

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 98-427-Cr-King

UNITED STATES OF AMERICA,
Plaintiff,

v.

LUIS ADEL BORDON, et al.,
Defendants.

JOINT MEMORANDUM OF LAW IN OPPOSITION TO APPLICATION OF
THE FEENEY AMENDMENT TO THE PROTECT ACT

Respectfully submitted,

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I.
INTRODUCTION

Given the significance of the complex legal questions presented in this case and what appears to be a matter of first impression, the Court directed the parties to file appellate-type briefs outlining in detail their respective positions.

The defendants respectfully seek to expedite the Court's consideration of pending issues relative to the applicable law at resentencing and in compliance with the Court's request, our legal claims are cogently set forth below.

II.
STATEMENT OF ISSUES PRESENTED

Point I.

WHETHER RETROACTIVE APPLICATION OF THE FEENEY AMENDMENT VIOLATES THE *EX POST FACTO* CLAUSE OF THE UNITED STATES CONSTITUTION

Point II.

WHETHER CONGRESSIONAL INEXACTITUDE IN DRAFTING THE 'SENTENCING UPON REMAND' SECTION OF THE FEENEY AMENDMENT RENDERS SECTION 3742(g) STATUTORILY INFIRM AND MUST BE DENIED LEGAL EFFECT

Point III.

WHETHER THE FEENEY AMENDMENT VIOLATES THE SEPARATION OF POWERS DOCTRINE BY DIRECTING THE DEPARTMENT OF JUSTICE TO IMPERMISSIBLY INTRUDE INTO THE JUDICIAL FUNCTION

III. STATEMENT OF THE CASE

On June 9, 1998, the three members of the Bordon family (father Luis Adel, and sons Luis and Adel) were indicted on a single count of gambling (18 U.S.C. § 1955) and one count of money laundering of the gambling proceeds (18 U.S.C. § 1956) (DE 1). The indictment alleged that the defendants operated a “gambling business, that is, an illegal lottery operation, commonly known as ‘bolita’ and ‘numbers’” (Count I, ¶ 2) and conducted “financial transactions which involved the proceeds of specified unlawful activity, that is, the proceeds of an illegal gambling business being conducted in violation of [18 U.S.C. §] 1955 and [§] 849.09 Florida Statutes ...” (Count II, ¶ 2).

Each defendant was released on a \$50,000 personal surety bond the following day (DE 6, 10, 13). The defendants commenced trial on August 17, 1998. They were each convicted by the jury on August 27, 1998 (DE

48-50), but were allowed by the court to remain on bond pending sentencing.

At sentencing on November 24, 1998, this court departed two levels downward from the guidelines, based on the rationale that the money laundering guidelines overrepresented the principal offense of gambling. Accordingly, Luis Adel Bordon was sentenced to concurrent prison terms of 57 months on each count followed by a two-year term of supervised release (DE 93). Sons Luis Bordon and Adel Bordon received concurrent prison terms of 46 months followed by two-year terms of supervised release (DE 95, 97).

The defendants appealed their convictions (DE 98-100), and the government appealed the sentences (DE 101-103). Because the defendants' appeal involved significant legal issues and the defendants presented no risk of flight or danger to the community, this court continued bond pending the outcome of the appeal.

Nearly two years later, the U.S. Court of Appeals for the Eleventh Circuit issued its opinion. *United States v. Bordon*, 228 F. 3d 412 (11th Cir. 2000), *cert. denied*, 531 U.S. 1152, 121 S. Ct. 1097 (2001) (*Bordon I*). The appellate court affirmed the convictions, but vacated the two-level

downward departure sentences because the court failed “to make adequate factual findings” and remanded the case for resentencing. Upon receipt of the mandate (DE 137, 142), this court scheduled resentencing for October 17, 2000 (DE 137). Meanwhile, the government moved to revoke the bonds (DE 136), but the court continued the bonds pending resentencing (DE 143).

The first resentencing hearing commenced on January 29, 2001, as the court directed the U.S. Probation Office to update the PSI (DE 150). Significant sentencing motions were filed by the parties. This court reset the resentencing hearing for May 30, 2001 (DE 155), but the prosecutor was unavailable (DE 159), and Luis Adel Bordon sought a continuance (DE 157).

The resentencing hearing continued on July 13, 2001 (DE 163). After being led by the government to believe the court had no discretion in determining the applicable guidelines or the sentence, this court sentenced Luis Adel Bordon to 60 months imprisonment on Count I and 97 months on count II, said sentences to run concurrently, plus a term of 2 years supervised release (DE 174). Luis Bordon and Adel Bordon were each sentenced to concurrent terms of 60 months imprisonment on count 1 and

78 months on Count 2, said sentences to run concurrently, plus 2 years supervised release (DE 170, 172). Only then did the court remand the defendants to commence service of their sentences. They filed timely notices of appeal (DE 175-177).

On the second appeal, the Eleventh Circuit determined that this court *did* have discretion in determining the applicable sentence, vacated the sentences, and remanded the case for resentencing. *United States v. Bordon*, 48 Fed.Appx. 326, 2002 WL 2001164 (11th Cir. 2002) (*Bordon II*).

Again after receiving the appellate mandate, this court ordered updated PSIs and scheduled the second resentencing for August 22, 2003, denying the government's motion to continue the sentencing hearing (DE 226, 228).¹ The government, relying on a copy of a statute they provided the Probation Office dealing with remands for resentencing, not vacated sentences, alleged that the PROTECT Act² governs all resentencings,

¹ Notices of Appearance by Jon A. Sale and Benedict P. Kuehne were entered for Luis Bordon and Adel Bordon on October 17, 2002 (DE 221), and by J. David Bogenschutz for Luis Adel Bordon (DE 222). Benson B. Weintraub was engaged as "Of Counsel" and filed submissions on the defendants' behalf prior to the second resentencing (third sentencing) which commenced on August 22, 2002.

² Pub. L. 108-21, Title IV, Sec. 401(a),(c),(j)(5), Apr. 30, 2003, 117

even though the language of the Act applies only to cases remanded by the appellate court and not to cases in which the sentences were vacated and then remanded. The United States declined to file any authority on point, even as the defense filed a comprehensive legal memorandum asserting that the PROTECT Act violates the *Ex Post Facto* clause and that the Guidelines in effect on the date of the resentencing hearing apply by operation of law.

The court heard considerable oral argument, principally from the defense.³ The court directed the government to file its written position in advance of the rescheduled sentencing hearing, but the submission was received just prior to the resumption of proceedings on August 28, 2003. Upon reconvening, the court noted the unique nature of the issues presented, particularly in the context of the overall history of the case and the true nature of the underlying offense conduct of gambling. The court

Stat. 667, 669, 673. See 18 U.S.C. § 3742(g)(1)(2003).

³ At the hearing, the defense asserted that as a matter of statutory construction, 18 U.S.C. § 3742(g)(1) applied only to “sentencing on remand,” distinguishing the application of the statute from sentences *vacated* and declared a nullity pursuant to the principle announced in *United States v. Stinson*, 97 F.3d 466, 469 (11th Cir. 1996), *cert. denied*, 519 U.S. 1137, 117 S. Ct. 1007 (1997).

indicated the parties should, for the sake of clarity and record preservation, file comprehensive briefs – consistent with the procedure governing appellate practice – on the pending issues. The defense was directed to file the initial brief, after which the government can respond and the defense reply.

In recognition of the substantial questions presented, the amount of time served by these defendants thus far (more than two years of actual imprisonment), and the potential for imposition of a guidelines sentence *appreciably lower than the amount of time already served*, based on intervening amendments to the Sentencing Guidelines which utilize a sentencing scheme similar in principle to that adopted by the court at the original sentencing, the court indicated that bond pending sentencing would be considered, if requested by the defense. That motion is pending.

IV. STATEMENT OF FACTS.

According to the evidence at trial and the government’s description of the case in the PSI, the Bordon family operated a legitimate family business, a liquor store in Hialeah. But, in addition to selling packaged liquor to customers, the defendants “conducted illegal lottery operations

commonly known as 'bolita' or the 'numbers' between August 8, 1990 and June 24, 1994." (PSI ¶¶ 6-7). The defendants "were involved in financial transactions with the gambling proceeds . . ." (PSI ¶¶ 7). "The defendants would telephonically or through the use of a facsimile machine, accept instructions to pay and collect their illegal proceeds from and to various coconspirators who were involved in conducting illegal gambling in the South Florida area." (PSI ¶¶ 7).

In the two previous sentencing proceedings, the court found that the defendants' underlying offense conduct was not "otherwise extensive" within the meaning of U.S.S.G. § 3B1.1 to warrant any upward role adjustment. To the contrary, the court found the Bordon sons warranted downward role adjustments based on their limited relative culpability.

The sum and substance of the case described the acceptance of wagers for a bolita operation at the liquor store, and the "laundering" of those gambling proceeds completely incidental to the gambling. To view the facts otherwise would have the "tail wagging the dog."

V. LEGAL ARGUMENT

Point I.

RETROACTIVE APPLICATION OF THE FEENEY AMENDMENTS TO THE PROTECT ACT VIOLATES THE *EX POST FACTO* CLAUSE

A. Introduction

On April 30, 2003 the President signed legislation initiated by the Department of Justice, styled the “Prosecutorial Remedies and Tools Against the Exploitation of Children Today Act of 2003,” (PROTECT Act), Pub. L. 108-21, 117 Stat. 650 (2003). The Attorney General described it as a “landmark piece of legislation that comprehensively strengthens the Government’s ability to prevent, investigate, prosecute and punish violent crimes against children.”⁴ This legislation was popularly known as the “Amber Alert” bill. The so-called PROTECT Act was an afterthought.

However, in what has now become known as the Feeney Amendment to the PROTECT Act, material portions of the Sentencing Reform Act of 1984 were radically or impliedly repealed or modified. The specific section of the Feeney Amendment challenged herein is 18 U.S.C.

⁴ See “Memorandum from John Ashcroft to All Federal Prosecutors” (July 28, 2003).

3742(g)(1). See Pub. L. 108-21, Title IV, Sec. 401(d)-(f), Apr. 30, 2003, 117 Stat. 670, 671.

The new version of Section 3742, not in effect either when the defendants' offense was committed nor when they were sentenced, relates to "Sentencing Upon Remand" and purports to apply "guidelines issued by the Sentencing Commission. . . that were in effect on the date of the *previous sentencing of the defendant prior to the appeal*, together with any amendments thereto by any act of Congress that was in effect on such date." *Id.* (emphasis added).

For the reasons set forth below, retroactive application of the Feeney Amendment, enacted in 2003, increases the punishment that would otherwise apply to these defendants at resentencing by operation of law. Amended Section 3742(g)(1) is invalid on its face and runs afoul of the critical constitutional prohibition against *Ex Post Facto*⁵ legislation.

B. The *Ex Post Facto* Clause Absolutely Prohibits Retroactive Application of the Feeney Amendment

As the Supreme Court stated in *Landgraf v. USI Film Products*, 511

⁵ US Const., Art. I, Sec. 9., cl. 3.

U.S. 244, 245 (1994), “the presumption against retroactivity is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.” The presumption is grounded, in part, by concern that the legislature’s “responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.” *Id.* at 266. A key purpose of the presumption serves to “restrict governmental power by restraining arbitrary and potentially vindictive legislation.” *Id.*⁶

The seminal case, *Calder v. Bull*, 3 Dall. 386, 391, 1 L.Ed. 648 (1798) underscored that “Every law that changes the punishment, and inflicts a greater punishment, or makes it greater than the law annexed to the crime, when committed, . . . All of these, and similar laws, are manifestly unjust and oppressive.” *Id.*, at 390-91, 1 L.Ed. 648.

The *Ex Post Facto* clause “flatly prohibits retroactive of penal legislation.” *Landgraf*, 511 US at 266, and a statute violates this constitutional prohibition if it operates retroactively and to the detriment of a

⁶ And as applied to the case *sub judice*, amended 3742(g)(1) raises concerns regarding vindictive resentencing generally laid to rest in *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969).

defendant. *Weaver v. Graham*, 450 U.S. 24, 29 (1981). The doctrine applies, *a fortiori*, in the context of Sentencing Guidelines. *Miller v. Florida*, 482 U.S. 423 (1987)(adverse changes in statutory sentencing guidelines cannot apply to pre-enactment offenses): *Summers v. United States*, 176 F.3d 1328, 1330 (11th Cir. 1999)(“It is the general rule that a defendant is sentenced under the Sentencing Guidelines in effect on the date of sentencing unless doing so would offend the *Ex Post Facto* clause of the United States Constitution.”).

The “Sentencing Upon Remand” provision of the Feeney Amendment, 18 U.S.C. 3742(g)(2003) is a penal law, and its retroactive application deprives defendants of the sentencing provisions that, absent the offending legislation, would apply by operation of law.

Parenthetically, the Feeney Amendments also emasculates the core section of the Sentencing Reform Act of 1984, 18 U.S.C. 3553(a)(1998), the operative provision of which previously stated that those rules “issued by the Sentencing Commission. . . in effect on the date the defendant is sentenced” must apply. 18 U.S.C. 3553(a)(5)(1998). See USSG 1B1.11,

p.s.⁷ Now, however, the Feeney Amendment modified, to the detriment of defendants, this section with language negating the former provisions of subsection (a)(5) by noting “except as provided in section 3742(g), are in effect on the date the defendant is sentenced.” 18 U.S.C. 3553(a)(4)((A)(ii)(2003).

The government, however, seeks to avoid the outcome determinative *Ex Post Facto* consequences of the statute by arguing that 3742(g) merely effects a permissible “procedural” change. For the reasons set forth, *infra*, that assertion is disingenuous at best, but in reality, plainly wrong.

C. The Government’s Assertion that Section 3742(g) Merely Effectuates a Permissible “Procedural” Change in the Law Has No Basis in Law

The government urges the Court to accept the attenuated proposition, one which has been categorically rejected by the Eleventh Circuit and every other appellate court to consider the issue, that the 2001

⁷ Notwithstanding this section of the Feeney Amendment—replacing former 3553(a)(5) with 3553(a)(4)—the Sentencing Commission, to whom Congress delegated plenary authority to implement the guidelines, has declined to change its long standing policy permitting application of sentencing guidelines that would violate the *Ex Post Facto* clause. This omission is materially significant because the Commission did promulgate emergency guidelines to address the principal purpose of the PROTECT Act, increasing the guidelines for child exploitation. See Note 17, *infra*.

amendment to USSG 2S1.1 is “procedural.” In an earlier pleading, the government argued that “Laws that change ‘modes of procedure’ and do not affect ‘substantial personal rights’ do not violate the Ex Post Facto Clause, even if they disadvantage the offender, citing *Dobbert v. Florida*, 432 U.S. at 293 (*sic*) and *Beazell v. Ohio*, 269 U.S. 167, 170-171 (1925).⁸ However, even new procedural provisions may violate the *Ex Post Facto* clause if they “creat[e] a significant risk of prolonging [defendant’s] incarceration.” *Garner v. Jones*, 529 U.S. 244, 251 (2000). The true test is whether the new law would “affect substantive entitlement to relief.” *Lindh v. Murphy*, 521 U.S. 320 (1997)(AEDPA amendments limiting habeas relief not constitutionally applicable to pending case under *Ex Post Facto* clause because “statute goes beyond mere procedure to affect substantive relief”).

Unquestionably, the 2001 amendment to 2S1.1 is “substantive,” not merely “procedural” and the government’s “defense” to the statute on this basis is clearly erroneous. On this point, the Eleventh Circuit and all other appellate Courts have ruled decisively. *United States v. Descent*, 292 F.3d

⁸ United States’ Response to Defendants’ Objections to the PSI, Conditional Motion for Upward Departure and Memorandum of Law at 4 (DE).

703, 708 (11th Cir. 2002)(amendment to 2S1.1 “effects a substantive change to the guidelines.”⁹ So long as the Feeney Amendment effects a change in the penal law that is substantive and affects substantial rights, its retroactive application is constitutionally prohibited.

Other provisions of the Feeney Amendment—not applicable to this case—rely on the procedural/substantive distinction to permit its retroactive application. Thus, in *United States v. Thurston*, 338 F.3d. 50, 71-72 (1st Cir. 2003), the Court found that a change in the standard of appellate review of sentences while the appeal was pending was just procedural and could be applied retroactively.

Significantly though, the First Circuit admonished that “It is the substance of the sentencing rules, both Guidelines and statutory, that impacts defendants.” *Id.* at 72.¹⁰ (emphasis added).

As the myriad of PROTECT Act issues find their way to the appellate courts, such Courts are generally not addressing—nor do the parties

⁹ *Accord.*, *United States v. Edwards*, 309 F.3d 110, 112-13 (3rd Cir. 2002)(same); *United States v. McIntosh*, 280 F.3d 479, 485 (5th Cir. 2002)(same).

¹⁰ *See also United States v. Hutman*, 339 F.3d 773, 775 (8th Cir. 2003).

appear to raise-- retroactivity issues that that have not impacted substantive or substantial rights. See e.g., *United States v. Pressley*, --- F.3d--- 2003 WL22132497*3, n. 1 (11th Cir. Sept. 16, 2003)(remanded).¹¹

For all of these reasons, it is manifestly evident that the Feeney Amendment at issue here is a constitutionally impermissible exercise of legislative authority.

Point II.

CONGRESSIONAL INEXACTITUDE IN DRAFTING THE 'SENTENCING UPON REMAND' SECTION OF THE FEENEY AMENDMENT RENDERS SECTION 3742(g) STATUTORILY INFIRM AND IT MUST BE DENIED LEGAL EFFECT

A. Introduction

The hastily enacted Feeney Amendment must be denied legal effect for a myriad of compelling reasons. The Amendment cannot, consistent with due process, survive the exacting scrutiny commanded by the canons of statutory construction.

B. The 'Sentencing Upon Remand' Provision Is a Salient Example of a Legislative Process That Was Insufficiently Specific With Respect to the Terms of the Statute

¹¹ See also *United States v. Simmons*, ---F.3d--- 2003 WL 22048229 (2nd Cir. Sept. 3, 2003); *United States v. Leon*, ---F.3d--- 2003 WL 22016885 (9th Cir. Aug. 27, 2003).

1. Under Amended 3742(g), it is Evident That Congress Failed to Distinguish Between ‘Vacated’ Sentences and Sentences that are Merely *Remanded* With Instructions, As Consistently Underscored by Controlling Law

The defense asserted that since amended Section 3742(g)(1) applies on its face only to “Sentencing on *Remand*” (emphasis added), the distinction between a sentence (as in this case) which is *vacated* in its entirety and merely *remanded*, the amendment must be denied legal effect due to its inexact drafting and casual linguistic usage.

This analysis begins, as it must, with an examination of the language of the statute itself. See *RJR Nabisco., Inc. v. United States*, 955 F.2d 1457, 1460 (11th Cir. 1992). We must “determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case.” *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997). The Court underscored that the clarity of the statutory language is determined by reference to “the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Id.* at 341. “When discerning a statute’s plain meaning, courts must endeavor to give effect to all statutory provisions in harmony with each

other.” *United States v. Drury*, ---F.3---, 2003 WL 22038921*7 (11th Cir. Sept. 3, 2003).

Clearly, this statute’s explicit use of the term ‘remand’—to the exclusion of a sentence that has been *vacated* by the Court of Appeals—retains material significance under the controlling law of this Circuit as well as the law of the case. The Court of Appeals was exceedingly deliberate, exact and calculating in delineating the unique judicial properties of a vacated sentence as opposed to a sentence that in some *limited* respect has been reversed and remanded.

A criminal sentence is a package of sanctions that the district court utilizes to effectuate its sentencing intent consistent with the Sentencing Guidelines. See [United States v. Jackson](#), 923 F.2d 1494, 1499 n. 5 (11th Cir.1991). Under this holistic approach, when a criminal sentence is vacated, it becomes void in its entirety; the sentence--including any enhancements--has "been wholly nullified and the slate wiped clean." [United States v. Cochran](#), 883 F.2d 1012, 1017 (11th Cir.1989) (quoting [North Carolina v. Pearce](#), 395 U.S. 711, 721, 89 S.Ct. 2072, 2078, 23 L.Ed.2d 656 (1969)). Consequently, when a sentence is **vacated** and the case is remanded for resentencing, the district court is free to reconstruct the sentence utilizing any of the sentence components. *Id.* See also [United States v. Jackson](#), 923 F.2d 1494 (11th Cir.1991); [United States v. Lail](#), 814 F.2d 1529 (11th Cir.1987). **If this were not the effect of our vacatur, we would have removed the illegal portion of the sentence and simply recalculated the sentence**, instead of remanding to the district court for a time-consuming and expensive hearing.

United States v. Stinson, 97 F.3d 468,469 (11th Cir. 1996)(emphasis added), *cited with approval* in Bordon II (Aug. 23, 2002).¹²

In *United States v. Davis*, 329 F.3d 1250, 1252 (11th Cir. 2003) the Eleventh Circuit recently amplified on the distinctions between a vacated sentence and a sentence that is remanded:

When a criminal sentence is vacated, a district court is generally free to reconstruct the sentence using any of the sentencing components. Stinson, 97 F.3d at 469. If the appellate court issues a limited mandate, however, the trial court is restricted in the range of issues it may consider on remand. United States v. Tamayo, 80 F.3d 1514, 1520 (11th Cir.1996). **A vacation of judgment for consideration in light of a particular decision is " 'much more limited in nature' than a general vacation by an appellate court, and its effect is 'not to nullify all prior proceedings.' "** *Id.* (quoting United States v. M.C.C. of Florida, Inc., 967 F.2d 1559, 1562 (11th Cir.1992)).

¹² “In Bordon I, we did not intend to hold that the district court abused its discretion because it departed downward. ---F.3d--- . Instead, we held that the court abused its discretion ‘by failing to make adequate factual findings’ to support the downward departure. *Id.* Our holding did not preclude the district court from departing downward during resentencing as long as the court made the necessary findings.” Bordon II. The Eleventh Circuit held that “we must vacate and remand the Bordons’ sentences to allow the district court to make any relevant findings.” *Id.* (emphasis added). Manifestly, the District Judge was correct in the first instance, exercising downward departure authority. However, the departure should have been supported by a more specific statement of reasons which necessitated vacation of the sentence.

(emphasis added).

“A basic premise of statutory of statutory construction is that a statute is to be interpreted so that no words shall be discarded as being meaningless, redundant or mere surplusage.” *Drury, supra* at 2003 WL 22038921*8, *citing United States v. Canals-Jimenez*, 943 F.2d 1284, 1287 (11th Cir. 1991). “It is our duty ‘to give effect, if possible, to every clause and word of a statute.’” *Id., citing United States v. Menasche*, 348 U.S 528, 538-39 (1955).

Amended Section 3742(g) speaks *only* to reversed sentences on “remand,” a legal construct considerably more narrow in scope than a sentence that has been vacated by the appellate court as if void *ab initio*.

2. The Rule of Lenity

At worst, this hastily drafted and inherently flawed statute begs the Court to resolve the gross ambiguity created by the lack of statutory precision according to the Rule of Lenity. “The rule of lenity applies if a statute—in this instance, a sentencing guideline—is ambiguous.” *United States v. Jeter*, 329 F.3d 1229 (11th Cir. 2003); *Cook v. Wiley*, 208 F.3d 1314 (11th Cir. 2000), *citing United States v. Lazo-Ortiz*, 136 F.3d 1282,

1286 (11th Cir. 1998)(noting that “[t]he ‘rule of lenity’ requires that actual ambiguities in *criminal* statutes, including sentencing provisions, be resolved in favor of criminal defendants.”)(original emphasis). Amended 3742 creates a grievous ambiguity that cannot be reconciled with the Constitutional safeguard protected by Art. I., Sec. 9, cl. 3. or USSG 1B1.11 or the *Chevron* deference owed to the Commission.

Under any permissible calculus of statutory interpretation, it is plainly evident that the statute does not withstand close scrutiny and may not, consistent with due process, be applied in this case.

3. The Practical Effect of the Feeney Amendment Defeats the Time Honored ‘Law of the Case’ Doctrine and ‘Mandate Rule,’ Resulting in a ‘Repeal by Implication’

Here, the “law of the case” as set forth in the mandate in Bordon II is undermined, ignored and repealed by the Feeney Amendment. In this regard, *United States v. Tamayo*, 80 F.3d 1514 (11th Cir.1996) is particularly instructive:

‘The law of the case doctrine, self-imposed by the courts, operates to create efficiency, finality and obedience within the judicial system.’ An appellate decision binds all subsequent proceedings in the same case not only as to explicit rulings, but also as to issues necessarily decided by implication on the prior appeal.

Id. at 1520 (citations omitted). The Feeney Amendment’s modification of 18 U.S.C. 3742 renders the law of the case doctrine, especially as applied in this case, a nullity. *Tamayo* adds:

Accordingly, “[a] district court when acting under an appellate court’s mandate, ‘cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon a matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.’”

Id., citing *Littman v. Mass. Life Ins. Co.*, 825 F.2d 1506, 1511 (11th Cir. 1987)(*en banc*). The Feeney Amendment, however, commands the District Court to do just that, “intermeddle” with the mandate.

In the sentencing context—and the extraordinary, and carefully deliberated provisions of the Sentencing reform Act of 1984—it is apparent, particularly from controlling Eleventh Circuit law, that reviewing courts must employ a “holistic approach”¹³ when a sentence is vacated. Thus, the Feeney Amendment must be considered within the structure and theory of the Guidelines and sentencing legislation *taken as a whole*. As the

¹³ The term “holistic” means “relat[es] to or concerned with wholes or with complete systems rather than with the analysis of, or treatment of, or dissection into parts.” *Miriam-Webster Online Dictionary* <http://www.m-w/cgi->

Supreme Court recently noted:

In determining whether Congress has specifically addressed the question at issue, a reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning--or ambiguity--of certain words ****1301** or phrases may only become evident when placed in context. See [*Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 130 L.Ed.2d 462 \(1994\)](#) ("Ambiguity is a creature not of definitional possibilities but of statutory ***133** context"). It is a "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." [*Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809, 109 S.Ct. 1500, 103 L.Ed.2d 891 \(1989\)](#). A court must therefore interpret the statute "as a symmetrical and coherent regulatory scheme," [*Gustafson v. Alloyd Co.*, 513 U.S. 561, 569, 115 S.Ct. 1061, 131 L.Ed.2d 1 \(1995\)](#), and "fit, if possible, all parts into an harmonious whole," [*FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 389, 79 S.Ct. 818, 3 L.Ed.2d 893 \(1959\)](#).

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 132-33 (2000).

The offending provisions of amended Section 3742, subsection (g) in particular and subsections (f)(1) and (f)(2) as well, make it exceedingly apparent that this stealth legislation functionally or at least impliedly repeals the entire common law of sentencing as developed by the Courts since at least the advent of guideline sentencing and, in addition, summarily and carelessly rejects the "Mandate Rule" and "Law of the Case" doctrine.

[bin/dictionary?book=Dictionary](#) . See e.g., *United States v. Davis*, *supra*, citing *Stinson*, *supra*.

“The Supreme Court has long adhered to the principle that repeals by implication are not favored.” *Tug Allie-B, Inc., v. United States*, 273 F.3d 936, 950-51 (11th Cir. 2001)(citations omitted).

The purportedly immediately effective adverse changes Feeney wrought in particular guidelines cannot be applied to an offense committed before the Feeney Amendments became effective. Yet, by its plain language, subsection (g)(1) dictates that the district court ignore any such holding by an appellate court. In such circumstances, paragraph (g)(1) simply dictates that the resentencing be according to the Feeney Amendment without regard to prior proceedings.¹⁴

From these well-settled canons of statutory construction alone, this Court must reject the government’s demand that the Feeney Amendment be applied in further proceedings before this Court.

¹⁴ For any case that is remanded, paragraph (g)(1) may actually eliminate the need for the government to appeal a district court’s *Ex Post Facto* ruling adverse to the government in the initial sentencing. This is so because the component of the law-of-the-case doctrine that makes district court rulings that have not been appealed controlling on remand operates only by way of the appellate mandate, which the district court is to ignore under the Feeney Amendment.

2. Viewing Amended 3742(g) in Context With Other Portions of This Section of the Feeney Amendment, It's Statutory Infirmities Are Substantially Exacerbated

i. 18 U.S.C. § 3742(f), as Changed by the Feeney Amendments

Amended Section 3742(f)(1) governs a broad category of remands—remands where the original sentence was imposed “in violation of law” or “as a result of an incorrect application of the guidelines.” 18 U.S.C. § 3742(f)(1). Even after the Feeney amendments, paragraph (f)(1), but not (g)(1) continues to mandate that the Court of Appeals exercise its own discretion in formulating the mandate. Paragraph (f)(1) provides that the appellate court “shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate.” *Id.*

In contrast, Paragraph (f)(2) governs remands where the appellate court finds that “the sentence is outside the applicable guideline range” and one or more specified errors is also present. 18 U.S.C. § 3742(f)(2). Those errors consist of the district court failing to “provide the required statement of reasons” for the departure and the district court departing “based upon an impermissible factor or departing to an unreasonable degree.” *Id.*

Paragraph (f)(2) also governs remands of cases involving the increasingly rare and atavistic non-guideline sentence. Thus, in a phrase that is grammatically parallel to the entire phrase addressing improper departures, paragraph (f)(2) provides that if the appellate court finds that “the sentence was imposed for an offense for which there is no applicable guideline and is plainly unreasonable,” it must remand. The amended paragraph (f)(2) now requires the appellate court, in all cases governed by it, to “state specific reasons for its conclusions.” *Id.* With respect to all appealed sentences falling within the scope of (f)(2)—irrespective of whether the sentence was subject to the guidelines or not and whether a sentence subject to the guidelines resulted from an upward or downward departure—the appellate court must “remand the case for further sentencing proceedings with such instructions as the court considers appropriate, *subject to subsection (g).*” *Id.* §§ 3742(f)(2)(A) & (B) (emphasis added).

Such internal inconsistency is precisely what is proscribed by the principles of construction articulated herein.¹⁵

¹⁵ Peter Goldberger, Esq. And Clayton A. Sweeney, Jr., Esq. contributed significantly to this section.

**ii. 18 U.S.C. § 3742(g), as Added
by the Feeney Amendments**

The applicability of the Feeney limitations on remand, however, cannot be finally resolved based simply upon the fact the court of appeals' discretion in formulating a remand is "subject to subsection (g)" under paragraph (f)(2), but not under paragraph (f)(1). On its face, subsection (g) directs that district courts ignore, in certain regards, appellate mandates issued under *both* paragraphs (f)(1) and (f)(2).. 18 U.S.C. § 3742(g) (preamble).

In summary as to this point, the Feeney Amendment's changes in 3742(g)-(f) defy the "holistic approach" to sentencing mandated by controlling law¹⁶ and the statute cannot survive the necessary scrutiny compelled by canons of statutory construction.

¹⁶ The clarity of statutory terms is determined by reference to "the language itself, the specific context in which that language is used, and the broader context of the statute as a whole" *Robinson v. Shell Oil Co., supra*, 519 U.S. at 340. "When discerning a statute's plain meaning, courts must endeavor to give effect to all statutory provisions in harmony with each

C. Conclusion

Application of the PROTECT Act's "Sentencing on Remand" provision is plainly void on its face, wholly unsupported by the strict construction of amended 3742(g) otherwise urged by the government.

Point III.

THE FEENEY AMENDMENT VIOLATES THE SEPARATION OF POWERS DOCTRINE BY DIRECTING THE DEPARTMENT OF JUSTICE TO IMPERMISSIBLY INTRUDE INTO THE JUDICIAL FUNCTION

The Feeney Amendment—and similar legislation recently enacted under General Ashcroft's tutelage—represents a marked and inappropriate intrusion of the Executive Branch, principally through the Attorney General and his subordinates, into the lives of ordinary citizens and, in this case, the Judicial Branch of government.

That the PROTECT Act places Article III Judges on what has popularly been described as a 'blacklist' is but one example how, when the intent of the PROTECT Act is not reflexively followed by an independent judiciary, the Separation of Powers doctrine is threatened.

other." *United States v. Drury, supra*, 2003 WL 22038921*7 (11th Cir. Sept. 3, 2003). The Feeney Amendment creates havoc, not harmony.

Moreover, the PROTECT Act, including the Feeney Amendment, impermissibly intrudes into the function of the US Sentencing Commission, an independent agency situated in the Judicial Branch. 28 U.S.C. 991(a).

In the sentencing context, the Supreme Court heralded the utility and value of a separation among the tripartite branches of government:

This Court has consistently given voice to, and has reaffirmed, the central judgment of the Framers of the Constitution that, within our political scheme, the separation of governmental powers into three coordinate branches is essential to the preservation of liberty.

Mistretta v. United States, 488 U.S. 361, 380 (1989), *citing Morrison v. Olson*, 487, U.S. 654, 685-86 (1988).

It is axiomatic that an independent agency is entitled to considerable deference in the interpretation of its enabling legislation. *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In this case, Congress—in a carefully deliberated process preceded by many years of legislative study and consideration—conferred upon the Sentencing Commission the duty promulgate, review and revise the guidelines, 28 U.S.C. 994(o), to issue “general policy statements” regarding their application, 28 U.S.C. 994(a)(1), and to “perform such

other functions as are required to permit the Federal courts to meet their responsibilities” as to sentencing, 28 U.S.C. 995(a)(22).

One of the Guidelines’ cornerstone application principles is codified under USSG 1B1.11, p.s to ensure that whatever guidelines are deemed applicable at sentencing, they must not offend the *Ex Post Facto Clause*. *Id.* Notwithstanding the Feeney Amendment, the Commissioners—all of whom vehemently opposed promulgation of the Feeney Amendment for a plethora of compelling reasons—have refused to adopt a regulation to implement the section of the Feeney Amendment at issue in this case.¹⁷ And while the Supreme Court recently indicated that *Chevron* deference should be confined to those instances in which the agency renders its interpretation of enabling legislation in the course of a rulemaking proceeding or adjudication, the Eleventh Circuit just responded:

Even so, most courts would not completely ignore an agency’s interpretation of its organic statutes—even if that interpretation is advanced in the course of litigation rather than a rulemaking or agency adjudication.

TVA v. Whitman, 336 F.3d 1236, 1250 (11th Cir. 2003).

¹⁷ This deliberate decision is particularly instructive because the Commission did in fact use its emergency powers to implement the child exploitation sections of the PROTECT Act in the Supplement to the 2002 *Guidelines Manual*. <http://www.ussc.gov/2002suppb/2002suppb.htm>

The PROTECT Act is anathema to the critical democratic axiom that “each of the three general departments of government [must remain] entirely **free from the control or coercive influence, direct or indirect, of either of the others.**” *Humphrey’s Executor v. United States*, 295 U.S. 602, 629 (1935), *cited with approval in Mistretta, supra*. Clearly the bolded emphasis captures the essence of the Administration’s mindset that the Executive shall rule supreme and the threat to the independence and integrity of the judiciary is abundantly evident.

Ashcroft’s employment of legislative acronyms, *e.g.*, PROTECT Act, PATRIOT Act, *etc.*,-- much of which is confusing to the court and litigants—underscores the Administration’s overzealous mindset that those citizens who challenge these acronymic provisions are, “un-American,” left wing, card carrying members of the Democratic Party and, worse yet, the ACLU. This characterization—promoted by legislative terroristic threats reminiscent of Senator Joseph McCarthy—present a real risk to the balance of power contemplated by the Framers of the Constitution. Those who challenge these provisions are every bit as “patriotic” as their right wing counterparts notwithstanding the

conservatives' propaganda campaign to the contrary.

The PROTECT Act must be stricken as unconstitutional because it so offends the doctrine of Separation of Powers that it permits the Department of Justice to impermissibly intrude into and threaten the integrity of an independent statutory Article III judicial commission and the judges of this Nation discharging their duties as neutral and detached buffers for the benefit of the Citizens. Moreover, the legislation trivializes the doctrine of *Chevron* deference and repeals the product of many decades of legislative and agency-created sentencing reform and case law that preceded and post-dated enactment of the Sentencing Reform Act of 1984.

Point V.

CONCLUSION

For these reasons, as well as all other reasons advanced herein, the Feeney Amendment must be invalidated and declared inapplicable to the *Bordon* case.

Respectfully submitted,

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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 98-427-Cr-King

UNITED STATES OF AMERICA,
Plaintiff,

v.

LUIS ADEL BORDON, et al.,
Defendants.

DEFENDANTS' JOINT REPLY TO UNITED STATES' RESPONSE IN OPPOSITION
TO DEFENDANTS' JOINT MEMORANDUM IN OPPOSITION TO APPLICATION OF
THE FEENEY AMENDMENT TO THE PROTECT ACT

I.
INTRODUCTION

The entire premise of the government's response is plainly wrong. Reduced to its minimum, the response reasserts the government's conclusory position that 18 U.S.C. 3742(g) is "procedural only", insufficient to trigger the protections of the *Ex Post Facto* clause. A brief reply is necessary to dispel that notion again, and to critically underscore their legally flawed positions.

II.
THERE IS NO "BRIGHT LINE TEST" TO ASSESS THE SUBTLE NUANCES OF THE
PROCEDURAL/SUBSTANTIVE DISTINCTION IN *EX POST FACTO*
JURISPRUDENCE

A. The Procedural-Substantive Dichotomy Lends No
Support To the Government's Position

The government boldly states that 18 U.S.C. 3742(g)(1) “effected a change in sentencing procedure, which does not affect a defendant’s substantial rights.”¹⁸ In seeking to garner support for this untenable and patently ridiculous proposition, it cites PROTECT Act cases—none of which address the free standing provision at issue in this case, Section 3742(g)(1)—noting that “other courts that have addressed *similar* procedural changes under the Feeney Amendment have found that their retroactive applications do not constitute ex post facto violations.”¹⁹ (emphasis added).

Each of the cases from which the government attempts to gain support stand merely for the proposition that a legislative change in the *standard of review for a pending appeal* now codified at 18 U.S.C. 3742(e) is purely procedural.

Cognizant of future PROTECT Act issues implicating other more complex and legally troublesome aspects of the Feeney Amendment, the *Thurston* Court, relied on by the United States, strongly admonished that “It is the substance of

¹⁸ Government’s Response at 13.

¹⁹ Government’s Response at 12, citing *United States v. Mallon*, ---F.3d---, 2003 WL 22285302 (7th Cir. Oct. 6, 2003); *United States v. Hutman*, 339 F3d 773, 775 (8th Cir. 2003); *United States v. Thurston*, 338 F.3d 50 (1st Cir. 2003).

the sentencing rules, both guidelines and statutory, that impacts defendants.” *Id.* at 72.²⁰

The Supreme Court has long acknowledged that “[t]he line between ‘substance’ and ‘procedure’ shifts as the legal context changes,” and that there is a wide range of “matters which, though falling within the uncertain area between substance and procedure, are rationally capable of classification as either.” *Hanna v. Plumer*, 380 U.S. 460, 471, 472,(1965)(internal citations omitted). Since *Hanna*, the Court has emphasized that: “the Court’s decisions in this area point up the impossibility of laying down a precise rule to distinguish ‘substance’ from ‘procedure,’ ” *St. Louis Southwestern Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985).

In the highly contextualized setting of sentencing with its inherent constitutional limitations, the Supreme Court cogently underscored that “the distinction between substance and procedure might sometimes prove elusive,” *Miller v. Florida*, 482 U.S. 423, 433 (1987) and “we are loath to enter the logical morass of distinguishing between substantive and procedural rules,” *Mistretta v. United States*, 488 U.S. 361, 392 (1989).

²⁰ In *United States v. Lester*, 268 F.Supp.2d 514,515 n. 2 (E.D. Pa. 2003), the district judge noted that “The Sentencing Guidelines and statutes that were in effect at the time the defendant committed the offense control these proceedings. Recent restrictions on departures under these circumstances. . . are inapplicable. The government agrees that the *ex post facto* clause bars application of the PROTECT Act to the defendant.”

The government's trifling effort to prevail on this basis asserting, as it was obliged to from its adversarial position— a bright line benchmark for distinguishing substance from procedure— must be categorically rejected.

B. The Intervening Substantive Guideline Amendment Confers an Expectancy on Defendants in This Case That They Will Realize its Ameliorating Benefit

Relying once again on the discredited assumption that Section 3742(g)(1) effectuates only a "procedural change,"²¹ the government next contends that its prospective application would not offend the *Ex Post Facto* clause because "it only serves to subject the Bordons to the same sentencing scheme available at the time of their initial sentencing."²² On this point too, the government is plainly mistaken.

It is axiomatic that the loss of "a valuable opportunity to have a lower sentence imposed" violates the *Ex Post Facto* clause. [United States v. Johns](#), 5 F.3d 1267, 1272 (9th Cir.1993); see also [Murtishaw v. Woodford](#), 255 F.3d 926, 965 (9th Cir.2001)(relying on [Lindsey v. Washington](#), 301 U.S. 397, 400 (1937) and [Johns](#) to hold that "[t]aking discretion away from a sentencer violates the *Ex Post Facto* clause"). Similarly, the Third Circuit held that on a remand for resentencing, an intervening amendment

²¹ Government's Response at 11.

²² See Note 4, *supra*.

prohibiting downward departures for post-sentence rehabilitation did not apply because this restriction on discretion was not previously in effect. *United States v. Yeaman*, 248 F.3d 223, 227-28 (3rd Cir. 2001). The perfect symmetry of guideline jurisprudence reinforces that under the *Johns* line of cases, and others, the Bordons share the same expectancy.

As the Feeney Amendment becomes the subject of academic scrutiny, commentators are noting at the outset that “[T]he new Feeney provisions barring use of favorably amended guidelines at resentencing on remand (PROTECT Act Sec. 401(e), creating new 18 U.S.C. 3742(g)(1)). . . violate ex post facto principles.” Peter Goldberger & Felicia Sarner, *The Feeney Amendment: Effective Date and Ex Post Facto Issues*, 27 The Champion 34 (NACDL)(July 2003).²³

III. CONCLUSION

There can be no reasonable doubt that defendants’ have met the burdens for the grant of bond pending resentencing. As evidenced by the

²³ University of California Press is publishing a Commentary next month: Benson B. Weintraub & Benedict P. Kuehne, *The Feeney Frenzy: A Case Study in The Politics of Sentencing*, 16 Federal Sentencing Reporter ____ (Dec. 2003) to assist the bench and bar in critically reviewing the subject legislation.

Court's prior determinations, defendants present neither a danger to the community nor a risk of flight. More critical to this proceeding, however, is whether defendants have raised a "substantial question" of law on which they have an arguable probability of success on the merits.

With the benefit of comprehensive briefs from the parties, and argument in open court, the defendants have upheld and exceeded their burdens. The parties concur that the issue raised in this case is one of first impression in the nation on which there is no directly controlling law.

Any further delay in granting bond pending sentencing will result in a tragic miscarriage of justice based on the amount of time already served by defendants, now more than 16 months. If successful at the conclusion of these proceedings, they will have been required to serve so far in excess of what the applicable guidelines require that it would engender an irreversible human tragedy.

For all of the reasons previously plead by defendants, it is respectfully prayed that bond pending sentencing be granted and that sentence be imposed without delay.

Respectfully submitted,

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