

## **II. Defendants Sentenced after August 3, 2010**

### **A. 11th Circuit: M.D.Ala.**

***United States v. Ross*, --- F.Supp.2d ----, 2010 WL 5168794 (S.D.Fla. Dec. 17, 2010)**

Sentencing Opinion and Order. The defendant requested a variance from the guideline range in effect at the time of his offense based on the guidelines promulgated by the FSA. *Id.* at \*1. “The conundrum before the Court is that under the law in effect prior to November 3, 2010, Defendant faced a five-year mandatory minimum sentence; however, if the Court were to apply the adjustments made in the Fair Sentencing Act of 2010, he would not be exposed to a mandatory minimum five-year sentence.” *Id.* Thus, the issue was whether the FSA applied. *Id.* The court stated that it “in good conscious cannot apply the Government's requested interpretation, thus arriving at a sentence the Congress believes to be totally unfair.” *Id.* at \*2. Because the letter from Senators Leahy and Durbin urges Attorney General Holder to apply the FSA to defendants not yet sentenced, and “in light of the fact that the Fair Sentencing Act itself, despite the fact that it is not retroactive, does not indicate categories of offenders to whom it applies: those who have not yet offended, offenders not yet convicted, offenders convicted but no[t] yet sentenced, or offenders already sentenced, the Court believes it is proper to sentence Defendant under the new Guidelines.” *Id.* “Therefore,” the court concluded, “taking into account all the relevant information, the Fair Sentencing Act of 2010 and supporting materials, this Court finds that the circumstances are sufficiently compelling to justify a deviation from the sentencing guideline in favor of the amended provisions of the Fair Sentencing Act of 2010.” *Id.*

***United States v. Wright*, No. 3:10cr43-MHT, 2010 WL 3155634 (M.D.Ala. Aug. 09, 2010)**

Order Granting Motion to Continue to allow the parties time to study the new law

(FSA) to decide the possible effect on the case and continue plea negotiations. The court noted that the central aim of the FSA was to narrow the crack/powder disparity.

**B. 10th Circuit – none**

**C. 9th Circuit**

***United States v. Marlon Spencer*, CR 09-00400 JW (N.D. Cal. Nov. 30, 2010) (Ware, J.)**

**(Doc. 81)**

Order Granting Defendant’s Motion to Strike Information, etc. The defendant, who had yet to stand trial and face sentencing, moved to strike the government’s § 851 Information, arguing, *inter alia*, that the FSA applied to alter his minimum mandatory sentence. *Id.* at 2. The court commented on the purpose of the FSA and the emergency amendment directive, as well as *Douglas* and § 3553(a)(4)(A)(ii), the court found that Congress intended the new guidelines to apply retroactively. *Id.* at 3-5. Further, the court found that considering implicit congressional intent to apply the Fair Sentencing Act retroactively, Defendant is entitled to the Act's ameliorative amendments.” *Id.* at 5.

**D. 8th Circuit**

***United States v. English*, --- F.Supp.2d ----, 2010 WL 5397288 (S.D.Iowa Dec. 30, 2010)**

Sentencing Memorandum Opinion and Order. The court concluded that the FSA applied at sentencing, and that *Brewer* was distinguishable because it dealt with “a factually distinct issue – whether the Fair Sentencing Act applies to individuals sentenced prior to August 3, 2010.” *Id.* at \*3. The court was persuaded by the reasoning in *Douglas* and specifically found “Congress' authorization and directive to the United States Sentencing Commission to enact emergency guideline amendments in order to “achieve consistency with other guideline provisions and applicable law,” to be direct evidence that Congress intended the Fair Sentencing Act be apply to all sentences after

the date of enactment. *See* Fair Sentencing Act, § 8. Indeed, because a court must apply the guidelines in place at the time of sentencing, *see* 18 U.S.C. § 3553(a)(4)(A)(ii), were a court to not apply the Fair Sentencing Act to individuals in Defendant's position, it would lead to an nonsensical result.” *Id.* (footnote omitted). The court further explained that if the defendant was sentenced after November 1, 2010 (the date the current guidelines went into effect), based on conduct that occurred before August 3, 2010, “a Court would be in the absurd position of applying guidelines amended to ensure ‘consistency with applicable law’ to situations in which that very ‘applicable law’ was not applicable.” *Id.* (footnote omitted). This would be contrary to congressional intent to ensure “consistency and conformity between the applicable law and the applicable guidelines[.]” *Id.*

The court concluded: “In light of Fair Sentencing Act's stated purpose, its command that emergency guidelines be implemented to ensure consistency with the Act, and the Act's construction with the guideline sentencing scheme generally, the Court finds that a necessary implication of the Act is that it apply to all sentences administered after August 3, 2010. To determine that the Savings Statute requires otherwise would simply frustrate the Act's purpose by creating greater inconsistency and unfairness in Federal cocaine sentences, and ensure ‘the legislative mind will be set at naught[.]’” *Id.* (quoting *Great Northern Ry. Co. v. U.S.*, 208 U.S. 452, 465 (1908)).

***United States v. Parks*, 2010 WL 5463743 (D. Neb. Dec. 28, 2010)**

Memorandum and Order. The defendant moved to strike the reference to drug quantity (50 grams of crack) from the indictment, “contending that the quantity reference is superfluous and irrelevant in light of the enactment of the Fair Sentencing Act[.]” *Id.* at \*1. The court addressed the history leading up to the enactment of the FSA, including

the lack of an evidentiary basis for the 100-to-1 ratio, the racially discriminatory impact of that ratio, and “Congress's stated goal in enacting the Fair Sentencing Act -- “to restore fairness to Federal cocaine sentencing.” *Id.* at \*2-\*3. The court quoted from the letter Senators Leahy and Durbin’s letter to the Attorney General, urging him “to seek sentences consistent with the Fair Sentencing Act[.]” *Id.* at \*3. The court also quoted Assistant Attorney General Lanny Breuer’s testimony before Congress on April 29, 2009, and attorney General Eric Holder’s remarks on June 19, 2009, each calling for crack sentencing reform. *Id.* at \*4. The court stated that “the government's present position is at odds with its professions to Congress and the public.” *Id.* at \*8.

The court cited *Griffith v. Kentucky*, 479 U.S. 314 (1987), for the proposition that new rules of substantive or procedural law announced by the Supreme Court apply to all cases not final. *Id.* at \*5. “One rationale for the rule is the actual inequity of violating the principle of treating similarly situated defendants the same.” *Id.*

The court then discussed the saving statute, which “need not be enforced if, ‘either by express declaration or necessary implication arising from the terms of the law as a whole, it results that the legislative mind will be set at naught by giving effect to the [saving statute].’ *Great Northern Ry. Co.*, 208 U.S. at 465. The provision is to be interpreted, read, and construed ‘in order to give effect to the will and intent of Congress.’ *Hertz v. Woodman*, 218 U.S. 205, 217 (1910).” *Id.* Moreover, the court stated, Even with statutory language that is ‘clearly delineated,’ exceptions may be implied ‘where essential to prevent ‘absurd results’ or consequences obviously at a variance with the policy of the enactment as a whole[.]” *Id.* at \*6 (quoting *United States v. Rutherford*, 442 U.S. 544, 552 (1979)).

Concerning congressional intent, the court stated: “The Supreme Court imputes

to Congress ‘an intention to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive.’” *Id.* (quoting *Hamm v. City of Rock Hill*, 379 U.S. 306, 308 (1965), *et al.*). Additionally, congressional intent can be implied from the context of the statute as a whole. *Id.*

Observing that the saving statute “applies only in the absence of an expression of congressional intent[,]” the court found “it clear in the text and structure of the Fair Sentencing Act, as part of other congressional enactments that establish the overall federal sentencing scheme, that Congress intended the Act to apply to cases pending at the time of the enactment.” *Id.* The court found that this congressional intention was expressed in the FSA’s directive regarding the emergency guideline amendments to conform guideline penalties to the new FSA penalties. *Id.*

Furthermore, the court found that if the saving statute was applied here and defendants were required to be sentenced “under a formula that is uniformly regarded as unfair and unjust,” it would lead to an “absurd result,” thereby frustrating “the expressed congressional goals of remedying racially discriminatory impact, ensuring that more culpable offenders are punished more harshly, and achieving consistency with the Guidelines.” *Id.* at \*7.

The court backed up its opinion with legislative history. *Id.* “The crack penalty reforms did not occur in a vacuum. It would be illogical to ignore Congress’s stated and implied objectives in order to exalt a hypertechnical interpretation of an antiquated statute. To do so would also diminish the effectiveness of the remedial advisory Guidelines scheme as envisioned by the Supreme Court.” *Id.*

“Moreover,” the court continued, “even if congressional intent were unclear, both the rule of lenity and the constitutional avoidance canon of statutory construction call for

the Fair Sentencing Act to be applied to cases pending at the time of its enactment.” *Id.* at \*8.

***United States v. Watson*, 2010 WL 4507374 (E.D.Ark. Nov. 02, 2010)**

Order Requesting the Parties’ Input on the FSA’s Applicability. “The Court directs the parties to state their position on the following two questions. First, do the parties agree that if the FSA's amendments to 21 U.S.C. § 841 are applied to Mr. Watson's count of conviction, the applicable mandatory minimum sentence will be reduced from ten to five years? Second, is Mr. Watson entitled to the benefit of the change in the law since he committed the offense and entered his guilty plea under the pre-FSA harsher regime?” *Id.* at \*1.

E. 7th Circuit – none

F. 6th Circuit

***United States v. Gillam*, --- F.Supp.2d ----, 2010 WL 4906283 (W.D. Mich. Dec. 3, 2010)  
(Neff, J.)**

Sentencing Memorandum. “This Court, persuaded that the Fair Sentencing Act permits no further federal crack cocaine sentencings that are not ‘fair,’” the court applied the FSA at the defendant’s sentencing. It reach this result by relying on the analysis in *Douglas*, Senators Leahy and Durbin’s letter to Eric Holder endorsing the analysis in *Douglas*, and a blog posting by Professor Berman. *Id.* at \*3-\*7. The court distinguished *Carradine* because the defendant’s plea and sentencing occurred after August 3, 2010. *Id.* at \*3.

***United States v. Askew*, No. 08-20334-BC, 2010 U.S. Dist. LEXIS 89253 (Aug. 30, 2010)**

Order Directing Government Response to Defendant’s Motion for a Sentence Reduction Pursuant to the Fair Sentencing Act. The court did not comment on whether

the FSA would apply in this § 2255 action; it just directed the government to respond to whether the FSA applies retroactively in cases where the defendant was convicted and sentenced before the new law was enacted. *Id.* at \*3.

**G. 5th Circuit**

***United States v. Whitfield*, No. 2:10CR13, 2010 WL 5387701 (N.D.Miss. Dec. 21, 2010)**

Memorandum Opinion. The court concluded that the FSA applies to post-enactment sentencings based on pre-enactment conduct and guilty plea. *Id.* at \*1. The court discussed the legislative history and intent, relying heavily on *Douglas* and noted the letter from Senators Leahy and Durbin. *Id.* at \*1-\*2. Although the 5th Circuit had not addressed the issue, “the court has previously determined that ‘changes in statute law relating only to procedure and remedy are usually held immediately applicable to pending cases.’ *Turner v. United States*, 410 F.2d 837, 842 (5th Cir.1969). The Fair Sentencing Act deals with remedies. This stance supports applying the FSA to current and future sentencings.” *Id.* at \*2. The court concluded: “The overarching theme of this country’s justice system is fairness. . . . This court is hesitant to impose a sentence that Congress has deemed unfair. Holding otherwise appears to this court as illogical.” *Id.* at \*2.

***United States v. Wendell Shelby*, 2:09-cr-00379-CJB (E.D. La. Nov. 10, 2010) (Barbee, J.)**

Order and Reasons. “Should Defendant Shelby be convicted, in imposing the sentence this Court will apply the Fair Sentencing Act of 2010, for the reasons fully stated in an opinion by Judge D. Brock Hornby, United States District Court for the District of Maine. *U.S. v. Douglas*, No. 09-202-P-H, — F.Supp. 2d — , 2010 WL 4260221 (D.Me. Oct. 27, 2010).” (Doc. 49)

***United States v. Joshua Favors*, No. A:10-cr-00384-LY-1 (W.D. Tex. Nov. 23, 2010)**

**(Yeakel, J.) (Doc. 34)**

Order Granting Defendant's Motion to be Sentenced under the FSA based on the same reasoning as *Douglas*.

**H. 4th Circuit**

***United States v. Lightfoot*, No. 3:10CR42-HEH, 2010 WL 5300890 (E.D.Va. Dec. 22, 2010)**

Memorandum Opinion. The court held that the FSA did not apply to a defendant who committed his offense prior to enactment of the FSA, but has not yet been sentenced. *Id.* at \*1. "[A] defendant is not entitled to the benefit of statutory criminal penalty amendments enacted between his date of offense and the time of sentencing absent explicit congressional language to the contrary." *Id.* at \*1. The defendant conceded that there is no such explicit language, but asked the court to apply the reasoning of *Douglas*. The court declined, stating: "Virtually every other court-including the Fourth Circuit-has held to the contrary, finding that the mandatory minimum in effect at the time of offense controls." *Id.* at \*2 (citing *Nelson, McAllister, Lewis, Glover, Bell, Brown, Gomes, Carradine, Wall, Millhouse, Jones, Hughes, Deleston, Ohaegbu, and Miller*). The court also rejected the reasoning of *Douglas*. *Id.* at \*2-\*3.

***United States v. Holloway*, 3: 04-cr-0090 (S.D.W.Va. Dec. 20, 2010) (Doc. 72)**

The court held that the FSA, including the statutory minimum mandatories, apply in any sentencing after Aug. 3 2010.

***United States v. Edward T. Johnson, Jr.*, 3:10-cr-138 (E.D. Va. Dec. 7, 2010) (Payne, J.) (Doc.**

**26)**

Order. The court summarily relied on *Douglas* in ruling that the FSA applied.

***United States v. Holmes*, 2010 WL 4961657 (E.D.Va. Dec. 01, 2010)**

Memorandum Opinion. Issue: “whether the FSA’s reduced penalty provisions apply to Defendant, who committed his offense prior to enactment of the FSA, but has not yet been sentenced.” *Id.* at \*1. The court rejected the reasoning of *Douglas*, stating that “[v]irtually every other court—including the Fourth Circuit—has held to the contrary, finding that the mandatory minimum in effect at the time of offense controls.” *Id.* at \*1-\*2 (citing *Nelson, McAllister, Lewis, Glover, Bell, Brown, Gomes, Carradine, Wall, Millhouse, Jones, Hughes, Deleston, Ohaegbu, and Miller*). “The reasoning in each of these cases is the same -- namely, that ‘the savings statute operates to bar the retroactive application of the FSA,’ . . . because the FSA ‘contains no express statement that it is retroactive’ and no such express intent can be inferred from its plain language[.]” *Id.* at \*2 (citing *Bell* and *Carradine*).

Note: the language in this case is virtually identical to that of *Lightfoot*.

**I. 3d Circuit**

***United States v. Jesus-Nunez*, No. 1:10-CR-017-01, 2010 WL 5422604 (M.D.Pa. Dec. 27, 2010)**

Memorandum. The court denied the defendant’s motion to apply the FSA at his sentencing. The court relied on *Carradine*, and held that the saving statute applies to the FSA, thereby making the defendant subject to the pre-FSA penalties in effect at the time of the offense. *Id.* at \*2.

***United States v. Burgess*, No. 2:09-cr-150, 2010 WL 5437265 (W.D.Pa., Dec. 27, 2010)**

Memorandum Opinion. The defendant relied on *Douglas* in arguing for the application of the FSA at his sentencing. *Id.* at \*1. The court adopted the memorandum opinion in *Crews* and found that “the statutory provisions in effect on the date of

Defendant's offense must be applied in determining an appropriate sentence." *Id.* at \*3. Notwithstanding *Douglas*, the court stated that it was bound by 3d Circuit precedent in *United States v. Jacobs*, 919 F.2d 10 (3d Cir.1990), which held that congressional intent cannot be considered when a repealing or amending statute does not expressly provide for retroactive effect." *Id.* at \*2.

***United States v. Crews*, --- F.Supp.2d ----, 2010 WL 5158124 (W.D.Pa. Dec. 20, 2010)**

Memorandum Opinion. The court found that under binding circuit precedent, "the statute in effect at the time of Crews' offense was applicable." *Id.* at \*1. In ruling that the FSA is not "retroactive" just because the defendant was sentenced after August 3, 2010, the court stated that "[t]here is no express retroactive provision in the Fair Sentencing Act." *Id.* (citing *Reeve*). The court rejected the reasoning in *Douglas*, relying instead on 3d Circuit precedent that "requires that for an amendment to be retroactive a provision for retroactivity must be expressly set forth in the statute." *Id.* at \*2-\*5.

**J. 2nd Circuit**

***United States v. Patterson*, 2010 WL 5480838 (S.D.N.Y. Dec. 30, 2010) (unpub'd)**

Opinion and Order. The defendants asserted that the FSA applied to all sentences occurring after August 3, 2010. *Id.* at \*1. The district court disagreed, finding "no support in any pre-FSA case law" to distinguish between defendant's sentenced before and after the date the new law was enacted. *Id.* at \*2. Unpersuaded by the reasoning in *Douglas*, the court stated that the Sentencing Reform Act does not modify or trump the saving statute "so far as mandatory penalties are concerned." *Id.* "More fundamentally," the court added, "it is one thing to direct, as the FSA does, that the Sentencing Guidelines, which are now discretionary, be promptly conformed and applied to a new

regime, and quite something else to infer from this that Congress necessarily intended that mandatory minimums, which are legislative dictates, be reduced retroactively in sentences following the date of the new enactment, notwithstanding the presumption of the Savings Statute. This Court concludes that nothing in the language of the FSA even hints at, let alone necessitates, the latter inference.” *Id.*

Despite stating that this ended the analysis, the court went on to express its disagreement with *Douglas* regarding the legislative history of the FSA. *Id.* at \*3. “the legislative history of the FSA demonstrates that Congress was acutely aware of retroactivity issues as it considered the measure—even considering making the entire measure retroactive—but chose in the end to insert no language expressly addressing retroactivity, thus leaving the Savings Statute as the default position.” *Id.* (citing Restoring Fairness to Federal Sentencing: Addressing the Crack-Powder Disparity, S. Comm. on the Judiciary, Senate Hearing 111-559, at 19, 22 (2009)). Moreover, the court continued, if Congress wanted to make the new law retroactive, it could have said so. *Id.* The court also commented that the defendants had no “cause to complain” as they were informed of the minimum mandatory when they pled guilty. *Id.*

Accordingly, the court held that the FSA did not apply to the future sentencing of the defendants whose conduct occurred before August 3, 2010. *Id.* at \*4.

***United States v. Tejada*, --- F.Supp.2d ----, 2010 WL 4967977 (S.D.N.Y. Dec. 02, 2010)**

Decision and Order. The defendant, who had not yet been resentenced on his 2007 drug conviction following remand, sought application of the FSA at sentencing. *Id.* at \*1. The government asked for the remand because the defendant had not been afforded allocution. The parties then entered a stipulation, wherein they agreed, *inter alia*, that the government would “move at resentencing for an order *nolle prosequi* of the previously

filed prior felony information,” the effect of which “would be to reduce the applicable statutory minimum sentence from 240 months to 120 months under 21 U.S.C. § 841(b)(1)(A).” *Id.* Thereafter, the FSA was enacted. Relying on *Glover*, the court stated that it was “not persuaded that the FSA applies retroactively to offenses committed prior to August 3, 2010.” *Id.* at \*2.

**K. 1st Circuit**

***United States v. Worthy*, --- F.Supp.2d ----, 2010 WL 5158124 (D.Me. Dec. 20, 2010)  
(Hornby, J.)**

Decision and Order on Defendants' Motions to Dismiss and Government's Motion to Dismiss and for Detention. Regarding whether the offense was a § 841(b)(1)(A) offense, the court noted its decision in *Douglas* controlled future sentencings. But even if that decision was reversed, the conspiracy alleged did not end until after the FSA was enacted. *Id.* at \*3 n.8.

***United States v. Whigham*, --- F.Supp.2d ----, 2010 WL 4959882 (D.Mass. Dec. 03, 2010)  
(Gertner, J.)**

Second Amended Sentencing Memorandum. The court simply referred to the FSA and related amendments in a footnote. *Id.* at \* n. 2.

***United States v. Douglas*, \_\_F. Supp.2d \_\_, 2010 WL 4260221 (D. Maine, Oct. 27, 2010)  
(Hornby, J.)**

In holding that “a defendant not yet sentenced on November 1, 2010, is to be sentenced under the amended Guidelines, and the Fair Sentencing Act’s altered mandatory minimums apply to such a defendant as well[,]” the court in *Douglas* reasoned that the FSA contains no saving clause. *Id.* at 13. It does, however, contain a statutory directive to the Sentencing Commission, “pursuant to the emergency authority” set forth in § 8(1) of the FSA, requiring the Commission 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.” FSA § 8(2) (emphasis added). But as the *Douglas* court pointed out, “the new Guidelines cannot be ‘conforming’ and ‘achieve consistency’ (Congress’s express mandate) if they are based upon statutory minimums that cannot be effective to a host of sentences over the next five years until the statute of limitations runs on pre-August 3, 2010 conduct.” Attachment 1 at 14; *see also id.* at 15-16 (“It would be a strange definition of ‘conforming’ and ‘consistency’ to have these new amended Guidelines go into effect while the old and therefore inconsistent statutory minimums continue.”).

The *Douglas* court read the saving statute, the Sentencing Reform Act of 1984, and the FSA together, and determined that “in 2010 Congress changed the course of all federal crack sentencings thereafter.” *Id.* at 18. The court then concluded, “based upon the context of the Act, its title, its preamble, the emergency authority afforded to the Commission, and the Sentencing Reform Act of 1984, that Congress did not want federal judges to continue to impose harsher mandatory sentences after enactment merely because the criminal conduct occurred before enactment.” *Id.*

***United States v. Watts*, No. 09-cr-30030-MAP, — F.Supp.2d —, 2010 WL 3553918 (D.Mass. Sept. 9, 2010)**

Order Denying Motion for Discovery. The discovery request was made in connection with defendant’s claim that the government was selectively targeting him for 21 U.S.C. § 851 enhancement based on race. *Id.* at \*1. The only mention of the FSA was as an indication that Congress agreed that the 100-to-1 ratio was “ill-conceived, unwise, and has often led to unfair consequences[.]” *Id.* at \*2 n.2.

**L. D.C. Circuit - none**

Respectfully submitted,

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I hereby certify that the foregoing Joint Digest of Written Opinions Dealing with Application of the Fair Sentencing Act of 2010 was electronically filed with the Clerk of Court, Middle District of Florida using the Court's CM/ECF system on this the 5th day of January, 2011, and as such the Clerk will provide electronic notice to the attention of AUSA Robert Bodnar and Rosemary Cakmis.

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