

**UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION**

UNITED STATES OF AMERICA

-vs-

Case No. 6:08-cr-270-Orl-31KRS

CLEOTHA JOHNSON, JR.

ORDER

On January 13, 2009, Cleotha Johnson, Jr. (“Johnson”) pled guilty to Counts 2 and 3 of the Indictment charging him with possession and conspiracy to possess with intent to distribute 50 grams or more of cocaine base – specifically, 69.2 grams. Johnson is scheduled to be sentenced on January 7, 2011.¹ Pending before me is Johnson’s Second Motion to Consider Retroactive Application of the Fair Sentencing Act (Doc. 207) and the Government’s response in opposition (Doc. 208).²

The primary issue here is the length of the mandatory minimum sentence to which Johnson is subject and, more particularly, whether the Fair Sentencing Act of 2010 (henceforth, the “FSA”) has any affect on that mandatory minimum. In accordance with the United States Sentencing

¹ This unusual delay was caused by the expectation that Congress would pass remedial legislation affecting crack cocaine sentencing.

² Out of ripeness concerns, the Court has waited until 48 hours before the sentencing hearing to enter this order. I do so to allow the parties time to become fully prepared to address these issues at the hearing.

Commission's Emergency Amendment³ to the guidelines, effective November 1, 2010, 69 grams of crack cocaine, together with 17 criminal history points and a three-level credit for acceptance of responsibility, places Johnson at a USSG score of 23-VI. As set forth in the Amended Presentence Investigation Report dated January 3, 2011, this score suggests a sentencing range of 92-115 months.⁴

However, because of the quantity of crack for which Johnson is being held responsible, together with a 21 U.S.C. § 851 enhancement, he faces a mandatory minimum sentence. The Government contends that Johnson should receive the mandatory minimum sentence that prevailed under the statutory provisions in place in 2008, when he committed the offense. At that time, 21 U.S.C. § 841(b)(1)(A)(iii), with an enhancement under 21 U.S.C. § 851, required a 240-month minimum sentence based on 50 grams or more of crack cocaine. Under the FSA, the quantity of crack required to trigger this 240-month mandatory minimum was increased from 50 grams to 280 grams, while the threshold for the 60-month (120-month enhanced) minimum was increased from 5 grams to 28 grams. 21 U.S.C. § 841 (b)(1)(B)(iii). Thus, under the provisions of the FSA, the mandatory minimum sentence for Johnson would be 120 months.⁵

³ This amendment was adopted by the United States Sentencing Commission in accordance with the congressional mandate of the Fair Sentencing Act of 2010 ("FSA"). See Supp. U.S. Sentencing Guidelines Manual § 2D1.1(c) (Nov. 1, 2010).

⁴ Absent a statutory mandatory minimum, the Court would ordinarily sentence Johnson based on a 1:1 ratio as authorized by the Supreme Court in *United States v. Kimbrough*, 552 U.S. 85 (2007). A 1:1 ratio produces a guideline score of 13-VI (base of 16 less three levels for acceptance of responsibility), suggesting a range of 33-41 months.

⁵ In an April 29, 2009 statement to the U.S. Senate Committee on the Judiciary, Subcommittee on Crime and Drugs, Lanny Breuer, Assistant Attorney General for the Department of Justice's Criminal Division, supported the complete elimination of the sentencing disparity between crack and

Johnson has cited substantial authority in support of his position (*see* Doc. 207 & 212) that the FSA’s mandatory minimums are applicable in this case.⁶ The Government’s response (Doc. 208) relies solely on the opinion in *United States v. Gomes*, 621 F.3d 1343, 2346 (11th Cir. 2010), in which the court said, “Moreover, because the FSA took effect in August 2010, after appellant committed his crimes, 1 U.S.C. Sec. 109 bars the Act from affecting his punishment.” *Id.* at 1346. As noted by Johnson, however, this statement was clearly *dicta*, and is therefore not binding authority.

Several Circuits have rejected the argument that the provisions of the FSA should be applied after the fact to defendants who were sentenced before the Act became law. *See, e.g., United States v. Lewis*, 625 F.3d 1224, 1228 (10th Cir. 2010); *United States v. Glover*, 2010 WL 4250060 at *2 (2d Cir. Oct. 27, 2010); *United States v. Bell*, 624 F.3d 803, 814 (7th Cir. 2010); *United States v. Carradine*, 621 F.3d 575, 579-81 (6th Cir. 2010). No Circuit has yet addressed the question now confronting this Court – whether the amended (lower) mandatory minimum sentence under the FSA applies to a defendant whose offense occurred before August 3, 2010, but who is sentenced thereafter.

There are, however, district court opinions that have found that the new mandatory minimums are applicable in a case such as this, where the conduct predated the FSA but the sentencing occurred afterward. *See, e.g., United States v. Johnson*, Case No. 3:10-cr-138 (E.D. Va.

powder cocaine. (*See* Appendix A). It is, therefore, baffling that the Government now opposes application of the FSA, which at least partially rectifies the unwarranted sentencing disparity between these two forms of the same drug.

⁶ *See also* authorities cited by the defendant in *United States v. Smith*, Case No. 6:10-cr-202 (Docs. 20, 24, 32, 34, 41, 43-45).

Dec. 6, 2010); *United States v. Spencer*, Case No. 5:09-cr-400-JW-1 (N.D. Cal. Nov. 30, 2010); *United States v. Favors*, No. 1:10-cr-384-LY-1 (W.D. Tex. Nov. 23, 2010).

Perhaps the most thorough and compelling opinion is that of Judge Hornby in *United States v. Douglas*, 2010 WL 4260221 (D. Me. Oct. 27, 2010). A number of other courts have followed Judge Hornby's decision. *See, e.g., United States v. Gillam*, 2010 WL 4906283 (W.D. Mich. Dec. 3, 2010); *United States v. Shelby*, Case No. 2:09-cr-00379 (E.D. La. filed Nov. 13, 2009). Professor Douglas Berman, an expert in the field of federal sentencing,⁷ has also made two submissions to Judge Kenneth M. Karas for his consideration in *United States v. Santana*, Case No. 7:09-cr-01022-KMK-1 (S.D. NY filed Oct. 22, 2009). These submissions, attached to this opinion as Appendix B, provide persuasive arguments for application of the FSA to all defendants who are sentenced after the effective date of the Act. Along these same lines, Senator Dick Durbin and Senator Patrick Leahy were lead sponsors of the FSA. In a letter to the Attorney General dated November 17, 2010, they cited *Douglas* with approval and implored him to apply the modified mandatory minimums of the FSA to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment. A copy of this letter is attached as Appendix C.

The Government acknowledges that I must sentence Johnson under the new FSA sentencing guidelines, which are based on an 18:1 crack-to-powder ratio, but would have me apply the old mandatory minimum sentencing provisions, which are based on a 100:1 crack to powder

⁷ Berman is the William B. Saxbe professor of law at the Moritz College of Law at the Ohio State University.

ratio. This is an incongruous and absurd result, which is at odds with the intent of Congress in enacting the FSA.

It is, therefore

ORDERED that Johnson's Motion is GRANTED. At sentencing, the Court will apply the FSA's 120-month mandatory minimum sentence.

DONE and **ORDERED** in Chambers in Orlando, Florida on January 4, 2011.



GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Marshal
United States Attorney
United States Probation Office
United States Pretrial Services Office
Counsel for Defendant
Cleotha Johnson, Jr.