No. 11-5683

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 2011

EDWARD DORSEY SR.,

PETITIONER,

vs.

UNITED STATES OF AMERICA,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITIONER'S REPLY TO RESPONDENT'S BRIEF

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AMENDED QUESTION PRESENTED[1]

Did the Seventh Circuit err when, in conflict with the First and Third Circuits, it held that the Fair Sentencing Act of 2010 does not apply to all defendants sentenced after its enactment?

[1]The question presented has been amended to reflect decisions by the Courts of Appeals that were issued after Petitioner filed his Petition.

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REPLY BRIEF

The government's 2-page brief acknowledges the need for this Court to grant certiorari to resolve the disagreement in the circuits over the question raised by Petitioner. Yet, the government does not recommend that this Court grant certiorari in this case. Rather, the government recommends that this Court grant certiorari in another case, *Hill v. United States*, No. 11-5721, and to hold Petitioner's case pending the disposition of *Hill*.

The government is correct that this Court should grant certiorari to resolve the circuit split on the Fair Sentencing Act's application. The government's recommendation that this Court grant certiorari in *Hill*, rather than this case, however, is unsound. This case, and not *Hill*, is an excellent vehicle to address the circuit split. Therefore, this Court should grant certiorari in this case and hold the petition in *Hill* pending the disposition of this case, or, at a minimum, grant certiorari in both this case and in *Hill*.

I. THE CIRCUITS ARE DIVIDED ON WHETHER THE FAIR SENTENCING ACT APPLIES TO ALL THOSE SENTENCED AFTER ITS ENACTMENT OR AFTER NOVEMBER 1, 2010.

At the time Petitioner filed his Petition, the Circuits were divided 1-1-1 over whether the Fair Sentencing Act applies to individuals who committed their underlying offense conduct prior to the Act's enactment, but who were sentenced after the Act's enactment. The Eleventh Circuit had held that the Act applies to all individuals sentenced after its enactment, regardless of the date of the underlying criminal conduct. *United States v.*

Rojas, 645 F.3d 1234 (11th Cir. 2011). The First Circuit had held that the Act applies to all individuals sentenced on or after November 1, 2010, the effective date of the Act's amendments to the Guidelines, again, regardless of the date of the underlying criminal conduct. *United States v. Douglas*, 644 F.3d 39 (1st Cir. 2011). The Seventh Circuit, in Petitioner's case, had held that the Act applies only to those who commit their offenses of conviction after the Act's enactment. *United States v. Fisher*, 635 F.3d 336, 339-40 (7th Cir. 2011).

At present, the Circuit split now stands at 3-1-1. The Fifth and Eighth Circuits have joined the Seventh Circuit in holding that the Act applies only to those who commit their offenses of conviction after the Act's enactment. *United States v. Tickles*, – F.3d –, 2011 WL 4953988 (5th Cir. Oct. 19, 2011); *United States v. Sidney*, 648 F.3d 904 (8th Cir. 2011). The Third Circuit joined the Eleventh Circuit in holding that the Act applies to all those sentenced after its enactment, *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011), but the Eleventh Circuit then vacated its panel decision and granted rehearing *en banc* on the issue, *United States v. Rojas*, – F.3d –, 2011 WL 4552364 (11th Cir. Oct. 4, 2011). The First Circuit's position remains unchanged. *Douglas*, 644 F.3d 39.

With respect to the three Circuits who have held that the Act applies only to those who commit their offenses after the Act's enactment, intra-Circuit conflicts exist. In the Seventh Circuit, 5 of the 10 active Judges agree with the Third Circuit's position. *United States v. Holcomb*, – F.3d –, 2011 WL 3795170 (7th Cir. Aug. 24, 2011) (Williams, J., dissenting; Posner, J., dissenting). As does at least one Judge in the Fifth Circuit. *Tickles*,

– F.3d –, 2011 WL 4953988 at *2 (Stewart, J. dissenting). In the Eighth Circuit, 5 of the 11 active Judges would have granted rehearing *en banc* in *Sidney*. No. 11-1216, docket entry (8th Cir. Oct. 6, 2011). Yet, both the Seventh and the Eighth Circuits have refused to rehear this issue *en banc*, meaning that the circuit split on this issue will exist until this Court resolves it. *Id.*; *Holcomb*, 2011 WL 3795170 at *1.

In sum, as the government acknowledges, because the circuit split on this issue is established and entrenched, this Court should resolve it. Although the government asks this Court to do so in a different case, Petitioner respectfully asks this Court to do it in his case because his case is an excellent vehicle to address the issue.

II. THIS CASE IS AN EXCELLENT VEHICLE.

This case presents an ideal vehicle in which to address the Circuit split on this issue. Petitioner preserved the Fair Sentencing Act issue by raising it in both the trial and appellate courts. It was the only issue raised on direct appeal. There are no procedural complexities in this case. Nor are the facts complex or convoluted. Rather, the facts are straightforward: if the Fair Sentencing Act applies to Petitioner, he will receive a shorter sentence. His guidelines range, 37 to 46 months' imprisonment, is well below the 10-year sentence he received. Nothing in the sentencing transcript indicates that the district court would refuse to impose a much shorter sentence if it had the discretion to do so. Indeed, there is no apparent reason why the district court would vary upward from the advisory guidelines range in this case. And so, there is no reason why this Court should not grant this Petition and address the significant Circuit split on the Fair Sentencing

Act's application to those sentenced after its enactment.

For unknown reasons, the government believes that *Hill* is a better vehicle to address this issue. Petitioner disagrees for at least eight reasons.

First, *Hill* is not an ideal vehicle to address this Circuit split because the petitioner in that case was sentenced after November 1, 2010, whereas Petitioner was sentenced before November 1, 2010. This is important because the Circuits are split three ways on this issue, not just two. If this Court only grants certiorari in a post-November 1 case, like *Hill*, it will not be squarely presented with the Fair Sentencing Act's application to pre-November 1 cases, like Petitioner's case. As the First Circuit did in *Douglas*, this Court could ultimately issue an opinion that has no application to those sentenced prior to November 1, 2010. 644 F.3d at 46. To avoid this possibility, and the complexities associated with addressing an issue not squarely presented, this Court should grant certiorari in this case either instead of *Hill* or in conjunction with *Hill*. By doing so, this Court would squarely confront the totality of the Circuit split on this issue, and not just a portion of that split.

Second, Petitioner's case is the published opinion from the Seventh Circuit. *Fisher*, 635 F.3d 336. As the government concedes in its response brief in *Hill*, Hill's case was an unpublished opinion that relied entirely on the published decision in Petitioner's case. It is only Petitioner's case that has precedential effect, not Hill's case. 7th Cir. Rule 32.1(b). Without a principled reason why Hill's case is more suitable for review than Petitioner's, which there is not, review should be of Petitioner's case, rather than, or at

least in conjunction with, Hill's case.

Third, Petitioner, and not Hill, sought rehearing *en banc* in the Seventh Circuit, which resulted in an influential dissent. *United States v. Fisher*, 646 F.3d 429, 430 (7th Cir. 2011) (Williams, J., dissenting). Judge Williams's dissent was cited by the Third Circuit in *Dixon*. 648 F.3d at 201. The government cites it in its response brief in *Hill*. It was the precursor to the dissents in *Holcomb*. 2011 WL 3795170 at *8. Petitioner has sought relief at every turn. Hill has not.

Fourth, Petitioner accepted responsibility and pleaded guilty, even though his advisory guidelines range was well below the mandatory minimum sentence, meaning that he had little to lose by going to trial. Hill did not. He forced the government to try him, which it successfully did. By his guilty plea, Petitioner's case is a better vehicle than Hill's case.

Fifth, the facts in Petitioner's case are more sympathetic. Petitioner pleaded guilty to 5.5 grams of crack cocaine; the threshold for mandatory minimum purposes was 5 grams of crack cocaine. The advisory guidelines range without the 10-year mandatory minimum was 37 to 46 months' imprisonment. There is nothing in the record to indicate that the district court would have imposed an upward variance in this case, nor is there anything in the record that would even support an upward variance. Thus, Petitioner's sentence was essentially increased three-fold based on .6 grams of crack cocaine. In contrast, Hill was still subject to a 5-year mandatory minimum sentence because he distributed a much greater quantity of crack cocaine, 53 grams. Even under the Fair

Sentencing Act, Hill is considered a serious drug trafficker; Petitioner is not.

Sixth, the published opinion in Petitioner's case also involved an individual sentenced prior to the Fair Sentencing Act's enactment. *Fisher*, 635 F.3d at 338. That Petitioner, Anthony Fisher, also seeks certiorari in this Court. *Fisher v. United States*, No. 11-6096. Some Judges have expressed scepticism over an interpretation of the general savings statute, 1 U.S.C. § 109, that permits the application of a new statute to those sentenced after it, but not before it. *See Holcomb*, 2011 WL 3795170 at *1 (Easterbrook, C.J.) ("As far as I am aware, the Supreme Court has never held any change in a criminal penalty to be partially retroactive. The choice always has been binary: retroactive or prospective."). If this Court were inclined to address the broader issues concerning the general savings statute's interpretation, it could do so by granting certiorari in Petitioner's case and in Fisher's case (undersigned counsel represents both Petitioner and Fisher). After all, both cases arise from the Seventh Circuit's published opinion on the Fair Sentencing Act's application. *Fisher*, 635 F.3d 336.

Seventh, Petitioner has raised arguments with respect to the interpretation of the general savings statute that neither the government nor Hill raise. One such argument was found persuasive by a district court judge. *See United States v. Holloman*, 765 F.Supp.2d 107 (C.D. Ill. 2011). That argument, and the others raised by Petitioner, deserve this Court's attention as well.

Finally, undersigned counsel notes that he was also counsel of record in the Seventh Circuit's decision in *Holcomb*, and he currently represents a total of 25 individuals with

Fair Sentencing Act claims either in this Court or the Seventh Circuit. The Office of the Federal Public Defender for the Central District of Illinois has been committed to this issue from the start, and it will remain committed to this issue until the end. Indeed, initially, this case was first in time: it was docketed as No. 11-5683 on August 5, 2011; *Hill* was docketed as 11-5721 on August 8, 2011. The government sought and received an extension in both cases on August 25, 2011. Their response in this case was due on October 6, 2011; the response in *Hill* was due the next day, October 7, 2011.

For some unexplained reason, the government requested a second extension of time in this case, yet then filed a timely response in *Hill*, meaning that *Hill* is now first in time solely because of the government's second extension in this case (an extension that appears to have been entirely unnecessary considering that, according to the government, this case and *Hill* present the same issue).[2] *Hill* is now slated for the November 4, 2011 conference, while this case has yet to be distributed. As the above demonstrates, there is no rational reason why the government delayed this case in favor of *Hill*. This case is a much better vehicle to address this issue.

For these reasons, this Court should grant certiorari in this case and either hold *Hill* pending the disposition of this case or grant certiorari in *Hill* in conjunction with this case.

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[2]Indeed, in one of undersigned counsel's other cases, *Hyde v. United States*, No. 11-6364, the government's response was due ten days after it filed its response in *Hill*, yet the government nonetheless requested an extension to file a response. On October 25, 2011, it filed the identical 2-page response in *Hyde* as it filed in this case. It is difficult to believe that the government actually needed an extension to file this 2-page response.

CONCLUSION

For the foregoing reasons, as well as those stated in the petition, a writ of certiorari should issue to review the Seventh Circuit's published decision in this case affirming Petitioner's sentence.

Respectfully submitted,
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