

Nos. 11-5683 and 11-5721

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**In the Supreme Court of the United States**

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EDWARD DORSEY, SR., PETITIONER

*v.*

UNITED STATES OF AMERICA

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COREY A. HILL, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON WRITS OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT*

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**BRIEF FOR THE UNITED STATES  
SUPPORTING PETITIONERS**

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DONALD B. VERRILLI, JR.  
*Solicitor General  
Counsel of Record*

LANNY A. BREUER  
*Assistant Attorney General*

MICHAEL R. DREEBEN  
*Deputy Solicitor General*

MARK R. FREEMAN  
*Assistant to the Solicitor  
General*

JOSHUA S. JOHNSON  
*Attorney  
Department of Justice  
Washington, D.C. 20530-0001  
SupremeCtBriefs@usdoj.gov  
(202) 514-2217*

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**QUESTION PRESENTED**

Whether the Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, applies in all initial sentencing proceedings after the effective date of the Act.

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**In the Supreme Court of the United States**

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No. 11-5683

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*v.*

UNITED STATES OF AMERICA

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COREY A. HILL, PETITIONER

*v.*

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*ON WRITS OF CERTIORARI  
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**BRIEF FOR THE UNITED STATES  
SUPPORTING PETITIONERS**

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**OPINIONS BELOW**

The opinion of the court of appeals in No. 11-5683 (Dorsey Pet. App. A1-A4) is reported at 635 F.3d 336. The order of the court of appeals denying rehearing (Pet. App. B1-B5) is reported at 646 F.3d 429.

The opinion of the court of appeals in No. 11-5721 (Hill Pet. App. A1-A2) is not published in the Federal Reporter but is available at 417 Fed. Appx. 560.

### JURISDICTION

The judgment of the court of appeals in No. 11-5683 was entered on March 11, 2011. A petition for rehearing was denied on May 25, 2011. The petition for a writ of certiorari was filed on August 1, 2011, and was granted on November 28, 2011.

The judgment of the court of appeals in No. 11-5721 was entered on April 7, 2011. The petition for a writ of certiorari was filed on July 1, 2011, and was granted on November 28, 2011. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

### STATUTORY PROVISIONS INVOLVED

The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372, as well as pertinent provisions of 21 U.S.C. 841; Section 21(a) of the Sentencing Act of 1987, Pub. L. No. 100-182, 101 Stat. 1266 (28 U.S.C. 994 note); and the Sentencing Guidelines, are set out in the appendix to this brief. App., *infra*, 5a-50a.

### STATEMENT

Following a guilty plea in the United States District Court for the Central District of Illinois, petitioner Dorsey (No. 11-5683) was convicted on one count of possessing with intent to distribute 5.5 grams of crack cocaine, in violation of 21 U.S.C. 841(a)(1). Petitioner Hill (No. 11-5721) was convicted after a jury trial in the United States District Court for the Northern District of Illinois on one count of distributing 50 or more grams of crack cocaine, also in violation of 21 U.S.C. 841(a)(1). On August 3, 2010, after both petitioners had been convicted but before either had been sentenced, the President signed into law the Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, which

amended, *inter alia*, the drug quantities that trigger mandatory minimum penalties for trafficking in crack cocaine. In each case, the district court refused to sentence petitioner under the FSA and imposed a mandatory minimum sentence under pre-FSA law. The court of appeals affirmed.

#### I. STATUTORY BACKGROUND

Powder cocaine (cocaine hydrochloride) and crack cocaine (a form of cocaine base) are “two forms of the same drug”: they contain the same active ingredient and produce the same physiological and psychotropic effects. *DePierre v. United States*, 131 S. Ct. 2225, 2228 (2011); *Kimbrough v. United States*, 552 U.S. 85, 94 (2007). Nonetheless, as this Court recently discussed, Congress required more than 20 years ago that offenses involving “cocaine base” be “handled very differently for sentencing purposes,” resulting in sentences for crack cocaine offenders “three to six times longer than those for powder offenses involving equal amounts of drugs.”<sup>1</sup> 552 U.S. at 94. After two decades of experience produced “almost universal criticism” of that sentencing disparity, U.S. Sentencing Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy 2* (May 2007) (2007 Report), Congress enacted the FSA in 2010 “[t]o restore fairness to Federal cocaine sentencing.” FSA Pmbl., 124 Stat. 2372.

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<sup>1</sup> The term “cocaine base” in Section 841(b)(1) is not limited to crack cocaine, but encompasses all varieties of “cocaine in its chemically basic form.” *DePierre*, 131 S. Ct. at 2237.

### A. Adoption Of The 100-to-1 Ratio

In the Anti-Drug Abuse Act of 1986 (1986 Act), Pub. L. No. 99-570, 100 Stat. 3207, Congress created the basic tiered scheme of five- and ten-year mandatory minimum penalties for drug-trafficking offenses that remains in effect today. *Kimbrough*, 552 U.S. at 95. Under that scheme, both the maximum authorized punishment and the mandatory minimum term of incarceration increases with the drug quantity attributable to an offender. The threshold quantities required to trigger the mandatory minimum penalties vary by the drug. See generally 21 U.S.C. 841(b)(1)(A)-(C) (2006 & Supp. IV 2010).

The 1986 Act was adopted in a time of “great public concern” over the proliferation of crack cocaine, which was then a relatively new drug. *Kimbrough*, 552 U.S. at 95. “Drug abuse in general, and crack cocaine in particular, had become in public opinion and in members’ minds a problem of overwhelming dimensions.” *Ibid.* (quoting U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy* 121 (Feb. 1995) (1995 Report)). Consequently, in setting the drug quantities that triggered the 1986 Act’s mandatory minimum prison sentences, Congress adopted a 100-to-1 ratio that treated every gram of crack cocaine as equivalent to 100 grams of powder cocaine: for trafficking in 5 grams of crack cocaine or 500 grams of powder cocaine, the 1986 Act required a minimum sentence of five years in prison, see 21 U.S.C. 841(b)(1)(B) (2006); for offenses involving 50 grams of crack cocaine or 5 kilograms of powder cocaine, it imposed a mandatory minimum penalty of ten years, see 21 U.S.C. 841(b)(1)(A) (2006).

The United States Sentencing Commission (Sentencing Commission or Commission), which in 1986 was in the process formulating the first version of the Sentencing Guidelines, responded by incorporating the 100-to-1 ratio into the drug quantity table in Section 2D1.1(c) of the Guidelines. Using the statutory threshold quantities for five- and ten-year mandatory minimum sentences as “reference points,” the Commission extrapolated upward and downward to derive proportional sentences for other drug quantities. 1995 Report 126; see *Kimbrough*, 552 U.S. at 96-97. Consequently, “[t]he 100-to-1 quantity ratio was maintained throughout the offense levels.” 1995 Report 126.

In 1988, consistent with the 100-to-1 ratio, Congress added a mandatory term of life in prison for offenders who, having two prior felony drug convictions, distributed at least 50 grams of cocaine base or 5000 grams of powder cocaine. See Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6452(a)(2), 102 Stat. 4371. In the same Act, Congress adopted a mandatory minimum penalty of five years of imprisonment for the simple possession of crack cocaine—the only federal mandatory minimum penalty for a first offense of simple possession of a controlled substance. § 6371, 102 Stat. 4370 (21 U.S.C. 844(a) (2006)); see 1995 Report 123-125.

**B. The Sentencing Commission’s Escalating Criticism Of The 100-to-1 Ratio**

The adoption of a 100-to-1 ratio in the treatment under federal law of “two easily convertible forms of the same drug” produced a variety of “extreme anomalies in sentencing.” 1995 Report 197. Because of that ratio, for example, a major trafficker in powder cocaine could receive a shorter prison sentence than the street-level

dealers who bought from that trafficker and converted the powder cocaine to crack. See *Kimbrough*, 552 U.S. at 95. Indeed, under the 100-to-1 ratio, the amount of powder cocaine required to trigger a five-year mandatory minimum prison sentence for a single powder offender—500 grams—could be converted into enough crack cocaine to trigger the same five-year mandatory minimum sentence for 89 crack offenders.<sup>2</sup> 1995 Report 160. The mandatory minimum penalty for simple possession of crack cocaine generated similarly striking anomalies. A first-time conviction for the simple possession of five grams of crack cocaine, for example, triggered a mandatory minimum penalty of five years in prison and a maximum of 20 years. See 21 U.S.C. 844(a) (2006). By contrast, the *maximum* penalty for the first-time simple possession of *any* quantity of powder cocaine was one year in prison, and many such offenders avoided incarceration altogether. *Ibid.*; see 1995 Report 151. It soon became apparent, moreover, that the impact of these sentencing disparities fell disproportionately on racial minorities. See *id.* at 192 (finding that minorities constitute “the vast majority of those persons most affected by such an exaggerated ratio”).

These and other sentencing anomalies created by the 100-to-1 ratio generated a chorus of criticism. See 1995 Report 1. In 1994, Congress responded by directing the Sentencing Commission to prepare a report describing “the differences in penalty levels that apply to different forms of cocaine” and “any recommendations that the Commission may have for retention or modification of such differences in penalty levels.” Violent Crime Con-

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<sup>2</sup> One gram of pure powder cocaine converts to approximately 0.89 grams of crack cocaine. 1995 Report 14.

trol and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 280006, 108 Stat. 2097. The Commission eventually issued four separate reports, each of which concluded that the 100-to-1 ratio could not be justified and that congressional action was required.

1. In February 1995, in response to the 1994 congressional directive, the Sentencing Commission published a comprehensive report on federal sentencing policy for cocaine offenses. See 1995 Report. After reviewing the available empirical data in light of the policy concerns that originally animated Congress's adoption of heightened penalties for crack cocaine, see *id.* at 146-160, 180-195, the Commission "strongly recommend[ed] against a 100-to-1 quantity ratio." *Id.* at 198. The Commission explained that its "central basis" for rejecting the 100-to-1 ratio was the creation of "extreme anomalies in sentencing produced by such a high differential in penalties between two easily convertible forms of the same drug." *Id.* at 197. The Commission similarly found that the mandatory minimum penalty for simple possession of crack cocaine had "created sentencing anomalies and unwarranted disparities in the treatment of essentially similar defendants, results that conflict with the fundamental purposes of the Sentencing Reform Act [of 1984, Pub. L. No. 98-473, Tit. II, Ch. II, 98 Stat. 1987]." 1995 Report 198.

Shortly thereafter, the Sentencing Commission proposed an amendment to the Guidelines that would have implemented a 1-to-1 quantity ratio for crack and powder cocaine offenses. See 60 Fed. Reg. 25,075-25,077 (1995). Congress disapproved the amendment, expressing its sense that "the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of

powder cocaine.” Act of Oct. 30, 1995, Pub. L. No. 104-38, §§ 1 & 2(a)(1)(A), 109 Stat. 334. But at the same time, Congress directed the Sentencing Commission to “propose [a] revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in [18 U.S.C. 3553(a)].” § 2(a)(2), 109 Stat. 335. In the accompanying House committee report, legislators acknowledged that “the current 100-to-1 quantity ratio may not be the appropriate ratio.” H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995). The committee expressed concern, however, that amending the Sentencing Guidelines for crack cocaine offenses without changing the corresponding mandatory minimum penalties would “create gross sentencing disparities,” because “[s]entences just below the statutory minimum would be drastically reduced, but mandatory minimums would remain much higher.” *Ibid.*

2. The Sentencing Commission responded in 1997 with a report in which it “firmly and unanimously” reiterated its conclusion that, “although research and public policy may support somewhat higher penalties for crack than for powder cocaine, a 100-to-1 quantity ratio cannot be justified.” U.S. Sentencing Comm’n, *Special Report to the Congress: Cocaine and Federal Sentencing Policy 2* (Apr. 1997) (1997 Report). The Commission particularly urged that the five-gram quantity trigger for a five-year minimum sentence for crack cocaine offenders was “too low,” *id.* at 7, and emphasized that the racially disparate impact of the 100-to-1 penalty resulted in a widespread “perception of unfairness and inconsistency” in federal sentencing, *id.* at 8. The Commission accord-

ingly recommended that Congress adopt a ratio of approximately 5-to-1. *Id.* at 9.

3. In 2002, after Congress failed to act, the Sentencing Commission issued an updated report in which it “again unanimously and firmly conclude[d]” that the 100-to-1 ratio should be “decreas[ed] substantially.” U.S. Sentencing Comm’n, *Report to the Congress: Cocaine and Federal Sentencing Policy* viii (May 2002) (2002 Report). The Commission—which by 2002 no longer included any of the commissioners who had authored the earlier reports, see *id.* at 1 n.4—explained that “[t]he 100-to-1 drug quantity ratio was established based on a number of beliefs” about the dangers of crack cocaine “that more recent research and data no longer support.” *Id.* at 91. As a result, the Commission concluded, “the offense seriousness of most crack cocaine offenders is overstated,” and “a differential this extreme is unjust.” *Id.* at 100. Furthermore, “[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000.” *Id.* at 102. Thus, the Commission concluded, to the extent that the 100-to-1 ratio “results in unduly severe penalties for most crack cocaine offenders, the effects of that severity fall primarily upon black offenders.” *Id.* at 103.

The Commission accordingly proposed “a three-pronged approach for revising federal cocaine sentencing policy”: (i) increase the threshold quantities of crack cocaine required to trigger statutory penalties in order to achieve at most a 20-to-1 ratio; (ii) in exchange, adopt new sentencing enhancements targeted at the most serious drug offenders; and (iii) maintain the same trigger quantities for powder cocaine offenders, understanding that the new sentencing enhancements would

in practical effect increase the penalty for many powder traffickers as well. 2002 Report viii. The Commission also “unanimously reiterate[d]” its prior finding that the five-year mandatory minimum penalty for simple possession of crack cocaine “is unjustified and should be repealed.” *Id.* at 109.

4. Finally, in 2007, the Commission determined that “the problems associated with the 100-to-1 drug quantity ratio” were “so urgent and compelling” that the Commission would “partially address some of the problems” on its own. 2007 Report 9. The Commission announced that it would amend the drug quantity table in Section 2D1.1(c) of the Guidelines to reduce the base offense level for crack cocaine offenses by two levels. See 72 Fed. Reg. 28,571-28,573 (2007). This had the effect of providing Guidelines ranges that included (rather than exceeded) the statutory minimum penalties, but still continued to “fit within the existing statutory penalty scheme.” 72 Fed. Reg. at 28,573. The Commission emphasized that it viewed this change “only as an interim solution to some of the problems associated with the 100-to-1 drug quantity ratio” and that “[a]ny comprehensive solution” would require legislative action. *Ibid.*

The Commission then issued a fourth report in which it “unanimously and strongly urge[d] Congress to act promptly” to revise the 100-to-1 ratio and repeal the mandatory minimum penalty for simple possession. 2007 Report 8. The Commission reaffirmed the “core findings” from its previous reports, *id.* at 7, including (1) that the 100-to-1 ratio “overstate[s] the relative harmfulness of crack cocaine”; (2) that the mandatory minimum penalties for crack cocaine offenses “sweep too broadly and apply most often to lower level offenders”;

(3) that the penalty scheme “fail[s] to provide adequate proportionality”; and (4) that “[t]he current severity of crack cocaine penalties mostly impacts minorities.” *Id.* at 8. “Based on these findings,” the Commission reiterated its conclusion that “the 100-to-1 drug quantity ratio significantly undermines the various congressional objectives set forth in the Sentencing Reform Act.” *Ibid.*

The Commission observed that this Court’s decision in *United States v. Booker*, 543 U.S. 220 (2005), had engendered significant litigation over “whether, and how, sentencing courts should consider the 100-to-1 drug quantity ratio,” which was by then the target of “almost universal criticism.” 2007 Report 1, 2. Cf. *Spears v. United States*, 555 U.S. 261, 265-266 (2009) (per curiam) (reaffirming that, after *Booker* and *Kimbrough*, “district courts are entitled to reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines”). The Commission urged that, rather than permit inconsistent, case-by-case variations from the statutory ratio, Congress should enact “a uniform remedy to the problems created by the 100-to-1 drug quantity ratio” that would “better promote the goals of the Sentencing Reform Act, including avoiding unwarranted sentence disparities among defendants with similar criminal records.” 2007 Report 1-2.

Finally, the Commission urged Congress to include in any legislation implementing its recommendations a grant of “emergency amendment authority” to permit the Commission to “incorporate the statutory changes in the federal sentencing guidelines.” 2007 Report 9. Such emergency authority, the Commission explained, “would enable the Commission to minimize the lag between any statutory and guideline modifications for cocaine offenders.” *Ibid.*

### C. The Fair Sentencing Act

The President signed the Fair Sentencing Act into law on August 3, 2010. Entitled an act “[t]o restore fairness to Federal cocaine sentencing,” Pmbl., 124 Stat. 2372, the FSA essentially implements the Sentencing Commission’s 2002 proposal for cocaine sentencing reform. See 2002 Report 104; accord 2007 Report 8 & n.26. The FSA passed the Senate by unanimous consent and the House by voice vote.

Section 2 of the Act, entitled “Cocaine Sentencing Disparity Reduction,” increases the threshold quantities of crack cocaine required to trigger five- and ten-year mandatory minimum penalties from 5 and 50 grams to 28 and 280 grams, respectively, leaving the corresponding quantities of powder cocaine unchanged at 500 and 5000 grams. 124 Stat. 2372. The FSA thus replaces the 100-to-1 ratio with a ratio of approximately 18-to-1.<sup>3</sup>

Section 3 of the FSA repeals the mandatory minimum sentence for simple possession of crack cocaine. 124 Stat. 2372.

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<sup>3</sup> Congress’s selection in the FSA of 28 grams as the trigger for the five-year mandatory minimum penalty appears to reflect evidence that wholesale crack distributors typically trade in quantities of one ounce (*i.e.*, approximately 28 grams) or more. See 2007 Report 18, 84 n.124; see also 156 Cong. Rec. H6202 (daily ed. July 28, 2010) (Rep. Lungren) (“According to narcotics officers I have spoken with, you want to reach the wholesale and mid-level traffickers who often trafficked in 1-ounce quantities. That is why [the FSA] would raise the amount of crack cocaine necessary to trigger a mandatory 5-year sentence from 5 grams to 28 grams, which is close to the 1 ounce.”).

Sections 4 through 6 of the FSA implement the Commission's recommendation to adopt targeted increases in penalties for more culpable offenders. See 2002 Report 104. The Act thus substantially increases the maximum fines permitted for drug-trafficking offenses, § 4, 124 Stat. 2372-2373, and directs the Sentencing Commission to review and amend the Guidelines to ensure an additional enhancement is provided for certain conduct during drug-trafficking crimes, such as the use of violence or the distribution of drugs to unusually vulnerable persons, §§ 5-6, 124 Stat. 2373-2374. Section 7 of the FSA directs the Commission to cap or reduce the base offense level for defendants who receive a minimal role adjustment. 124 Stat. 2374. Sections 9 and 10 require certain reports to Congress, including a report within five years of the Act's passage on the "impact" of its changes. 124 Stat. 2374-2375.

Finally, Congress granted "emergency authority" to the Sentencing Commission to implement the FSA immediately and "conform[]" the Guidelines to "applicable law." § 8, 124 Stat. 2374. The Act thus not only permits the Commission to dispense with the 180-day period for congressional review of Guidelines amendments normally required under 28 U.S.C. 994(p), but specifically directs the Commission to act "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act." § 8, 124 Stat. 2374.

#### **D. The Emergency Guidelines Amendments**

The Sentencing Commission complied with Congress's directive in Section 8 of the FSA by issuing emergency Guidelines amendments that became effective on November 1, 2010. 75 Fed. Reg. 66,188 (2010). Among other changes, the Commission amended the

relevant crack cocaine quantities in the Drug Quantity Table in Section 2D1.1(c), which specifies the base offense level for trafficking offenses involving particular amounts of drugs, to reflect the FSA's 18-to-1 ratio. See *id.* at 66,189, 66,191. Under the Sentencing Reform Act, these amended Guidelines became immediately effective in all initial sentencing proceedings conducted on and after November 1, 2010, regardless of the date of the underlying offense. See 18 U.S.C. 3553(a)(4)(A)(ii).<sup>4</sup>

## II. THE PRESENT CONTROVERSIES

### A. *Dorsey* (No. 11-5683)

1. In August 2008, petitioner Dorsey was arrested after selling crack cocaine to a government informant at a motel in Kankakee, Illinois. Dorsey J.A. 48-49. A federal grand jury in the Central District of Illinois indicted petitioner on one count of possessing with intent to distribute five grams or more of cocaine base, in violation of 21 U.S.C. 841(a)(1). Dorsey J.A. 9. The government subsequently filed a notice under 21 U.S.C. 851(a)(1) stating that petitioner was subject to enhanced statutory penalties because he had previously been convicted of two felony drug offenses. Dorsey J.A. 11-12.

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<sup>4</sup> The Commission later submitted to Congress a permanent version of the emergency FSA Guidelines amendments. See 76 Fed. Reg. 24,960 (2011). Congress did not intervene, and the permanent amendments became effective on November 1, 2011. See *ibid.* The Commission also determined, pursuant to its authority under 28 U.S.C. 994(u), that the amended Guidelines would be made retroactively applicable to offenders already serving terms of imprisonment for crack cocaine offenses. 76 Fed. Reg. 41,333-41,334 (2011); see 18 U.S.C. 3582(c)(2); Sentencing Guidelines § 1B1.10.

In April 2010, petitioner waived his right to a jury trial and stipulated that he had knowingly possessed crack cocaine with the intent to distribute. See 09-cr-20003 Docket entry Nos. 14, 16 (C.D. Ill. Apr. 9, 2010). The district court scheduled a bench trial to determine the amount of crack cocaine petitioner had possessed. On June 3, 2010, the day of the scheduled trial, petitioner elected to enter an open plea of guilty. See Dorsey J.A. 21. During his plea colloquy, petitioner admitted to possessing 5.5 grams of crack cocaine at the time of his arrest. *Id.* at 29, 46-48. Petitioner also acknowledged that, given his prior felony drug convictions, he faced a mandatory minimum penalty of ten years in prison under the law then in effect. *Id.* at 41-43; see 21 U.S.C. 841(b)(1)(B) (2006).

2. At his sentencing hearing on September 10, 2010, petitioner urged the district court to apply the revised penalty scheme provided by the FSA, which had become effective one month earlier. See Dorsey J.A. 54-55, 69, 70. Because the Sentencing Commission had not yet issued its emergency Guidelines amendments, it was undisputed that the court would apply the pre-FSA Guidelines. See 18 U.S.C. 3553(a)(4)(A)(ii). But under the FSA, petitioner would face no mandatory minimum penalty because he possessed less than 28 grams of crack cocaine. See 21 U.S.C. 841(b)(1)(B) (Supp. IV 2010). Consequently, petitioner would be free to argue for a sentence substantially lower than what the pre-FSA Guidelines would otherwise advise. See *Spears*, 555 U.S. at 265-266.

The district court rejected petitioner's request and sentenced him under the version of 21 U.S.C. 841(b) in effect at the time of his offense. See Dorsey J.A. 70. Because petitioner's advisory Guidelines range was be-

low the pre-FSA mandatory minimum penalty of ten years, see *id.* at 67-68, the district court sentenced petitioner to serve 120 months in prison, *id.* at 80, 85.

3. The court of appeals affirmed. Dorsey Pet. App. A1-A4. The court consolidated petitioner's appeal with that of another crack cocaine offender, Anthony Fisher, who had been both convicted and sentenced before the enactment of the FSA. The court of appeals concluded that Fisher's effort to invoke the FSA was foreclosed by the court's earlier decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), cert. denied, 131 S. Ct. 2121 (2011), which had held that the general federal saving statute, 1 U.S.C. 109, prevents offenders who were sentenced before August 3, 2010, from challenging their sentences based on the amendments made by the FSA. Dorsey Pet. App. A3; see *Bell*, 624 F.3d at 814-815. Section 109 provides that the repeal or amendment of a statute does not extinguish any penalty or liability under the repealed law "unless the repealing Act shall so expressly provide." 1 U.S.C. 109.

The court of appeals then rejected petitioner's argument that, notwithstanding Section 109, the FSA's text and history "necessar[ily] impl[y] that the FSA must be applied \* \* \* to sentences imposed *after*" the date the FSA became effective, regardless of when the offense occurred. Dorsey Pet. App. A3 (emphasis added). Concluding that Congress failed to "drop[]" any "hint" that it "wanted the FSA \* \* \* to apply to not-yet-sentenced defendants convicted on pre-FSA conduct," the court of appeals declared that "the FSA does not apply retroactively" and that "the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." *Id.* at A4.

**B. Hill (No. 11-5721)**

1. In March 2007, petitioner Hill sold approximately 53.3 grams of crack cocaine to a government informant. Hill Presentence Investigation Report (PSR) 4. In June 2008, he was arrested, and a federal grand jury in the Northern District of Illinois returned a one-count indictment charging him with distributing 50 grams or more of cocaine base in violation of 21 U.S.C. 841(a)(1). PSR 3; see Hill J.A. 6. After a jury trial in April 2009, petitioner was convicted. *Id.* at 83.

2. At petitioner's sentencing hearing on December 2, 2010, the district court stated that, in the absence of an applicable mandatory minimum, the court would have sentenced petitioner to serve 51 months in prison. Hill J.A. 69. The court recognized, however, that the amount of crack cocaine involved in petitioner's offense (53.3 grams) subjected him to a mandatory minimum sentence. *Ibid.* Under the law in effect at the time of petitioner's offense, the mandatory minimum sentence for distributing 50 or more grams of crack cocaine was ten years of imprisonment. See 21 U.S.C. 841(b)(1)(A) (2006). After the FSA, however, the mandatory minimum penalty for the same quantity is five years in prison. See 21 U.S.C. 841(b)(1)(B) (Supp. IV 2010).

Petitioner argued that Congress intended the FSA to apply in all sentencing proceedings after the effective date of the Act. Hill J.A. 64-68. The district court indicated that it might have agreed with petitioner and imposed the post-FSA mandatory minimum sentence of 60 months, but it believed it was precluded under Seventh Circuit precedent from applying the FSA to pre-enactment offenders. *Id.* at 63, 68-69. The court therefore sentenced petitioner to serve 120 months in

prison, the mandatory minimum penalty under pre-FSA law. *Id.* at 78, 85.

3. The court of appeals affirmed. Hill Pet. App. A1-A2. In an unpublished order, the court concluded that petitioner’s sole argument on appeal—that the FSA “should apply to any defendant sentenced after its enactment, even if the underlying crime was committed before”—was foreclosed by the court’s decision in petitioner Dorsey’s case. *Id.* at A2.

### C. Subsequent Proceedings

1. Petitioner Dorsey sought rehearing en banc, which the court of appeals denied. Dorsey J.A. 103-115. Judge Williams, joined by Judge Hamilton, dissented. She concluded that 1 U.S.C. 109 was inapplicable because the “fair implication” of the FSA, as revealed in Section 8 of the Act, was that Congress intended “to have the FSA apply to those individuals yet to be sentenced.” Dorsey J.A. 107-108, 111. Judge Williams explained that Congress was aware that the new emergency Guidelines would apply immediately in pending cases, and she reasoned that Congress’s desire to ensure “‘consistency’ between the guidelines and the statute \* \* \* signals an intent to apply the FSA to pending cases just as the guidelines would be.” *Id.* at 108.

2. At the time of the decisions below, the position of the United States was that 1 U.S.C. 109 required that pre-enactment offenders, such as petitioners, remain subject to the pre-FSA mandatory minimum penalty scheme because Section 109 “requires Congress to ‘expressly provide’ for retroactive application of an ameliorative penalty provision in order to avoid the default rule” (emphasis omitted) and “[t]he FSA con-

tains no such provision.” 11-5683 Gov’t C.A. Br. 14. In July 2011, however, the United States revisited its position in light of differing judicial decisions on the application of the FSA to pre-enactment offenders in post-FSA sentencings. Compare, *e.g.*, Dorsey Pet. App. A2-A4 (FSA inapplicable) with, *e.g.*, *United States v. Douglas*, 644 F.3d 39, 42-44 (1st Cir. 2011) (FSA mandatory minimum penalties apply in all initial sentencings following the November 1, 2010 emergency Guidelines amendments).<sup>5</sup> In a memorandum issued to all federal prosecutors on July 15, 2011, the Attorney General concluded that, while the FSA does not apply to sentences already imposed, the Act’s “new mandatory minimum sentencing provisions [apply] to all sentencings that occur on or after August 3, 2010, regardless of when the offense conduct took place.” App., *infra*, 3a. Federal prosecutors advised the courts, including the court of appeals below, of the revised view of the United States.

3. Following the Attorney General’s decision, the Seventh Circuit considered whether to grant rehearing en banc to overrule the decision below in No. 11-5683. The court divided evenly and thus denied rehearing en banc. *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

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<sup>5</sup> The Third Circuit later held that the FSA applies in all post-FSA sentencings, *United States v. Dixon*, 648 F.3d 195, 203 (2011), as did a panel of the Eleventh Circuit in *United States v. Rojas*, 645 F.3d 1234, 1236, vacated on the grant of rehearing en banc, 659 F.3d 1055 (2011). The Fifth and Eighth Circuits, in contrast, held that the FSA’s statutory penalties apply only to post-FSA conduct. *United States v. Tickles*, 661 F.3d 212, 215 (5th Cir. 2011); *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011).

a. Chief Judge Easterbrook, joined by four members of the court, voted to deny rehearing. He recognized that Congress can override Section 109, and apply a new ameliorative law to pre-enactment conduct, without an “express” provision to that effect. *Holcomb*, 657 F.3d at 448. He believed, however, that a law cannot be “partial[ly] retroactiv[e]” under Section 109 and that, therefore, to say that the FSA is “not fully retroactive is to say that Congress did *not* supersede § 109.” *Ibid.* He also concluded that Congress’s directive to the Commission in Section 8 of the FSA, “which tells the Commission to get a move on in revising its Guidelines, does not imply anything about when the new minimum and maximum sentences go into force.” *Id.* at 450.

b. Judge Williams, also joined by four members of the court, dissented. She explained that “[o]nly one reasonable implication can be drawn from section 8 of the Act,” which requires the Commission to exercise emergency authority to issue “conforming amendments” to the Guidelines as necessary “to achieve consistency with other guideline provisions and applicable law.” *Holcomb*, 657 F.3d at 456. Because Congress was aware that sentencing courts use the Guidelines in effect on the day of sentencing, 18 U.S.C. 3553(a)(4)(A)(ii), she reasoned, Congress must have intended new Guidelines based on an 18-to-1 ratio to “take effect right away, even in sentencings where the offender’s conduct pre-dated the Act.” 657 F.3d at 456. It would make no sense, Judge Williams explained, for such defendants nevertheless to be “subject to pre-FSA 100:1 mandatory minimums.” *Ibid.* That result, she argued, does not achieve the “consistency” between the Guidelines and “applicable law” that Congress required; “[i]t achieves the opposite.” *Id.* at 457. Accordingly, “[t]he necessary

implication of the [FSA] is that its mandatory minimums apply in all sentencings after its passage.” *Id.* at 459-460.

c. Judge Posner, in addition to joining Judge Williams’s opinion, filed his own dissent from the denial of rehearing en banc. He emphasized that “unless the Act’s revised mandatory minimum sentences are also applicable” to offenders sentenced under the amended Guidelines, those offenders “will receive sentences in excess of the sentencing guidelines that Congress \* \* \* intended would apply to such defendants.” *Holcomb*, 657 F.3d at 462. That result would thwart Congress’s direction to “the Sentencing Commission to make haste to conform [the Guidelines] to the new, more lenient statutory minimums.” *Ibid.* Judge Posner illustrated these “perverse results” with tables demonstrating that, for many defendants, the pre-FSA mandatory minimums would render the new Guidelines of no consequence—a “senseless” outcome. *Id.* at 461 (citation omitted).

#### SUMMARY OF ARGUMENT

Congress enacted the Fair Sentencing Act to remove from federal sentencing law the disproportionate and racially disparate sentencing effects of the 100-to-1 ratio. It therefore directed the Sentencing Commission to conform the Guidelines to the new “applicable law” in the amended statutory provisions “as soon as practicable.” FSA § 8, 124 Stat. 2374. The text and structure of the FSA, together with its history and purposes, make clear that, notwithstanding the general federal saving statute, 1 U.S.C. 109, Congress intended the FSA’s revised mandatory minimums to be effective immediately in sentencing proceedings following its

enactment. Petitioners, who had not yet been sentenced when the FSA became law, were entitled to be sentenced according to its terms.

A. Congress expressed its intent to make its repeal of the 100-to-1 ratio immediately effective by directing the Sentencing Commission to issue “emergency” “conforming amendments” “as soon as practicable” to “achieve consistency” between the Sentencing Guidelines and “applicable law.” Congress understood that, under the framework for federal sentencing determinations established by the Sentencing Reform Act, courts must impose a sentence in light of the Sentencing Guidelines that “are in effect on the date the defendant is sentenced,” irrespective of the date of the underlying conduct. 18 U.S.C. 3553(a)(4)(A)(ii). By directing the Commission to implement the FSA “as soon as practicable” by “conforming” the Guidelines to “applicable law,” Congress clearly expressed its intent that the FSA’s revised penalty scheme should be given effect in all initial sentencing proceedings after the date of its enactment. Congress understood that to repeal the 100-to-1 ratio without amending both the statutory mandatory minimum penalties and the Guidelines would introduce needless and unjustifiable incongruities into the law. Accordingly, Congress amended the statutory penalties in 21 U.S.C. 841(b) and directed the Commission to conform the Guidelines to those amendments “as soon as practicable,” so that a revised drug quantity table would not unnecessarily lag *behind* the statutory reforms.

As Congress additionally understood, it would make little sense to require the Commission to incorporate the 18-to-1 ratio into emergency Guidelines if the pre-FSA mandatory minimums would remain “applicable law” for

the thousands of pre-enactment offenders who would be sentenced under those emergency Guidelines. The resulting scheme would produce gross incongruities in sentences and would perpetuate the very evils Congress sought to eradicate. Indeed, for a wide variety of common drug quantities, the pre-FSA mandatory minimums would override the *entire* post-FSA Guidelines range, rendering the Guidelines that Congress directed the Commission to promulgate “as soon as practicable” essentially irrelevant.

B. The history and purposes of the Fair Sentencing Act underscore that Congress intended its repeal of the 100-to-1 ratio to be immediately effective. The evolution of the FSA informs the interpretation of the enacted text in two respects. First, Congress specifically considered and deleted from an early version of the legislation a provision that would have confined the FSA’s effect to post-enactment offense conduct only, thus implying that no such limitation was intended. Second, the debates preceding the enactment of the FSA—which passed the Senate unanimously and the House by voice vote—make plain that Congress had no further tolerance for the severely disproportionate impact of the 100-to-1 ratio on racial minorities. Requiring district courts to continue to impose mandatory minimum sentences based on that discredited ratio for years into the future would directly conflict with Congress’s core purpose in the Fair Sentencing Act: to restore fairness in cocaine sentencing by setting aside assumptions about the risks associated with crack cocaine that were, by 2010, universally recognized to be mistaken. While Congress respected finality principles by declining to disrupt sentences already imposed (thereby avoiding the significant costs to the criminal

justice system that would attend full-scale resentencings), it left no doubt that it intended to purge federal law of the racially disproportionate effects of the discredited 100-to-1 policy.

C. The default rule in 1 U.S.C. 109 does not require a different result. Section 109 reverses the common law rule of technical abatement and establishes a default presumption that federal liability incurred when a person violates an Act of Congress is not extinguished by the modification or repeal of the law regulating his conduct or prescribing the appropriate penalty. Because one legislature cannot bind the powers of a future legislature, however, the default rule created by Section 109 may be overcome if Congress indicates a contrary intent in a later statute, whether expressly or by “necessary implication.” *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908). Although the FSA is the sort of ameliorative legislation that triggers an inquiry under Section 109, Congress made clear its intention that the FSA’s new mandatory minimum penalty provisions should apply immediately in all initial sentencing proceedings. At the same time, Section 109 preserves sentences already imposed at the time of the FSA’s enactment: Congress gave no indication that it wished to incur the costs associated with full-scale resentencings. That congressional framework, which is consistent with the normal operation of the Sentencing Reform Act, should be enforced.

## ARGUMENT

**THE FAIR SENTENCING ACT APPLIES IN ALL INITIAL SENTENCING PROCEEDINGS AFTER ITS ENACTMENT**

The Fair Sentencing Act of 2010 (FSA), Pub. L. No. 111-220, 124 Stat. 2372, rectifies a glaring disparity in federal criminal law that produced “disproportionately harsh sanctions” for crack cocaine offenses for more than 20 years. *Kimbrough v. United States*, 552 U.S. 85, 110 (2007). Congress adopted the 100-to-1 ratio in 1986 because it believed crack cocaine to be exponentially more potent, addictive, and dangerous than powder cocaine: “Congress faced what it perceived to be a new threat of massive scope.” *DePierre v. United States*, 131 S. Ct. 2225, 2235 (2011). In fact, the massive threat never materialized, and the factual assumptions that drove Congress to enact the 100-to-1 ratio proved to be unfounded. See *Kimbrough*, 552 U.S. at 97-98; 2002 Report 91. Yet the 100-to-1 ratio remained embedded in federal law, generating “extreme anomalies in sentencing” (1995 Report 197) that disproportionately imposed severe mandatory minimum penalties on racial minorities. See 2007 Report 8.

In the FSA, Congress finally accepted the recommendation of the Sentencing Commission to reduce the crack/powder ratio in 21 U.S.C. 841(b)(1) and provide emergency authority for the Commission to coordinate the Guidelines with the new drug quantity thresholds for the statutory minimum penalties. Thus, the Act more than quintupled the threshold quantities of crack cocaine necessary to trigger mandatory minimum prison terms, replacing the 100-to-1 ratio with a new ratio of approximately 18-to-1. FSA § 2, 124 Stat. 2372. It repealed the five-year mandatory minimum penalty for

simple possession of crack cocaine. § 3, 124 Stat. 2372. And it directed the Sentencing Commission to implement these changes “as soon as practicable” in “emergency” Guidelines amendments that would “achieve consistency” between the Guidelines and “applicable law.” § 8, 124 Stat. 2374.

The FSA became effective when the President signed the Act into law on August 3, 2010. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991) (“[A]bsent a clear direction by Congress to the contrary, a law takes effect on the date of its enactment.”). The general federal saving statute, 1 U.S.C. 109, provides that the repeal or amendment of a statute does not extinguish any penalty or liability under the repealed law “unless the repealing Act shall so expressly provide.” The FSA does not expressly state that the amended provisions of 21 U.S.C. 841(b) will apply in sentencing proceedings for pre-enactment offenders. But Congress nevertheless made its intent plain in the FSA, and that intent controls notwithstanding Section 109’s express-statement rule because “one legislature cannot abridge the powers of a succeeding legislature.” *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 135 (1810) (Marshall, C.J.). As this Court has explained, and as all members of the court of appeals recognized, see *United States v. Holcomb*, 657 F.3d 445, 448 (7th Cir. 2011) (opinion of Easterbrook, C.J.); *id.* at 455 (opinion of Williams, J.), the default rule supplied by Section 109 has no application whenever Congress has expressed a different intention, “either expressly or by necessary implication, in a subsequent enactment.” *Great N. Ry. Co. v. United States*, 208 U.S. 452, 465 (1908); see also *Warden v. Marrero*, 417 U.S. 653, 659 n.10 (1974) (“by fair implication”). Because Congress made clear in the FSA that it intended the

Act's reforms to have immediate effect, petitioners were entitled to be sentenced according to its terms. The judgment of the court of appeals in these cases must be reversed.

**A. The Text, Structure, And Background Of The FSA Demonstrate Congress's Intent To Give The Act's Reforms Immediate Effect**

Congress expressed its intent to make its repeal of the 100-to-1 ratio immediately effective in post-FSA sentencings by directing the Sentencing Commission to issue "emergency" conforming amendments to the Sentencing Guidelines "as soon as practicable" to "achieve consistency" between the Guidelines and "applicable law." FSA § 8, 124 Stat. 2374. That directive, in the context of the surrounding structure of federal sentencing law, is incompatible with the court of appeals' belief that Congress intended district courts to continue imposing mandatory minimum sentences under pre-FSA law.

***1. Congress directed the Sentencing Commission to conform the Guidelines to "applicable law," which meant the FSA's new penalty scheme***

Congress enacted the sentencing reforms in the FSA against the backdrop of the Sentencing Reform Act of 1984, Pub. L. No. 98-473, Tit. II, 98 Stat. 1987, which established the basic framework for all federal sentencings. Under that framework, sentencing courts must consult the Sentencing Guidelines that "are in effect on the date the defendant is sentenced," irrespective of the date of the underlying conduct. 18 U.S.C. 3553(a)(4)(A)(ii). Although the Guidelines are no longer binding, see *United States v. Booker*, 543 U.S. 220 (2005), this Court has made clear that a sentencing court

must still consider the advice of the Sentencing Commission at the time the sentence is imposed. *Id.* at 245-246; see, e.g., *Gall v. United States*, 552 U.S. 38, 49 (2007) (“[T]he Guidelines should be the starting point and the initial benchmark.”).

By directing the Sentencing Commission to implement the FSA “as soon as practicable” through amendments that “conform[ed]” the Guidelines to “applicable law,” Congress necessarily implied that the FSA’s 18-to-1 penalty scheme should be given effect prospectively in *all* initial sentencing proceedings, irrespective of the date of the underlying offense conduct. In instructing the Commission to conform the Guidelines to “applicable law,” Congress necessarily meant the FSA, because the then-existing Guidelines would *already* have reflected pre-FSA sentencing law: the only “conforming amendments” necessary were those required to bring the Guidelines into alignment with the FSA itself. And by directing the Commission to “conform[]” the Guidelines to the FSA, Congress instructed the Commission to harmonize the Guidelines with the statutory penalty scheme so that the two systems would function as a logical, consistent, and coherent whole. See, e.g., *Webster’s New Int’l Dictionary of the English Language* 561 (2d ed. 1958) (“conform” means “[t]o shape in accordance with,” to “make like,” or “to bring into harmony or agreement”). Congress directed the Commission to take this step, moreover, knowing that the resulting Guidelines amendments would apply immediately in all initial sent-

encing proceedings, including those involving offenses that predated the FSA.<sup>6</sup> 18 U.S.C. 3553(a)(4)(A)(ii).

The exceptional urgency of Congress’s directive to the Commission in Section 8 confirms that Congress intended its repeal of the 100-to-1 ratio to be immediately effective in post-FSA sentencings. Congress gave the Commission at most 90 days to promulgate amended Guidelines. If it had believed that the Act’s most significant reform—the altered mandatory minimum penalty structure—would apply only to post-Act offenders, it would have had little reason to require the Commission to act with such dispatch. While changes in the Guide-

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<sup>6</sup> The Guidelines recognize an exception to this rule for circumstances in which applying the Guidelines in effect on the date of sentencing would violate the Ex Post Facto Clause of the Constitution. See Sentencing Guidelines § 1B1.11(b)(1). Even assuming *arguendo* that the Ex Post Facto Clause applies to advisory Guidelines, that Clause would have no application to changes that *decreased* an offender’s advisory Guidelines range, as would be true for vast numbers of crack offenders under the FSA. Accordingly, Congress would have had no reason to doubt that, under Section 3553(a)(4)(A)(ii), the emergency Guidelines amendments required by the FSA would be applicable for most or all crack offenders no later than 90 days after enactment. FSA § 8, 124 Stat. 2374. In any event, in the government’s view, the advisory nature of the Guidelines after *Booker* removes any ex post facto concerns, as the Seventh Circuit has correctly held. *United States v. Demaree*, 459 F.3d 791, 794-795 (7th Cir. 2006), cert. denied, 551 U.S. 1167 (2007). But see *United States v. Wetherald*, 636 F.3d 1315, 1321-1322 (11th Cir.) (advisory Guidelines can violate the Ex Post Facto Clause on an as-applied basis if they present a “substantial risk” of a more severe sentence), cert. denied, 132 S. Ct. 360 (2011); *United States v. Ortiz*, 621 F.3d 82, 87 (2d Cir. 2010), cert. denied, 131 S. Ct. 1813 (2011); *United States v. Lanham*, 617 F.3d 873, 889-890 (6th Cir. 2010), cert. denied, 131 S. Ct. 2443 (2011); *United States v. Lewis*, 606 F.3d 193, 199 (4th Cir. 2010); *United States v. Turner*, 548 F.3d 1094, 1098-1100 (D.C. Cir. 2008). No ex post facto issues are presented in this case.

lines regime would go into effect immediately and thus provide advice to sentencing courts, those courts already had—and were exercising—the authority to “reject and vary categorically from the crack cocaine Guidelines based on a policy disagreement with those Guidelines.” *Spears v. United States*, 555 U.S. 261, 265-266 (2009) (per curiam); see also 2007 Report 1-2. The innovation of the FSA, as Congress well understood, was to reduce *statutory* barriers to fairer sentences.

On the court of appeals’ theory, Congress would have had no urgent need to accelerate the Commission’s normal procedures, under which amendments to the Guidelines may become effective six months after their submission to Congress. See 28 U.S.C. 994(p). The statute of limitations for federal drug offenses is five years. 18 U.S.C. 3282. Given the time required to discover, investigate, and prosecute drug crimes, even an offender who committed a crack cocaine offense on the day the FSA became law probably would not face sentencing for a year or longer.<sup>7</sup> Indeed, if Congress had intended district courts to continue to sentence pre-enactment offenders under the law in effect at the time of the offense, it would have been more sensible for Congress to *withhold* emergency amendment authority

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<sup>7</sup> At the time of the FSA’s enactment, the median time between indictment and sentencing for federal drug offenses (other than marijuana offenses) was approximately 11 months. See Administrative Office of the U.S. Courts, *Judicial Business of the United States Courts*, Tbl. D-10, at 272 (2010). And a significant delay often occurs between the commission of the offense and the defendant’s arrest, even when the arrest results from a controlled drug purchase. Petitioner Hill, for example, committed his offense 15 months before he was arrested. See Hill PSR 3-4. Additional delay may also occur between arrest and indictment. See 18 U.S.C. 3161(b) (government may bring charges at any time up to 30 days after the defendant’s arrest).

from the Commission. Prior law would then have continued to govern prior conduct while the Commission formulated and proposed its amendments.

But Congress was not satisfied to wait. Instead, in Section 8 of the FSA, it (i) revived the Commission's expired authority under former Section 21(a) of the Sentencing Act of 1987 to issue emergency Guidelines amendments without waiting for congressional approval; (ii) directed the Commission to exercise that authority "as soon as practicable"; and (iii) specified that "in any event," the Commission was required to issue its amended Guidelines "not later than 90 days after the date of enactment of this Act." 124 Stat. 2374. The natural inference is that Congress intended the FSA's integrated package of reforms—new Guidelines implementing the new "applicable law"—to govern the sentencing of pre-enactment offenders, the only significant category of offenders likely to face sentencing on the 91st day after the FSA's enactment.

***2. The history of the crack/powder sentencing disparity supports the inference that Congress intended the FSA's statutory amendments to be immediately effective***

The court of appeals made no effort to reconcile its reasoning with Section 8 of the FSA. See *Dorsey* Pet. App. A2-A3 (acknowledging Congress's emergency directive to the Commission, yet concluding, without explanation, that Congress failed to "drop[] a hint" that it intended the FSA to "apply to not-yet-sentenced defendants convicted on pre-FSA conduct"). But in his opinion on the denial of rehearing en banc in *United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011), Chief Judge Easterbrook reasoned that, while Section 8 may

have instructed the Commission to “get a move on in revising its Guidelines,” that directive does not “imply anything about when the new [statutory] minimum and maximum sentences go into force.” *Id.* at 450. That suggestion is irreconcilable not only with the FSA’s textual directive to the Commission to conform the Guidelines to “applicable law,” but also with the history of the crack/powder sentencing disparity, with which Congress was intimately familiar.

The crack/powder disparity was a “high profile area” that had previously occasioned Congress’s only exercise of its power to disapprove a revision of the Guidelines. See *Kimbrough*, 552 U.S. at 106. Congress was well aware from that experience that Guidelines amendments alone would not achieve coherent reform of federal cocaine sentencing policy. In 1995, Congress indicated its disapproval of a piecemeal solution to the problems posed by the 100-to-1 ratio by rejecting the Commission’s proposal to eliminate the 100-to-1 ratio from the Sentencing Guidelines. Congress took that step, in part, because of the “gross sentencing disparities” that would have resulted from such a change *without* simultaneously amending the statutory minimum penalties. H.R. Rep. No. 272, 104th Cong., 1st Sess. 4 (1995) (1995 House Report). Congress’s primary reason for disapproving the 1995 amendment was its conclusion that a 1-to-1 ratio was too low. See Act of Oct. 30, 1995, Pub. L. No. 104-38, § 2(a)(1)(A), 109 Stat. 334. But the House committee report also emphasized that, regardless of the correct ratio, it would make no sense for the Sentencing Commission to adopt a ratio under the Guidelines that was significantly out of proportion with the governing statutory minimum penalties: “[I]f the Commission’s guideline amendments went into effect without

Congress lowering the current statutory mandatory minimum penalties, it would create gross sentencing disparities.” 1995 House Report 4; see also *id.* at 10 (explaining that the Commission’s proposal would “drastically reduc[e]” Guidelines sentences “while the mandatory minimums would remain much higher,” thereby “creat[ing] significant sentencing disparities for offenses involving minor quantity differences”). Congress accordingly rejected the Commission’s proposal to amend only the Guidelines and instead directed the Commission to propose a “revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes *and* guidelines.” § 2(a)(2), 109 Stat. 335 (emphasis added).

As Congress understood in enacting the FSA, absent a statutory directive to the contrary, the Commission would not be legally compelled to synchronize the Guidelines with the ratios in the mandatory minimum sentencing statutes. See *Kimbrough*, 552 U.S. at 102-105. The Commission could have adopted a different ratio in the Guidelines and still maintained technical consistency with the statutory minimum penalties by virtue of Guidelines § 5G1.1(b), which provides that, “[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.” But in directing the Sentencing Commission to implement the FSA on an emergency basis through “conforming amendments” calculated to “achieve consistency” with “applicable law,” Congress could not have intended the Commission to recreate the same kind of “gross sentencing disparities” between the statutory penalties and the Guidelines that

Congress had decried in 1995.<sup>8</sup> See 1995 House Report 4.

To the contrary, Congress recognized that to repeal the 100-to-1 ratio in the statute without promptly amending the Guidelines would risk introducing needless incongruities into the law. The Sentencing Commission had emphasized exactly that point to Congress in its 2007 Report. After “unanimously and strongly urg[ing]” Congress to amend the statutory minimum penalties, 2007 Report 8, the Commission further requested that Congress include in any legislation implementing its recommendations “emergency amendment authority for the Commission to incorporate the statutory changes in the federal sentencing guidelines.” *Id.* at 9. Such authority, the Commission

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<sup>8</sup> The FSA thus creates a very different legal regime than the one that applied at the time of *Neal v. United States*, 516 U.S. 284 (1996). In that case, the Court held that the Sentencing Commission’s adoption of a method for calculating drug weight in LSD cases different from the one Congress had adopted in the mandatory minimum sentencing statutes did not alter this Court’s prior construction of the statutory methodology. *Id.* at 295-296. As the Court made clear in *Kimbrough*, this Court also “assumed” in *Neal* that the statute did not require the Commission “to adhere to the Act’s method for determining LSD weights” within the Guidelines regime. *Kimbrough*, 552 U.S. at 104-105 & n.14. In the FSA, by contrast, Congress directed the Commission to “conform[]” the Guidelines to “applicable law”—the new FSA statutory thresholds. Particularly given that the Commission had consistently “keyed” the Guidelines ranges to the crack cocaine mandatory minimums, 552 U.S. at 100 n.10, and in light of the Commission’s repeated pleas to Congress to lower the mandatory minimums so that the Commission could follow suit in the Guidelines, *e.g.*, 2007 Report 6-9, the FSA can only be interpreted as directing the Commission to follow the FSA’s penalty structure in revising the Guidelines. The Commission’s response to the FSA understood Section 8 in precisely that fashion. See pp. 36-38, *infra*; see also App., 44a-46a, *infra*.

emphasized, “would enable the Commission to *minimize the lag between any statutory and guideline modifications* for cocaine offenders.” *Ibid.* (emphasis added). Congress responded in Section 8 of the FSA not only by granting to the Commission the emergency authority it had requested, but by directing the Commission to exercise that authority “as soon as practicable.”

Section 8’s direction to the Commission to issue emergency Guidelines as soon as possible was thus intended to ensure that the revised drug quantity table would not needlessly lag *behind* the FSA’s statutory changes. By changing the trigger quantities for the statutory minimum penalties in 21 U.S.C. 841(b), repealing the mandatory minimum sentence for simple possession in 21 U.S.C. 844(a), and then directing the Commission to issue “conforming amendments” to the Guidelines as soon as possible, Congress enabled the Commission to accomplish what the Commission had been unable to do 15 years earlier: purge the 100-to-1 ratio from the Sentencing Guidelines in a manner that “achieve[d] consistency with other guideline provisions and applicable law.” 124 Stat. 2374.<sup>9</sup>

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<sup>9</sup> Failing to apply the FSA to all post-Act sentencings would produce another anomaly. Section 10 of the Act 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.” 124 Stat. 2375. But the offenders most likely to face sentencing in early years after the Act will be pre-enactment offenders, given the five-year limitations period for federal drug offenses and the time required to prosecute. See pp. 29-30 & n.7, *supra*. Thus, if the FSA’s revised statutory penalties were inapplicable to pre-enactment offenders, then “during the time period in which the Sentencing Commission is supposed to produce a report on the effects

**3. Congress understood that the Commission could not effectively “achieve[] consistency” with “applicable law” if the pre-FSA mandatory minimums remained in effect**

Congress’s instruction to the Commission in Section 8 to “achieve consistency” in implementing the FSA underscores the necessary inference that Congress intended all of the FSA’s reforms, including the statutory amendments, to have immediate effect. As Congress well understood, the Commission could not meaningfully “achieve consistency” with “applicable law,” § 8, 124 Stat. 2374, if the pre-FSA mandatory minimums remained “applicable” to pre-enactment offenders.

As Congress knew, the Commission has characteristically incorporated mandatory minimum penalties into the Sentencing Guidelines in a manner that ensures the consistency and proportionality of the sentences imposed for all drug quantities. Since the first version of the Guidelines, it has done so by using the threshold quantities for the mandatory minimum penalties imposed by Congress as “reference points” (1995 Report 126) and then “extrapolating upward and downward to set guideline sentencing ranges for all drug quantities” (2007 Report 3). See generally U.S. Sentencing

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of the FSA, the Act often [would] be inapplicable.” *Dixon*, 648 F.3d at 202; see *ibid.* (suggesting that the required report “would be incomplete, at best, and incomprehensible, at worst” (citation omitted)); accord *Holcomb*, 657 F.3d at 457 (Williams, J., dissenting from denial of rehearing en banc). Congress’s direction to the Commission to study “the impact of the changes in Federal sentencing law under this Act and the amendments made by this Act” in the first “5 years after the date of enactment of this Act” naturally implies that Congress expected the FSA to have an “impact” immediately.

Comm'n, *Report to the Congress: Mandatory Minimum Penalties in the Federal Criminal Justice System* 53-55 (Oct. 2011) (2011 Mandatory Minimums Report). The Commission has employed this technique not only for crack and powder cocaine offenses, see 2007 Report 3; *Kimbrough*, 552 U.S. at 96-97, but for other mandatory minimum penalties in the federal drug laws as well, see, e.g., 2011 Mandatory Minimums Report 53-54; 2007 Report 5. By incorporating statutory penalties into the Guidelines in this way, the Commission is able to establish a rational and consistent penalty scheme that, from the foundation established by Congress, assigns base offense levels to drug offenders in proportion to the quantity of drugs for which they are found responsible. See 2011 Mandatory Minimums Report 349 n.845 (explaining that “incorporating the mandatory minimum penalties in this manner” serves the purpose, *inter alia*, of ensuring “graduated, proportional increases based on drug quantity for the full range of possible drug types and quantities”).

When Congress directed the Commission in Section 8 of the FSA 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,” 124 Stat. 2374, it signaled its intention for the Commission to incorporate the FSA’s 18-to-1 ratio into the Guidelines in a similarly rational and proportional manner. And that is in fact how the Commission understood Section 8. In promulgating its emergency Guidelines amendments, the Commission explained that it would “account for the[] statutory changes” made by the FSA by “conform[ing] the guideline penalty structure for crack cocaine offenses to the approach followed for other

drugs”—*i.e.*, by using the FSA’s revised statutory trigger quantities for the five- and ten-year mandatory minimum penalties (28 grams and 280 grams, respectively) as reference points and extrapolating upward and downward. 75 Fed. Reg. at 66,191 (App. *infra*, 44a-46a). The Commission explained: “[T]his approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.” *Ibid.*

But as Congress would have recognized, a “consisten[t] and proportional[.]” scheme of this kind would be impossible for the Commission to achieve immediately if the pre-FSA mandatory minimums remained “applicable.” Indeed, a Guidelines regime predicated on an 18-to-1 drug quantity ratio would be irreconcilably *inconsistent* with statutory minimum penalties based on a ratio more than five times as severe. The table below illustrates some of the gross incongruities that would result from sentencing pre-enactment offenders under the post-FSA Guidelines, see 18 U.S.C. 3553(a)(4), but also imposing the pre-FSA mandatory minimum penalties. See generally *Holcomb*, 657 F.3d at 462 (Posner, J., dissenting from the denial of rehearing en banc) (providing similar examples). For example, an offender who possessed with the intent to distribute five grams of crack cocaine would face an advisory Guidelines sentence of 24 to 30 months of imprisonment under the post-FSA Guidelines amendments, assuming a criminal history category of II and no other aggravating or mitigating factors. See Guidelines § 2D1.1(c) (2011); *id.* Ch. 5, Pt. A (sentencing table). Under 21 U.S.C. 841(b)(1)(B) (2006), however, the district court would be

required to impose a minimum sentence of 60 months—a sentence *two and one-half times* the minimum suggested by the Guidelines. And if the offender had a previous felony drug conviction, his post-FSA Guidelines range would still be 24 to 30 months, but his mandatory minimum penalty under pre-FSA law would be 120 months—up to *five times* the appropriate sentence indicated by the Guidelines.<sup>10</sup>

In light of Congress’s directive to the Commission to make “conforming amendments \* \* \* to achieve consistency” with “applicable law” in adopting new Guidelines that Congress knew would be immediately applicable to *all* offenders, 18 U.S.C. 3553(a)(4)(A)(ii),

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<sup>10</sup> These incongruities would be even worse for offenders with no criminal history, for whom the applicable Guidelines ranges are even lower. See Sentencing Guidelines Ch. 5, Pt. A (sentencing table). Under the “safety valve” provision in 18 U.S.C. 3553(f), however, drug-trafficking offenders who have little or no criminal history and who satisfy the other requirements of that provision—including “truthfully provid[ing] to the Government all information and evidence the defendant has concerning the offense or offenses that were part of the same course of conduct or of a common scheme or plan,” 18 U.S.C. 3553(f)(5)—may be sentenced without regard to a statutory minimum penalty. See also Guidelines § 5C1.2. Offenders with a criminal history category of II or higher (*i.e.*, those with at least 2 criminal history points), however, are ineligible for relief under the safety valve. Relatively few crack offenders are eligible for safety-valve relief because most are disqualified by their criminal histories. See 2011 Mandatory Minimums Report 195 (only 11.7% of crack cocaine offenders received safety-valve relief in fiscal year 2010).

Crack Cocaine Quantity (grams)	Criminal History Category	Post-FSA Guidelines Sentence (months)	Pre-FSA Mandatory Minimum (months)	Increase Over FSA Minimum Sentence
5.0	II	24-30	60	150%
5.6	II	30-37	60	100%
11.2	II	37-46	60	62%
50.0	II	70-87	120	71%
112.0	II	87-108	120	38%
5.0 1 prior drug felony	II	24-30	120	400%
5.0 2 prior drug felonies	III	27-33	120	344%

**Post-FSA Guidelines sentences and pre-FSA mandatory minimum penalties for selected crack cocaine quantities.**

such results are contrary to Congress's manifest intent. The impossibility of a "consisten[t]" penalty scheme under the court of appeals' interpretation of the FSA is underscored by the fact that, for a wide variety of common drug quantities, the *entire Guidelines range* under the Commission's post-FSA Guidelines would be

overridden by the pre-FSA mandatory minimum penalties.<sup>11</sup>

Mandatory minimum statutes play a critical role in crack cocaine sentencing. As this Court noted in *Kimbrough*, “[t]he Sentencing Commission reports that roughly 70 percent of crack offenders are responsible for drug quantities that yield base offense levels [under the pre-FSA Guidelines] at or only two levels above those that correspond to the statutory minimums.” 552 U.S. at 108 n.15 (citing 2007 Report 25). And under pre-FSA law, most crack offenders remained subject to mandatory minimums at sentencing. See 2011 Mandatory Minimums Report 195 (in fiscal year 2010, 64% remained subject). For many of those defendants, the post-FSA Guidelines would be entirely irrelevant if the 100-to-1 statutory minimums remained applicable. Even offenders who qualified for sentences below the mandatory minimum under 18 U.S.C. 3353(e) by virtue of substantial assistance to the prosecution would not be assisted by the post-FSA Guidelines. Cf. 2011 Manda-

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<sup>11</sup> For example, under the FSA’s 18-to-1 ratio, an offender with a criminal history category of II who was convicted of trafficking in 10 grams of crack cocaine would have a base offense level of 18 and an advisory Guidelines sentence of 30 to 37 months. See Guidelines § 2D1.1(c) (2011). But under pre-FSA law, the same offender would face a mandatory minimum penalty of 60 months, displacing his post-FSA Guidelines range entirely. See 21 U.S.C. 841(b)(1)(B) (2006). Even if that offender received a two- or even four-level enhancement for specific offense characteristics—for example, for possessing a firearm (Guidelines § 2D1.1(b)(1)) or maintaining a premises for distributing drugs (*id.* § 2D1.1(b)(12))—the applicable post-FSA Guidelines range would still be completely overridden by the pre-FSA mandatory penalty. A four-level increase would yield a base offense level of 22 and an advisory Guidelines range of 46 to 57 months, still less than the 60-month mandatory minimum penalty.

tory Minimums Report 196 (approximately 25% of crack offenders received substantial-assistance relief from statutory minimum penalties in fiscal year 2010). Substantial-assistance departures must be based solely on the level of the cooperation provided, not on an otherwise-applicable Guidelines range or *Booker* factors. See, e.g., *United States v. Winebarger*, No. 11-1905, 2011 WL 6445136, at \*7 (3d Cir. Dec. 23, 2011).

The post-FSA ranges that would be submerged below the pre-FSA mandatory minimum statutes encompass some of the most common crack cocaine quantities prosecuted in the federal courts. In fiscal year 2006, for example, the median drug weight for all crack cocaine offenders in the federal courts was 51.0 grams, and more than one-third of all offenders had less than 25 grams. See 2007 Report Tbl. 5-2, at 108, Tbl. 5-3, at 112. Given the significant influence of mandatory minimum statutes, as Judge Boudin observed, “[i]t seems unrealistic 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.” *United States v. Douglas*, 644 F.3d 39, 444 (1st Cir. 2011); see also *Holcomb*, 657 F.3d at 457 (Williams, J. dissenting from the denial of rehearing en banc) (“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.”); *United States v. Dixon*, 648 F.3d 195, 201 (3d Cir. 2011) (“Refusing to apply the mandatory minimums in the FSA eviscerates the very consistency and conformity that the statute requires.”).

It is implausible that Congress directed the Commission to act “as soon as practicable” to issue

amended crack cocaine Guidelines that would be wholly inapplicable to a substantial percentage of the crack cocaine offenders likely to face sentencing in the immediate wake of the FSA. Congress enacted the FSA against the backdrop of this Court's ruling in *Gall*, which recognized that "the Guidelines should be the starting point and the initial benchmark" for all sentencing decisions. 552 U.S. at 49. Congress could not have meant that district courts sentencing pre-enactment offenders must often start with a benchmark that would serve no purpose.

**B. The History And Purposes Of The FSA Confirm That Congress Did Not Intend District Courts To Continue To Impose Mandatory Minimum Sentences Under A 100-to-1 Ratio**

Congress's overriding aim in enacting the FSA was to correct a disproportionate and unjustified punishment regime that created racial disparities in sentencing and that had "foster[ed] disrespect for and lack of confidence in the criminal justice system." 2002 Report 103. In abolishing the 100-to-1 ratio, Congress commanded the Commission to act "as soon as practicable" to conform its Guidelines to the new mandatory minimum statutes, which embodied an 18-to-1 ratio. The history and purpose of the FSA remove any doubt that Congress sought to eradicate the 100-to-1 ratio from federal sentencing practice from the date of the Act forward.

***1. The history of the FSA corroborates Congress's intent***

Introduced in October 2009 as S. 1789 and reported out of the Senate Judiciary Committee by unanimous vote, the FSA passed the full Senate by unanimous consent and the House of Representatives by voice vote.

See 156 Cong. Rec. S1681 (daily ed. Mar. 17, 2010) (statement of Sen. Durbin); *id.* at S1683; 156 Cong. Rec. H6204 (daily ed. July 28, 2010). Although no committee report accompanied the bill, the legislative history corroborates the clear implication of Section 8 of the FSA in at least two respects.

*First*, in drafting the FSA, Congress considered and rejected statutory language that would have expressly limited the application of the Act to offenses committed after the Act's effective date. The Senate bill that ultimately became the FSA, S. 1789, was based on an earlier measure, H.R. 265, 111th Cong. (2009) (H.R. 265), that had been introduced in the House in January 2009. Much of the original text of S. 1789 was drawn nearly verbatim from H.R. 265, including the provisions amending the crack/powder disparity, repealing the mandatory minimum penalty for simple possession of crack cocaine, and providing for various sentencing enhancements. Compare H.R. 265, §§ 3-5, 8-9 (as introduced Jan. 7, 2009), with S. 1789, 111th Cong. §§ 2-8 (as introduced Oct. 15, 2009); see also 156 Cong. Rec. H6199 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee) (describing H.R. 265 as “the underpinnings” of the FSA).<sup>12</sup> H.R. 265 further provided in its eighth section for a grant of “emergency authority” to the Sentencing Commission in language that closely parallels Section 8 of the FSA.

But H.R. 265 differed in two significant respects from the statute that Congress ultimately enacted. First, H.R. 265 provided, in a separate section entitled “Effective Date,” that “[t]he amendments made by this

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<sup>12</sup> H.R. 265 would also have provided new federal grant programs to encourage drug treatment programs for prisoners. See H.R. 265, §§ 6-7. These provisions were not carried forward in S. 1789.

Act shall apply to any offense committed on or after 180 days after the date of enactment of this Act. There shall be no retroactive application of any portion of this Act.” H.R. 265, § 11. The FSA contains no analogous provision. Second, while H.R. 265 would have provided emergency amendment authority to the Commission, it would have done so on a permissive rather than mandatory basis: the bill provided that the “Sentencing Commission, *in its discretion, may*” promulgate emergency amendments implementing “the directives in this Act.” H.R. 265, § 8(a) (emphasis added). That permissive formulation was carried forward into the original version of S. 1789 introduced in the Senate. But Section 8 emerged from the legislative process as a mandatory directive to the Commission to implement the FSA’s reforms “as soon as practicable.” FSA § 8, 124 Stat. 2374.

Congress thus specifically considered and *deleted* language that would have confined the Act’s effect to post-enactment conduct, implying that no such limitation was intended. See *Russello v. United States*, 464 U.S. 16, 23-24 (1983) (“Where 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.”). And Congress underscored that it regarded implementation of the FSA’s reforms as a priority by rejecting language that would merely have permitted, but not required, the Commission to act immediately.<sup>13</sup>

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<sup>13</sup> Although the Court declined to draw any inference from the permissive rather than mandatory authority granted to the Attorney General in *Reynolds v. United States*, No. 10-6549 (Jan. 23, 2012), slip op. 12, in the context of the FSA, the deliberate change from a permissive approach to a mandatory directive in the drafting history of

*Second*, the legislative history of the FSA makes clear that Congress was intensely concerned with the racially disparate impact of the crack/powder disparity. The Sentencing Commission reported in 2002 that “[t]he overwhelming majority of offenders subject to the heightened crack cocaine penalties are black, about 85 percent in 2000.” 2002 Report 102; see also 2007 Report 15 (approximately 82% of crack cocaine offenders in 2006 were black). Consequently, to the extent that the 100-to-1 ratio “result[ed] in unduly severe penalties for most crack cocaine offenders, the effects of that severity f[ell] primarily upon black offenders.” 2002 Report 103.

The unintended racial impact of the 100-to-1 ratio greatly disconcerted members of Congress. See, *e.g.*, 155 Cong. Rec. S10,491 (daily ed. Oct. 15, 2009) (statement of Sen. Durbin) (“[T]he crack/powder disparity disproportionately affects African Americans.”); *id.* at S10,492 (statement of Sen. Leahy) (“[T]his policy has had a significantly disparate impact on racial and ethnic minorities. \* \* \* These statistics are startling. It is no wonder this policy has sparked a nationwide debate about race bias and undermined citizens’ confidence in the justice system.”); *id.* at S10,493 (statement of Sen. Specter) (“I do not believe that the 1986 Act was intended to have a disparate impact on minorities but the reality is that it does.”); 156 Cong. Rec. H6198 (daily ed. July 28, 2010) (statement of Rep. Clyburn) (reducing the crack/powder disparity “will do more than any other policy change to close the gap in incarceration rates between African Americans and white Americans”); *id.* at H6202 (statement of Rep.

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Section 8 underscores Congress’s intent that the amended Guidelines not lag behind the FSA’s statutory amendments. See pp. 27-35, *supra*.

Lungren) (“When African Americans, low-level crack defendants, represent 10 times the number of low-level white crack defendants, I don’t think we can simply close our eyes.”). Congress cannot have intended to continue to impose statutory penalties based on a 100-to-1 ratio and thus perpetuate those racial disparities.

**2. *The purpose of the FSA reinforces Congress’s intent***

The court of appeals’ interpretation of the FSA is also irreconcilable with the manifest purpose of the Act. Congress named the statute the “Fair Sentencing Act of 2010.” § 1, 124 Stat. 2372. It explicitly stated that the purpose of the Act was to “restore fairness to Federal cocaine sentencing.” Pmbl., 124 Stat. 2372. It enacted the statute in response to “almost universal criticism” (2007 Report 2) of the 100-to-1 disparity as disproportionately severe, unwarranted by any legitimate public policy, and racially disparate in impact. And the Sentencing Commission—the expert body that Congress had specifically created for the purpose, *inter alia*, of advising it on the need for statutory changes in sentencing law, see 28 U.S.C. 994(r)—had described the need to abolish the 100-to-1 ratio as both “urgent and compelling.” 2007 Report 9.

Against that background, “what possible reason” could Congress have had “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), *aff’d*, 644 F.3d 39 (1st Cir. 2011). None exists. Congress’s judgment, based on the unanimous findings of the Sentencing Commission reiterated over more than 15 years, was that the statutory penalties reflecting the

100-to-1 ratio (as well as the mandatory minimum sentence for the simple possession of crack cocaine) were themselves a source of substantial unfairness in federal law. Prolonging the inequities of that scheme would serve no rational legislative purpose. Even the court of appeals could not identify any reason why Congress would have wanted offenders like petitioners to be sentenced “under a structure which has now been recognized as unfair” based only on a “temporal roll of the cosmic dice.” *Dorsey* Pet. App. A4; see also *Holcomb*, 657 F.3d at 450 (Easterbrook, C.J.) (seeing “no satisfactory answer” to why Congress would have wanted pre-enactment offenders to remain subject to the prior mandatory minimums).

Chief Judge Easterbrook thought it equally arbitrary to conclude that August 3, 2010, the date of the FSA’s enactment, was the effective date: “[W]hat’s fair about condemning someone sentenced on August 2 to more time in prison than a person sentenced the next day, even though they committed their crimes on the same date?” *Holcomb*, 657 F.3d at 451-452. But ordinary rules of finality counsel against the disruption caused by upsetting sentences already imposed and requiring full-scale resentencing. In many cases, the government may have declined to bring or agreed to drop other charges in reliance on the stringent mandatory minimum sentences for crack offenders. Reopening those sentences without permitting the government to revive other charges could create serious injustices, particularly if the statute of limitations or loss of evidence frustrated any such effort. Additionally, requiring full-scale resentencing under the FSA for previously sentenced defendants would impose substantial burdens on the administration of justice. Congress therefore

had sound reason for leaving past sentencings undisturbed. But those concerns do not suggest that it intended to countenance the infliction of new unfairness in the future. See *Douglas*, 644 F.3d at 43-44 (noting that “the FSA’s legislative history indicates Congress’[s] concern about any proposal that would require courts to resentence the vast number of prisoners in federal custody serving sentences for pre-FSA cocaine base offenses,” but also observing that “new sentences being imposed today for pre-FSA cocaine base offenses are a far smaller category and present no such administrative burden”).

Moreover, applying an ameliorative change to defendants sentenced after the new rule is issued, while withholding the new rule from defendants already sentenced, is the ordinary practice under the Sentencing Reform Act. The sentencing court applies the Guidelines and policy statements in effect on the date of sentencing, regardless of the date of the underlying conduct. See 18 U.S.C. 3553(a)(4)(A)(ii) and (5)(B). But the court cannot ordinarily modify a sentence of imprisonment already imposed.<sup>14</sup> 18 U.S.C. 3582(c).

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<sup>14</sup> Congress has authorized the Commission to make retroactively effective Guidelines amendments that reduce the recommended term of imprisonment. See 28 U.S.C. 994(u). But Congress has not required the Commission to do so. Thus, by instructing the Commission to issue emergency Guidelines implementing the FSA, Congress left to the Commission’s discretion whether to make the amended Guidelines retroactive. In July 2011, the Commission voted to take that step, emphasizing that its decision would “not make any of the statutory changes in the [FSA] retroactive.” See 76 Fed. Reg. 41,333 (July 13, 2011). Although that decision rendered many previously imposed sentences eligible for modification, see 18 U.S.C. 3582(c)(2), such proceedings are not full-fledged resentencings and consequently entail far fewer burdens on the criminal justice system. See *Dillon v. United*

Thus, defendants not yet sentenced may often benefit from new, more lenient Guidelines provisions while defendants who committed their crimes on the same dates, but who were charged or pleaded guilty earlier, may not. The “partial retroactivity” that Chief Judge Easterbrook regarded as incompatible with 1 U.S.C. 109, see 657 F.3d at 448, is in fact the general rule in federal sentencing law. And Congress adhered to that general rule in enacting the FSA.

**C. The Court Of Appeals’ Reliance On The General Saving Statute Was Misplaced**

The court of appeals concluded that the general saving statute, 1 U.S.C. 109, foreclosed petitioners’ requests to be sentenced under the FSA. See Dorsey Pet. App. A3-A4; Hill Pet. App. A2; see also *Holcomb*, 657 F.3d at 446-447 (Easterbrook, C.J.). Although the court of appeals was correct that the FSA is the sort of ameliorative criminal legislation that may trigger the default rule established by Section 109, that rule has no proper application here. Congress clearly expressed its intent that the FSA’s revised statutory penalties should apply in all initial sentencing proceedings after the effective date of the Act, see pp. 27-43, *supra*, and it was the prerogative of Congress in 2010 “to make its will known in whatever fashion it deem[ed] appropriate.” *Lockhart v. United States*, 546 U.S. 142, 148 (2005) (Scalia, J., concurring). Because Congress expressed no such intent with regard to offenders who had already

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*States*, 130 S. Ct. 2683, 2691 (2010) (Section 3582(c)(2) authorizes “only a limited adjustment to an otherwise final sentence and not a plenary resentencing proceeding”); see also 76 Fed. Reg. at 41,334 (observing that Section 3582(c)(2) motions are “routinely” decided “on the filings, without the need for a hearing or the presence of the defendant”).

been sentenced under prior law, however, Section 109 preserves the final judgments imposed in such cases, consistent with the framework established by Congress in the Sentencing Reform Act.

**1. Section 109 provides a default rule that is overcome by a clear contrary legislative intent**

At common law, the repeal or amendment of a criminal statute—including an amendment that reduced the applicable penalties—abated all prosecutions under the repealed statute that had not yet become final on appeal. *Marrero*, 417 U.S. at 660; *Bradley v. United States*, 410 U.S. 605, 607-608 (1973); see, e.g., *United States v. Tynen*, 78 U.S. (11 Wall.) 88, 95 (1871) (replacement of 1813 criminal statute by a broader criminal statute with different penalties abated pending prosecution). To avoid inadvertent abatements under that doctrine, Congress in 1871 enacted the general federal saving statute, which in its current form provides:

The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or 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.

1 U.S.C. 109; see Act of Feb. 25, 1871, ch. 71, § 4, 16 Stat. 432; *Marrero*, 417 U.S. at 660.

Section 109 thus presumptively reverses the common law rule: federal criminal liability incurred when a person commits an offense is presumed *not* to be released or extinguished by the modification or repeal

of the law proscribing his conduct or providing the penalty. See *Marrero*, 417 U.S. at 659-664 (Section 109 preserved a prohibition against parole under repealed statute); *United States v. Reisinger*, 128 U.S. 398, 403 (1888) (“[The] word ‘liability’ [in the saving statute] is intended to cover every form of punishment to which a man subjects himself, by violating the common laws of the country.” (quoting *United States v. Ulrici*, 28 F. Cas. 328, 329 (C.C.E.D. Mo. 1875) (No. 16,594) (Miller, Circuit Justice))).

But Section 109 establishes only a default rule. Because “one legislature cannot abridge the powers of a succeeding legislature,” *Fletcher*, 10 U.S. (6 Cranch) at 135, this Court has recognized “that an express-reference or express-statement provision cannot nullify the unambiguous import of a subsequent statute.” *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring). “When the plain import of a later statute directly conflicts with an earlier statute, the later enactment governs, *regardless* of its compliance with any earlier-enacted requirement of an express reference or other ‘magical password.’” *Id.* at 149. See, e.g., *Marcello v. Bonds*, 349 U.S. 302, 310 (1955) (concluding that the Immigration and Nationality Act exempted deportation hearings from the procedural requirements of the APA, notwithstanding the APA’s express-reference requirement).

For this reason, notwithstanding that Section 109 on its face preserves liability for acts done under repealed statutes unless the repealing act “expressly provide[s]” otherwise, this Court has explained that Section 109 has no effect if a subsequent Act of Congress clearly expresses—in any sufficient fashion—a contrary intent. See, e.g., *Great N. Ry.*, 208 U.S. at 465 (Section 109

“cannot justify a disregard of the will of Congress as manifested either expressly or by necessary implication in a subsequent enactment.”); *id.* at 466 (“by fair implication”); *Hertz v. Woodman*, 218 U.S. 205, 218 (1910) (“by clear implication”); *Marrero*, 417 U.S. at 659 n.10 (“by fair implication”).

**2. Congress clearly expressed its intent that the FSA’s revised penalties should apply immediately in post-enactment sentencings.**

Section 109 therefore does not prevent a sentencing court from applying the FSA’s revised statutory penalties to pre-enactment offenders, such as petitioners, who had not yet been sentenced on the date of enactment. As explained, pp. 27-43, *supra*, Congress clearly expressed its intent that its repeal of the 100-to-1 ratio should be immediately effective. Section 8’s emergency directive to the Sentencing Commission is incompatible with the court of appeals’ conclusion that Congress intended district courts to continue to impose mandatory minimum sentences under pre-FSA law for years into the future. It was Congress’s prerogative in enacting the Fair Sentencing Act to “to make its will known in whatever fashion it deem[ed] appropriate.” *Lockhart*, 546 U.S. at 148 (Scalia, J., concurring). That intent controls under Section 109 and was binding on the courts below.

At the same time, Section 109 requires the conclusion that pre-enactment offenders on whom a sentence had *already* been imposed at the time of the FSA’s enactment remain ineligible for relief from the mandatory statutory penalties imposed under prior law. See *Marrero*, 417 U.S. at 659-664 (Section 109 barred habeas corpus relief for an offender convicted and

sentenced under a prior scheme). Nothing in the FSA expresses a clear congressional intent with regard to such offenders: by directing the Commission to issue “as soon as practicable” Guidelines amendments that would apply in all initial sentencing proceedings, 18 U.S.C. 3553(a)(4), Congress addressed itself to future sentencing determinations, not to determinations already made and embodied in final judgments. Consequently, as every court of appeals to address the question has held, see *United States v. Baptist*, 646 F.3d 1225, 1229 (9th Cir. 2011) (per curiam) (collecting cases), Section 109 bars offenders who were both convicted and sentenced before the enactment of the FSA from obtaining relief under the Act, except to the limited extent that Congress has otherwise provided for retroactive sentence adjustments under the Sentencing Reform Act. 1 U.S.C. 109; see 18 U.S.C. 3582(c).<sup>15</sup>

Congress thus adhered in the Fair Sentencing Act to the basic framework for federal sentencing determinations established decades earlier in the Sentencing Reform Act. As already discussed, see pp. 49-50, *supra*, that Act contemplates that a sentencing court cannot ordinarily modify a sentence of imprisonment already imposed. 18 U.S.C. 3582(c). But it also contemplates a system of ongoing refinement in which sentencing courts must consider the suitable penalty for an offense as reflected in the most recent Guidelines and policy statements promulgated by the Sentencing Commission. 18 U.S.C. 3553(a)(4) and (5); see, *e.g.*, 28 U.S.C. 991(b)(1)(C) (directing that the Guidelines and policy statements shall “reflect, to the extent practicable,

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<sup>15</sup> As previously noted, see note 14, *supra*, the Sentencing Commission in July 2011 exercised its discretion under 28 U.S.C. 994(u) to make its post-FSA Guidelines amendments retroactively effective.

advancement in knowledge of human behavior as it relates to the criminal justice process”); 28 U.S.C. 994(f); 28 U.S.C. 994(o) (“The Commission periodically shall review and revise, in consideration of comments and data coming to its attention, the [Guidelines].”). Thus, the Senate committee report accompanying the Sentencing Reform Act explained that Section 3553(a)(4) reflected the “philosophy embodied in” the Act that the operative version of the Guidelines should always reflect the “most sophisticated” understanding of the penalties that “will most appropriately carry out the purposes of sentencing.” S. Rep. No. 223, 98th Cong., 1st Sess. 74 (1983); see also *ibid.* (“To impose a sentence under outmoded guidelines would foster irrationality in sentencing and would be contrary to the goal of consistency in sentencing.”).

Consistent with that longstanding approach to federal sentencing law, Congress did not seek in the Fair Sentencing Act to disturb mandatory minimum sentences imposed before the FSA’s enactment. But it *did* intend that crack cocaine offenders such as petitioners who had not yet been sentenced when the FSA became effective would receive a sentence according to the FSA’s terms, which reflect Congress’s best judgment regarding the penalty appropriate for their crimes.

CONCLUSION

The judgments of the court of appeals should be reversed and the cases remanded for further proceedings.

Respectfully submitted.

DONALD B. VERRILLI, JR.  
*Solicitor General*

LANNY A. BREUER  
*Assistant Attorney General*

MICHAEL R. DREEBEN  
*Deputy Solicitor General*

MARK R. FREEMAN  
*Assistant to the Solicitor  
General*

JOSHUA S. JOHNSON  
*Attorney*

JANUARY 2012

**APPENDIX A**

[SEAL OMITTED]

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

July 15, 2011

**MEMORANDUM FOR ALL FEDERAL PROSECUTORS**

**FROM:** Eric H. Holder, Jr. ERIC J. HOLDER, JR.  
Attorney General

**SUBJECT:** Application of the Statutory Mandatory  
Minimum Sentencing Laws for Crack Co-  
caine Offenses Amended by the Fair Sen-  
tencing 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 de-

structive, 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.

**APPENDIX B**

1. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 provides:

**An Act**

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,*

**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, DR 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.**

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.**

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 sub-

ject to an aggravating role enhancement under the guidelines; and

(B) the offense involved 1 or more of the following super-aggravating 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.

**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.

**SEC. 8. EMERGENCY AUTHORITY FOR UNITED STATES SENTENCING COMMISSION.**

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.

**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.

2. 21 U.S.C. 841(a) provides:

**Prohibited acts A**

**(a) Unlawful acts**

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

3. 21 U.S.C. 841(b) (2006 & Supp. IV 2010) provides:

**(b) Penalties**

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—

13a

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl- N-[ 1-(2-phenylethyl)-4-piperidinyl ] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2- phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$10,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$20,000,000 if the defendant is an individual or \$75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in

addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$5,000,000 if the defendant is an individual or \$25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has

become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$8,000,000 if the defendant is an individual or \$50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in ac-

cordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marijuana, except in the case of 50 or more marijuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000

if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance

shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised re-

lease of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$100,000 if the defendant is an individual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marijuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's

knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION.—For purposes of this paragraph, the term “without that individual’s knowledge” means that the individual is unaware that a substance with the ability to alter that individual’s ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

4. 21 U.S.C. 841(b) (2006 & Supp. III 2009) provides:

**(b) Penalties**

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of-

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(ii) 50 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidiny] propanamide;

(vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than

life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$4,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$8,000,000 if the defendant is an individual or \$20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subpara-

graph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 5 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$4,000,000 if the

defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillary J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results

from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$2,000,000 if the defendant is an individual or \$10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marijuana, except in the case of 50 or more marijuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that

authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E)(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$1,000,000 if the defendant is an individual or \$5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$250,000 if the defendant is an individual or \$1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$500,000 if the defendant is an individual or \$2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or \$100,000 if the defendant is an indi-

vidual or \$250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or \$200,000 if the defendant is an individual or \$500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18;

(C) \$500,000 if the defendant is an individual; or

(D) \$1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a) of this section, or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18 or imprisoned not more than five years, or both.

(7) PENALTIES FOR DISTRIBUTION.—

(A) IN GENERAL.—Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18.

(B) DEFINITION.—For purposes of this paragraph, the term “without that individual's knowledge” means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation

in or communicate unwillingness to participate in conduct is administered to the individual.

5. 21 U.S.C. 844(a) (Supp. IV 2010) provides:

**Penalties for simple possession**

**(a) Unlawful acts; penalties**

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior con-

viction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

6. 21 U.S.C. 844(a) (2006) provides:

**Penalties for simple possession**

**(a) Unlawful acts; penalties**

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of \$1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of im-

prisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of \$2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of \$5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of \$1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including

the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

7. 18 U.S.C. 3553(a) provides:

**Imposition of a sentence**

(a) FACTORS TO BE CONSIDERED IN IMPOSING A SENTENCE.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and
  - (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such pol-

icy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.<sup>1</sup>

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

8. Pub. L. No. 104-38, 109 Stat. 334 (1995) provides:

An Act

To disapprove of amendments to the Federal Sentencing Guidelines relating to lowering of crack sentences and sentences for money laundering and transactions in property derived from unlawful activity.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,*

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<sup>1</sup> So in original. The period probably should be a semicolon.

**SECTION 1. DISAPPROVAL OF AMENDMENTS RELATING TO LOWERING OF CRACK SENTENCES AND SENTENCES FOR MONEY LAUNDERING AND TRANSACTIONS IN PROPERTY DERIVED FROM UNLAWFUL ACTIVITY.**

In accordance with section 994(p) of title 28, United States Code, amendments numbered 5 and 18 of the “Amendments to the Sentencing Guidelines, Policy Statements, and Official Commentary”, submitted by the United States Sentencing Commission to Congress on May 1, 1995, are hereby disapproved and shall not take effect.

**SEC. 2. REDUCTION OF SENTENCING DISPARITY.**

**(a) RECOMMENDATIONS.—**

(1) **IN GENERAL.**—The United States Sentencing Commission shall submit to Congress recommendations (and an explanation therefor), regarding changes to the statutes and sentencing guidelines governing sentences for unlawful manufacturing, importing, exporting, and trafficking of cocaine, and like offenses, including unlawful possession, possession with intent to commit any of the forgoing offenses, and attempt and conspiracy to commit any of the forgoing offenses. The recommendations shall reflect the following considerations—

(A) the sentence imposed for trafficking in a quantity of crack cocaine should generally exceed the sentence imposed for trafficking in a like quantity of powder cocaine;

(B) high-level wholesale cocaine traffickers, organizers, and leaders, of criminal activities should generally receive longer sentences than low-level retail cocaine traffickers and those who played a minor or minimal role in such criminal activity;

(C) if the Government establishes that a defendant who traffics in powder cocaine has knowledge that such cocaine will be converted into crack cocaine prior to its distribution to individual users, the defendant should be treated at sentencing as though the defendant had trafficked in crack cocaine; and

(D) an enhanced sentence should generally be imposed on a defendant who, in the course of an offense described in this subsection—

(i) murders or causes serious bodily injury to an individual;

(ii) uses a dangerous weapon;

(iii) uses or possesses a firearm;

(iv) involves a juvenile or a woman who the defendant knows or should know to be pregnant;

(v) engages in a continuing criminal enterprise or commits other criminal offenses in order to facilitate his drug trafficking activities;

(vi) knows, or should know, that he is involving an unusually vulnerable person;

- (vii) restrains a victim;
- (viii) traffics in cocaine within 500 feet of a school;
- (ix) obstructs justice;
- (x) has a significant prior criminal record; or
- (xi) is an organizer or leader of drug trafficking activities involving five or more persons.

(2) **RATIO.**—The recommendations described in the preceding subsection shall propose revision of the drug quantity ratio of crack cocaine to powder cocaine under the relevant statutes and guidelines in a manner consistent with the ratios set for other drugs and consistent with the objectives set forth in section 3553(a) of title 28 United States Code.

(b) **STUDY.**—No later than May 1, 1996, the Department of Justice shall submit to the Judiciary Committees of the Senate and House of Representatives a report on the charging and plea practices of Federal prosecutors with respect to the offense of money laundering. Such study shall include an account of the steps taken or to be taken by the Justice Department to ensure consistency and appropriateness in the use of the money laundering statute. The Sentencing Commission shall submit to the Judiciary Committees comments on the study prepared by the Department of Justice.

Approved Oct. 30, 1995.

9. 75 Fed. Reg. 66,188 (2010) provides in pertinent part:

UNITED STATES SENTENCING COMMISSION  
Sentencing Guidelines for United States Courts

\* \* \* \* \*

Notice of a temporary, emergency amendment to sentencing guidelines and commentary.

SUMMARY: Pursuant to section 8 of the Fair Sentencing Act of 2010, Public Law 111-220, the Commission hereby gives notice of a temporary, emergency amendment to the sentencing guidelines and commentary. This notice sets forth the temporary, emergency amendment and the reason for amendment.

\* \* \* \* \*

[66,190]

\* \* \* \* \*

Reason for Amendment: This amendment implements the emergency directive in section 8 of the Fair Sentencing Act of 2010, Public Law 111-220 (the “Act”). The Act reduced the statutory penalties for cocaine base (“crack cocaine”) offenses, eliminated the statutory mandatory minimum sentence for simple possession of crack cocaine, and contained directives requiring the Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases. The emergency amendment authority provided in section 8 of the Act required the Commission to promulgate the guidelines, policy statements, or amendments provided for in the Act, and

to make such conforming changes to the guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law, not later than 90 days after the date of enactment of the Act.

First, the amendment amends the Drug Quantity Table in § 2D1.1 (Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy) to account for the changes in the statutory penalties made in section 2 of the Act. Section 2 of the Act reduced the statutory penalties for offenses involving manufacturing or trafficking in crack cocaine by increasing the quantity thresholds required to trigger a mandatory minimum term of imprisonment. The quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment was increased from 5 grams to 28 grams, and the quantity threshold required to trigger the 10-year mandatory minimum term of imprisonment was increased from 50 grams to 280 grams. *See* 21 U.S.C. 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

To account for these statutory changes, the amendment conforms the guideline penalty structure for crack cocaine offenses to the approach followed for other drugs, *i.e.*, the base offense levels for crack cocaine are set in the Drug Quantity Table so that the statutory minimum penalties correspond to levels 26 and 32. *See generally* § 2D1.1, comment. (backg'd.). Accordingly, using the new drug quantities established by the Act, offenses involving 28 grams or more of crack cocaine are assigned a base offense level of 26, offenses involving 280 grams or more of crack cocaine are assigned a base offense level of 32, and other offense levels are estab-

lished by extrapolating upward and downward. Conforming to this approach ensures that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionally reflected throughout the Drug Quantity Table.

\* \* \* \* \*

10. Section 21 of Pub. L. No. 100-182 provided that:

**EMERGENCY GUIDELINES PROMULGATION AUTHORITY.**

(a) IN GENERAL.—In the case of—

- (1) an invalidated sentencing guideline;
- (2) the creation of a new offense or amendment of an existing offense; or
- (3) any other reason relating to the application of a previously established sentencing guideline, and determined by the United States Sentencing Commission to be urgent and compelling;

the Commission, by affirmative vote of at least four members of the Commission, and pursuant to its rules and regulations and consistent with all pertinent provisions of title 28 and title 18, United States Code, shall promulgate and distribute to all courts of the United States and to the United States Probation System a temporary guideline or amendment to an existing guideline, to remain in effect until and during the pendency of the next report to Congress under section 994(p) of title 28, United States Code.

(b) EXPIRATION OF AUTHORITY.—The authority of the Commission under paragraphs (1) and (2) of subsection (a) shall expire on November 1, 1989. The authority of the Commission to promulgate and distribute guidelines under paragraph (3) of subsection (a) shall expire on May 1, 1988.

10. Sentencing Guidelines 2D1.1(c) (2009) for cocaine base provides:

**DRUG QUANTITY TABLE**

<b>Controlled Substances and Quantity*</b>	<b>Base Offense Level</b>
(1) 4.5 KG or more of Cocaine Base	Level 38
(2) At least 1.5 KG but less than 4.5 KG of Cocaine Base	Level 36
(3) At least 500 G but less than 1.5 KG of Cocaine Base	Level 34
(4) At least 150 G but less than 500 G of Cocaine Base	Level 32
(5) At least 50 G but less than 150 G of Cocaine Base	Level 30
(6) At least 35 G but less than 50 G of Cocaine Base	Level 28
(7) At least 20 G but less than 35 G of Cocaine Base	Level 26
(8) At least 5 G but less than 20 G of Cocaine Base	Level 24
(9) At least 4 G but less than 5 G of Cocaine Base	Level 22

(10) At least 3 G but less than 7 G of Cocaine Base	Level 20
(11) At least 2 G but less than 3 G of Cocaine Base	Level 18
(12) At least 1 G but less than 2 G of Cocaine Base	Level 16
(13) At least 500 MG but less than 1 G of Cocaine Base	Level 14
(14) Less than 500 MG of Cocaine Base	Level 12

\* \* \* \* \*

\*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight of the entire mixture or substance is assigned to the controlled substance that results in the greater offense level.

\* \* \* \* \*

11. Sentencing Guidelines 2D1.1(c) (Suppl. 2010) for cocaine base provides:

**DRUG QUANTITY TABLE**

<b>Controlled Substances and Quantity*</b>	<b>Base Offense Level</b>
(1) 8.4 KG or more of Cocaine Base	Level 38
(2) At least 2.8 KG but less than 8.4 KG of Cocaine Base	Level 36

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(3)	At least 840 G but less than 2.8 KG of Cocaine Base	Level 34
(4)	At least 280 G but less than 840 G of Cocaine Base	Level 32
(5)	At least 196 G but less than 280 G of Cocaine Base	Level 30
(6)	At least 112 G but less than 196 G of Cocaine Base	Level 28
(7)	At least 28 G but less than 112 G of Cocaine Base	Level 26
(8)	At least 22.4 G but less than 28 G of Cocaine Base	Level 24
(9)	At least 16.8 G but less than 22.4 G of Cocaine Base	Level 22
(10)	At least 11.2 G but less than 16.8 G of Cocaine Base	Level 20
(11)	At least 5.6 G but less than 11.2 G of Cocaine Base	Level 18
(12)	At least 2.8 G but less than 5.6 G of Cocaine Base	Level 16
(13)	At least 1.4 G but less than 2.8 G of Cocaine Base	Level 14
(14)	Less than 1.4 G of Cocaine Base	Level 12

\* \* \* \* \*

\*Notes to Drug Quantity Table:

- (A) Unless otherwise specified, the weight of a controlled substance set forth in the table refers to the entire weight of any mixture or substance containing a detectable amount of the controlled substance. If a mixture or substance contains more than one controlled substance, the weight

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of the entire mixture or substance is assigned to  
the controlled substance that results in the  
greater offense level.

\* \* \* \* \*