No. 11-5721

IN THE SUPREME COURT OF THE UNITED STATES

COREY A. HILL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applies in an initial sentencing proceeding that takes place on or after the statute's effective date if the offense occurred before that date.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not published in the Federal Reporter but is available at 417 Fed. Appx. 560.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2011. The petition for a writ of certiorari was filed on July 1, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of distributing 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Presentence Investigation Report (PSR) 3. He was sentenced to ten years of imprisonment, to be followed by ten years of supervised release. Pet. App. C23-C24. The court of appeals affirmed. Id. at A1-A2.

1. On March 28, 2007, a confidential informant working with the Bureau of Alcohol, Tobacco, Firearms and Explosives arranged by telephone to purchase two ounces of crack cocaine (a type of cocaine base) from petitioner. PSR 4. Later that day, petitioner arrived at the informant's home and sold approximately 53.3 grams of crack cocaine for $1300. Ibid. Several months later, federal agents arrested petitioner, and a grand jury in the Northern District of Illinois returned a one-count indictment charging him with distribution of 50 grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Id. at 3. On April 22, 2009, a jury convicted petitioner on that count. Ibid.

2. On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010 (FSA or Act), Pub. L. No. 111-220, 124 Stat. 2372, the stated purpose of which was "[t]o restore fairness to Federal cocaine sentencing." The Act, among other things, lowered the penalties for certain cocaine-base offenses by increasing the

threshold quantities of cocaine base that trigger certain mandatory-minimum sentences. Under pre-FSA law, a defendant would be subject to a statutory mandatory-minimum sentence of five years of imprisonment (ten years if he had a prior felony drug conviction) for distributing either five grams of cocaine base or 500 grams of powder cocaine, and would be subject to a ten-year mandatory-minimum sentence (20 years if he had a prior felony drug conviction) for distributing either 50 grams of cocaine base or 5000 grams of powder cocaine. See 21 U.S.C. 841(b)(1)(A), (1)(A)(ii)-(iii), (1)(B) and (1)(B)(ii)-(iii) (2006). The FSA increased the amount of cocaine base that triggers the five-year mandatory minimum from five grams to 28 grams and increased the amount of cocaine base that triggers the ten-year mandatory minimum from 50 grams to 280 grams. FSA § 2(a), 124 Stat. 2372. By increasing those thresholds, the FSA reduced the ratio between corresponding threshold quantities of powder cocaine and cocaine base from 100:1 to approximately 18:1. On October 27, 2010, pursuant to special emergency authority conferred in the Act (§ 8, 124 Stat. 2374), the United States Sentencing Commission promulgated amendments to the federal Sentencing Guidelines designed to implement the FSA, which became effective four days later (November 1, 2010). U.S. Sentencing Comm'n, Sentencing Guidelines for United States Courts, 75 Fed. Reg. 66,188 (2010) (FSA Emergency Amendments).

3. On December 2, 2010, following both the passage of the FSA and the effective date of the emergency Guidelines amendments, the district court held a sentencing hearing for petitioner. Pet. App. C. The court stated that, in the absence of an applicable mandatory minimum, consideration of the sentencing factors set forth in 18 U.S.C. 3553(a) -- including the revised Sentencing Guidelines -- would lead it to impose a 51-month prison sentence. Pet. App. C14. The court recognized, however, that the amount of crack involved in petitioner's offense (53.3 grams) subjected him to a statutory mandatory minimum. Ibid. Under the law in effect at the time of his offense, the mandatory minimum would be ten years of imprisonment. 21 U.S.C. 841(b)(1)(A)(iii) (2006) (ten-year mandatory minimum for offense involving 50 grams or more of cocaine base). Under the FSA, however, the mandatory minimum would be only five years. FSA § 2(a), 124 Stat. 2372 (five-year mandatory minimum for offense involving between 28 and 280 grams of cocaine base).

Petitioner argued that, because the sentencing was taking place after the FSA's effective date, the FSA's five-year mandatory minimum should apply. Pet. App. C4-C14. The district court rejected that argument. Id. at C13-C14. Although the court indicated that it might have agreed with petitioner's argument had the issue been a matter of first impression, it concluded that circuit precedent precluded application of the FSA to defendants

whose offense conduct occurred before the Act's enactment. Id. at C13. It therefore applied the pre-FSA mandatory minimum and imposed a ten-year sentence. Id. at C14, C23.

4. Petitioner's only argument on appeal was that the FSA "should apply to every defendant sentenced after its enactment, even if the underlying crime was committed before." Pet. App. A2. The government opposed that position, arguing that the FSA should not apply to defendants whose crimes predated its enactment. Gov't C.A. Br. 6-15.

The court of appeals affirmed petitioner's sentence. Pet. App. A1-A2. It stated that petitioner's argument was foreclosed by its decision in United States v. Fisher, 635 F.3d 336 (7th Cir.), petitions for cert. pending Nos. 11-5683 (filed Aug. 1, 2011) and 11-6096 (filed Aug. 23, 2011), which held that the FSA applies only to offenses committed after the Act's enactment. Pet. App. A2.

5. On July 15, 2011, two weeks after the petition for a writ of certiorari was filed in this case, the Attorney General sent a memorandum to all federal prosecutors about the application of the FSA. App., infra, 1a-2a. The memorandum noted that, "[i]mmediately following the enactment of the Fair Sentencing Act, the Department [had] advised federal prosecutors that the new penalties would apply prospectively only to offense conduct occurring on or after the enactment date." Id. at 1a (emphasis omitted). It observed, however, that "[m]any courts have now

considered the temporal scope of the Act and have reached varying conclusions." Ibid. In particular, some courts, "reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date." Ibid.

The "differing court decisions," in combination with "the serious impact on the criminal justice system of continuing to impose unfair penalties," caused the Attorney General to review the government's position "regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment." App., infra, 2a. That review led the Attorney General to "agree with those courts that have held that Congress intended the Act not only to 'restore fairness in federal cocaine sentencing policy' but to do so as expeditiously as possible and to [apply to] all defendants sentenced on or after the enactment date." Ibid. (quoting 124 Stat. 2372). "As a result," he concluded, "the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place." Ibid. He accordingly directed all federal prosecutors to "act consistently with these legal principles." Ibid.

Although the Attorney General's memorandum was issued after the opportunity for further review by the court of appeals in

petitioner's case had passed, the government promptly informed the court of appeals (as well as other courts) of its revised position in other cases that were still pending. United States v. Holcomb, No. 11-1558, 2011 WL 3795170, at *1 (7th Cir. Aug. 24, 2011) (opinion of Easterbrook, C.J.); see United States v. Dixon, 648 F.3d 195, 198 n.2 (3d Cir. 2011); U.S. Pet. at 1, United States v. Sidney, 648 F.3d 904 (8th Cir. 2011) (No. 11-1216). The ten active judges on the court of appeals, in a split 5-5 vote, refused to reconsider the issue en banc. Holcomb, 2011 WL 3795170, at *1.

DISCUSSION

Petitioner contends (Pet. 7-17) that this Court's intervention is necessary to resolve a conflict in the circuits about the applicability of the FSA's revised statutory penalties to preenactment offenders. The government agrees. The court of appeals incorrectly concluded that defendants who committed their offenses before the FSA are still subject, in post-FSA sentencings, to heightened statutory penalties that Congress has repudiated as fundamentally unsound. Although that conclusion accords with the Eighth Circuit's, it conflicts with the holdings of the First and Third Circuits. The Seventh and Eighth Circuits have cemented the circuit conflict by denying en banc review to consider adopting the government's position.

Contrary to the Seventh and Eighth Circuit's positions, both the text and the purpose of the FSA demonstrate Congress's intent

that the Act apply immediately at all initial sentencing proceedings. The issue, which will potentially affect the sentences of thousands of current and future federal defendants, is squarely presented in this case. This Court should accordingly grant certiorari and reverse the court of appeals' judgment.[1]

1. a. In 1986, Congress adopted a 100:1 ratio between the quantities of powder cocaine and cocaine base required to trigger certain mandatory-minimum sentences. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207-2 to -3. "Congress apparently believed that crack was significantly more dangerous than powder cocaine" because it was more addictive, associated with more violence, more harmful to users, more prevalent among teenagers, and increasingly more popular due to its high potency and low cost. Kimbrough v. United States, 552 U.S. 85, 95-96 (2007). Shortly after the 100:1 ratio went into effect, however, the Sentencing Commission and others began to question those beliefs. See United States v. Santana, 761 F. Supp. 2d 131, 135-136 (S.D.N.Y. 2011) (collecting authorities).

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[1] The question presented in this case is also presented in several other petitions currently on the Court's docket, including Hernandez v. United States, petition for cert. pending, No. 11-6602 (filed Sept. 21, 2011); Lewis v. United States, petition for cert. pending, No. 11-6464 (filed Sept. 13, 2011); Hyde v. United States, petition for cert. pending, No. 11-6364 (filed Sept. 9, 2011); Robinson v. United States, petition for cert. pending, No. 11-5842 (filed Aug. 11, 2011); Dorsey v. United States, petition for cert. pending, No. 11-5683 (filed Aug. 1, 2011).

In particular, the Sentencing Commission challenged the view that crack is considerably more harmful than powder cocaine, concluding that "crack is associated with 'significantly less trafficking-related violence . . . than previously assumed'"; that the two drugs have identical "'negative effects'" in at least some circumstances; and that "'the epidemic of crack cocaine use by youth never materialized to the extent feared.'" Kimbrough, 552 U.S. at 97-98 (quoting U.S. Sentencing Comm'n, Report to the Congress: Cocaine and Federal Sentencing Policy 94, 96, 100 (2002) (2002 Report)). The Commission also observed that the 100:1 ratio had the undesired effect of punishing major traffickers (who typically deal in powder cocaine) more lightly than street-level dealers (who often convert that powder cocaine to crack). Id. at 98 (citing U.S. Sentencing Comm'n, Special Report to Congress: Cocaine and Federal Sentencing Policy 66-67, 174 (1995)). And the Commission further observed that, because most defendants convicted of offenses involving crack cocaine are African-American, the 100:1 ratio "'fosters disrespect for and lack of confidence in the criminal justice system' because of a 'widely-held perception' that it 'promotes unwarranted disparity based on race.'" Ibid. (quoting 2002 Report 103).

b. Congress ultimately responded to those concerns by enacting the FSA, in order "[t]o restore fairness to Federal cocaine sentencing." 124 Stat. 2372. The legislative history

demonstrates broad agreement that a 100:1 ratio was unjustified. See, e.g., 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (Sen. Durbin) ("There is a bipartisan consensus that current cocaine sentencing laws are unjust."). The Act accordingly replaced the 100:1 ratio with a ratio of roughly 18:1. FSA § 2(a), 124 Stat 2372. At the same time, it also (among other things) instructed the Sentencing Commission to increase the recommended Guidelines sentences for certain types of especially harmful drug trafficking offenses, such as offenses involving violence. FSA §§ 5-6, 124 Stat. 2373-2374.

The Act directed the Commission to act promptly in issuing the Guidelines amendments "provided for in this Act," along with "such conforming amendments * * * as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." FSA § 8, 124 Stat. 2374. The Commission was required to promulgate the amendments "as soon as practicable, and in any event not later than 90 days after the enactment of this Act." FSA § 8(1), 124 Stat. 2374. The Act further provided that the amendments would take effect immediately upon their promulgation, dispensing with the 180-day congressional-review period typically required (under 28 U.S.C. 994(p)) before Guidelines amendments become effective. FSA § 8(1) (granting Commission the authority described in "section 21(a) of the Sentencing Act of 1987"); see Sentencing Act of 1987, Pub. L. No.

100-182, § 21, 101 Stat. 1271 (authorizing "a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress").

The Commission complied with Congress's directive by issuing temporary emergency guidelines amendments that became effective on November 1, 2010. FSA Emergency Amendments, 75 Fed. Reg. at 66,188.[2] Among other things, the emergency amendments adjusted the Drug Quantity Table in Sentencing Guidelines § 2D1.1(c), which specifies the base offense levels for drug-trafficking offenses involving particular amounts of drugs. Id. at 66,189, 66,191. In order to conform the Drug Quantity Table to the FSA, the amendments adjusted the base offense levels for crack-cocaine offenses to reflect the same 18:1 ratio that the FSA had adopted for statutory mandatory minimums. Ibid. Pursuant to 18 U.S.C. 3553(a)(4)(ii), which requires a district court initially sentencing a defendant to consider the guidelines that "are in effect on the date the defendant is sentenced," these amendments immediately applied to defendants sentenced on or after the amendments' effective date.

2. a. The court of appeals' decision in this case refused to apply the FSA's mandatory-minimum penalty scheme to a preenactment offender who was sentenced after both the FSA and its

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[2] The Commission has since promulgated similar amendments that are scheduled to become effective on a permanent basis on November 1, 2011. U.S. Sentencing Comm'n, Sentencing Guidelines for United States Courts, 76 Fed. Reg. 24,960 (2011).

implementing guidelines amendments became effective. That holding conflicts with the decisions of two other circuits.

The Third Circuit has held that the FSA applies to all defendants sentenced on or after the statute's effective date. United States v. Dixon, 648 F.3d 195, 203 (2011). The court reasoned that "Congress's emergency directive to the Sentencing Commission * * * to 'make such conforming amendments' that would 'achieve consistency with other guideline provisions and applicable law' demonstrates that Congress wanted the mandatory minimums in the FSA to apply to sentences handed down as of its effective date." Id. at 200 (quoting FSA § 8(2), 124 Stat. 1274). The court noted that, because "the statute of limitations for drug offenses is five years," many offenders sentenced after the FSA's effective date will have committed their crimes before that date. Id. at 202. If those preenactment offenders are subject to pre-FSA mandatory minimums implementing a 100:1 ratio, the court observed, the pre-FSA mandatory minimums "would always trump the new Guidelines [which implement an 18:1 ratio] for the large number of defendants whose Guidelines ranges are below the mandatory minimum." Id. at 201. The court concluded that "Congress could not have intended such a bizarre outcome," which would

"eviscerate[] the very consistency and conformity that the statute requires." Id. at 201-202.[3]

The First Circuit has held that the FSA applies at least in all sentencings occurring after November 1, 2010, the effective date of the Sentencing Commission's emergency guideline amendments. United States v. Douglas, 644 F.3d 39, 42-44 (2011). "It seems unrealistic," the court reasoned, "to suppose that Congress strongly desired to put 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." Id. at 44. The court explained that "the imposition

[3] In United States v. Vera Rojas, 645 F.3d 1234, 1240 (11th Cir. 2011) (per curiam), a panel of the Eleventh Circuit reached a similar conclusion, reasoning that "[b]y granting the Sentencing Commission the emergency authority to amend the Sentencing Guidelines by November 1, 2010, Congress necessarily indicated its intent for the FSA to apply immediately." Id. at 1239. The court explained that "[t]o ask district courts to consider the date the offense was committed to determine the statutory minimum, but the date of sentencing to determine the guidelines range, would lead to an incongruous result that is inconsistent with Congressional intent," "would run afoul of the policies motivating [the Act's] enactment," would "render ineffectual Congress's express directive to the Sentencing Commission," and "would achieve absurd results." Ibid. On October 4, 2011, the Eleventh Circuit granted rehearing en banc in Vera Rojas (and vacated the panel opinion). 2011 WL 4550170. The Eleventh Circuit also granted rehearing en banc in United States v. Hudson, 426 Fed. Appx. 748 (2011) (per curiam), reh'g granted, 2011 WL 4552115 (Oct. 4, 2011), in which a panel had refused to apply the FSA to a defendant whose offense was committed, and who was originally sentenced, before August 3, 2010, but who was rensentenced after August 3, 2010, following the grant of relief under 28 U.S.C. 2255.

now of a minimum sentence that Congress has already condemned as too harsh makes this an unusual case." Ibid.

b. In contrast, the Seventh and Eighth Circuits have concluded that the FSA applies only to postenactment offenders. United States v. Sidney, 648 F.3d 904, 910 (8th Cir. 2011); United States v. Fisher, 635 F.3d 336 (7th Cir.), petitions for cert. pending Nos. 11-5683 (filed Aug. 1, 2011) and 11-6096 (filed Aug. 23, 2011). Both courts have focused on the federal "savings statute," 1 U.S.C. 109, which generally requires courts to impose the penalties in place at the time of the offense, rather than those in place at the time of sentencing. Sidney, 648 F.3d at 906; Fisher, 635 U.S. at 338. Although the First and Third Circuits have found the savings statute to be superseded in these circumstances by specific congressional intent that the FSA's penalty scheme take effect immediately, the Seventh and Eighth Circuits have reached the contrary conclusion. Compare Dixon, 648 F.3d at 200-203; Douglas, 644 F.3d at 44, with Sidney, 648 F.3d at 907-908; Fisher, 635 F.3d at 338.

The Seventh and Eighth Circuits initially decided this issue without the benefit of the government's current position. The government has since informed both circuits of that position. See p. 7, supra. Both circuits have nevertheless denied en banc review. United States v. Sidney, No. 11-1216, Docket entry (8th Cir. Oct. 6, 2011); United States v. Holcomb, No. 11-1558, 2011 WL

3795170, at *1 (7th Cir. Aug. 24, 2011) ("A majority of the active judges did not vote in favor of rehearing en banc, and the proposal therefore fails. Petitions for rehearing or rehearing en banc will not be accepted; this decision is the court's final judgment.").

As previously mentioned (see p. 7, supra) the Seventh Circuit's denial of en banc review was the result of an evenly divided 5-5 vote. Holcomb, 2011 WL 3795170, at *1. The five judges who voted against rehearing en banc believed the circuit's rule to be correct. Id. at *1-*8 (opinion of Easterbrook, C.J.). The other half of the active circuit judges -- including the two who were on the panel that originally decided the issue -- concluded that the circuit's rule "is wrong." Id. at *8 (Williams, J., dissenting from denial of rehearing en banc); see id. at *9. They explained that applying pre-FSA mandatory minimums at post-FSA sentencings "would 'undercut the bill's primary objective,' 'result in sentencing anomalies Congress surely did not intend,' benefit the 'worst offenders,' give 'rise to oddities,' and 'not necessarily promote more equitable outcomes.'" Id. at *16 (quoting Abbott v. United States, 131 S. Ct. 18, 27-28 (2010)) (ellipses omitted).

Judge Posner separately addressed the "absurd," "perverse," and "gratuitously silly" results of applying the court of appeals' rule. Holcomb, 2011 WL 3795170, at *17-*19 (Posner, J., dissenting from denial of rehearing en banc). He explained that unless the

FSA's mandatory minimums apply to preenactment offenders sentenced after its passage, such offenders "will receive sentences in excess of the sentencing guidelines that Congress -- in directing the Sentencing Commission to make haste to conform them to the new, more lenient statutory minimums (more lenient because of the enhanced quantity thresholds) -- intended would apply to such defendants." Id. at *18. His opinion includes charts illustrating, for example, that the pre-FSA mandatory minimum imposed on one Seventh Circuit defendant (ten years) exceeded the lower end of his post-FSA guidelines range (30 months) by 300% and the upper end of that range (37 months) by 224%. Ibid.

3. As Judge Posner and the other dissenters recognized, the rule that the court of appeals applied in this case is incorrect. Congress's controlling intent is that the FSA apply in every sentencing proceeding on or after the date of its enactment (August 3, 2010), regardless of when the underlying offense occurred.[4]

a. The general federal savings statute, 1 U.S.C. 109, provides that "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or

[4] As every court of appeals to have addressed the question has agreed, however, the FSA's modified mandatory-minimum sentences do not apply to defendants who were sentenced before its passage. See, e.g., United States v. Baptist, 646 F.3d 1225, 1229 (9th Cir. 2011) (per curiam) ("Like every other circuit court to have considered this question, we can find no evidence that Congress intended the Fair Sentencing Act to apply to defendants who had been sentenced prior to the August 3, 2010 date of the Act's enactment.").

liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability." Congress enacted the original version of the savings statute in 1871, in response to the common-law presumption that the repeal of a criminal statute abated all prosecutions that had not yet become final on appeal. Warden v. Marrero, 417 U.S. 653, 660 (1974). The savings statute reverses that presumption, so that now a defendant is generally subject to both the substantive criminal laws and the criminal sentencing laws in effect at the time of his offense, regardless of any later changes. United States v. Reisinger, 128 U.S. 398, 402-403 (1888) (holding that the savings statute allowed a defendant's prosecution under an indictment returned after the repeal of the criminal law under which he was charged); Marrero, 417 U.S. at 661 (explaining that "the saving clause has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of an offense").

The savings statute does not control, however, when it contradicts the clear intent of Congress that a specific law eliminating a criminal offense or lowering a criminal sentence take immediate effect. Although the text of Section 109 could be read as requiring Congress to provide a clear textual statement of its

intent to supersede a sentence in effect at the time of a defendant's offense, such a construction would conflict with the longstanding rule that "one legislature cannot abridge the powers of a succeeding legislature." Fletcher v. Peck, 10 U.S. (6 Cranch) 87, 135 (1810). This Court has often recognized "that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute" and has refused to require "'magical passwords in order to effectuate an exemption'" from a statute setting forth a general rule. Lockhart v. United States, 546 U.S. 142, 148 (2005) (Scalia, J., concurring) (quoting Marcello v. Bonds, 349 U.S. 302, 310 (1955)).

The Court has accordingly held that the general savings statute "cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment." Great N. R. Co. v. United States, 208 U.S. 452, 465 (1908) (emphasis added). The Court has explained that "if possible, * * * effect [should] be given to all the parts of a law"; that a later enactment is part of "the law as a whole"; and that the savings statute should not be applied if "the legislative mind will be set at naught" by doing so. Ibid. Thus, if a subsequent act "necessarily, or by clear implication, conflicts with the general [savings statute], the latest expression of the legislative will must prevail." Hertz v. Woodman, 218 U.S. 205, 218 (1910).

b. The "necessary implication" of the FSA is that Congress intended the revised mandatory-minimum penalties for cocaine-base offenses to apply in all initial sentencings conducted after the Act's effective date. Congress manifested that intent most clearly by requiring the Sentencing Commission to promulgate immediately-effective implementing amendments "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act." FSA § 8(1), 124 Stat. 2374.

The Commission's charge to immediately implement "conforming amendments" necessary "to achieve consistency with * * * applicable law," FSA § 8(2), 124 Stat. 2374, included the task of harmonizing the Drug Quantity Table in the Sentencing Guidelines with the 18:1 ratio in the FSA. The term "applicable law" necessarily referred to the sentencing statutes as amended by the FSA, since any preexisting law would already have been addressed by the Commission and would not have required any new "conforming amendments." And in order to "achieve consistency with" that post-FSA law, the Commission would need to "ensure[] that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses for other drugs," as modified by the FSA, was "consistently and proportionally reflected throughout the Drug Quantity Table." FSA Emergency Amendments, 75 Fed. Reg. at 66,191; see also Dixon, 648 F.3d at 200 ("'Applicable law' must be the FSA, not the 1986 Act, because

Congress sought to bring the Guidelines in conformity with the 18:1 ratio in the FSA.").

Congress's mandate that the Commission promptly issue immediately effective amendments to implement an 18:1 ratio in the Drug Quantity Table necessarily reflects an intent that the FSA's 18:1 ratio for mandatory minimums apply immediately. Congress understood that district courts would be required to apply the new guidelines at initial sentencings that occurred after their issuance. See 18 U.S.C. 3553(a)(4)(ii). And nearly all defendants sentenced in the initial months after the FSA's enactment would be preenactment offenders.[5] Subjecting those preenactment offenders to pre-FSA mandatory minimums, which are premised on a 100:1 ratio, would subvert Congress's intent to apply an 18:1 ratio under the Sentencing Guidelines. See, e.g., Holcomb, 2011 WL 3795170, at *12 (Williams, J., dissenting from denial of rehearing en banc) ("It makes no sense for Congress to will that guidelines based on

[5] For several reasons, a lengthy delay typically ensues between commission of an offense and the sentencing for that offense. See, e.g., Dixon, 648 F.3d at 202. First, there is often a delay between the offense and the arrest. Petitioner here, for example, committed his offense over 14 months before he was arrested, see PSR 3-4, and the five-year statute of limitations, 18 U.S.C. 3282(a), would permit much longer delays. Next, there can be a delay between arrest and indictment, as the Speedy Trial Act allows the government to bring charges at any time up to 30 days after the arrest. 18 U.S.C. 3161(b). Finally, the median time between indictment and sentencing for federal drug offenses (other than marijuana offenses) is more than 11 months. Admin. Office of the U.S. Courts, Judicial Business of the United States Courts 272, tbl. D-10 (2010).

an 18:1 ratio take effect immediately in sentencings even for crimes committed before the Act if those same defendants would be subject to pre-FSA 100:1 mandatory minimums.").

Under Sentencing Guidelines § 5G1.1(b), "[w]here a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence." As Judge Posner's charts demonstrate, the old mandatory minimums would frequently overwhelm the new Guidelines sentences, rendering them irrelevant. Holcomb, 2011 WL 3795170, at *18 (Posner, J., dissenting from denial of rehearing en banc). Thus, "Congress's 'emergency' directive is unnecessary if it did not intend to apply the FSA immediately because the old mandatory minimums would still control in many cases." Dixon, 648 F.3d at 201.

Many situations illustrate the gross incongruity that would result if the new emergency Guidelines had to coexist with the pre-FSA mandatory minimums. For example, for a defendant convicted of an offense involving five grams of cocaine base, the new Guidelines would recommend a sentence of 24-30 months (assuming a criminal history category II and no other aggravating or mitigating factors), but the pre-FSA statutory scheme would require a mandatory-minimum sentence of five years -- 100% to 150% higher. Holcomb, 2011 WL 3795170, at *18 (Posner, J., dissenting from denial of rehearing en banc). The same defendant, if convicted of

an offense involving 50 or 100 grams of cocaine base, would have a recommended Guidelines sentence of 70-87 months, but the pre-FSA mandatory minimum would be ten years -- 38% to 71% higher. Ibid.

Congress could not have intended for its directive to the Sentencing Commission -- to promptly "make such conforming amendments" that would "achieve consistency with * * * applicable law," FSA § 8(2), 124 Stat. 2374 (emphasis added) -- to result in such incongruities. "Using a pre-FSA 100:1 minimum coupled with an 18:1 guideline to decide a sentence does not 'achieve consistency.' It achieves the opposite." Holcomb, 2011 WL 3795170, at *13 (Williams, J., dissenting from denial of rehearing en banc); see also Dixon, 648 F.3d at 201 ("Refusing to apply the mandatory minimums in the FSA eviscerates the very consistency and conformity that the statute requires."); Douglas, 644 F.3d at 44 ("It seems unrealistic to suppose that Congress strongly desired to put 18:1 guidelines into 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."). The urgency of Congress's directive to the Sentencing Commission -- which not only required amendments effective in 90 days, but encouraged and allowed them even sooner -- accordingly produces a "necessary implication" that Congress intended the FSA's new mandatory-minimum thresholds to apply immediately.

c. That necessary implication finds further support in additional features of the Act. To begin with, the stated purpose of the Act -- "[t]o restore fairness to Federal cocaine sentencing," 124 Stat. 2372 -- militates in favor of immediate application. The Act reflects Congress's judgment that "the 100:1 ratio * * * was unsound and unduly harsh." Douglas, 644 F.3d at 43. Continuing to apply that ratio at initial sentencings after the Act's passage -- potentially for another five years, until the statute of limitations had run on all pre-FSA offenses, see 18 U.S.C. 3282(a) -- would perpetuate the very unfairness that Congress had repudiated, including the perceived racial disparities in sentencing. See, e.g., 156 Cong. Rec. at S1683 (Sen. Leahy) ("These disproportionate punishments have had a disparate impact on minority communities. This is unjust and runs contrary to our fundamental principles of equal justice under law.").

Congress would not have intended that result. See, e.g., Holcomb, 2011 WL 3795170, at *13 (Williams, J., dissenting from denial of rehearing en banc) ("[W]hy would Congress want sentencing judges to continue to impose sentences that it had already declared to be unfair?"); Dixon, 648 F.3d at 202 ("In plainly seeking to 'restore fairness' to sentencing, Congress intended to apply the Act to all sentences rendered as of the Act's passage."); Douglas, 644 F.3d at 44 ("[T]he imposition now of a minimum sentence that Congress has already condemned as too harsh makes this an unusual

case.”). No practical or administrative concerns existed that would counsel in favor of delay. See Douglas, 644 F.3d at 43-44. Indeed, for reasons already discussed, it produces a far more coherent scheme -- in which the new Guidelines and statutory minimums work together, rather than at cross-purposes -- for the revised statutory penalties, like the revised Guidelines penalties, to take effect immediately.

Section 10 of the Act provides still more evidence that Congress intended immediate application. That section directs the Sentencing Commission, “[n]ot later than 5 years after the date of enactment of this Act,” to “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.” FSA § 10, 124 Stat. 2375. If, during those five years, pre-FSA law were to continue to apply to the large class of preenactment offenders (as to whom the statute of limitations would not yet have run), then “during the time period in which the Sentencing Commission is supposed to produce a report on the effects of the FSA, the Act often [would] be inapplicable.” Dixon, 648 F.3d at 202. That “anomaly” would “frustrate[] the ability of the Sentencing Commission to compile” the report that Congress wanted. Ibid. (suggesting that, as a result, the report “would be incomplete, at best, and incomprehensible, at worst”) (internal quotation marks omitted);

see also Holcomb, 2011 WL 3795170, at *13 (Williams, J., dissenting from denial of rehearing en banc).

Congress did not enact a statute at war with itself. Congress would not intend that the Guidelines immediately implement an 18:1 ratio, but often be superseded by mandatory minimums applying a 100:1 ratio; that "fairness" be "restore[d]" to sentencing, but that courts continue to impose the precise sentences it had deemed unfair; and that the Sentencing Commission study the FSA's effect on offenders as to whom the Act would not actually apply. The "necessary implication," therefore, is that Congress intended the Act's revised penalty scheme to apply immediately.

4. The question of the FSA's applicability at the initial sentencings of preenactment offenders has considerable national importance and warrants this Court's review. Since 1996, federal courts have sentenced approximately 4000 to 6000 crack offenders each year. See Unfairness in Federal Cocaine Sentencing: Is It Time to Crack the 100 to 1 Disparity?: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary, 111th Cong., 1st Sess. 49, fig.1 (2009) (statement of Hon. Ricardo H. Hinojosa, Acting Chair, U.S. Sentencing Comm'n). As previously mentioned, the statute of limitations for the relevant offenses is five years, 18 U.S.C. 3282(a), so courts will continue to sentence pre-FSA offenders for several years to come. Thousands of offenders will thus at least potentially be affected

by the question presented. Holcomb, 2011 WL 3795170, at *8 (Williams, J., dissenting from denial of rehearing en banc) ("This issue affects pending cases and many cases to come in light of the five-year statute of limitations on drug prosecutions."). In each of those cases, application of the FSA may have a profound effect on the sentence. As previously discussed, applying pre-FSA mandatory minimums can more than double the sentence that the defendant might otherwise have received. See pp. 16, 21-22, supra. It is untenable for sentences to vary that widely depending on the circuit where a defendant is charged and sentenced.

This case squarely presents the issue and therefore provides a good vehicle for resolving the circuit conflict. Petitioner committed his offense on March 28, 2007, well before the FSA's enactment, and was sentenced on December 2, 2010, after the effective dates of both the FSA and the conforming amendments to the Sentencing Guidelines. PSR 4; Pet. App. C1. The amount of cocaine base involved in his offense (53.3 grams) would subject him to a ten-year mandatory-minimum sentence under pre-FSA law, but only a five-year mandatory-minimum sentence under the FSA. PSR 4; compare 21 U.S.C. 841(b)(1)(A)(iii) (2006), with FSA § 2, 124 Stat. 2372. The issue of the FSA's application was raised in the district court and preserved on appeal. Pet. App. A2, B4-B5. The district court expressly stated that it would have given petitioner a five-year sentence, rather than a ten-year sentence, had the FSA

applied. Id. at B14. The question presented is therefore outcome-determinative in this case, and its resolution will provide needed clarity for the sentencing of thousands of similarly situated offenders.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Office of the Attorney General
Washington, D. C. 20530

July 15, 2011

MEMORANDUM FOR ALL FEDERAL PROSECUTORS

FROM: Eric H. Holder, Jr.
Attorney General

SUBJECT: Application of the Statutory Mandatory Minimum Sentencing Laws for Crack Cocaine Offenses Amended by the Fair Sentencing Act of 2010

It has been the consistent position of this Administration that federal sentencing and corrections policies must be tough, predictable and fair. Sentencing and corrections policies should be crafted to enhance public safety by incapacitating dangerous offenders and reducing recidivism. They should eliminate unwarranted sentencing disparities, minimize the negative and often devastating effects of illegal drugs, and inspire trust and confidence in the fairness of our criminal justice system.

Last August marked an historic step forward in achieving each of these goals, when the President signed the Fair Sentencing Act of 2010 into law. This new law not only reduced the unjustified 100-to-1 quantity ratio between crack and powder cocaine sentencing law, it also strengthened the hand of law enforcement by including tough new criminal penalties to mitigate the risks posed by our nation's most serious, and most destructive, drug traffickers and violent offenders. Because of the Fair Sentencing Act, our nation is now closer to fulfilling its fundamental, and founding, promise of equal treatment under law.

Immediately following the enactment of the Fair Sentencing Act, the Department advised federal prosecutors that the new penalties would apply prospectively only to *offense conduct* occurring on or after the enactment date, August 3, 2010. Many courts have now considered the temporal scope of the Act and have reached varying conclusions. The eleven courts of appeal that have considered the issue agree that the new penalties do not apply to defendants who were sentenced prior to August 3. As for defendants sentenced on or after August 3, however, there is no judicial consensus. Some courts read the Act's revised penalty provisions to apply only to offense conduct occurring on or after August 3. Other courts, though, reading the Act in light of Congress's purpose and the Act's overall structure, conclude that Congress intended the revised statutory penalties to apply to all sentencings conducted after the enactment date. Those courts ask a fundamental question: given that Congress explicitly sought to restore fairness to cocaine sentencing, and repudiated the much criticized 100:1 ratio, "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?" *United States* v. *Douglas*, 746 F. Supp. 2d 220, 229 (D. Me. 2010), *affirmed*, *United States* v. *Douglas*, No.10-2341, 2011 WL 2120163 (1st Cir. May 31, 2011).

In light of the differing court decisions—and the serious impact on the criminal justice system of continuing to impose unfair penalties—I have reviewed our position regarding the applicability of the Fair Sentencing Act to cases sentenced on or after the date of enactment. While I continue to believe that the Savings Statute, 1 U.S.C. § 109, precludes application of the new mandatory minimums to those sentenced before the enactment of the Fair Sentencing Act, I agree with those courts that have held that Congress intended the Act not only to "restore fairness in federal cocaine sentencing policy" but to do so as expeditiously as possible and to all defendants sentenced on or after the enactment date. As a result, I have concluded that the law requires the application of the Act's new mandatory minimum sentencing provisions to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place. The law draws the line at August 3, however. The new provisions do not apply to sentences imposed prior to that date, whether or not they are final. Prosecutors are directed to act consistently with these legal principles.

Although Congress did not intend that its new *statutory* penalties would apply retroactively to defendants sentenced prior to August 3, Congress left it to the discretion of the Sentencing Commission, under its longstanding authority, to determine whether new cocaine *guidelines* would apply retroactively. Last month, I testified before the Commission that the guidelines implementing the Fair Sentencing Act should be applied retroactively, because I believe the Act's central goals of promoting public safety and public trust—and ensuring a fair and effective criminal justice system—justified the retroactive application of the guideline amendment. On June 30, 2011, the Sentencing Commission voted unanimously to give retroactive effect to parts of its permanent amendment to the federal sentencing guidelines implementing the Fair Sentencing Act. That decision, however, has no impact on the statutory mandatory sentencing scheme—defendants who have their sentences adjusted as a result of guidelines retroactivity will remain subject to the mandatory minimums that were in place at the time of their initial sentencing.

I recognize that this change of position will cause some disruption and added burden as courts revisit some sentences imposed on or after August 3, 2010, and as prosecutors revise their practices to reflect this reading of the law. But I am confident that we can resolve those issues through your characteristic resourcefulness and dedication. Most importantly, as with all decisions we make as federal prosecutors, I am taking this position because I believe it is required by the law and our mandate to do justice in every case. The goal of the Fair Sentencing Act was to rectify a discredited policy. I believe that Congress intended that its policy of restoring fairness in cocaine sentencing be implemented immediately in sentencings that take place after the bill was signed into law. That is what I direct you to undertake today.