THE OHIO STATE UNIVERSITY
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November 30, 2010

The 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:

Prompted by the Government's filed opposition, I write in further support of the pending motions to apply the terms of the Fair Sentencing Act of 2010 (hereafter "FSA") during the upcoming sentencing of cases in which the offense behavior took place before the FSA became law. I write to highlight some undisputed legal realities that in part account for my belief that the only sensible reading of the FSA and congressional intent calls for applying the amended statutory penalty provisions of 21 U.S.C. § 841 in a case of this nature.

To begin, it is undisputed that all defendants still to be sentenced for any major drug offense involving large quantities of crack, including those who committed their major crack offenses before the enactment of the FSA, will get the benefit of the new crack/powder 18:1 quantity ratio that is reflected in the newly amended and now operative federal sentencing guidelines. This is so — and only so — because Congress in the FSA expressly ordered the U.S. Sentencing Commission to "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" and to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." Thus, it is also undisputed that if the defendants in this case were more serious offenders who had committed crimes involving larger quantities of crack (and whose guideline sentences would, therefore, be above the applicable mandatory minimums), they would benefit from the FSA's new reduced crack/powder sentencing ratio which Congress enacted into law and which Congress expressly directed the Sentencing Commission to immediately incorporate into the guidelines "as soon as practical" to serve to the FSA's stated goal in its preamble to "restore fairness to Federal cocaine sentencing."

In addition, it is undisputed that a chief reason Congress decided to reduce the crack/powder quantity ratio through the FSA — i.e., one key aspect of the Act's design to "restore fairness" to federal drug sentencing — was to ensure that minor crack offenders would

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not be punished more severely than the major cocaine dealers who should be the chief target of federal prosecutions. One of the chief architects of the FSA, Senator Jeff Sessions of Alabama, emphasized this point upon passage of the Act by the House of Representatives:

> The long-awaited passage of these bipartisan reforms [in the FSA] brings needed fairness to our sentencing laws while empowering law enforcement with the tools they need to target the worst offenders...
>
> Under this legislation, serious drug offenders are subject to more serious penalties, including tough new sentencing enhancements — helping to disrupt the drug trafficking operations that claim so many innocent victims. At the same time, the disparity between crack and powder cocaine sentencing has now been significantly reduced to better and more strategically target federal resources at those who distribute wholesale quantities of narcotics.

News Release, Office of Senator Jeff Session, *Congress Approves Landmark Drug Reform Compromise from Sessions and Judiciary Colleagues* (July 28, 2010), *at* http://sessions.senate.gov/public/index.cfm?FuseAction=PressShop.NewsReleases&ContentRecord_id=1a65bdfb-e4b4-53d1-f86c-e845c43ff542

Yet, while it is undisputed that the sentence reductions Congress adopted through the FSA are now benefitting not-yet-sentenced major crack offenders, and while it is undisputed that the FSA was designed to restore "fairness"in part by making sure "serious drug offenders are subject to the more serious penalties," the Government here contends that minor crack offenders — and only minor crack offender — must be denied the benefits of the FSA's new crack/powder 18:1 quantity ratio. This reading of the FSA is not only inconsistent with the language of the FSA and the context of the statute as a whole — which expressly seeks to greater sentencing "fairness" and "consistency" — it is also patently unsound and illogical. Indeed, because it is hard to envision a rational reason, let alone a good reason, to justify denying application of the FSA only in the sentencing of minor offenders, the Government's proposed construction of the FSA itself raises serious constitutional questions under any equal protection standard of constitutional scrutiny. *Cf. United States v. Douglas*, No. 09-4955 (2d Cir. Nov. 23, 2010) (rejected a proposed interpretation of a federal criminal statute because it "would be ignoring Congress' objective" in the statute and "would be an illogical result').

Critically, the Government seeks to obscure the important and sensible distinction between applying the FSA retrospectively to defendants *who had been already sentenced* as of its enactment date, and applying the FSA prospectively to defendants *not yet sentenced* as of its enactment date. It is reasonable and sensible to suggest that Congress concluded that offenders who were sentenced before the FSA became law should not be able to demand a return to court for a complete "redo" — with all the added expense and uncertainty of the resentencing process — based on the FSA's new sentencing provisions and its ordered revision of the federal sentencing guidelines. But it is neither reasonable nor sensible to suggest that Congress concluded that only minor crack offenders who have not yet been sentenced should be subject to harsher (now-amended) sentencing laws while all major crack offenders who have not yet been sentenced should get the benefits of the amended sentencing provisions of the FSA.

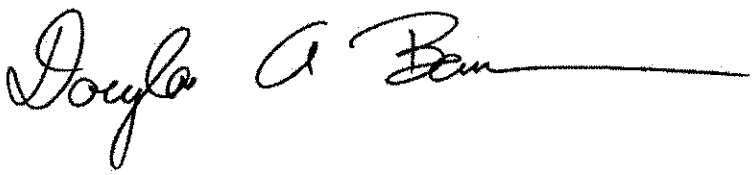
Stated slightly differently, it is reasonable to assume and conclude that concerns about finality and judicial economy may have kept Congress from wanting to enable *already sentenced* defendants from reopening and relitigating the sentences they received before the FSA became law. But it is not sensible to assume or conclude that concerns about finality and judicial economy may have kept Congress from wanting to enable *not-yet-sentenced* defendants from being initially sentenced pursuant to the FSA's new sentencing structure. In fact, judicial economy is better served by making the terms of the FSA's sentencing structure applicable to all not-yet-sentenced defendants: a simple, straight-forward rule applying the FSA to pending cases would prevent sentencing judges in many cases from having now to figure out (1) whether a defendant's offense conduct took place before or after the FSA enactment, and/or (2) whether and how a defendant's sentence should be governed by the new crack sentencing guidelines or the old crack sentencing statute. Indeed, though it is easy to understand how Congress's interest in sentencing fairness, consistency and judicial economy supports application of the FSA to all not-yet-sentenced defendants, it is hard to understand or even to identify any valid congressional interest that would be served by continuing to apply the older (and now amended) crack sentencing provisions to only not-yet-sentenced minor crack offenders.

As detailed in my initial letter, if there is any uncertainty as to whether of the FSA was intended to be applied to pending cases as soon as possible, this interpretive ambiguity should be resolved in favor of the defendant in accord with the rule of lenity. As the Second Circuit has made clear, the rule of lenity resolves statutory interpretation disputes in "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 above, I firmly believe that the "language and structure, legislative history, and motivating policies" of the FSA make clear that Congress wanted its revised sentencing provisions to apply to all pending cases as soon as possible. But, even if this Court is moved by the Government's claims that congressional intent here is unclear, the rule of lenity (as well as the constitutional doubt canon of statutory construction) call for the FSA to be so applied.

I thank the Court once again for considering my submissions.

Sincerely,



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