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November 29, 2010

Honorable Preet Bharara
United States Attorney
Southern District of New York
One Saint Andrew's Plaza
New York, New York 10007

Re: Modifying the Government's Policy in the Southern District
on Applying the Fair Sentencing Act of 2010 to Pending Cases

Dear Mr. Bharara:

We are criminal-defense lawyers whose practices involve the representation of individuals charged with narcotics offenses in the Southern District of New York.

As you're undoubtedly aware, about two weeks ago, Senators Durbin and Leahy wrote Attorney General Holder to urge him to direct federal prosecutors to take the position that the Fair Sentencing Act of 2010 (the "FSA") should be applied to not-yet-sentenced defendants (a copy of their letter is enclosed). Consistent with legislative history we have canvassed in motions submitted in cases throughout this district, the two Senators explain that Congress intended the FSA to apply to all defendants who had not yet been sentenced when the law took effect.¹ Judges are already starting to apply the FSA to pending cases over the Government's objection. See, e.g., United States v. Douglas, 2010 WL 4260221 (D. Me. 2010) (Hornby, J.).

¹ As discussed in memoranda such as the one I filed on behalf of a client in United States v. Elvis Santana, et al., 09 Cr. 1022 (KMK), whether the FSA should apply "retroactively"--to defendants who have already been sentenced--has no bearing on whether defendants who have not yet been sentenced should receive the benefit of an Act that begins with the preamble: "To restore fairness to Federal cocaine sentencing." Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 at 1 (2010) (emphasis added). Moreover, while there was discussion during the congressional debates about whether the FSA would apply "retroactively" (to sentenced defendants), there appears to have been no discussion about whether it would apply in pending cases, as Senators Durbin and Leahy explain was their intent when they sponsored this legislation. The Second Circuit's recent summary order in United States v. Baldwin, Docket No. 09-1725-cr (2d Cir. Oct. 27, 2010), similarly addresses only whether the FSA should apply to already-sentenced defendants.

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Included among them is the Honorable Shira A. Scheindlin, who recently applied the FSA to the sentencing of a defendant whose conduct predated its enactment. See United States v. Jeannette Garcia, 09 Cr. 1054 (SAS).

In light of the Senators' letter and what we believe will be an increasing number of decisions applying the FSA to pending cases, we write to inquire whether you plan to adopt a policy requiring (or at least allowing) prosecutors in this district to support defense motions to apply the FSA to such cases. Not only do we believe it would be consistent with congressional intent, the goal of sentencing consistency would be furthered by a uniform policy that accords with the decision of Judge Scheindlin and other district judges. Many of us have more than one client that would be affected by a change in policy. We note that the large number of dispositions that would undoubtedly follow would provide the added benefit of conserving prosecutorial and judicial resources that could be better applied to other cases.

Very truly yours,



Alexander E. Eisemann

Enclosure

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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.

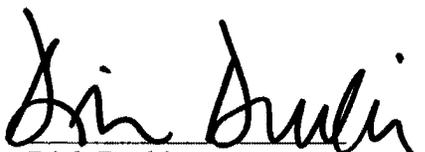
We were therefore disturbed to learn that the Justice Department apparently has taken the position that the Fair Sentencing Act should not apply to defendants who have not yet been sentenced if their conduct took place prior to the legislation's enactment. In his opinion, Judge Hornby states that the 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