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BOARD OF CONTRIBUTORS Justice Department abandons argument, concedes on crack cocaine guidelines

When Congress said 'Fair Sentencing,' it meant fair sentencing

Commentary by Ken Swartz

The confusion over sentencing crack cocaine cases in federal court has finally ended.

A year ago today, President Obama signed the long awaited (Federal Sentencing Act (FSA). But it wasn't until last month that the prosecutors and courts were given clarity on how to apply it.

Its intent was to restore fairness to federal cocaine sentencing by reducing the crack cocaine-to-powder ratio disparity from 100:1 to 18:1. For instance, the FSA raises the quantity of crack cocaine triggering a 5-year minimum sentence from 5

grams to 28 grams. Similarly, the FSA raises the quantity of crack cocaine triggering a 10-year sentence from 50 grams to 280 grams. Equally important, the FSA gave the Sentencing Commission emergency authority to amend the sentencing guidelines to be consistent with the new law.

As soon as the FSA was enacted, questions arose about whether it applied retroactively to defendants not yet sentenced but whose offenses were committed prior to enactment. The statute contained no express provision stating whether Congress intended for FSA to apply to all sentencings after August 3, 2010 or only to those where the criminal offenses occurred after August 3, 2010.

The government generally took the position that without a retroactivity provision the FSA was only applicable to offenses occurring after enactment. This is because the Savings Clause, 1 U.S.C. §109, states that the repeal of any statute shall not nullify a penalty incurred under the original statute unless expressly provided by the repealing act. Therefore the new statute, the FSA, cannot reduce the penalty for a defendant whose offense had been subject to the old statutory penalty. Without express language in the FSA directing the courts to apply the new penalties to pre-enactment offenses, many sentencing judges agreed that the Savings Clause prevented them from imposing reduced penalties to crimes committed before August 3, 2010. As a result, district court judges throughout the Eleventh Circuit and other circuits imposed inconsistent sentences.

A case from Miami would eventually give the 11th U.S. Circuit Court of Appeals an opportunity to resolve this problem. Carmen Rojas was charged with conspiracy to distribute 71.8 grams of crack cocaine after she and her codefendant exchanged crack cocaine with an undercover informant for money in January of 2010. Following her arrest, she pled guilty in Miami federal court in June of 2010. At her sentencing hearing — held after enactment of the FSA — her attorney asked for a sentence under the new law, which would have allowed the judge to sentence her as a first-time offender to a 5-year mandatory minimum. Invoking the Savings Clause, the government argued the FSA was not retroactive and opposed Rojas' request. The sentencing judge agreed with the government and imposed a 10-year sentence under pre-FSA law.

A few weeks ago on July 6, the Eleventh Circuit reversed Rojas' sentence in U.S. v. Rojas and ruled the FSA applied to those offenses that occurred prior to enactment but sentenced afterwards. It rejected the government's Savings Clause argument. The appellate court decided that the Savings Clause does not "save" the older mandatory minimum sentence for a defendant who had not been sentenced by the date the FSA was enacted. Congress intended for the legislation to immediately halt the unfair sentencing practices in crack cocaine cases. Applying the Savings Clause would be contrary to the will of Congress as expressed in the language of the FSA. The First Circuit had reached the same conclusion on May 31 of this year in U.S. v. Douglas.


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Shortly after the Rojas decision, the Department of Justice reversed its position on the Savings Clause. In a memorandum written to all federal prosecutors and issued on July 15, Attorney General Eric Holder conceded that the new mandatory minimums apply to sentencings after the enactment, regardless of when the offense took place. The Attorney General admitted that Congress intended for the Act to "restore fairness in federal cocaine sentencing policy" and to "do so as expeditiously as possible" for all defendants sentenced after the enactment date. He recognized "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."

While the Attorney General's position is welcome news, these problems could have been avoided if the Department of Justice recognized earlier that it was Congress' intent to bring fairness to sentencing immediately after enactment. In fact, on November 17, 2010, Sens. Dick Durbin, D-Illinois and Patrick Leahy, D-Vermont, the lead sponsors of the FSA, urged Holder to retreat from his original position and to instruct federal prosecutors to apply the new law to "defendants who have not yet been sentenced, regardless of when their conduct took place." The senators' pleas did not work. But after losing in two appellate courts, the government has finally abandoned the Savings Clause argument and concluded that Congress meant it when it said "Fair Sentencing."

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