

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge William J. Martínez**

Criminal Case No. 12-cr-0048-WJM

UNITED STATES OF AMERICA,

Plaintiff,

v.

2. **ANDREW BARTHOLOMEW,**

Defendant.

ORDER GRANTING ANDREW BARTHOLOMEW'S MOTION TO CONTINUE

On January 24, 2013, Defendant Andrew Bartholomew ("Defendant") pled guilty to one count of knowingly and intentionally conspiring to distribute and possess with intent to distribute 280 grams or more of cocaine base. (ECF No. 396.) At the change of plea hearing, Defendant's sentencing was set for Friday April 19, 2013. (*Id.*)

On April 17, 2013, Defendant filed the instant Motion to Continue Sentencing ("Motion"), seeking to have his sentencing hearing continued based on the Justice Safety Valve Act of 2013, which is currently pending before Congress. The Court vacated Defendant's sentencing hearing to give the parties an opportunity to brief the Motion. (ECF No. 487.) The Motion having been fully briefed, and for the reasons set forth below, the Motion is granted.

Based on the quantity of drugs involved in the conspiracy, the offense to which Defendant pled guilty is presently subject to a mandatory minimum sentence of ten years. See 21 U.S.C. § 841(b)(1)(A)(iii); Plea Agreement (ECF No. 397) ¶ 13. Given

his criminal history, Defendant does not qualify for the safety valve which currently exists in the law. See 18 U.S.C. § 3553(f) (which requires that a defendant have no more than one criminal history point for the safety valve to apply); ECF No. 476 (discussing whether Defendant has six or seven criminal history points). There is no indication that the Government intends to file a motion for substantial assistance in accordance with U.S.S.G. § 5K1.1. Therefore, at this juncture, and with the current state of the law, it appears that the Court would have no discretion but to sentence the Defendant to at least a ten year custodial sentence.

Defendant's Motion seeks to stay his sentencing hearing in hopes that the United States Congress will alter this legal landscape. (ECF No. 482 at 2.) On March 20, 2013, the Justice Safety Valve Act of 2013 ("Act") was introduced in the United States Senate. See Justice Valve Act of 2013, S.R. 619, 103rd Congress (2013) (accessed through Library of Congress's website at <http://thomas.loc.gov/cgi-bin/query/z?c113:S.619:>). The co-sponsors of the Act are Democratic Senator Patrick Leahy and Republican Senator Rand Paul.

The full-text of the Act is as follows:

A BILL

To amend Title 18, United States Code, to prevent unjust and irrational criminal punishments.

*Be it enacted by the Senate and House of
Representatives of the United States of America in
Congress assembled,*

SECTION 1. SHORT TITLE

This Act may be cited as the 'Justice Safety Valve Act

of 2013'.

SEC. 2. AUTHORITY TO IMPOSE A SENTENCE BELOW A STATUTORY MINIMUM

Section 3553 of title 18, United States Code, is amended by adding at the end the following:

'(g) Authority To Impose a Sentence Below a Statutory Minimum to Prevent an Unjust Sentence -

(1) GENERAL RULE - Notwithstanding any provision of law other than this subsection, the court may impose a sentence below a statutory minimum if the court finds that it is necessary to do so in order to avoid violating the requirements of subsection (a).

(2) COURT TO GIVE PARTIES NOTICE- Before imposing a sentence under paragraph (1), the court shall give the parties reasonable notice of the court's intent to do so and an opportunity to respond.

(3) STATEMENT IN WRITING OF FACTORS- The court shall state, in the written statement of reasons, the factors under subsection (a) that require imposition of a sentence below the statutory minimum.

(4) APPEAL RIGHTS NOT LIMITED- This subsection does not limit any right to appeal that would otherwise exist in its absence.'

Identical legislation was introduced in the United States House of Representatives on April 24, 2013. See Justice Safety Valve Act of 2013, H.R. 1695.IH, 113th Congress (2013). The House version of the Act has six co-sponsors and includes members of both parties. See <http://thomas.loc.gov/cgi-bin/bdquery/z?d113:HR01695:@@P> (accessed May 6, 2013). Both the Senate and House versions of the Act—which are identical—have been referred to the respective judiciary committees.

Defendant asks the Court to continue his sentencing to “allow[] him the opportunity to avail himself of the possibilities offered by this proposed legislation

should it pass.” (ECF No. 482 at 4.) Defendant points out that, in its current form, the Act is not retroactive. (*Id.* at 3.) Therefore, if the Court were to proceed with Defendant’s sentencing and the Act were to later pass in its current form, there is little chance that Defendant would benefit from this new legislation. (*Id.* at 4.)

As an initial matter, the parties dispute whether the Act, if it passes in its current form, would even apply to Defendant. Defendant argues that the Act would likely apply to him based on *Dorsey v. United States*, 132 S.Ct. 2321 (2012). The Government takes the position that, because the Act is not currently retroactive and the Defendant has already pled guilty to an offense with a mandatory minimum, it is unclear whether the legislation would apply to him. (ECF No. 485 at 6.)

In *Dorsey*, the Supreme Court considered whether the Fair Sentencing Act of 2010 (“FSA”) applied to criminal defendants who had been convicted of their offense before the legislation passed but had not yet been sentenced. The FSA was enacted to reduce the disparity between punishments for offenses involving powder cocaine as compared to cocaine base, a/k/a crack cocaine. *Id.* at 2329. The FSA changed the amount of cocaine base necessary to trigger certain mandatory minimum sentences and directed the United States Sentencing Commission to revise the Sentencing Guidelines on an emergency basis to conform with the statutory amendments. *Id.* Like the current version of the Justice Safety Valve Act, the FSA was silent as to when it took effect and whether it applied retroactively.

The Supreme Court characterized the issue of when the FSA would begin to apply as “difficult in part because relevant language in different statutes argues in

opposite directions. *Id.* at 2330. The Court recognized that, unless Congress “clearly indicate[s] to the contrary”, the federal savings act dictates that the FSA would not apply to offenders that had already been convicted but not yet sentenced. *Id.* at 2326. The Court also noted, however, that the FSA explicitly refers to the Sentencing Guidelines, which state that an offender must be sentenced under the version of the Guidelines in effect at the time of sentencing. *Id.* at 2331 (citing 18 U.S.C. § 3553(a)(4)(A)(ii)).

Given this contradicting authority, the Supreme Court looked at various aspects of the FSA in an attempt to discern Congress’s intent. The Court recognized that the purpose of the FSA was to reduce disparities and unfairness in federal sentencing. *Id.* at 2333-34. The Court held that failing to apply the FSA to offenders who had been convicted but not yet sentenced when the FSA was enacted would be contrary to this purpose and would actually increase disparity and perpetuate the unfairness. *Id.* The Court also noted that Congress explicitly required the Sentencing Commission to amend the Guidelines on an emergency basis and, in doing so, must have understood that any newly-enacted Guidelines would apply to offenders that had not yet been sentenced. *Id.* at 2332. The Court went on to discuss prior case law and found that no magic words are required for Congress to clearly intend that a law apply retroactively, and that Congress’s silence on the date of applicability was not a “strong countervailing consideration” given the factors discussed above. *Id.* at 2335. Based on all of these factors, the Court held that Congress intended the FSA to apply to offenders that had been convicted prior to its enactment but who had not yet been sentenced. *Id.* at 2336.

Defendant argues that “it is likely that the application of this Act’s relief will mirror

that of the Fair Sentencing Act of 2010, and thus Mr. Bartholomew at this point would be eligible to argue for its application.” (ECF No. 494 at 2.) The Court does not agree with the Defendant’s position that the Act would “likely” apply to Mr. Bartholomew; rather, the Court agrees with the Government that such application is “unclear”.

On the one hand, the Supreme Court’s reasoning in *Dorsey* relied heavily on the fact that the FSA directed the Sentencing Commission to amend the Guidelines, and to do so on an emergency basis. *Dorsey*, 132 S.Ct. at 2332-33. The Justice Safety Valve Act is a proposed statutory amendment; there would be no impact to the Sentencing Guidelines. Therefore, the Guidelines’ countervailing temporal aspect (that an offender is sentenced under the Guidelines in effect at the time of sentencing) would not be present to weigh against the general saving statute (which provides that an offender is subject to the penalties in place at the time the offense is committed). This leads the Court to believe there is a significant possibility that the Justice Safety Valve Act, if passed in its current form, would not apply to Defendant.

On the other hand, the Justice Safety Valve Act states that its purpose is to “prevent unjust and irrational criminal punishments.” Because there has been no debate on the Act at this time, there is obviously no legislative history. However, given the common arguments raised about the unfairness of mandatory minimums and the disparate sentences that result due to the Government’s discretion with respect to charging decisions, plea decisions, and whether to file a motion for substantial assistance, it is easy to see how the legislative history could develop in a manner similar to that of the FSA. The statutory purpose and the legislative history was a significant consideration for the *Dorsey* court. See 132 S.Ct. at 2333-34. Therefore, it

is possible that the Justice Safety Valve Act could be held to apply to an offender in Defendant's position under that aspect of the reasoning of *Dorsey*.¹

Of course, it is also entirely possible that the Justice Safety Valve Act could be amended during the course of the legislative process in a manner that would clarify this issue. The Court's research shows that, in similar legislation, Congress often includes some provision outlining when the new remedy is to go into effect and to whom it should apply. See Violent Crim Control and Law Enforcement Act of 1994, H.R. Conf. Rep. 103-711, Sec. 80001 at *198 (enacting the current Safety Valve contained in 18 U.S.C. § 3553(f) and stating that it "shall apply to all sentences imposed on or after the 10th day beginning after the date of enactment of this Act."). Of course, the Court cannot state with any degree of confidence whether Congress will do so in this case, and what impact any such amendment would have on the applicability of the Act to the Defendant. Therefore, the Court finds that there is significant uncertainty as to whether, assuming the Act becomes law, it would apply to Defendant.

¹ Defendant also argues the Justice Safety Valve Act would apply to him because Attorney General Eric Holder took the position, in the wake of the passage of the FSA, that it would apply to any offender sentenced after the FSA's effective date. (ECF No. 494 at 2.) Defendant appears to argue by analogy that, because General Holder took such position with respect to the FSA, he would do so here as well. However, as the Government points out, General Holder has not to date taken any position on the Justice Safety Valve Act. Additionally, even if General Holder were at a later time voice support for the Justice Safety Valve Act, and take the position that it should apply to an individual who has not yet been sentenced, there is no indication that his position would affect the statute's retroactivity. From the Court's research it is clear that none of the courts evaluating the retroactivity of the FSA appeared persuaded by General Holder's position on whether it should apply retroactively. In fact, the Court could not locate any opinion in which General Holder's position was even mentioned. Mr. Holder's memorandum was dated July 15, 2011 and, three months later, the Fifth Circuit held that the FSA did not apply to offenders who were yet to be sentenced at the time of its passage. Therefore, the Court is not compelled by Defendant's contention that the Justice Safety Valve Act would likely apply to him if the Attorney General takes such position.

Aside from its potential applicability to the Defendant, the Government argues against staying the Defendant's sentencing because there is no indication that the Act will pass both the House and the Senate and become law. (ECF No. 485 at 3.) The Court acknowledges that the Act is still in the early stages of legislation and, given the ineptitude of the current Congress, any guess as to whether it will progress and, if so, how quickly, would be pure speculation. However, it is notable that a co-sponsor of the Act in the Senate, Patrick Leahy, is the Chairman of the Senate Judiciary Committee, which increases the likelihood that the Act will at least be brought for a vote in that Committee. Moreover, the Act has bi-partisan support in both the House and the Senate, which significantly increases its chances of passage.

The Government also argues that continuance of the sentencing would impose an administrative and cost burden on the United States because, until the sentencing occurs, Defendant is a pre-trial detainee and there is limited bed space for this category of offender. (ECF No. 485 at 3.) The Government candidly admits that there is currently no shortage of pre-trial detainee bed space but contends that "by continuing this sentencing hearing, the Court opens the door to other motions to continue sentencing for defendants who are similarly situated, thus delaying the Court process for a substantial number of detainees and stretching the limited bed space availability." (*Id.*)

In response, Defendant has parsed the filings in drug conspiracy cases that are currently pending before this Court and points out that most of the other defendants therein have either pled guilty to an offense that is not subject to a mandatory minimum or have cooperated with the Government to the extent that a motion for substantial

assistance pursuant to U.S.S.G. § 5K1.1 is expected. (ECF No. 494.) Having crunched the numbers, Defendant contends that there approximately five other defendants in all of these related cases who may seek to postpone their sentencings to permit future potential application of the Act. (*Id.* at 6.) Accepting these representations, and given the Government's representation that there is currently no shortage of bed space, the Court finds the Government's "floodgates" argument unavailing.

The Court takes no position on whether it would go below the mandatory minimum even if it had the discretion which would be afforded by the Act. However, it is notable that the Defendant's sentencing range under the Guidelines is below the mandatory minimum. As Defendant has pointed out, imposing a sentence of even one to two years shorter than the mandatory minimum is a significant cost savings to the Government and the American public.

In sum, there is significant uncertainty surrounding whether the Justice Safety Valve Act of 2013 will become law and, if it does, whether it will apply to Mr. Bartholomew. The Court acknowledges that a continuance of the Defendant's sentencing potentially opens the door for other offenders to request the same relief. However, Defendant has shown that the impact of this Order is unlikely to open the floodgates and overwhelm the capacity of the United States Marshall's bed space. If the Act does not ultimately pass, the Defendant will likely be in federal custody for at least ten years. The fact that he may end up serving a greater portion of such sentence in pre-trial custody of the United States Marshall rather than post-judgment custody of the Bureau of Prisons is immaterial to the Court.

Therefore, having considered all of the above factors, the Court finds that the balance of the equities and the interests of justice weigh in favor of continuing the date of Defendant's sentence hearing. Accordingly, the Court hereby ORDERS as follows:

1. Defendant's Motion to Continue Sentencing Hearing (ECF No. 482) is GRANTED;
2. A sentencing hearing is SET for November 14, 2013 at 10:00 a.m. in Courtroom A801;
3. Nothing in this Order precludes Defendant from seeking a further continuance of his sentencing hearing if Congress has not taken action on the Justice Safety Valve Act by the date of that hearing.

Dated this 10th day of May, 2013.

BY THE COURT:



William J. Martinez
United States District Judge