THE OHIO STATE UNIVERSITY
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October 21, 2010

Honorable Kenneth M. Karas
United States District Judge
Southern District of New York
United States Courthouse
300 Quarropas Street, Room 533
White Plains, New York 10601-4150

Re: United States v. Elvis Santana, et al.,
09 Cr. 1022 (KMK)

Dear Judge Karas:

Counsel for some defendants in the above-captioned case have informed me that your Honor is currently considering motions to apply the terms of the Fair Sentencing Act of 2010 (hereafter "FSA"), which amended the penalty provisions of 21 U.S.C. § 841, during the upcoming sentencing of pending cases in which the offense behavior took place before the FSA became law. Taking on the role of a de facto amicus curae, I write to supplement some of the arguments set forth by counsel in this case.[1] Because I believe that principles of statutory construction support application of the provisions of FSA to all pending cases, I wanted to write to suggest a resolution to these motions that would enable this Court to avoid wading too deeply into the many complicated constitutional and policy issues that might arise if this Court were to refuse to apply the amended penalty provisions of 21 U.S.C. § 841 in a case of this nature.

As the motion papers already highlight, there are serious constitutional arguments and strong policy considerations supporting the application of the FSA to *all* criminal cases not yet final. But, even more fundamentally, basic principles of statutory interpretation as well as venerated canons of construction suggest the FSA is to be applied to any and all cases such as this one in which an *initial* sentencing has not yet taken place. As detailed below, I believe Congress revealed its intent for the FSA to apply to pending cases through key provisions of the

1 Alexander Eisemann, counsel for defendant William Anderson, has offered to provide this letter to the Court and to distribute it to the Government and all defense counsel by filing it with his ECF account.

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statute itself and through comments by key legislators in the Congressional Record. Moreover, even if this Court finds congressional intent to be unclear, both the rule of lenity and the constitutional doubt canon of statutory construction call for the FSA to be so applied.

I. THE STATUTORY TEXT AND RELATED COMMENTS INDICATE THAT CONGRESS INTENDED THE FAIR SENTENCING ACT OF 2010 TO APPLY TO PENDING CASES AS SOON AS POSSIBLE

The Supreme Court has explained that congressional intent to apply a statute to pending cases may be revealed by the explicit language of the statute itself or by studying the context of the statute as a whole. *See Lindh v. Murphy*, 521 U.S. 320, 326 (1997). The Supreme Court has also repeatedly stressed the broader legal "principle that a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Bradley v. School Bd of Richmond*, 416 U.S. 696, 711 (1974).

In this setting, the structure, language and context of the FSA strongly suggest that Congress expected and intended for its new crack sentencing provisions to be applied to pending cases as soon as possible. The structure and language of the statute supports this reading in part because the FSA expressly directs that:

> The United States Sentencing Commission shall– (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.

This provision of the FSA reveals Congress's express goal of having the federal sentencing guidelines amended immediately in order to establish "consistency" between the guidelines and statutes ("applicable law") as soon as possible. The "consistency" sought by Congress obviously involves having the Commission revise downward the sentencing guideline provisions for crack offenses so that they incorporate immediately the same 18:1 quality ratio that is reflected in the new mandatory minimum quantity thresholds set forth in the FSA. And, this consistency has now been achieved through the emergency guideline amendments which were formally approved by the U.S. Sentencing Commission just last week and which will become effective November 1, 2010. *See* U.S. Sentencing Commission, News Release, *United States Sentencing Commission Promulgates Amendment to Implement Fair Sentencing Act of 2010* at 1 (Oct. 15, 2010), *available at* http://www.ussc.gov/PRESS/rel20101015.pdf ("Today

the United States Sentencing Commission voted to promulgate a temporary, emergency amendment to the federal sentencing guidelines consistent with the statutory changes to crack cocaine and other drug trafficking offenses made by the Fair Sentencing Act of 2010. The amendment will take effect on November 1, 2010.")

By requiring the U.S. Sentencing Commission to promulgate guideline amendments "as soon as practicable, and in any event not later than 90 days after the date of enactment of" the FSA, Congress revealed its apparent intent and expectation that the new crack sentencing provisions in the FSA be applied to pending cases as soon as possible. Indeed, now that the crack guidelines have been officially amended to reflect the FSA's new 18:1 ratio — and given the long-standard guideline-application default rule which mandates the application of the guidelines in effect at the time of sentencing, regardless of when the crime was committed, as long as this application does not violate the Ex Post Facto Clause — all defendants as of November 1 to be sentenced pursuant to the newly amended *guidelines*, even those who committed their offenses before the enactment of the FSA, will get the benefit of the new 18:1 ratio that is reflected in the new guidelines. Given this reality, together with the Congressional desire "to achieve consistency" between the relevant sentencing guidelines and statutes, it would be quite anomalous and inconsistent with the whole goal of the FSA for those defendants subject to the guidelines (i.e., those defendants convicted of offenses involving the highest quantities of crack) to be the only ones to immediately benefit from Congress's revision of the triggering quantities for mandatory minimum sentences for crack offenses.

Let me restate this point slightly differently: when the FSA was enacted, Congress was assuredly aware that the default rule of applying amended guidelines to pending cases would require the application of a new 18:1 guideline ratio without regard to when the crack statute was violated. Additionally, Congress demanded that crack guideline amendments be promulgated within ninety days of the FSA's enactment to promote "consistency" between the guidelines and the statute, which in turn signals its intent to apply the FSA to pending cases because the amended guidelines would be applied to pending cases. If the pre-FSA *statute* calibrated to a 100:1 ratio along with a *guideline* calibrated at an 18:1 ratio were applied to determine the sentence in a given crack case, this dichotomous application would undermine, not promote, the stated purpose of sentencing consistency and would, more fundamentally, fly in the face of Congress's obvious desire to ensure that the least serious crack offenders not always be subject to the most severe sentencing terms. In other words, these collective realities, taken together, reflect Congress' intent, either expressly or impliedly, to apply the FSA to pending cases as soon as possible: Congress's instruction to the U.S. Sentencing Commission to amend the guidelines on an emergency basis, the Commission's promulgation of new guidelines consistent with the 18:1 ratio calibrated in the FSA, the default rule of application of new guidelines to pending cases, the expressed desire "to achieve consistency" between the new guidelines and the FSA, and the fundamental goal of the FSA to ensure that the least serious crack offenders are not categorically subject to the most severe sentencing terms.

This interpretation of the language and operative structure of the FSA is further supported by its legislative context. Congress's avowed goal in promulgating and passing the new sentencing provisions of the FSA was clearly to correct past injustices and to ensure that various

qualitative aggravating offense factors like role in the offense and use of violence receive more consideration and that the single quantitative factor of drug weight be given relatively less emphasis. For instance, when the Senate passed the amendment, Senator Patrick Leahy stated that the FSA "reduces the disparities that leave some in jail for years while their more privileged counterparts go home after relatively brief sentences. Today, that compromise means we are one step closer to fixing this decades-old injustice." Congressional Record (111th Congress), S 1683. Indeed, a review of the entirety of the record, both from the Senate and House, shows that Congress: (1) recognized the problems in the (then) current law, (2) recognized the harmful effect of those currently imprisoned under such a problematic law, and (3) wanted to take steps to immediately address these problems. This legislative history further supports the notion that Congress intended the amended sentencing provisions of the FSA to apply not only to those defendants who committed a crack offense after the enactment date, but also as soon as possible to cases currently pending, and especially to those cases which have not yet involved even an initial sentencing. Therefore, this Court can and should find that the FSA applies to this pending case.

II. IF CONGRESSIONAL INTENT IS UNCLEAR, THE RULE OF LENITY AND THE CONSTITUTIONAL DOUBT CANON OF STATUTORY CONSTRUCTION CALL FOR THE FSA TO BE APPLIED TO PENDING CASES AS SOON AS POSSIBLE

As the Third Circuit has recently reiterated, the "rule of lenity provides that when ambiguity in a criminal statute cannot be clarified by either its legislative history or inferences drawn from the overall statutory scheme, the ambiguity is resolved in favor of the defendant." *United States v. Fleming*, 617 F.3d 252, 269 (3d Cir. 2010) (internal quotation omitted). And the Second Circuit, in applying the rule of lenity to determine the reach of recently reduced crack guidelines, has further explained that "the meaning of language is inherently contextual and the Supreme Court has always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." *United States v. McGee*, 553 F.3d 225, 229 (2d Cir. 2009) (internal quotation omitted).

As suggested in Part I *supra*, I firmly believe that the "language and structure, legislative history, and motivating policies" of the Fair Sentencing Act all call for its new crack sentencing provisions to be applied to pending cases as soon as possible. But, if a reasonable doubt persists on this score, this interpretive ambiguity should be resolved in favor of the defendant in accord with the rule of lenity. Indeed, as Justice Breyer has recently explained, sound statutory interpretative principles should "give the rule of lenity special force in the context of mandatory minimum provisions," because "an interpretation that errs on the side of exclusion (an interpretive error on the side of leniency) still permits the sentencing judge to impose a sentence" that will still serve all other sentencing goals set forth by Congress in other statutory provisions. *United States v. Dean*, 129 S. Ct. 1849, 1860-61 (2009). Critically, finding that the sentencing provisions of the FSA apply to this pending case will not *require* this Court to impose a lower or

unjust sentence, rather it will simply *permit* this Court to impose a fitting and just sentence that is "sufficient but not greater than necessary" under the term of 18 U.S.C. § 3553(a) without the rigid restrictions previously imposed by the now-amended sentencing statutes.

In addition, as the motion papers already filled in this case highlight, there are serious constitutional arguments — implicating both the Fifth Amendment guarantee of Equal Protection and the Eighth Amendment prohibition on cruel and unusual punishment — which would follow from a decision to sentence defendants based on a now-amended and thus defunct severe mandatory minimum sentencing term. This fact, in turn, further supports applying the Fair Sentencing Act to pending cases as soon as possible, even if congressional intent were thought unclear, in order to avoid serious constitutional questions.

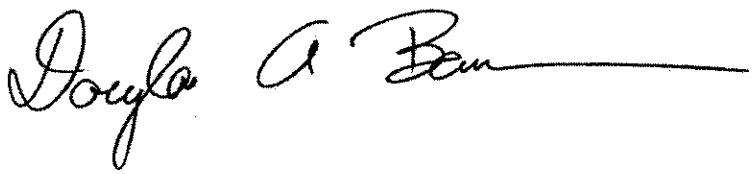
As the Supreme Court has explained, when a statute is susceptible to two constructions, one of which raises grave and doubtful constitutional questions, and the other which avoids such questions, the court's duty is to adopt the latter. *See Jones v. United States*, 526 U.S. 227, 239 (1999). The avoidance canon of statutory construction "is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that Congress did not intend the alternative which raises serious constitutional doubts." *Clark v. Martinez*, 543 U.S. 371, 381 (2005). It "is a means of giving effect to congressional intent, not of subverting it." *Id.* at 382.

Just as an ameliorative change in the judicial interpretation of a criminal statute is applied to all cases on direct review, it should as a matter of equal justice apply here to an ameliorative change to the drug quantities that trigger a mandatory minimum. As discussed earlier, Congress enacted the Fair Sentencing Act to correct the disparate impact of the 100-to-1 crack-cocaine powder ratio. Indeed, members of Congress expressly noted that the old ratio was "contrary to our fundamental principles of equal protection under the law." *See, e.g.* 156 Cong. Rec. H6196-01 (daily ed. July 28, 2010) (Statement of Rep. Clyburn). Application of the Fair Sentencing Act to cases not yet final will also avoid a potential conflict with the Eighth Amendment. The constitutional protection against cruel and unusual punishment requires that a sentence serve at least one of the purposes of sentencing: retribution, deterrence, incapacitation, and rehabilitation. In serving those purposes, the punishment should be "graduated and proportioned" to the offense. *Weems v. United States*, 217 U.S. 349, 367 (1910). Continued application of the disproportionately harsh pre-FSA law cannot easily be justified as a matter of retribution, deterrence, incapacitation, rehabilitation or proportionality, especially given that, for well over a decade, the U.S. Sentencing Commission had urged Congress to reform this law because it did not effectively comport with these purposes and failed to reflect the relative culpability of drug offenders. *See* U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Feb. 1995); U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (Apr. 1997); U.S. Sentencing Commission, *Special Report to Congress: Cocaine and Federal Sentencing Policy* (May 2002).

In sum and as explained above, I believe Congress revealed its intent for the FSA to apply to pending cases as soon as possible through key provisions of the statute itself and through comments by key legislators in the Congressional Record. Moreover, even if this Court

finds congressional intent to be unclear, both the rule of lenity and the constitutional doubt canon of statutory construction call for the FSA to be so applied. I thank the Court for considering this submission. If my appearance at oral argument would be of any assistance, I would be happy to attend.

Sincerely,



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