

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

x

UNITED STATES OF AMERICA,

-against-

10 Cr. 391-44 (CM)

JASON ROBINSON,

Defendant.

x

MEMORANDUM DECISION AND ORDER ON SENTENCING:
APPLICABILITY OF THE FAIR SENTENCING ACT AND THE
RESULTING SENTENCING GUIDELINES TO THIS CASE

McMahon, J.:

The issue raised by this case (and a number of others on this court's docket) is this: on which date did Congress intend that the new mandatory minimum sentences in the Fair Sentencing Act of 2010 (which became effective on August 3, 2010) should begin to apply to unsentenced defendants. The Court has adjourned Mr. Robinson's sentencing to consider the issue in light of the unexpected change in the Government's position on this issue.

After considerable thought and research, I have concluded that the FSA, fairly read, authorizes the application of Congress' newly promulgated mandatory minimum sentences to defendants who were not sentenced as of November 1, 2010 -- the date on which the new sentencing guidelines authorized by the statute came into effect -- regardless of when those defendants committed their crimes.¹

¹ I cannot conclude, as have the First, Third and Eleventh Circuits, that the FSA contains any language demonstrating an intent to make the statute apply to all defendants who were unsentenced on August 3, 2010, the statute's effective date, although I would like to.

Facts of this Case

Jason Robinson, together with over 58 other residents of Orange County, New York, was arrested on May 13, 2009 and charged with, *inter alia*, membership in a conspiracy to distribute and possess with intent to distribute cocaine base (crack) during the period 2007-2009. On February 24, 2011, Robinson pled to a single count of possessing with intent to distribute “five grams or more of a mixture or substance . . . which contains cocaine base,” a Class C felony, in violation of 21 USC 812, 841 (a)(1) and 841 (b)(1)(B), and 846. At the time of the criminal conduct, this crime carried a statutory mandatory minimum sentence of five years in prison.² By the time Robinson took his plea, however, Congress had passed the so-called Fair Sentencing Act, (Fair Sentencing Act of 2010, Pub. L. 111–220 (the "FSA")), which, *inter alia*, 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 to the Sentencing Commission to review and amend the guidelines to account for specified aggravating and mitigating circumstances in certain drug cases.

Statement of The Legal Issue

The FSA was signed into law on August 3, 2010. Pertinent to today’s discussion are the following provisions of the Act:

- (1) The act amended 21 U.S.C. 841(b)(1)(B) to reduce the ratio between powder and crack cocaine that subjected a defendant to a mandatory minimum terms of imprisonment; the ratio, which had been 100:1 (500 grams of powder cocaine/5 grams of crack), was reduced to 18:1 (200 grams of powder/28 grams of crack). In other words, the act increased the “crack” quantity threshold required to trigger the 5-year mandatory minimum term of imprisonment from 5 grams to 28 grams, and the

²According to the presentence report, the amount of crack for which Robinson accepted responsibility in his plea agreement (a document to which the Court is not party) was at least 28 grams but less than 112 grams; however, he allocated only to five grams or more at his plea, *see United States v. Jason Robinson*, 10 cr 391-44 (CM) (Transcript of Change of Plea Proceeding at 7-8), and the Government is not asking the Court to make any other finding.

10-year mandatory minimum term of imprisonment from 50 grams to 280 grams. See 21 U.S.C. §§ 841(b)(1)(A), (B), (C), 960(b)(1), (2), (3).

- (2) The act directed the United States Sentencing Commission to promulgate new sentencing guidelines for crimes involving crack cocaine, and to do so within 90 days of the statute's enactment (i.e., by November 1, 2010).
- (3) Because the new guidelines would ordinarily not have gone into effect until Congress had a 180 day opportunity to review them, Congress granted the Commission so-called "emergency" authority to promulgate the new guidelines, which had the effect of causing them to go into effect as soon as they were promulgated, without any waiting period. Thus, the new guidelines went into effect on the date they were promulgated by the Commission which was November 1, 2010.

When it passed the FSA, Congress did not expressly state that the new statute was intended to operate retroactively. Indeed, the legislative history of the statute contains statements suggesting that Congress, or at least some members of Congress, may not have wanted to flood the courts with applications for resentencing, which would have occurred had the statute been fully retroactive. See, Restoring Fairness to Federal Sentencing: Hearing Before the Subcomm. On Crime and Drugs of the S. Comm. On the Judiciary, 111th Cong. 16-22 (2009), discussed in United States v. Acoff, 634 F. 3d 200, 205 (2d Cir. 2011)(Lynch, J. concurring).

The lack of any express language about retroactivity implicates the so-called General Savings Statute, 1 U.S.C. § 109, which provides:

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

As the Eleventh Circuit describes the operation of the General Savings Statute, "if § 109 applies to the FSA, the FSA cannot 'release or extinguish' the penalty [a defendant] would have received under the old version of 21 U.S.C. § 841 (b)(1)(B)" United States v. Rojas, 645 F. 3d 1234 (11th Cir. 2011). Put otherwise, if § 109 applies, then Robinson must be sentenced to a minimum

term of 60 months in prison, despite the change in the mandatory minimum law that predated, not just his sentencing, but the date of his plea.

Reading the General Savings Statute literally, one would think the question easily answered: Congress needs to state, in unmistakable terms, that it intended for a new statute to have retroactive effect, or it will not. However, the United States Supreme Court long ago dispensed with the need for such literalness. Over a century ago, it has held that the “express” language of the Savings Statute does not require either an explicit reference to § 109 or any special retroactivity provision; rather the Savings Statute may be overridden “either by express declaration *or necessary implication*,” Great N. Ry. Co. v. United States, 208 U.S. 452, 465 (1908). In later cases, the Supreme Court said that no “magic passwords” are required to achieve retroactive application in the face of the Savings Statute, Marcello v. Bonds, 349 U.S. 302, 310 (1955), and that any new statute that “can be said by fair implication or expressly to conflict with” the Savings Statute will override it. Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 659 n. 10) (1974).

So I must ascertain whether anything in the FSA “necessarily” or “fairly” implies that Congress intended the statute (specifically its altered mandatory minimum sentences) to apply to Robinson’s conduct, which occurred prior to the passage of the statute. If the answer is no, then Robinson is subject to a mandatory minimum sentence of five years, notwithstanding the fact that the FSA eliminates the mandatory minimum for the crime to which he pled.

Second Circuit Jurisprudence

The first case to arrive at the Second Circuit following the passage of the FSA was United States v. Diaz, 627 F. 3d 930 (2d Cir. 2010). In Diaz, a defendant who had already exhausted his appeal from a sentence imposed well prior to the enactment of the FSA sought to

reopen his case for the imposition of an FSA-compliant sentence. The Court of Appeals rejected his plea:

As a result, the FSA cannot be applied to reduce Appellant's sentence because, *inter alia*, he was convicted and sentenced before the FSA was enacted.

Id. The Second Circuit's conclusion seems to comport with the will of Congress, at least if the legislative history's obvious distaste for thousands upon thousands of resentencings is any guide.³

The next Second Circuit pronouncement on the subject of the FSA's retroactive application was United States v. Acoff, 634 F. 3d 200 (2d Cir. 2011). Acoff was found guilty of the same offense as Robinson here – a violation of 21 U.S.C. § 841(b)(1)(B) – and was sentenced to a term less than the five year mandatory minimum. Again, the sentencing took place prior to the enactment of the FSA. However, Acoff's case was still on appeal when the FSA was passed, so his sentence was not yet final. Acoff argued that the general savings statute did not foreclose retroactivity in his case. Another panel of the Second Circuit, citing Diaz, rejected his argument.⁴

The brief *per curiam* opinion in Acoff did no more than reject the notion that a defendant whose sentence “was not yet final” could avail himself of retroactivity. That language is

³ On June 30, 2011, the United States Sentencing Commission issued an announcement that it was recommending that the permanent (ie., non-emergency) newly-promulgated guidelines be applied retroactively to sentenced defendants like Diaz. United States Sentencing Commission News Release: U.S. Sentencing Commission Votes Unanimously to Apply Fair Sentencing Act of 2010 Amendment to the Federal Sentencing Guidelines Retroactively, June 30, 2011. However, the Commission stated in its news release that only Congress could make the mandatory minimums retroactive (which is correct); Diaz made it clear that, in this Circuit, our Court of Appeals sees nothing in the language of the FSA that would cause it to conclude that Congress intended for the new mandatory minimums to apply to defendants who were sentenced prior to the effective date of the FSA.

⁴ It appears that every single Circuit Court of Appeals to consider whether the FSA applies to defendants who were sentenced before the effective date of the statute has reached the same result. See United States v. Dixon, -- F. 3d -- (3d Cir. 2011), n. 3 (collecting cases).

susceptible of being read narrowly, to apply to defendants who, like Acoff, had been sentenced prior to August 3, 2010, but whose sentences were not yet “final” (because an appeal was pending) on that date. However, in a concurring opinion in which the other members of the panel declined to join, my learned former colleague, The Hon. Gerard Lynch, used somewhat more sweeping language in order to set up his plea to Congress to rectify what he assumed was an oversight:

Through the combination of the savings statute, 1 U.S.C. § 109, and the provisions of the Fair Sentencing Act of 2010 . . . which fails to provide for any retroactive application of its reform of the sentences for crack cocaine offenses, Congress has commanded that offenders *who committed such offenses before the effective date of the FSA but are to be sentenced after that date* must be sentenced under the harsh terms of the prior law

The *per curiam* opinion does not reach quite so broadly.

The Second Circuit has not yet expressly considered whether Diaz and Acoff foreclose a defendant who was not yet sentenced, either on the effective date of the statute or on the effective date of the newly-promulgated Guidelines, from receiving the benefit of the FSA’s new mandatory minimums scheme. However, for many months after the effective date of the FSA, the Government took the position that the statute had no retroactive effect whatever if the conduct at issue was committed prior to the effective date of the statute. In this Circuit, it cited Diaz and Acoff for those positions, reading their language broadly and not confining them to their precise facts. This court, among others, accepted the Government’s argument, albeit with reluctance.

Recent Developments Elsewhere

Not all courts, however, agreed with the Government’s position on retroactivity. In addition to several district judges, the First and Eleventh Circuits concluded that the FSA – while not applying to defendants like Diaz and Acoff, who were sentenced before August 3, 2010 --

did apply to defendants who were sentenced after the date when the FSA became effective, regardless of when the offense was committed. United States v. Douglas, 644 F. 3d 29 (1st Cir. 2011); United States v. Rojas, 645 F. 3d 1234 (11th Cir. 2011).

Then, on July 15, 2011, Attorney General Holder announced that it would thenceforth be the position of the Justice Department that the statute was intended to and did apply to defendants who committed their crimes before August 3, 2010 – the effective date of the statute – but who were sentenced thereafter. See, Holder, *Memorandum for All Federal Prosecutors*, dated July 15, 2011. The Attorney General adhered to the position that defendants who were sentenced prior to the effective date of the statute did not fall within its ambit. Shortly thereafter, the Third Circuit concurred with Mr. Holder’s stance. United States v. Dixon, -- F. 3d -- , 2011 WL 3449494 (3d Cir. Aug. 9, 2011).

Robinson’s Sentence

The Government has urged, in Mr. Robinson’s case, that this Court should reverse its holding in earlier cases and restrict Diaz and Acoff to their facts – i.e., to the situation in which a defendant not only committed his crime before the effective date of the FSA, but also was sentenced before the effective date of the FSA. Were I to do so, and sentence Mr. Robinson in accordance with the new statute, he would no longer be subject to any mandatory minimum.

Obviously I can reverse my own earlier decision. However, I am bound by the opinions of the Second Circuit; as my colleague, The Hon. Kenneth B. Karas, has recently noted, the Attorney General’s epiphany affords me no basis to override binding precedent. United States v. Anderson, S3 09 Cr. 1022 (KMK) (S.D.N.Y. July 20, 2011) (oral opinion). And at one time I rejected the position now espoused by the Government, and concluded that Diaz and Acoff were not intended to be restricted to their facts.

However, the jurisprudence on this subject has developed considerably since I reached my original decision, and I am constrained to note that in neither Diaz nor Acoff did the Court of Appeals analyze whether the FSA could be said, either “by fair implication” or by “necessary implication,” to apply to a defendant who is being sentenced *after the effective date of the revised Sentencing Guidelines for which the statute called*. No doubt this was because the defendants in both those cases were sentenced, not only before the new guidelines became effective, but the effective date of the statute. Indeed -- as the Government has pointed out in a brief filed in a companion case -- it was apparently not asked to conduct any such analysis; Acoff’s only argument on appeal was that Diaz did not apply to him because he had not yet exhausted his appeal, so his sentence could not be said to be final. Having been sentenced prior to the effective date of the statute, Acoff lacked both the opportunity and the motive to argue that anything in the FSA necessarily pointed to a Congressional decision that the statute’s revised penalty scheme should apply as soon as revised, FSA-compliant Guidelines, went into effect.

I, however, am confronted with the need to sentence a defendant, not only after the effective date of the statute, but also after the effective date of the revised Guidelines that were called for in that statute. If close textual analysis of the FSA reveals a congressional intent that all sentences imposed after the effective date of the statute, or the effective date of the the new guidelines, should accord with the provisions of the FSA (including its revised mandatory minimum sentences), nothing that is specifically stated in either Diaz or Acoff appears to foreclose me from following the will of Congress.⁵ I thus turn to that as-yet unaddressed question.

⁵ Indeed, the concurring opinions of Judges Calabresi and Lynch, which reveal their extreme reluctance to reach the result they did, virtually compel me to engage in the analysis that was not necessary in Acoff.

As set forth above, the principal revision wrought by the FSA was the diminution in the powder cocaine/crack cocaine disparity – from 100:1 to 18:1 – by increasing the quantity of drugs needed to impose the mandatory minimum sentences (five and ten years) called for by 21 U.S.C. §§ 841(b)(1)(A) and (B). In order to effectuate this new sentencing scheme, Congress included in the Act a section, Section 8, entitled “Emergency Authority for United States Sentencing Commission,” which provides as follows:

The United States Sentencing Commission shall –

- (1) Promulgate the guidelines, policy statements, or amendment 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.

The italics in (1) highlight the “emergency authority” to which reference is made in (2); it is a congressionally-authorized suspension of the rule found at 28 U.S.C. § 994(p), which provides:

The Commission, at or after the beginning of a regular session of Congress, but not later than the first of May, may promulgate... and submit to Congress amendments to the guidelines.....accompanied by a statement of the reasons therefor and shall take effect on a date specified by the Commission, which shall be no earlier than 180 days after being so submitted and no later than the first day of November of the calendar year in which the amendment or modification is submitted

Pursuant to this usual rule, no revision to the guidelines in light of the FSA could have become effective until the summer of 2012 at the earliest. When the Guidelines were first passed, however, Congress gave the Commission emergency guidelines promulgation authority, 28 U.S.C. § 21, which allowed the Commission to issue a guideline that would be effective

immediately, subject, however, to modification by Congress following the issuance of the Commission's next report. This emergency authority expired by its terms on November 1, 1989. That long-expired authority was expressly resurrected by Congress so that the FSA-compliant Guidelines could become effective without going through the lengthy vetting procedure set forth in § 994(p).

The only "necessary" or "fair" implication of Congress' *express* grant of this extraordinary emergency authority to the Sentencing Commission is that Congress intended for the FSA – including the new guidelines that were formulated to carry out the provisions of that law -- to become fully effective at the earliest possible date, and in any event no later than 90 days after the statute's effective date, or November 1, 2010.

The reason why this is the *necessary* implication of Congress' express action is really quite simple. The new guidelines are consistent with the FSA's revised mandatory minimum sentences. Indeed, the new mandatory minimums are effectively imported into the new guidelines, because where the guideline sentence is less than an applicable mandatory minimum sentence, the guidelines themselves provide that the mandatory minimum becomes *the guidelines sentence* – not an alternative to the guidelines sentence. U.S.S.G. § 5G1.1(b)

However, sentences imposed on and shortly after the effective date of the newly-promulgated guidelines – indeed, for some years thereafter – will necessarily be for criminal activity that took place prior to August 3, 2010, the effective date of the FSA. There is a five year statute of limitations for crimes under federal narcotics statutes; this period of repose means that many crimes committed prior to the effective date of the new statute will not come up for sentencing (perhaps not even for prosecution) for many years after the effective date of the new Guidelines. United States v. Holcomb, -- F. 3d – (7th Cir 2011), 2011 WL 3795170, *12 (August

24, 2011) (Williams, J., dissenting) (“[T]here are bound to be many such cases in light of the five-year statute of limitations for drug offenses, 18 U.S.C. § 3282, and the time it takes to investigate and prosecute such cases.”). When it passed the FSA, Congress knew about the statute of limitations. Had it been Congress’ intention that the old mandatory minima continue to apply to unsentenced defendants whose crimes were committed prior to August 3, 2010, it did not need to go out of its way to confer emergency authority on the Commission; it could have given the Commission months or even years to come up with a new sentencing scheme, and then subjected the result to its usual painstaking § 994(p) review.

Congress can also be presumed to have known, when it chose Section 8 as the vehicle for implementing the FSA, that the version of the Guidelines in effect on the date of a defendant’s sentencing is the version of the Guidelines that is to be applied to the defendant’s conduct – regardless of when the defendant committed his crime – unless application of the then-current guideline would increase the defendant’s sentence above what he could have received on the date he committed his crime, in violation of the *Ex Post Facto* Clause of the United States Constitution. Congress knows this because it so provided when it passed the Sentencing Reform Act of 1984. See 18 U.S.C. § 3553(a)(4)(A)(ii); *see also*, U.S.S.G. § 1B1.11(a). Thus, the revised guidelines called for by Congress are statutorily applicable to all defendants sentenced after their effective date, regardless of when they committed their crimes.

As the Third Circuit noted in United States v. Dixon, -- F. 3d – (3d cir. 2011), this fact, too, fairly implies that Congress intended for the statute to apply as soon as the new guidelines applied. The mandate of Section 8 would not make sense “if the new mandatory minimums are not in accord with the Guidelines because, regardless of the Commission’s actions, the old mandatory minimums would always trump the new Guidelines for the large number of

defendants whose Guidelines ranges are below the mandatory minimum.” (Slip Op. at 14). Put otherwise, the import of the FSA was not to alter the guidelines, but to reduce the drug quantities necessary to trigger the mandatory minimums; changing the guidelines to conform to the newly-expressed will of Congress was simply a byproduct of the real thrust of the statute. The new guidelines reduce the guidelines range for many, if not most, of the defendants who are to be sentenced after their effective date. But if the FSA did not become fully effective when the new guidelines did, a large number of defendants who are sentenced after November 1, 2010 will have guideline ranges that fall below the mandatory minimum sentences that the FSA repealed. If the new mandatory minimums are not applied to those defendants, they cannot benefit from the newly-promulgated guidelines, because the old mandatory minimums will trump the emergency guidelines. This would effectively negate the impact of Congress’ express directive that the new guidelines apply immediately.⁶

All of the above leads me to conclude that, while Congress did not intend to resurrect cases long since closed, it intended that the FSA be applied by sentencing judges on a going-forward basis on the date that the revised Guidelines became effective, and no later than 90 days after August 3, 2010. It makes no sense to demand “emergency” guidelines if they were simply going to sit on the books, “effective” but unable to be implemented in the large number of cases where the revised guidelines were lower than the now-repealed mandatory minimum sentence, and viable only in the occasional case for some years thereafter. If Congress’ unmistakable intent to have a new sentencing scheme apply immediately does not “necessarily” or “fairly”

⁶ I believe that the First Circuit’s concern about this issue, as expressed in Douglas, where Judge Boudin said, “...it is not easy to say, as a general matter, that a lowering of the guidelines, even by Congress’ direction, inherently requires or even implies that higher mandatory minimums should be abandoned,” is misplaced. The issue here is whether one can fairly or necessarily imply that Congress wanted the new mandatory minima to be a part of the guidelines.

imply that Congress intended the FSA's new mandatory minimums apply to all defendants who were sentenced on and after November 1, 2010, then Congress' extraordinary grant of emergency authority borders on the ridiculous – a conclusion this court is reluctant to reach.

Both the First and the Third Circuits accepted some variant of this reasoning. In United States v. Douglas, *supra.*, the First Circuit panel stated:

One can argue that Congress, having ordered the new 18:1 guidelines to apply no later than November 1, 2010, would not have wanted its end—fairer sentences – to be frustrated by requiring judges to continue to apply the old 100:1 minimums ratio where the conduct predated the statute.... While the rule of lenity does not apply where the statute is “clear,”section 109 is less than clear in many of its interactions with other statutes, and that is arguably true in the present case as well. Our principal concern here is with the “fair” or “necessary” implication...

644 F., 3d at 43. And in Dixon, where the Third Circuit said that Congress' intent “is discernable from the text of the [FSA] itself, the court said:

The Saving Statute “cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment....The import of this reasoning is that the Saving Statute cannot control when preserving repealed penalties would plainly conflict with the intent of Congress as expressed in a subsequent statute.

The Third Circuit panel also read Congress' directive that the Commission make the new guidelines consistent with “applicable law” as referring to the FSA itself, not to the statute that was being repealed by the FSA – and so concluded that Congress evinced an intent that courts should apply the FSA to sentences given as of its effective date.

The alternative view was articulated in the opinion written by Chief Judge Easterbrook for himself and the five other members of the Seventh Circuit who voted not to *en banc* Holcomb. He said:

A reader might be inclined to ask why the 2010 Act's changes to minimum and maximum sentences should not take effect on

November 1, 2010, the same date as the revised Guidelines— for revised Guidelines apply to new sentences even if the conduct took place years earlier. [citations omitted]. There is no inconsistency however, because the Guidelines and the 2010 Act are doing different things. The statute that provides penalties for cocaine and cocaine base, 21 U.S.C. § 841 (b), sets minimum and maximum punishments; the Guidelines then influence where within that range the judge imposes sentence. The 2010 Act amended § 841(b). Judges are free to disagree with the Commission, see United States v. Booker, 543 U.S. 200 (2005); Kimbrough v. United States, 52 U.S. 85 (2007); but they are not free to disagree with Congress. Thus we have two retroactivity dates. One is when the new minimum and maximum penalties take effect; the other is when the revised Guidelines take effect. The Commission has, and has used, statutory authority to apply the lower Guidelines even to closed cases starting November 1, 2011. The Commission lacks any equivalent authority to make different statutory minimum and maximum sentences applicable to cases in which the criminal conduct predated August 3, 2010.

But Judge Easterbrook's argument proceeds from the premise that nothing in the FSA gives rise to the necessary or fair implication that Congress wanted the FSA's new mandatory minimums to apply from and after the date the new guidelines became effective. For the reasons set forth above, I think that one can draw that inference – a position with which not only the First, Third and Eleventh Circuits agree, but half of the Seventh Circuit agrees!

For these reasons, Jason Robinson will be sentenced in accordance with the revised guidelines and without regard to the pre-August 3, 2010 mandatory minimum for distribution and possession with intent to distribute five grams and more of mixtures and substances containing detectable amounts of cocaine base (crack).

I am not insensible to the fact that this decision works its own unfairness. Prior to today, I have sentenced a number of young men charged in this indictment to mandatory minimum sentences – even though many of them had served or are serving time in the Orange County Correctional Facility for the very conduct that underlies their convictions in this case. I made it clear at a number of those sentencings that at least some of those defendants would have received

lesser sentences if only I had believed that the FSA's new sentencing scheme could be applied to their cases. Changing my mind creates an unfortunate discrepancy among identically situated defendants, and punishes those who did the right thing and admitted their guilt early on. That, of course, is no reason to refrain from confessing error if I feel that I can and must; a foolish consistency, as we all know, is the hobgoblin of little minds. I am, however, dismayed to learn -- even as I sign off on this opinion -- that the Government (which urges on me the result I now reach) is insisting that those defendants are precluded, by virtue of the appeal waiver in its standard plea agreement, from having any appeal from their sentences heard on the merits. I find this foolish *inconsistency* deeply troubling. I hope that I will have the opportunity to reconsider the sentences I imposed on those young men -- though I cannot presently envision a procedural vehicle that could be used for that purpose.

This constitutes the decision and order of the Court.

Dated: September 16, 2011

U.S.D.J.

BY ECF TO ALL COUNSEL