district courts in the odd position of having to apply Guidelines implemented to 'achieve consistency with applicable law' to cases in which the 'applicable law' was not applicable." *Id.*, 648 F.3d at 201. Secondly, there is, in the words of a Seventh Circuit judge who dissented from the denial of rehearing en banc in the *Dorsey* case, the "[o]dd[ ]" result that "the only ones who benefit from [the guideline amendments] are the worst offenders." *United States v. Fisher*, 646 F.3d 429, 432 (7th Cir. 2011) (Williams, J., dissenting from denial of rehearing en

banc).[4] *See also Dorsey*, 132 S. Ct. at 2337 (noting that such "cliffs" "would create similar Guidelines sentences for offenders who dealt in radically different amounts of crack"). While this judge was speaking of the failure to apply the new mandatory minimums in original sentencing proceedings, there is the same perverse result if courts cannot apply the new mandatory minimums in § 3582(c)(2) proceedings based on the new guidelines. Defendants will fully benefit from the new guidelines only if they trafficked in a large enough quantity of crack cocaine for the new sentencing range to remain above the *old* mandatory minimum, such that the 18-to-1 ratio controls. For defendants whose offenses involved small enough quantities of crack cocaine to place the new guideline range below the mandatory minimum, the 18-to-1 ratio will not control. The result is that lower-level crack defendants will be denied the full benefit of the Fair Sentencing Act, while higher-level crack defendants will receive the full benefit, which is an absurd result that is patently inconsistent with the purpose of the Act.

There is also a principle of statutory construction triggered by the fact that Congress had before it the other bill noted *supra* p. 18 with the clause expressly providing that "[t]here shall be no retroactive application of any portion of this Act." In the bill it actually passed, Congress did not include that provision. This triggers the principle of construction that "[w]here Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." *Plata v. Schwarzenegger*, 603 F.3d 1088, 1096 (9th Cir. 2010) (quoting *Russello v. United States*, 464 U.S. 16,

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[4] The *Dorsey* case was consolidated with the *Fisher* case for purposes of this opinion. *See Fisher*, 646 F.3d at 430.

23-24 (1983)). *See also John Hancock Mut. Life Ins. Co. v. Harris Trust and Savings Bank*, 510 U.S. 86, 100-01 (1993) (quoting *Russello*, applying it to rejection of Senate draft of bill, and stating that "[w]e are directed by those words [in the final bill], and not by the discarded draft"); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) (noting enactment of House bill rather than Senate bill and stating that "[f]ew principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language"). And the deletion of limiting language is exactly what happened here; the earlier version of the bill expressly and broadly barred any retroactive application and the final version of the bill contained no limitation at all.

Finally, there are two fairness principles of statutory construction to consider – one not so clearly established which is specific to the general saving statute and one which is very clearly established and more general. The first is the suggestion of some of the Supreme Court general saving statute cases, recognized in the First Circuit's *Douglas* opinion, that "some sense of the 'fair' result . . . sometimes plays a role" in deciding whether to apply the statute. *Douglas*, 644 F.3d at 44 (citing *United States v. Chambers*, 291 U.S. 217 (1934) and *Hamm v. City of Rock Hill*, 379 U.S. 306 (1964)). In *Chambers*, the Court dealt with prosecutions under the old National Prohibition Act, *see id.*, 291 U.S. at 221, which Congress and the rest of the country had recognized, similar to the recognition about the old crack law here, was a failed policy. In *Hamm*, the Court dealt with prosecutions of protestors against racial discrimination that the new law was intended to eliminate, *see id.*, 379 U.S. at 307, somewhat similar to the

disparate racial impact that the new crack law here is intended to ameliorate, *see Dorsey*, 132 S. Ct. at 2328 (noting public understanding of sentences embodying 100-to-1 ratio as reflecting unjustified race-based differences and citing multiple Sentencing Commission reports).

The second fairness principle of statutory construction to consider is the rule of lenity, which "embodies 'the instinctive distastes against men languishing in prison unless the lawmaker has clearly said they should,'" *United States v. Bass*, 404 U.S. 336, 348 (1971) (quoting Henry Friendly, *Mr. Justice Frankfurter and the Reading of Statutes*, Benchmarks 196, 209 (1967)). The application of that rule to the question of whether the Fair Sentencing Act applies immediately to all sentences was also discussed in the First Circuit's *Douglas* opinion:

> Finally, while the rule of lenity does not apply where the statute is "clear," (citation omitted), [the general saving statute] is less than clear in many of its interactions with other statutes, and that is arguably true in the present case as well. Our principal concern here is with the "fair" or "necessary" implication, *[Warden, Lewisburg Penitentiary v.] Marrero*, 417 U.S. [653,] 659 n.10 [(1974)]; *Great N. Ry. Co. [v. United States]*, 208 U.S. [452,] 465 [(1908)], derived from the mismatch between the old mandatory minimums and the new guidelines and to be drawn from the congressional purpose to ameliorate the cocaine base sentences. But the rule of lenity, applicable to penalties as well as the definition of crimes, adds a measure of further support to Douglas.

Douglas, 644 F.3d at 44. While the issue before the court in *Douglas* was retroactive application of the Fair Sentencing Act mandatory minimums in original sentencing proceedings, the reasoning applies equally to their application in § 3582(c)(2) sentence modification proceedings.

E. NEITHER THIS COURT'S *BAPTIST* DECISION NOR THIS COURT'S *SYKES* DECISION REQUIRE A DIFFERENT RESULT.

The government argued below – and the district court agreed – that this Court's prior decisions in *United States v. Baptist*, 646 F.3d 1225 (9th Cir. 2011), *cert. denied*, 132 S. Ct. 1053 (2012), and *United States v. Sykes*, 658 F.3d 1140 (9th Cir. 2011) precluded applying the Fair Sentencing Act statutory mandatory minimums here. ER 13-14; CR 34. In *Baptist*, this Court held the Fair Sentencing Act statutory mandatory minimums did not retroactively apply to a defendant who was sentenced prior to passage of the Act simply because he had an appeal pending at the time the Act was passed. *See id.*, 646 F.3d at 1227, 1229. In *Sykes*, the Court held the Fair Sentencing Act statutory mandatory minimums did not retroactively apply in 18 U.S.C. § 3582(c)(2) sentence modification proceedings based on an earlier, pre-Act amendment of the crack cocaine guideline which had been made retroactive in 2008. *See id.*, 658 F.3d at 1143-44, 1148.

The present case is different from both *Baptist* and *Sykes* in a key respect. In both *Baptist* and *Sykes*, the guidelines which had been applied were pre-Act guidelines. In *Baptist*, the defendant had been sentenced prior to the date the Fair Sentencing Act was signed into law, *see id.*, 646 F.3d at 1227, presumably under the guidelines in effect on the date of June 17, 2009 on which he was sentenced.[5] In *Sykes*, the 2007 guideline amendments made retroactive in 2008 were applied in

[5] This exact sentencing date is not reflected in the opinion in *Baptist* but it is reflected in the parties' briefs in the case, which were attached to the government's district court opposition in this case, *see* CR 34, Exs. 1, 2, and are also available on Westlaw, *see* 2010 WL 5585515; 2010 WL 5585516.

a § 3582(c)(2) motion. *See id.*, 658 F.3d at 1143-44.[6] As a result, neither *Baptist* nor *Sykes* led to the "incongruous result that puts district courts in the odd position of having to apply Guidelines implemented to 'achieve consistency with applicable law' to cases in which the 'applicable law' was not applicable." *United States v. Dixon*, 648 F.3d at 201, *quoted supra* p. 23.

The district court here was put in this "odd position," however. The guidelines which everyone agreed applied were the Fair Sentencing Act guidelines of 70-87 months. But the statutory mandatory minimum which the court felt applied was the old 120-month mandatory minimum. This led to the "incongruous result" of being able to give only a 1-month reduction in sentence based on a guideline range which had been reduced by *51 months*.

The difference between these circumstances and the circumstances in cases such as *Baptist* and *Sykes* is suggested by the reasoning of the two court of appeals cases with which the Supreme Court agreed in *Dorsey*, *see supra* p. 17 n.2. Both of those courts had previously held – like this Court in *Baptist* – that the new Fair Sentencing Act mandatory minimums did not apply to a defendant who had an appeal pending at the time the Act was signed into law but had been sentenced before. *See United States v. Dixon*, 648 F.3d at 198-99 n.3 (citing *United States v. Reevey*, 631 F.3d 110 (3d Cir. 2010), *cert. denied*, 131 S. Ct. 2947 (2011)); *United States v. Douglas*, 644 F.3d at 42 (citing *United States v. Goncalves*, 642 F.3d 245 (1st Cir.), *cert. denied*, 132 S. Ct. 596 (2011)). But both courts recognized that those prior holdings were not controlling in cases in which the new guidelines had

[6] The 2010 emergency guidelines and the 2011 guidelines on which Mr. Augustine's motion was based did not yet exist.

been applied. As the court in *Dixon* explained it:

> When considering whether a law applies retroactively, the question is always "to whom"? In *Reevey*, we held that [the Fair Sentencing Act] did not apply retroactively to the group comprised of defendants who committed their crimes and who were sentenced before the Act was enacted. In doing so, we joined every Court of Appeal to consider the issue. (Citations omitted.) The "to whom" question here is different. The issue in this case is whether the [Fair Sentencing Act] applies to the separate group of defendants who committed their crimes before the Act was enacted, but who were sentenced afterwards. We specifically abstained from answering this question in *Reevey*, 631 F.3d at 115 n.5 (distinguishing a defendant in Dixon's position from Reevey because Reevey, unlike Dixon, committed his crime and was sentenced before the [Fair Sentencing Act] was enacted). Our answer to the question whether Congress intended to apply the [Fair Sentencing Act] to one group – defendants in Reevey's position – has no bearing on whether Congress intended to apply the [Fair Sentencing Act] to another – defendants in Dixon's position.

Dixon, 648 F.3d at 198-99 n.3. *See also Douglas*, 644 F.3d at 42 (noting that "we reserved [in *Goncalves*] the issue that is now before us").

Here, there is a third group of defendants – the group of defendants who committed their crimes before the Fair Sentencing Act was enacted and were previously sentenced under the old guidelines but are now back in court for the new guidelines to be applied under 18 U.S.C. § 3582(c)(2). The "'to whom' question" is different for this separate group of defendants just as it was different for the separate group of defendants considered in *Dixon* and *Douglas*. *Accord Douglas*, 644 F.3d at 46 (noting that "a set of problems remain," describing one of those problems as whether Fair Sentencing Act mandatory minimums should control in § 3582(c)(2) proceedings if Commission made guideline amendments retroactive, recognizing question remains undecided, and noting that "the courts will have to address [those problems] through the usual processes"). The "to

whom" question here is also different than for the group of defendants in the position of the defendant in *Sykes* – which could be labeled a fourth group of defendants. Where the question in cases such as *Baptist* and *Sykes* – and the cases distinguished in *Dixon* and *Douglas* – was whether Congress intended that post-Act mandatory minimums be combined with pre-Act guidelines – which would lead to its own sort of incongruity – the question here is whether Congress intended that post-Act guidelines be combined with pre-Act mandatory minimums.

It is the reasoning of *Dorsey* which answers this last question. And the answer is, "No." Congress did not intend post-Fair Sentencing Act guidelines to be combined with pre-Fair Sentencing Act mandatory minimums.

VI.

CONCLUSION

The case should be remanded to the district court with instructions that the law in this instance does permit what the district court itself opined "fairness requires," *supra* p. 7. The district court should be instructed that it can impose a sentence within the Fair Sentencing Act guideline range, because it is the Fair Sentencing Act mandatory minimums, not the old mandatory minimums, that apply.

Respectfully submitted,

DATED: July 18 , 2012

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF RELATED CASES

Counsel for appellant is aware of the following additional cases which present the issue presented in this case:

United States v. Jesus Martinez, No. 12-50094

United States v. Ronald Herbert Ellis, No. 12-50165

United States v. Bruce Sutton, No. 12-50185

United States v. Orlando Clement, No. 12-50189

DATED: July 18 , 2012

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(c) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 8,010 words.

DATED: July 18 , 2012

s/ Carlton F. Gunn
CARLTON F. GUNN
Attorney at Law

STATUTORY APPENDIX

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.

○

Certificate of Service

I hereby certify that on July 18, 2012, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Carlton F. Gunn
By: CARLTON F. GUNN