UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

UNITED STATES OF AMERICA

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

NATHANIEL GREEN

ORDER

This case comes before me for sentencing on January 7, 2011. In connection with Count 4 of the Indictment, Defendant Nathaniel Green ("Green") requests that the Court apply the modified mandatory minimum contained in the Fair Sentencing Act of 2010 ("FSA"). Pub. L. No. 111-220, § 2(b), 124 Stat. 2372 (2010).

On January 4, 2011, I entered an opinion regarding Green's co-defendant, Cleotha Johnson, in which I applied the ten-year mandatory minimum sentence of the FSA rather than the twenty-year mandatory minimum that prevailed under the old sentencing scheme. (*See* Doc. 219.) The same rationale and result applies to Green. In addition, the Court has now obtained a survey from counsel in a related case, *United States v. Smith*, No. 6:10-cr-202 (Doc. 54), which summarizes all written opinions dealing with application of the FSA to defendants whose conduct occurred before August 3, 2010, when the FSA was enacted, but who were sentenced after its enactment. That survey is attached.[1]

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[1] Part I of the survey, which summarizes all written opinions dealing with application of the FSA to defendants who were sentenced prior to August 3, 2010, is omitted.

In sum, there have been no circuit court opinions dealing with the application of the FSA to defendants in the same position as this defendant – *i.e.*, who were sentenced after August 3, 2010, for offenses committed before that date. There are, however, eighteen district court opinions that fall into this category. Eleven of these opinions, from nine states and ten districts,[2] have held that the FSA should be applied in this circumstance. Seven opinions from three states and four districts have held otherwise.[3]

The courts that have rejected retroactive application of the FSA to defendants in Green's position have relied primarily on *Warden, Lewisburg Penitentiary v. Marrero*, 417 U.S. 653 (1974), for the proposition that retroactivity cannot apply absent an *express* provision in the new statute. *See, e.g., United States v. Patterson*, 2010 WL 5480838 at *1 (S.D. N.Y. Dec. 30, 2010); *United States v. Jesus-Nunez*, 2010 WL 5422604 at *2 (M.D. Pa. Dec. 27, 2010); *United States v. Lightfoot*, 2010 WL 5300890 at *1-3 (E.D. Va. Dec. 22, 2010). Like Judge Hornby in *United States v. Douglas*, 2010 WL 4260221 (D. Me. Oct. 27, 2010), however, I do not read *Marrero* so narrowly as to exclude any possibility of an interpretation of congressional intent by way of a fair or necessary implication. *Id*. at *4-6. Here, that implication is clear. Defendants who have not yet been sentenced for pre-FSA conduct should receive the benefit not only of the new ameliorative emergency guidelines, but the correspondingly lower mandatory minimums as well.

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[2] Southern District of Florida, Northern District of California, Southern District of Iowa, District of Nebraska, Western District of Michigan, Northern District of Michigan, Eastern District of Louisiana, Southern District of West Virginia, District of Maine, and the Middle District of Florida.

[3] Eastern District of Virginia, Middle District of Pennsylvania, Western District of Pennsylvania, and the Southern District of New York.

To do otherwise would be to ascribe to Congress an intent to produce a patently unfair and absurd result.

Therefore, the Court will apply the mandatory minimum provisions of the FSA at Green's sentencing.

DONE and **ORDERED** in Chambers, Orlando, Florida on January 7, 2011.

GREGORY A. PRESNELL
UNITED STATES DISTRICT JUDGE

Copies furnished to:

Counsel of Record
Pro Se Party
Magistrate Judge
United States Marshals Service
United States Probation Office
United States Pretrial Services