No. 11-5683

In The
Supreme Court of the United States

EDWARD DORSEY, SR.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the Fair Sentencing Act of 2010 applies to all defendants sentenced on or after its enactment.

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BRIEF FOR PETITIONER

Mr. Dorsey respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Seventh Circuit and remand this case for resentencing under the Fair Sentencing Act of 2010.

OPINIONS BELOW

The opinion of the court of appeals affirming Mr. Dorsey's sentence is reported at 635 F.3d 336 (7th Cir. 2011). J.A. 96-102. The opinion denying rehearing en banc is reported at 646 F.3d 429 (7th Cir. 2011). J.A. 103-15. The district court did not issue a written opinion, but the sentencing transcript is reprinted in the joint appendix. J.A. 56-83.

JURISDICTION

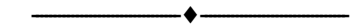
The judgment of the court of appeals was entered on March 11, 2011, and a timely petition for rehearing en banc was denied on May 25, 2011. J.A. 96-115. A timely petition for writ of certiorari was filed on August 1, 2011. This Court granted the petition on November 28, 2011. J.A. 116. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

1. The Fair Sentencing Act of 2010, Pub. L. No. 111-220, 124 Stat. 2372 (2010), full text set forth in Appendix C to the Petition for a writ of certiorari. Pet. App. C.

2. The saving statute, 1 U.S.C. § 109, provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability 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, forfeiture, or liability. The expiration of a temporary statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the temporary statute 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, forfeiture, or liability.



STATEMENT OF THE CASE

For some 25 years, federal cocaine sentencing laws have distinguished between cocaine in its base form and cocaine in its salt form. *See DePierre v. United States*, 131 S.Ct. 2225, 2227-28 (2011). Trafficking in

the former was punished much more harshly than trafficking in the latter. *Id.* at 2229. Congress recognized this unfairness with the passage of the Fair Sentencing Act of 2010. Pub. L. No. 111-220, 124 Stat. 2372 (2010). The issue in this case is whether the Fair Sentencing Act applies immediately, to all individuals sentenced after its enactment, or whether district courts must continue to sentence certain individuals under an unfair sentencing scheme.

I. Statutory Background

On August 3, 2010, the President signed into law the Fair Sentencing Act of 2010. 124 Stat. 2372. The Act's stated purpose was to "restore fairness to Federal cocaine sentencing." *Id.* The Act used the term "restore" because it was not until 1986 that unfairness found its way into federal cocaine sentencing.

A. The Anti-Drug Abuse Act of 1986

"In 1986, increasing public concern over the dangers associated with illicit drugs – and the new phenomenon of crack cocaine in particular – prompted Congress to revise the penalties for criminal offenses involving cocaine-related substances." *DePierre*, 131 S.Ct. at 2229. After holding several hearings to address the emergence of crack cocaine, Congress enacted the Anti-Drug Abuse Act of 1986 (ADAA), Pub. L. No. 99-570, 100 Stat. 3207 (1986). *Id.* The ADAA was premised on Congress' belief, at that time, that crack cocaine was significantly more dangerous than

powder cocaine because it was cheaper, more potent, more addictive, more harmful, more prevalent among teenagers, and associated with more violence. *See Kimbrough v. United States*, 552 U.S. 85, 95-96 (2007).

As relevant here, the ADAA established various mandatory minimum sentences for cocaine-related drug offenses. In doing so, the ADAA differentiated between mixtures and substances containing "cocaine base," which includes crack cocaine, and mixtures and substances containing coca leaves, cocaine, and cocaine salts (hereinafter "cocaine"). The ADAA established a 100-to-1 ratio between the two groups. For instance, trafficking in only 5 grams of cocaine base, compared to 500 grams of cocaine, triggered a 5-year mandatory minimum sentence. *Id.*; 21 U.S.C. § 841(b)(1)(B)(iii) (2009). Similarly, trafficking in 50 grams of cocaine base, compared to 5,000 grams of cocaine, triggered a 10-year mandatory minimum sentence. 21 U.S.C. § 841(b)(1)(A)(iii) (2009).

The penalties were even steeper if one had a prior felony drug conviction.[1] In that case, trafficking in only 5 grams of cocaine base, compared to 500 grams of cocaine, triggered a 10-year mandatory minimum sentence, while trafficking in 50 grams of cocaine base, compared to 5,000 grams of cocaine,

[1] The enhanced penalties apply only if the government files a proper notice pursuant to 21 U.S.C. § 851.

triggered a 20-year mandatory minimum sentence, or a sentence of life imprisonment if the defendant had two prior felony drug convictions.[2] 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii) (2009).

Practically speaking, this 100-to-1 ratio primarily applied to punish those who trafficked in crack cocaine far more harshly than those who trafficked in powder cocaine. *See* United States Sentencing Commission: Report to Congress: Cocaine and Federal Sentencing Policy (2007). This is so despite the fact that crack cocaine and powder cocaine, "two forms of the same drug," are "chemically similar," with the identical active ingredient and "the same physiological and psychotropic effects." *Kimbrough*, 552 U.S. at 94. Indeed, powder cocaine, a salt, is converted into crack cocaine, a base, simply by combining the powder cocaine with water and sodium bicarbonate, or baking soda. *DePierre*, 131 S.Ct. at 2228.

In light of the similarities between crack cocaine and powder cocaine, after the ADAA's passage, the 100-to-1 ratio came under attack by "a chorus of critics, including practitioners, public officials (including

[2] Moreover, simple possession of 5 grams or more of cocaine base triggered a 5-year mandatory minimum sentence. 21 U.S.C. § 844 (2009). If an individual had 1 prior felony drug conviction, this 5-year mandatory minimum was triggered by only 3 grams of cocaine base; 2 prior felony drug convictions triggered the mandatory minimum if the individual possessed only 1 gram of cocaine base. Simple possession of other forms of cocaine, in contrast, never triggered a mandatory minimum sentence. *Id.*

judges), and scholars." *United States v. Santana*, 761 F.Supp.2d 131, 135-36 (S.D.N.Y. 2011) (collecting sources). The United States Sentencing Commission, which initially adopted the 100-to-1 ratio in its Guidelines Manual, also repeatedly found that the ratio was "generally unwarranted." *Kimbrough*, 552 U.S. at 97. In 1995, 1997, 2002, and 2007, the Sentencing Commission recommended that Congress eliminate or lower the 100-to-1 ratio in the ADAA.[3] *Id.* at 99-100. It did so for three reasons. *Id.* at 97-98.

First, the basic assumptions underlying the disparate ratio proved to be false; research revealed that crack cocaine was neither more harmful, more prevalent among teenagers, nor associated with more violence than powder cocaine. *Id.* Second, the 100-to-1 ratio proved to be inconsistent with the ADAA's goal of punishing major drug traffickers more severely because major traffickers generally dealt in powder cocaine, not crack cocaine. *Id.* at 98. And third, the 100-to-1 ratio worked to foster disrespect for and lack of confidence in the criminal justice system because it created an unwarranted racial disparity. *Id.* "Approximately 85 percent of defendants convicted of crack offenses in federal court are black; thus the severe sentences required by the 100-to-1 ratio [were] imposed 'primarily upon black offenders.'" *Id.*

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[3] The Sentencing Commission has limited the definition of "cocaine base" in the Guidelines to crack cocaine. U.S.S.G. § 2D1.1(c) (n.D). The statutory definition of "cocaine base" is broader. *DePierre*, 131 S.Ct. at 2231.

B. The Fair Sentencing Act of 2010

In response to the unfairness wrought by the ADAA, Congress passed, and the President signed into law on August 3, 2010, the Fair Sentencing Act. The Act passed the Senate by unanimous consent on March 17, 2010, and the House of Representatives by a voice vote on July 28, 2010.[4]

Of the Fair Sentencing Act's ten sections, three seek to ameliorate the disparity between crack cocaine and powder cocaine found in the federal sentencing laws, and two of those sections are at issue in this case.[5]

In Section 2, Congress lowered the 100-to-1 ratio to an effective 18-to-1 ratio by increasing the quantities of crack cocaine triggering the 5-year mandatory minimum penalty in 21 U.S.C. § 841(b)(1)(B)(iii) from 5 grams to 28 grams and the 10-year mandatory minimum penalty in 21 U.S.C. § 841(b)(1)(A)(iii) from 50 grams to 280 grams, § 2, 124 Stat. at 2372.[6]

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[4] 124 Stat. at 2375; S.1789: Fair Sentencing Act of 2010, at http://www.govtrack.us/congress/bill.xpd?bill=s111-1789 (last visited Jan. 13, 2012).

[5] Section 3 also eliminated the mandatory minimum penalties for cocaine base offenses in 21 U.S.C. § 844(b), but that section is not at issue here.

[6] The Fair Sentencing Act also made identical amendments to 21 U.S.C. § 960. Although that section is not at issue in this case, its reach will be controlled by the decision in this case.

In Section 8, Congress directed the Sentencing Commission to

> (1) promulgate the guidelines, policy statements, or amendments 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 . . . ; 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.

§ 8, 124 Stat. at 2374.

In response, the Sentencing Commission promulgated an emergency, temporary amendment, effective November 1, 2010. *See* U.S.S.G. App. C, Amend. 748, Reason for Amend. The temporary amendment, *inter alia*, increased the quantities of crack cocaine set forth in the Drug Quantity Table, U.S.S.G. § 2D1.1(c), to reflect the increased quantities codified in 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii) pursuant to Section 2 of the Fair Sentencing Act. *Id.*

The Sentencing Commission later re-promulgated as permanent this portion of the temporary amendment, effective November 1, 2011. U.S.S.G. App. C., Amend. 750. The increased quantities now reflect the Fair Sentencing Act's 18-to-1 ratio. *Id.* On June 30, 2011, the Sentencing Commission voted unanimously

to designate this portion of the amendment as retroactively applicable to all eligible individuals previously sentenced under § 2D1.1 for a crack cocaine offense. U.S.S.G. § 1B1.10(c).[7]

The Fair Sentencing Act contains neither a saving clause nor an effective date clause. The latter omission simply means that the Fair Sentencing Act went into effect on the date of its enactment, August 3, 2010. *Gozlon-Peretz v. United States*, 498 U.S. 395, 404 (1991). The former omission means that Congress did not specifically save the former unfair penalties. This omission has centered the debate over the reach of the Fair Sentencing Act on the saving statute, 1 U.S.C. § 109. *See generally United States v. Holcomb*, 657 F.3d 445 (7th Cir. 2011).

C. The Saving Statute, 1 U.S.C. § 109

In relevant part, the saving statute provides:

> The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the repealing Act shall so expressly provide, and such statute shall be

[7] The temporary amendment also amended the guidelines to reflect the elimination of § 844's mandatory minimums for possession of crack cocaine. U.S.S.G. App. C, Amend. 748, Reason for Amend. The Sentencing Commission also re-promulgated this amendment as permanent, effective November 1, 2011, and made it retroactive. U.S.S.G. App. C., Amend. 750; U.S.S.G. § 1B1.10(c).

> treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture, or liability.

1 U.S.C. § 109.

The saving statute has its origins in the Reconstruction Era following the Civil War. *See* John P. MacKenzie, Comment, *Hamm v. City of Rock Hill and the Federal Saving Statute*, 54 Geo. L.J. 173 (1965). Enacted on February 25, 1871, as the last section of the Act "Prescribing the Form of the enacting and resolving Clauses of Acts and Resolutions of Congress, and Rules for the Construction thereof," ch. 71, 16 Stat. 432 (1871), the saving statute was nominally part of an 8-year task, begun in 1865, to codify all federal laws, MacKenzie, 54 Geo. L.J. at 175-76.

The 1871 Act originally contained four sections in addition to the saving provision. Cong. Globe, 41st Cong., 2d Sess. 2464-65 (1870). The first three sections sought to codify rules of construction to avoid surplusage and uncertainty in statutes. The first section sought to shorten the preamble to Acts of Congress. The second section set forth permissible interpretations of certain words (such as "masculine words might be applied to females"), and the third section defined the terms "State," and "oath." Similarly, the fourth section set forth a rule of statutory construction similar to the saving provision: "whenever an act shall be repealed which repeals a former act, such former act shall not thereby be revived,

unless the repealing act expressly so provides."[8] *Id.* As with the saving provision, these sections were meant primarily as technical changes to "revise, simplify, arrange, and consolidate" federal law. *See* MacKenzie, 54 Geo. L.J. at 176-77.

Below, the court of appeals held that the Fair Sentencing Act does not apply in this case due to the operation of the saving statute. Accordingly, the interplay between the two statutes is at the heart of this case.

II. Procedural History

A. Proceedings in the District Court

On January 7, 2009, a federal grand jury in the Central District of Illinois returned a one-count indictment against Mr. Dorsey, charging him with possession with intent to distribute 5 grams or more of crack cocaine on August 6, 2008, in violation of 21 U.S.C. § 841(a)(1) & (b)(1)(B)(iii) ("Count One"). J.A. 9-10. On April 20, 2009, the government filed an information, pursuant to 21 U.S.C. § 851, seeking enhanced penalties in light of Mr. Dorsey's prior felony drug convictions. J.A. 11. On June 3, 2010, Mr. Dorsey pleaded guilty to Count One. J.A. 50-51. He admitted that he possessed with intent to distribute approximately 5.5 grams of crack cocaine. *Id.*

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[8] Congress did not pass the first section or the definition of "State" set forth in the third section. 16 Stat. 432.

On July 29, 2010, the probation officer prepared the Presentence Investigation Report ("PSR"). Using the November 1, 2009 Guidelines Manual, the probation officer first determined that Mr. Dorsey was responsible for 5.5 grams of crack cocaine, and, accordingly, set his base offense level at 24, pursuant to U.S.S.G. § 2D1.1(c)(8). PSR at 5. With a two-level reduction for acceptance of responsibility, U.S.S.G. § 3E1.1(a), Mr. Dorsey's total offense level was 22. *Id.* With an offense level of 22 and a criminal history category of VI, Mr. Dorsey's advisory guidelines range was 84 to 105 months' imprisonment. *Id.* at 14. Because the probation officer determined that Count One involved more than 5 grams of crack cocaine, and because the government filed the § 851 information, the probation officer concluded that Mr. Dorsey faced a mandatory minimum 10-year sentence, which became the guidelines range, U.S.S.G. § 5G1.1(b).

On September 9, 2010, Mr. Dorsey filed a sentencing memorandum, asking the district court to sentence him under the Fair Sentencing Act because, under the Act, he would not incur a mandatory minimum penalty; the 5.5 grams of crack cocaine he possessed was substantially below the Fair Sentencing Act's 28-gram threshold. J.A. 54-55.

At the sentencing hearing on September 10, 2010, the district court adopted the PSR and held the Fair Sentencing Act inapplicable because Mr. Dorsey committed the underlying criminal conduct prior to the Act's enactment. J.A. 69-70. The district court sentenced Mr. Dorsey to the 10-year mandatory

minimum sentence based on the penalties in the prior version of § 841(b), to be followed by a mandatory minimum 8-year term of supervised release, and imposed a $100 mandatory special assessment. J.A. 79-81, 84-95.

B. Proceedings in the Court of Appeals

On September 13, 2010, Mr. Dorsey filed a timely Notice of Appeal. J.A. 3. On November 12, 2010, he filed a motion to consolidate his appeal with that of Anthony Fisher, who had recently filed a brief arguing that the Fair Sentencing Act applied to all appeals pending on the date of the Act's enactment. *United States v. Fisher*, 635 F.3d 336, 338 (7th Cir. 2011). Although Fisher was sentenced before the Fair Sentencing Act's enactment, Mr. Dorsey sought consolidation to adopt the arguments raised by Fisher. The Seventh Circuit granted the motion and consolidated the cases on November 19, 2010. J.A. 4-5.

On December 6, 2010, Mr. Dorsey filed his Opening Brief. He adopted the arguments raised in Fisher's brief, namely, that the saving statute did not save the prior penalties in § 841(b) because, *inter alia*: (1) he did not seek abatement; (2) Congress did not intend to save the former penalties; and (3) the Fair Sentencing Act's purpose – to remedy an unwarranted racial disparity – precluded the saving statute's application. He further asserted that the text of the Fair Sentencing Act necessarily implied that Congress intended the Act to apply immediately to all

individuals not yet sentenced on the date of enactment. Finally, Mr. Dorsey asserted that, because he was sentenced after the Fair Sentencing Act's enactment, he never "incurred" a mandatory minimum penalty under the prior version of § 841(b). Mr. Dorsey further noted that, if the temporary, emergency amendment to the drug guideline applied in his case, his base offense level would fall to 16, U.S.S.G. § 2D1.1(c)(12), and his advisory guideline range would plummet from 84 to 105 months' imprisonment to 37 to 46 months' imprisonment.

The government disagreed, citing the saving statute, 1 U.S.C. § 109.[9] The case was argued orally on February 15, 2011. J.A. 7.

Less than one month later, on March 11, 2011, a panel of the Seventh Circuit affirmed. J.A. 96-102; *United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011). The Seventh Circuit held: "the FSA does not apply retroactively, and [we] further find that the relevant date for a determination of retroactivity is the date of the underlying criminal conduct, not the date of sentencing." J.A. 101-02; *Fisher*, 635 F.3d at 340. The apparent basis for this ruling was the saving statute and the court's earlier decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), which held that the Fair Sentencing Act did not apply to cases pending on

[9] The government has since changed its position and now asserts that the district court should have sentenced Mr. Dorsey under the Fair Sentencing Act.

appeal on the date of its enactment. J.A. 98; *Fisher*, 635 F.3d at 338.

On March 23, 2011, Mr. Dorsey filed a timely Petition for Rehearing en banc. J.A. 7. On May 25, 2011, the Seventh Circuit denied rehearing en banc, with two judges dissenting. J.A. 103-15; *United States v. Fisher*, 646 F.3d 429 (7th Cir. 2011). In dissent, Judge Williams, joined by Judge Hamilton, concluded that the Fair Sentencing Act should apply to all defendants sentenced after its enactment. J.A. 105; *Fisher*, 646 F.3d at 430.[10]

On November 28, 2011, this Court granted the petitions in this case and in *Hill v. United States*, No. 11-5721, and consolidated the cases for oral argument.

[10] On August 24, 2011, the Seventh Circuit issued another opinion refusing to rehear the issue presented in this case en banc. *United States v. Holcomb*, 657 F.3d 445, 445 (7th Cir. 2011). The decision was a 5-5 split, with five judges affirming *Fisher*, and the other five repudiating it for those reasons expressed by the dissent from the denial of rehearing en banc. Joining Judges Williams and Hamilton were Judges Posner, Wood, and Rovner. *Id.* at 452-63. Judges Wood and Rovner were on the original panel that decided *Fisher*, and so two of the three judges who decided *Fisher* now believe the decision is incorrect. Judge Evans, who authored *Fisher*, passed away on August 10, 2011.

SUMMARY OF THE ARGUMENT

The issue in this case is one of statutory interpretation, and it involves the intersection of two statutes: one enacted in August 2010 (the Fair Sentencing Act); the other enacted in 1871 (the saving statute). The lower courts have focused primarily on the text of the Fair Sentencing Act, assuming that the saving statute normally precludes the application of an ameliorative amendment to a statutory mandatory minimum penalty provision, even if that amendment was in effect on the date of sentencing. *See, e.g., Holcomb*, 657 F.3d 445.

Even assuming this assumption is accurate, it is not dispositive. Rather, the saving statute "cannot justify a disregard of the will of Congress as manifested, either expressly *or by necessary implication*, in a subsequent enactment." *Great Northern Ry. Co. v. United States*, 208 U.S. 452, 465 (1908) (emphasis added). The text of the Fair Sentencing Act provides the "necessary implication" that Congress intended the Act to apply to all individuals sentenced after its enactment. *United States v. Dixon*, 648 F.3d 195 (3d Cir. 2011). The Seventh Circuit's decision to the contrary should be reversed.

Moreover, the lower courts' assumption is inaccurate. By its own terms, the saving statute saves only penalties "incurred" under a prior statute. This Court's decision in *Hertz v. Woodman*, 218 U.S. 205, 220 (1910), makes clear that a penalty is incurred only upon the occurrence of all facts and events essential

to its imposition. This definition reflects the plain meaning of the term "incurred" around the time of the saving statute's enactment. Black's Law Dictionary 613 (1891). Under this definition, a penalty is "incurred" only by a subsequent act or operation of law. *Id.* Accordingly, a penalty is not incurred when an offense is committed.

Instead, with respect to a mandatory minimum penalty under 21 U.S.C. § 841(b), the penalty is not incurred until sentencing because under prevailing law drug quantity under § 841(b), for mandatory minimum purposes, is a sentencing factor, and not an element of the offense. *See, e.g., United States v. Martinez*, 301 F.3d 860, 865 (7th Cir. 2002). Although it did so in Mr. Dorsey's case, the government did not need to allege drug quantity in the indictment, or prove it to a jury beyond a reasonable doubt. *Id.* at 864-66. Rather, the district court determines drug quantity, as it does all sentencing factors, under a preponderance of the evidence standard based on evidence submitted at the sentencing hearing. *See McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986).

Because Mr. Dorsey was sentenced after the Fair Sentencing Act's enactment, he never "incurred" a mandatory minimum penalty under the prior version of § 841(b) for purposes of the saving statute. Thus, the district court should have sentenced him under the amended provisions of § 841(b). Principles of statutory retroactivity support this conclusion. The saving statute, by its own terms, does not preclude this common-sense result. Accordingly, this Court should

reverse the Seventh Circuit's decision to the contrary and remand this case for resentencing.

The saving statute is also inapplicable in this case because, by its own terms, it applies only to the "repeal" of a statute. 1 U.S.C. § 109. The Fair Sentencing Act did not "repeal" 21 U.S.C. § 841(b); it "amended" it. § 2, 124 Stat. at 2372. Thus, only if the term "repeal" in the saving statute is considered ambiguous could the saving statute be interpreted to extend to amendments. Yet, even if the statute is considered ambiguous, in light of its history and purpose, as well as the statutory presumption favoring strict construction of statutes in derogation of the common law and the rule of lenity, it should be construed strictly not to reach ameliorative amendments to criminal penalty provisions in effect on the date of sentencing.

The saving statute was enacted as a general rule of statutory construction to assist in the codification of all federal laws. Cong. Globe, 41st Cong., 2d Sess. 2466 (1870); Cong. Globe, 41st Cong., 3d Sess. 775, 1474 (1871). Its purpose was to obviate the common law presumption of abatement following the repeal, or abrogation, of a statute. *Warden v. Marrero*, 417 U.S. 653, 660 (1974). It was also meant to obviate mere technical abatement, which occurred when a repealing statute increased a penalty provision, rather than abrogated it. *Hamm v. City of Rock Hill*, 379 U.S. 306, 314 (1964).

In contrast, the saving statute was not meant to obviate the common law rule of amelioration, or the rule "quite generally followed by the federal and state courts alike that where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto," *Moorehead v. Hunter*, 198 F.2d 52, 53 (10th Cir. 1952). To the extent this Court has suggested otherwise, this suggestion should be revisited. The saving statute has no application in this case because the Fair Sentencing Act involves an ameliorative amendment to a penalty provision, and this amendment was in effect on the date Mr. Dorsey was sentenced. A strict construction of the saving statute, necessary because it is derogation of the common law, as well as the rule of lenity, supports this conclusion. *United States v. R.L.C.*, 503 U.S. 291, 305 (1992); *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952).

Accordingly, the Seventh Circuit erred when it held that the Fair Sentencing Act did not apply at Mr. Dorsey's initial sentencing hearing, despite the fact that the Act was in effect on that date. Its decision should be reversed, and this case should be remanded for resentencing under the Fair Sentencing Act.

ARGUMENT

I. The Fair Sentencing Act Necessarily Implies That Congress Intended It To Apply To All Those Sentenced After Its Enactment.

This Court has made clear that an express statement in new legislation is unnecessary to override the saving statute. The saving statute "cannot justify a disregard of the will of Congress as manifested, either expressly *or by necessary implication*, in a subsequent enactment." *Great Northern Ry. Co.*, 208 U.S. at 465 (emphasis added). More recently, this Court reaffirmed that the saving statute may be superseded by "fair implication" of a later act. *Warden v. Marrero*, 417 U.S. at 659 n.10; *see also Holcomb*, 657 F.3d at 461 (Posner, J., dissenting).

As the Third Circuit has held, the text of the Fair Sentencing Act fairly implies that Congress intended the Act to apply immediately to all individuals not yet sentenced after its enactment. *Dixon*, 648 F.3d at 203. The primary evidence of this is Section 8, where Congress granted emergency authority to the Sentencing Commission to make conforming amendments to the guidelines in order to achieve consistency with the Fair Sentencing Act. *Id.* at 201-02.

The importance of this emergency directive lies in Congress' earlier directive, in the Sentencing Reform Act of 1984, that district courts must apply the Guidelines "in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(A)(ii); *Dixon*, 648

F.3d at 201. This directive confirms that, when Congress directed the Sentencing Commission to amend the guidelines in emergency fashion, it knew that these amendments would apply "at the date of sentencing, regardless of when the offense occurred." *Dixon*, 648 F.3d at 201. The "fair implication" from this is that Congress intended that the ameliorative provisions of the Fair Sentencing Act apply immediately to all those *sentenced* after the Act's enactment. *Id.* at 200-02; *Holcomb*, 657 F.3d at 456-57 (Williams, J., dissenting).

Both Petitioner Hill and the government will make this argument as well, and so this brief avoids unnecessary repetition. *See* Pet. for Writ of Cert. in *Hill v. United States*, No. 11-5721 (July 1, 2011); Br. for U.S. in *Hill v. United States*, No. 11-5721 (Oct. 7, 2011). If Mr. Hill asserts that only those who are sentenced on or after November 1, 2010 should receive the benefit of the Fair Sentencing Act, Mr. Dorsey disagrees.

Although the First Circuit has adopted this date as the relevant sentencing date for the Fair Sentencing Act's application, it did so only because the facts of that case involved a defendant sentenced after November 1, 2010. *United States v. Douglas*, 644 F.3d 39, 46 (1st Cir. 2011). The First Circuit implied that the same result would apply to an individual sentenced between August 3, 2010 and November 1, 2010, especially if the amended guidelines were made retroactive, which they were. *Id.*

Moreover, in Section 8, Congress directed the Sentencing Commission to amend the guidelines "as soon as practicable and in any event not later than 90 days after the date of enactment of this Act." § 8, 124 Stat. at 2374. Given the extensive policy-making discretion accorded the Commission in promulgating amendments that would be "consistent with" the Fair Sentencing Act, the 90-day language is no more than an administrative necessity, not a directive by Congress to distinguish between those sentenced on or after August 3, 2010, and those sentenced on or after November 1, 2010.

Because Mr. Dorsey was sentenced after the Fair Sentencing Act's enactment, he should have been sentenced under its amended provisions, and the Seventh Circuit's decision to the contrary should be reversed.

II. The Saving Statute Is Inapplicable Because Mr. Dorsey Never Incurred A Penalty Under The Prior Version Of § 841(b).

Turning to the text of the saving statute, statutory interpretation begins with the statute's text. *Dean v. United States*, 129 S.Ct. 1849, 1853 (2009). The saving statute provides, in relevant part, "[t]he repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability *incurred* under such statute." 1 U.S.C. § 109 (emphasis added). "Incurred" is not defined. This Court, however, has interpreted the term in *Hertz*

v. Woodman, 218 U.S. 205 (1910). Moreover, the ordinary meaning of the term "incurred," as it was understood around the time when the saving statute was enacted, is also relevant. *Carcieri v. Salazar*, 555 U.S. 379, 388 (2009).

A. A penalty is not incurred at the time an offense is committed.

Without citing any authority, the Seventh Circuit below held that a criminal penalty is "incurred" when the offense is committed. J.A. 101-02; *Fisher*, 635 F.3d at 340; *see also United States v. Tickles*, 661 F.3d 212, 215 (5th Cir. 2011); *United States v. Sidney*, 648 F.3d 904, 910 (8th Cir. 2011). This conclusion contradicts this Court's interpretation of the term "incurred," and well as the term's plain meaning.

i. Under this Court's precedent, a penalty is "incurred" for purposes of the saving statute when no other fact or event is essential to its imposition.

In *Hertz v. Woodman*, this Court held that a tax liability was "incurred" for purposes of the saving statute when "the occurrence of no other fact or event was essential to the imposition" of the tax. 218 U.S. at 220. The case involved an inheritance tax and its repeal after the death of Woodman. *Id.* at 210-11. The issue was whether the tax on Woodman's inheritance survived the repeal because Woodman died prior to the repeal. *Id.*

This Court answered in the affirmative. *Id.* at 220, 224. It held that the saving statute saved the prior tax because the defendants, Woodman's beneficiaries under his will, inherited their legacies, or shares, immediately upon Woodman's death. *Id.* at 219-20. "No further event could make their title more certain nor their possession and enjoyment more secure." *Id.* at 220. Thus, because the defendants inherited their shares upon Woodman's death, and because the inheritance tax had not yet been repealed when Woodman died, the defendants were obligated to pay the tax. *Id.* And, because they were obligated to pay the tax, they incurred liability. 218 U.S. at 220. The liability was incurred "when no other fact or event was essential to [its] imposition." *Id.*

This interpretation of the term incurred is in direct conflict with the Seventh Circuit's decision below that a criminal penalty is incurred at the time the offense is committed. J.A. 101-02; *Fisher*, 635 F.3d at 340. A penalty is not incurred when an offense is committed because *at least* two other essential facts or events must occur – the return of an indictment and a subsequent conviction.[11] *Cf. Hertz*, 218

[11] As discussed below in subsection B, in the federal system, and especially with respect to a mandatory minimum penalty, under § 841(b) or any other statute, a third event must occur – the determination of sentencing factors, in this case, drug quantity (and the determination of a prior conviction), and this does not occur until sentencing. Therefore, at a minimum, in order for a mandatory minimum penalty to be "incurred," the defendant would have to be indicted, convicted, *and* sentenced.

U.S. at 220. The occurrence of each of these facts are essential to the imposition of a penalty. *Id.* Until they occur, a penalty is not incurred.

ii. This Court's precedent is consistent with the plain meaning and usage of the term "incurred."

This Court's interpretation of the word "incurred" is consistent with how the term was defined around the time of the saving statute's enactment. The legal dictionaries defined "incur" by contrasting it with an affirmative act: "Men contract debts; they incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by act or operation of law." Black's Law Dictionary 613 (1891); Dictionary of Terms and Phrases Used in American or English Jurisprudence, Vol. 1, at 595-96 (1879).

Consistent with this Court's decision in *Hertz*, this definition confirms that there must be some legal action "cast upon" the defendant after an offense is committed before a penalty can be incurred. If no legal action is taken, nothing is incurred. Because "incurred," by definition, is contingent on a subsequent act or operation of law, an individual does not incur anything prior to the act or operation of law. In this case, therefore, a penalty is not incurred at the time the defendant traffics in crack cocaine. Rather,

subsequent events, like the filing of an indictment,[12] conviction, and sentence on the indictment must happen before any penalty is incurred.

Congress' use of the past tense of the verb in the saving statute supports this construction because the use of the past tense "denot[es] an act that has been completed." *Barrett v. United States*, 423 U.S. 212, 216 (1976). The penalty has to have been incurred; it is not enough that the penalty might possibly incur at some future point. *Id.*; *Hertz*, 218 U.S. at 218-20; *compare* 1 U.S.C. § 109, *with Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 205 (1994) (reference to "incurring possible escalating daily penalties"); *Nash v. United States*, 229 U.S. 373, 377 (1913) (Holmes, J.) ("If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death."); *United States v. Padelford*, 9 Wall. (76 U.S.) 531, 543 (1869) (pardon purged a participant of whatever offense he committed and relieved him "from any penalty which he might have incurred").

Moreover, in common usage, one would not say that he incurred a penalty when he committed a

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[12] While an indictment would be *necessary* to incur a penalty, it would not be *sufficient* on its own. The indictment may be dismissed, or more importantly, a jury may return a not guilty verdict at trial. Moreover, to say that a penalty is incurred by the filing of an indictment ignores the presumption of innocence the law affords every criminal defendant. *In re Winship*, 397 U.S. 358, 363 (1970). It cannot be correct that a person that is presumed *innocent* nonetheless has already incurred a *penalty* merely by the filing of an indictment.

crime. After all, not all crimes are detected. It makes little sense to say that one has incurred a *penalty* by a criminal act that will forever go *unpunished*. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (in matters of statutory construction, the Court "must be guided to a degree by common sense"). For instance, one would not say that the habitual speeder incurs penalties to and from work if he is never stopped for speeding.

Unlike some state saving statutes, Congress did not refer to "offense committed" or "act done" within the text of the saving statute.[13] Yet, Congress knew how to include this language in a saving statute. In an Act passed less than one year prior to the passage of the saving statute (July 1870 v. February 1871), Congress repealed a tax on legacies and successions, but included this language in the repealing statute: "this act shall not be construed to affect any *act done*,

[13] *See, e.g.,* Ky. Rev. Stat. Ann. § 446.110 ("No new law shall be construed to repeal a former law as to any offense committed against a former law, nor as to any act done, or penalty, forfeiture or punishment incurred . . . under the former law[.]"); N.H. Rev. Stat. Ann. § 624:5 ("No offense committed and no penalty or forfeiture incurred . . . shall be affected by the repeal. . . ."); N.Y. Gen. Constr. Law § 93 (McKinney) ("The repeal of a statute or part thereof shall not impair any act done, offense committed or . . . penalty, forfeiture or punishment incurred. . . ."); Tex. Gov't Code Ann. § 311.031 (West) ("[T]he . . . repeal of a statute does not affect . . . any violation of the statute or any penalty, forfeiture, or punishment incurred under the statute. . . ."); W. Va. Code Ann. § 2-2-8 (West) ("The repeal of a law . . . shall not affect any offense committed, or penalty or punishment incurred. . . .").

right accrued, or *penalty incurred* under former acts, but every such act is hereby saved." An Act to reduce Internal Taxes, and for other Purposes, ch. 255, § 17, 16 Stat. 256, 261 (1870).[14]

If "penalty incurred" were synonymous with "offense committed," as the Seventh Circuit held, this federal statute, and the various state statutes, are implausibly superfluous. *See* n.12 & 13, *supra*; *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.' "). If a penalty is actually incurred when an act is done, there would have been no need for Congress to enumerate both "act done" and "penalty incurred" in the 1870 statute. *Duncan*, 533 U.S. at 174 (noting this Court's general "reluctan[ce] to treat statutory terms as surplusage."). The phrase "penalty incurred" is not synonymous with "offense committed." Thus, the Seventh Circuit erred below when it held that a penalty is incurred when the offense is committed. J.A. 101-02; *Fisher*, 635 F.3d at 340.

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[14] The following Acts contained similar language: An Act to amend existing Laws relating to Internal Revenue, and for other Purposes, ch. 169, § 34, 14 Stat. 471, 485 (1867); An Act to reduce Duties on Imports, and to reduce Internal Taxes, and for other Purposes, ch. 315, § 46, 17 Stat. 230, 258 (1872); An Act revising and amending the Laws relative to the Mints, Assay Offices, and Coinage of the United States, ch. 131, § 67, 17 Stat. 424, 435 (1873).

B. A mandatory minimum penalty under § 841(b) is not incurred until the imposition of sentence because, under current prevailing law, drug quantity is a sentencing factor that is determined by the court at sentencing.

Under *Hertz*, and the term's plain meaning, the meaning of "incurred" centers on what facts and events are essential for the imposition of a penalty. *Id.* at 220. In *Hertz*, it was not considered essential that the tax had not been paid at the time of repeal; what was essential was that the obligation to pay the tax had accrued. *Id.* at 210, 219-20. In the federal system, and especially with respect to a mandatory minimum penalty under § 841(b), in addition to indictment and conviction, there is another essential event that must occur – the determination of sentencing factors, such as drug quantity and the existence of a prior conviction – and such determinations are not made until sentencing.

The Fair Sentencing Act did not amend the *substantive* provisions in § 841(a), but rather amended the *penalty* provisions in § 841(b) by increasing the quantity of crack cocaine necessary to trigger certain mandatory minimum penalties.[15]

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[15] The Fair Sentencing Act also had the effect of lowering the statutory maximum penalties in § 841(b), but those penalties are not at issue in this appeal. Rather, while the statutory maximum would fall from life to 30 years' imprisonment, Mr. Dorsey received a 10-year mandatory minimum sentence. His

(Continued on following page)

In most Circuits, including the Seventh Circuit, where this case originates, the drug quantity necessary to trigger § 841(b)'s mandatory minimum penalties is a sentencing factor, not an element of the offense.[16] It has been held that "a statute that sets a mandatory minimum neither alters the maximum penalty for the crime committed nor creates a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range available to it." *United States v. Krieger*, 628 F.3d 857, 863 (7th Cir. 2010), *cert. denied*, 132 S.Ct. 139 (2011).

Because under current prevailing law drug quantity for mandatory minimum purposes is a sentencing factor, it is found by a judge at sentencing by a preponderance of the evidence submitted at the

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advisory guidelines range was below this minimum (84 to 105 months' imprisonment), and the range would be even lower upon resentencing under the Fair Sentencing Act (37 to 46 months' imprisonment). Thus, this case concerns a statutory mandatory minimum sentence. The statutory maximum, whether life or 30 years' imprisonment, is irrelevant.

[16] *Martinez*, 301 F.3d at 865; *see also United States v. Goodine*, 326 F.3d 26, 31-33 (1st Cir. 2003); *United States v. Solis*, 299 F.3d 420, 454 (5th Cir. 2002); *United States v. Copeland*, 321 F.3d 582, 603 (6th Cir. 2003); *United States v. Webb*, 545 F.3d 673, 677 (8th Cir. 2008); *United States v. Wilson*, 244 F.3d 1208, 1215 n.4 (10th Cir. 2001); *United States v. Taylor*, 317 Fed. Appx. 944, 947-48 (11th Cir. 2009) (unpublished); *contra United States v. Graham*, 317 F.3d 262, 274-75 (D.C. Cir. 2003); *United States v. Gonzalez*, 420 F.3d 111 (2d Cir. 2005); *United States v. Martinez*, 277 F.3d 517, 527-30 (4th Cir. 2002).

sentencing hearing. *See McMillan*, 477 U.S. at 91; *Fisher*, 646 F.3d at 434 (Williams, J., dissenting). It need not be alleged in the indictment, nor proven at trial beyond a reasonable doubt.

For instance, if Mr. Dorsey had pleaded guilty to the possession of 4 grams of crack cocaine, rather than 5.5 grams of crack cocaine, but the government introduced evidence to establish the latter quantity at sentencing, the district court would have been required to impose the mandatory minimum, even though Mr. Dorsey never admitted the greater drug quantity. *See, e.g., United States v. Clark*, 538 F.3d 803, 805-06 (7th Cir. 2008) (defendant did not admit to any drug quantity when he pleaded guilty, but the district court was still required to impose the mandatory minimum based on the drug quantity findings made at the sentencing hearing).

Thus, under *Hertz*, as well as the plain meaning of "incurred," the mandatory minimum penalty under § 841(b) is incurred only at sentencing because it is only then that all facts and events essential to the imposition of penalty are satisfied. *Cf.* 218 U.S. at 220. Even after a conviction, the mandatory minimum penalty has not been established. *Clark*, 538 F.3d at 805-06. That happens at sentencing, and, therefore, the penalty is not incurred until sentencing. *Cf. Hertz*, 218 U.S. at 220; *see also McMillan*, 477 U.S. at 91; *Martinez*, 301 F.3d at 865.

This Court implied as much in *United States v. Dunnigan*, 507 U.S. 87, 95 (1993). There, the issue

was whether a district court could constitutionally apply an obstruction of justice enhancement under U.S.S.G. § 3C1.1, at a time when the provision was *mandatory*. 507 U.S. at 88-89. In answering in the affirmative, this Court noted, "not every accused who testifies at trial and is convicted *will incur* an enhanced sentence under § 3C1.1 for committing perjury." *Id.* at 95 (emphasis added). This was so because the district court determines whether the defendant actually committed perjury *at the time of sentencing*, not at trial, because obstruction, for purposes of § 3C1.1, is a *sentencing factor*, not an element of the underlying offense. *See id.*

The same logic applies in this case. Because the district court determines drug quantity – which, under prevailing law is a *sentencing factor* for mandatory minimum purposes – based on evidence introduced *at sentencing*, the mandatory minimum penalty is incurred only at sentencing. As in *Dunnigan*, and consistent with *Hertz*, not every defendant who is convicted of a § 841(a) offense *will incur* a mandatory minimum penalty, but, if a defendant does, the penalty is incurred at sentencing, and not before. Only at sentencing have all facts and events essential to the penalty's imposition occurred. *Hertz*, 218 U.S. at 220.

This is not to say that "incur" is synonymous with "impose." Rather, the terms share a semantic relationship, similar to the terms "receive" and "give." Linguistically, this could be called an "agent-patient" relationship. *See, e.g.*, D.J. Allerton, *Verbs and their Satellites*, in The Handbook of English Linguistics

152 (Blackwell ed. 2006). For instance, when a court imposes a penalty, the defendant incurs it, which is similar to saying that one receives an object when it is given. In other words, the terms "incur" and "impose" are not synonymous, but rather work in tandem, like the words "give" and "receive." One would not say that "give" means "receive"; nor should one say that "incur" means "impose." Instead, a penalty is incurred when it is imposed, just as a gift is received when it is given. *See, e.g., Carmell v. Texas*, 529 U.S. 513, 523 n.11 (2000) (citing a 1792 text for the proposition that a defendant could not *incur* banishment as a punishment because the law precluded its *imposition*); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 n.27 (1974) (citing 1845 text for proposition that "jurors always determined the amount of deodand *to be imposed* with great moderation, and with a due regard to the rights of property and the moral innocence of the party *incurring the penalty*") (emphasis added).

This interpretation corresponds to Congress' use of the sentencing date to determine the applicable sentencing guidelines range, 18 U.S.C. § 3553(a)(4)(A)(ii), as well as the applicable statutory penalty range under certain statutes (including mandatory minimum penalties), *see James v. United States*, 550 U.S. 192, 213-14 (2007) (recidivism increase and mandatory minimum in 18 U.S.C. § 924(e)); *Almendarez-Torres v. United States*, 523 U.S. 224, 245-46 (1998) (recidivism increase in 8 U.S.C. § 1326). In each case, an individual's penalty is determined at sentencing, based

on evidence introduced at the sentencing hearing, irrespective of the facts developed at trial or admitted during a change-of-plea colloquy. *See also* 18 U.S.C. § 3553(e) (authorizing discretion to impose a sentence below the mandatory minimum upon the government's motion for substantial assistance.

For instance, if an individual is found to have brandished or discharged a firearm possessed in furtherance of a crime of violence or drug trafficking crime, he incurs an enhanced mandatory minimum sentence (of 7 or 10 years, respectively) only after such a finding is made at sentencing. *See Harris v. United States*, 536 U.S. 545, 568 (2002). The same is true with respect to a statutory recidivist increase. If the government introduces evidence at a sentencing hearing of a prior conviction in a felon-in-possession-of-a-firearm case, and the sentencing court determines that the prior conviction qualifies as a "violent felony," the defendant has incurred a higher penalty range, as well as a 15-year mandatory minimum sentence, at sentencing. *See, e.g., James*, 550 U.S. at 195-96. "[N]o penalty is incurred until the defendant is convicted, judgment entered and sentence imposed. . . ." *State v. Tapp*, 26 Utah 2d 392, 395, 490 P.2d 334, 336 (1971) (interpreting analogous state saving statute); *but see State v. Reis*, 115 Haw. 79, 91-92, 165 P.3d 980, 992-93 (Haw. 2007) (collecting cases).

Finally, this interpretation is consistent with the courts of appeals' unanimous refusal to apply the Fair Sentencing Act to cases pending on appeal on the date of its enactment. *See United States v. Powell*,

652 F.3d 702 (7th Cir. 2011) (collecting cases). For individuals sentenced prior to the Fair Sentencing Act's enactment, the penalty incurred under the prior version of § 841(b) because that provision was in effect when the sentence was imposed.

For an individual sentenced after the Fair Sentencing Act's enactment, however, like Mr. Dorsey, a mandatory minimum penalty was never "incurred" under the prior version of § 841(b) because that version no longer existed at the time of sentencing. Accordingly, because Mr. Dorsey did not incur a penalty under the prior version of § 841(b), the saving statute, by its own terms, has no application in this case. Instead, Mr. Dorsey should have been sentenced under the Fair Sentencing Act's amended provisions. Because he was not, the Seventh Circuit's decision in this case must be reversed.

C. Principles of retroactivity support the conclusion that a mandatory minimum penalty is incurred at sentencing.

Rather than address the meaning of "incurred," the Seventh Circuit instead identified the date of the offense conduct as the "relevant retroactivity event" for purposes of the Fair Sentencing Act's application. J.A. 101-02; *Fisher*, 635 F.3d at 340. Other courts have written on this subject in terms of "retroactivity" rather than in terms of when a penalty is incurred under the saving statute.

Even assuming that a statutory retroactivity analysis is relevant, the application of a mandatory minimum penalty provision, in effect on the date of sentencing, is not a retroactive exercise. "[T]he relevant retroactivity event is the sentencing date, not the date the offense was committed, because the application of a mandatory minimum is a sentencing factor, not an element of the offense. Accordingly, the application of the FSA is the *prospective* application of current law, not a *retroactive* exercise." *United States v. Holloman*, 765 F.Supp.2d 1087, 1090-91 (C.D. Ill. 2011) (Mills, J.); *see also Landgraf v. USI Film Products, Inc.*, 511 U.S. 244, 269 (1994) ("[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law.").

This Court's traditional approach to statutory retroactivity is rooted in *ex post facto* principles. *Landgraf*, 511 U.S. at 269-70; *Id.* at 290 (Scalia, J., concurring). Under this approach, a statute operates retroactively only if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Landgraf*, 511 U.S. at 269-70. A statute that "merely remove[s] a burden on private rights by repealing a penal provision" is not a retroactive statute. *Id.* at 270. Because the Fair Sentencing Act lowered § 841(b)'s penalty provisions, it does not fall within the definition of a retroactive statute. *Id.* at 270, 280.

This conclusion also follows from the application of the more modern "temporal application" approach to statutory retroactivity. *See, e.g., id.* at 291-92 (Scalia, J., concurring); *Rep. of Austria v. Altmann*, 541 U.S. 677, 681, 697 n.17, 697-98 (2004). The critical issue under this approach is:

> what is the relevant activity that the rule regulates. Absent clear statement otherwise, only such relevant activity which occurs after the effective date of the statute is covered. Most statutes are meant to regulate primary conduct, and hence will not be applied in trials involving conduct that occurred before their effective date. But other statutes have a different purpose and therefore a different relevant retroactivity event.

Landgraf, 511 U.S. at 291-92 (Scalia, J., concurring).

This approach recognizes that statutory retroactivity is not as simple as identifying the date of the commission of the relevant act and asking whether it preceded the date of the new provision's enactment. *Landgraf*, 511 U.S. at 269-70. For instance, in *Rep. of Austria v. Altmann*, this Court held that the Foreign Services Intelligence Act, 28 U.S.C. § 1602 (1976), applied to claims that were based on conduct that preceded the enactment of the Act because the claims, rather than the underlying conduct initiating the claims, were "the relevant conduct regulated by the Act." 541 U.S. 677, 681, 697 n.17, 697-98 (2004); *see also Landgraf*, 511 U.S. at 293 (Scalia, J., concurring) (because an injunction operates in the future, "the

relevant time for judging its retroactivity is the very moment at which it is ordered.").

Under this approach, the relevant retroactivity event in this case is the imposition of sentence, as the Fair *Sentencing* Act obviously regulates *sentencing*. *Holloman*, 765 F.Supp.2d at 1090-91; *see also Altmann*, 541 U.S. at 681, 697-98*; Landgraf*, 511 U.S. at 291-92 (Scalia, J., concurring). The drug quantities in § 841(b) amended by the Fair Sentencing Act are *sentencing* factors, and are based on evidence introduced *at the sentencing hearing*. *Martinez*, 301 F.3d at 865; *see also McMillan*, 477 U.S. at 91.

Because the Fair Sentencing Act was in full force and effect at the time Mr. Dorsey was sentenced, the Act applied prospectively in his case, not retroactively, and he should have been sentenced under its provisions. *Holloman*, 765 F.Supp.2d at 1090-91. Because the Seventh Circuit held differently in this case, its decision should be reversed.[17]

III. The Saving Statute Should Not Preclude The Prospective Application Of An Ameliorative Amendment To A Penalty Provision.

The saving statute is inapplicable by its terms for a second, independent reason: it is triggered only by

[17] If this Court determines that the term "incurred" is ambiguous, it should construe the term in Mr. Dorsey's favor in light of the arguments made in Section III(B)-(D).

the "repeal" of a statute, and the Fair Sentencing Act expressly "amended" rather than "repealed" § 841(b). The legislative history and the statute's purposes, as explained by this Court, confirm that it was not meant to preclude the application of ameliorative amendments to penalty provisions. Particularly telling is the rejection of a revision to the saving statute that would have expressly reached penalty ameliorations. To the extent this Court has suggested otherwise in *Marrero*, this Court should reconsider its suggestion. Under a strict construction of the saving statute, and in light of the rule of lenity, the saving statute should not be interpreted to preclude the application of an ameliorative penalty amendment, like the one at issue in this case, to an individual, like Mr. Dorsey, who was sentenced after the effective date of the amendment.

A. Under its plain terms, the saving statute applies only to "repeals."

The saving statute provides: "[t]he *repeal* of any statute shall not have the effect to release or extinguish any penalty, forfeiture, or liability incurred under such statute, unless the *repealing* Act shall so expressly provide. . . ." 1 U.S.C. § 109 (emphasis added). The Fair Sentencing Act did not "repeal" 21 U.S.C. § 841(b); it "amended" it (specifically, the drug quantities in 21 U.S.C. § 841(b)(1)(A)(iii) & (B)(iii)). § 2, 124 Stat. at 2372.

"Repeal" and "amend" were defined differently at the time the saving statute was enacted.[18] Moreover, Congress used the terms concomitantly in legislation passed in or around 1871 (the date the saving statute was enacted).[19] If the words had the same meaning,

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[18] *Compare* Black's Law Dictionary 67 (2d ed. 1891) ("Amendment. In legislation. A modification or alteration proposed to be made in a bill on its passage, or an enacted law; also such modification or change when made."), *with id.* at 1023 (2d ed. 1891) ("Repeal. The abrogation or annulling of a previously existing law by the enactment of a subsequent statute which declares that the former law shall be revoked and abrogated, (which is called 'express' repeal,) or which contains provisions so contrary to or irreconcilable with those of the earlier law that only one of the two statutes can stand in force, (called 'implied' repeal.)").

[19] *See, e.g.*, An Act to provide a Government for the District of Columbia, ch. 62, §§ 18, 28, 17 Stat. 419, 423, 425 (1871) ("[A]ll acts of the legislative assembly shall at all times be subject to repeal or modification by the Congress. . . ."; "[T]he said legislative assembly shall have the power to create by general law, modify, repeal, or amend, . . . corporations . . . and to define their powers and liabilities. . . .") (enacted February 21, 1871, four days before the enactment of the saving statute); An Act granting the Right of Way through the public Lands to the Jacksonville and Saint Augustine Railroad Company, ch. 323, 17 Stat. 280, 280 (1872) ("Congress shall have the right to alter, amend, or repeal this act[.]"); An Act to enforce the Provisions of the Fourteenth Amendment to the Constitution of the United States, and for other Purposes, ch. 22, § 7, 17 Stat. 13, 15 (1871) ("[N]othing herein contained shall be construed to supersede or repeal any former act or law. . . ."); An Act to prevent the Extermination of Fur-bearing Animals in Alaska, ch. 189, § 8, 16 Stat. 180, 182 (1870) ("Congress may at any time hereafter alter, amend, or repeal this act"); An Act to amend an Act entitled "An Act to incorporate the Freedman's Saving and Trust Company," approved March third, eighteen hundred and sixty-five, ch. 90, 16 Stat. 119, 119 (1870) ("Congress shall have the right to alter

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then Congress enacted a bevy of superfluously worded statutes, a result this Court would hardly reach. *See, e.g., TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("We are 'reluctant to treat statutory terms as surplusage in any setting.' ").

Moreover, the words are still defined differently today.[20] And so, when Congress said it "amended" 21 U.S.C. § 841(b) in the Fair Sentencing Act, § 2, 124 Stat. at 2372, that is what it did. It did not "repeal" § 841(b) or any of its provisions. *See City of Milwaukee v. Illinois*, 451 U.S 304, 329 n.22 (1981) ("We prefer to read the statute as written."); *Shlahtichman v. 1-800-Contacts, Inc.*, 615 F.3d 794, 801 (7th Cir. 2010) ("The statutory language strikes us as significant not only for the terms that it uses but for those it does not."), *cert. denied*, 131 S.Ct. 1007 (2011).

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or repeal this amendment at any time."). An Act to provide for the Creation of Corporations in the District of Columbia by General Law, ch. 80, 16 Stat. 98, 116 (1870) ("[T]he Congress of the United States may at any time alter, amend, or repeal this act . . . and may amend or repeal any incorporation formed or created under this act[.]"); An Act to incorporate the Washington Mail Steamboat Company, ch. 33, § 8, 16 Stat. 78, 79 (1870) ("Congress may at any time hereafter alter, amend, or repeal this act.").

[20] *Compare* Black's Law Dictionary 94 (9th ed. 2009) (defining amendment as "A formal revision or addition . . . made to a statute . . . ; specif., a change made by addition, deletion, or correction; esp., an alteration in wording."), *with id.* at 1413 (defining repeal as "abrogation of an existing law by legislative act," and noting that a repeal may be "express" or "implied").

Nor does the term "repeal," if contained in a saving statute, necessarily encompass "amend." For instance, most states have saving statutes, and those statutes, when meant to reach farther than "repeal," include language to that effect.[21] If "repeal" included "amend," or meant something other than the abrogation of a statute, these statutes would be as superfluous as the federal statutes cited above.

The inclusion of "repeal by implication" in the definition of "repeal" does not undermine this point. *See* n.18 & 20, *supra*. By its terms, the Fair Sentencing

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[21] *See, e.g.,* Me. Rev. Stat. tit. 1, § 302 ("repeal or amendment"); Vt. Stat. Ann. tit. 1, § 214 (West) (same); Mo. Ann. Stat. § 1.160 (West) (same) ("repealed or amended"); Wyo. Stat. Ann. § 8-1-107 (West) (same); Ga. Code Ann. § 16-1-11 (West) ("repeal, repeal and reenactment, or amendment"); Ohio Rev. Code Ann. § 1.58 (West) ("reenactment, amendment, or repeal"); Tex. Gov't Code Ann. § 311.031 (West) ("reenactment, revision, amendment, or repeal"); Colo. Rev. Stat. Ann. § 2-4-303 (West) ("repeal, revision, amendment, or consolidation"); S.C. Code Ann. § 2-7-50 ("altering, amending, adding to or repealing"); Md. Ann. Code art. 1, § 3 ("repeal, or the repeal and reenactment, or the revision, amendment or consolidation of any statute, or of any section or part of a section of any statute, civil or criminal"); Wash. Rev. Code Ann. § 10.01.040 (West) ("whether such repeal be express or implied"); Mich. Comp. Laws § 8.4a ("repeal of any statute or part thereof"); N.Y. Gen. Constr. Law § 93 (McKinney) (same); N.J. Stat. Ann. § 1:1-15 (West) ("repeal or alteration of any act or part of any act"); 5 Ill. Comp. Stat. 70/4 ("repeals, either by express words or by implication, whether the repeal is in the act making any new provision upon the same subject or in any other act"); Nev. Rev. Stat. Ann. § 169.235 (West) ("superseding of any law"); Cal. Gov't Code § 9608 ("termination or suspension (by whatsoever means effected)").

Act "amended" § 841(b). § 2, 124 Stat. 2372. Its use of the term "amended," instead of "repealed," should be seen as direct evidence of its intent not to save the prior version of § 841(b) in all pending prosecutions. *See, e.g., Dean*, 129 S.Ct. at 1853 ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face."); *United States v. Turkette*, 452 U.S. 576, 580 (1981) (unambiguous language must ordinarily be regarded as conclusive). Accordingly, the saving statute should not bar the application of the Fair Sentencing Act's amendments at a time when those amendments were in effect.

B. The saving statute's history and purpose confirm that, to the extent the statute was meant to apply beyond repeals to amendments, it was not meant to preclude the prospective application of ameliorative amendments to penalty provisions.

If it is unclear, or ambiguous, whether the saving statute reaches amendments, its history and purpose may be consulted for guidance. *Concrete Pipe and Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal.*, 508 U.S. 602, 627 (1993). A statute's origins are also relevant, and a court should interpret a statute to achieve its aim. *United States v. Tohono O'odham Nation*, 131 S.Ct. 1723, 1730 (2011).

i. The legislative history of the saving statute indicates that it was enacted as a general rule of statutory construction, and not to alter the substance of existing federal law.

The 1871 Act that contained the saving statute was part of a larger project to codify all federal laws. MacKenzie, 54 Geo. L.J. at 175-76. Presidentially-appointed commissioners were asked to "revise, simplify, arrange, and consolidate" all federal laws, as well as identify "contradictions, omissions, and imperfections" within the laws. *Id.*; Cong. Globe, 41st Cong., 2d Sess. 2466 (statement of Rep. Poland).

The legislative history on the saving statute is sparse, but illuminating. Neither the House of Representatives nor the United States Senate discussed the saving statute during the debate of the 1871 Act. *See* Cong. Globe, 41st Cong., 2d Sess. 2464-67 (1870); Cong. Globe, 41st Cong., 3d Sess. 775-77 (1871). There was some discussion, however, on the Act's fourth section,[22] which, somewhat similar to the saving statute, provided: "whenever an act shall be repealed which repeals a former act, such former act shall not thereby be revived, unless the repealing act expressly so provides." Cong. Globe, 41st Cong, 2d Sess. 2465. Senator Howard initially objected to this provision because it was in derogation of the common

[22] This section became the third section in the final Act, but it is referred to here as the fourth section, consistent with its discussion during debate on the Act.

law. Cong. Globe, 41st Cong., 3d Sess. 775. This objection was not considered, however, because other Senators indicated that the Act's purpose was to assist the commissioners in codifying the laws and that the Act had to be passed without delay in order to serve this purpose. *Id.* at 776-77.

After the Act passed both the House and the Senate, and a few days before its enactment, Representative Poland described the undiscussed sections of the Act, including the saving statute, as establishing "a few general rules for the construction of statutes, and the effect of repealing statutes, all designed to avoid prolixity and tautology in drawing statutes and to prevent doubt and embarrassment in their construction." Cong. Globe, 41st Cong., 3d Sess. 1474 (1871).

Apparently, the commissioners were not satisfied with the text of the saving statue. *See* MacKenzie, 54 Geo. L.J. at 180-81. They sought "additions" to the statute the following year. *Id.* Unlike the saving statute, the proposed provision would have expressly applied to penalty ameliorations, thus saving harsher penalties: "The repeal of a statute shall not affect the liability of any person to criminal punishment for an act or omission commenced before the repeal takes effect; *but such act or omission may be punished in the manner and to the extent authorized by the laws in force when it was commenced*." *Id.* at 180 (emphasis added) (citing Commissioners' Draft of the Revision of the United States Statutes (1872)). Critically, these

revisions were rejected and did not become law.[23] 54 Geo. L.J. at 180-81.

This legislative history indicates that Congress viewed the saving statute as a tool for use in drafting statutes necessary in the codification of federal law. The legislative history does not indicate that Congress sought to make broad changes to the common law with the passage of the saving statute. Rather, the rejection of the proposed revisions, which would have substantially broadened the saving statute's reach and expressly covered penalty ameliorations, indicates the opposite – "reluctance to effect broad changes" in the common law. *See* MacKenzie, 54 Geo. L.J. at 182.

ii. This Court has held that the saving statute was meant to abolish the common law presumption of abatement.

Although the legislative history says nothing about abatement, this Court has held that the saving statute was enacted "to abolish the common-law presumption that the repeal of a criminal statute resulted in the abatement of 'all prosecutions which had

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[23] The proposal also included this provision: "3. The repeal of a statute shall not release, extinguish, or impair any vested right, contract, obligation, cause of action, debt, demand, privilege, penalty, forfeiture or liability created, arising, or incurred before the repeal takes effect." *See* MacKenzie, 54 Geo. L.J. at 180.

not reached final disposition in the highest court authorized to review them.'" *Warden v. Marrero*, 417 U.S. 653, 660 (1974); *see, e.g., Yeaton v. United States*, 5 Cranch (9 U.S.) 281, 283 (1809) (prosecution abated in light of repeal of statute); *Commonwealth v. Duane*, 1 Binn. 601, 2 Am. Dec. 497 (Pa. 1809) (same). This Court has further targeted the obviation of "technical abatement" as the saving statute's primary purpose. *Hamm*, 379 U.S. at 314. A "technical abatement" occurred when a new statute amended a prior statute by *increasing* the penalties. MacKenzie, 54 Geo. L.J. at 173.

As this Court noted in *Hamm*, 379 U.S. at 314, *United States v. Tynen*, 11 Wall. (78 U.S.) 88 (1870), is an example of technical abatement. In that case, the defendant was indicted for submitting a false naturalization form and faced a term of imprisonment or a fine. *Tynen*, 11 Wall. (78 U.S.) at 90. Congress increased the penalties for the offense, however, prior to any action taken on the indictment, and, in response, this Court remanded the case with instructions to dismiss the indictment. *Id.* at 90-91, 95.

Tynen was decided after the saving statute was enacted, and so the statute was not a response to this Court's decision in that case. *See* MacKenzie, 54 Geo. L.J. at 174-75. Nonetheless, it is not improbable to think that Congress would have wanted to close the common-law rule's "escape hatch" that set an accused free if Congress increased the penalties for the charged offense. *Id.* at 173. "The misuse of the common-law doctrine in mere technical abatements is indeed

an illustration of judicial results which one might expect a legislature to have remedied." *Id.* at 181; *see also People v. Oliver*, 1 N.Y.2d 152, 159, 134 N.E.2d 197, 201 (N.Y. 1956) ("the common-law rule often worked to produce unjust results and defeat the obvious legislative design").

This Court has also indicated that the saving statute was meant to preclude abatement when a repealing statute *lowered* the penalties. *Marrero*, 417 U.S. at 660; *see also Bradley v. U.S.*, 410 U.S. 605, 608 (1973).[24] Citing three cases from the lower courts, in *Marrero*, this Court further acknowledged that the saving statute "has been held to bar application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of

[24] Neither of the cases cited in *Bradley* for the proposition that courts actually abated prosecutions in these circumstances stands for it. In *Beard v. State*, the court did not abate the prosecution, but rather saved the prior penalty because the application of the newer penalty would have violated the *Ex Post Facto* clause. 74 Md. 130, 21 A. 700, 701-02 (Md. 1891). In the other case, *Rex v. M'Kenzie*, the court did not abate the prosecutions either, but rather pronounced judgment under a lesser offense (common larceny instead of grand larceny). 168 Eng. Rep. 881, 1820 WL 2032 (K.B. 1820). Moreover, the two cases cited in *Marrero* were based on *ex post facto* concerns as well. *See Lindzey v. State*, 65 Miss. 542, 5 So. 99, 100 (1888); *Hartung v. People*, 22 N.Y. 95, 1860 WL 7885 at *7 (1860). Nonetheless, prosecutions were abated on at least six occasions following the repeal of a statute that merely lowered the penalties. *See* Today's Law and Yesterday's Crime: Retroactive Application of Ameliorative Criminal Legislation, 121 U. Pa. L. Rev. 120, 126 n.41-43 (Nov. 1972).

an offense." *Marrero*, 417 U.S. at 661. Yet, this Court did not suggest that the saving statute *was meant* to bar application of ameliorative criminal sentencing laws. *Id.* Nor would the legislative history support such a statement.

iii. This Court's previous suggestion that the saving statute precludes the application of ameliorative penalty amendments is infirm and ought to be reconsidered.

At common law, rather than abate prosecutions, both federal and state courts generally followed the principle that, "where a criminal statute is amended, lessening the punishment, a defendant is entitled to the benefit of the new act, although the offense was committed prior thereto." *Moorehead*, 198 F.2d at 53.[25] The amended provision was "rather to be considered as a continuance and modification of old laws than as an abrogation of those old and the reenactment of new ones." *Steamship Co. v. Jolliffe*, 2 Wall. (69 U.S.) 450, 458-59 (1864) (quotation and citation omitted); *see also Gulf, Co. & Santa Fe Ry. Co. v. Dennis*, 224 U.S. 503, 506-07 (1912) ("it becomes our duty to recognize the changed situation, and . . . to apply the intervening law"); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J.,

[25] The defendant in *Moorehead* conceded that the saving statute abrogated this rule. Mr. Dorsey does not.

concurring) (noting "presumption of retroactivity" with respect to amendments to criminal statutes).

For instance, in *Steamship Co.*, a pilot offered to pilot an ocean steamer, but the offer was declined, entitling the pilot to half-pilotage fees under the applicable law. 2 Wall. (69 U.S.) at 455-56. The law was amended, however, after suit was brought. *Id.* at 456, 458. The State argued that the action had to abate in light of the repeal of the earlier statute. *Id.* at 456. This Court rejected the argument, holding: "[t]he new act took effect simultaneously with the repeal of the first act; its provisions may, therefore, more properly be said to be substituted in the place of, and to continue in force with modifications, the provisions of the original act, rather than to have abrogated and annulled them." *Id.* at 458. As the dissent in that case makes clear, this Court was well aware of the common-law rule of abatement, *id.* at 464-67 (Miller, J., dissenting), but rejected it in favor of the application of the amended version of the statute, *id.* at 458 (majority opinion).

Similarly, in *Com. v. Wyman*, a case from 1853, the Massachusetts Supreme Judicial Court permitted the trial of a woman for arson despite the fact that the penalty provisions were amended prior to sentencing. 66 Mass. 237, 238-39 (1853). The court held that the amended, ameliorative penalty provisions applied, even though the conduct predated these amendments "because in the present case the whole

law was not revised, but only that part of it which imposed the punishment." *Id.* at 239.[26]

Thus, while there might have been instances in which prosecutions were abated following an amendment that lowered a penalty, *see* Today's Law and Yesterday's Crime, 121 U. Pa. L. Rev. at 126 n.41-43, abatement was not the exclusive remedy. It is Mr. Dorsey's position that this common law rule of amelioration survives the saving statute; the saving statute should not operate to preclude the application of ameliorative penalty provisions in prosecutions in which the penalty has yet to be imposed.

A number of states interpret analogous state saving statutes in this manner.[27] Moreover, such an

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[26] *See also People v. Oliver*, 1 N.Y.2d 152, 159-60, 134 N.E.2d 197, 201 (N.Y. 1956) ("where an ameliorative statute takes the form of a reduction of punishment for a particular crime, the law is settled that the lesser penalty may be meted out in all cases decided after the effective date of the enactment, even though the underlying act may have been committed before that statute."); *Turner v. State*, 870 N.E.2d 1083, 1085-86 (Ind. Ct. App. 2007) (recognizing "doctrine of amelioration"); *State v. Macarelli*, 118 R.I. 693, 698, 375 A.2d 944, 947 (R.I. 1977) (following *Oliver*'s "sound judicial philosophy"); *State v. Ambrose*, 192 Neb. 285, 290, 220 N.W.2d 18, 21 (Neb. 1974).

[27] *See, e.g., People v. Schultz,* 435 Mich. 517, 529, 533, 460 N.W.2d 505, 510, 512 (1990) (holding that state saving statute does not preclude the application of ameliorative amendments because such an application would "gloss over the historical and philosophical underpinnings" of the statute.); *Lewandowski v. State*, 271 Ind. 4, 6, 389 N.E.2d 706, 707 (Ind. 1979) ("[E]nactment of a ameliorative sentencing amendment was, in itself, a sufficient indication of the legislative intent that it be

(Continued on following page)

interpretation is consistent with the legislative history and Congress' belief that the saving statute was a rule of construction, rather than a substantive provision. MacKenzie, 54 Geo. L.J. at 182; Cong. Globe, 41st Cong., 3d Sess. 775-77. It is also consistent with the rejection of a broader saving statute that would have expressly barred the application of ameliorative criminal sentencing laws repealing harsher ones in force at the time of the commission of the offense. MacKenzie, 54 Geo. L.J. at 180-81.

Nor has this Court ever *applied* the saving statute to preclude the application of an amended penalty provision when that provision was in effect on the date of sentencing. In the eight cases in which this Court has been asked to apply the saving statute in the criminal context, it refused to do so in four of the cases. *Hamm*, 379 U.S. at 316-17; *Bridges v. United States*, 346 U.S. 209, 221 (1953); *Massey v. United States*, 291 U.S. 608 (1934); *United States v. Chambers*, 291 U.S. 217, 226 (1934). Of the other four, three involved whether the prosecutions should abate, not

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applied to all to whom such application would be possible and constitutional, thereby obviating application of the general saving statute[.]"); *In Re Estrada*, 63 Cal. 2d 740, 748, 408 P.2d 948, 953 (Cal. 1965) ("[W]here the amendatory statute mitigates punishment and there is no [express] saving clause, the rule is that the amendment will operate retroactively so that the lighter punishment is imposed. Neither a [general] saving clause . . . nor a construction statute . . . changes that rule."); *Oliver*, 1 N.Y.2d at 159, 134 N.E.2d at 201.

whether the defendants should get the benefit of an ameliorative penalty provision. *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 399 n.10 (1972); *Great Northern Ry. Co.*, 208 U.S. at 466; *United States v. Reisinger*, 128 U.S. 398, 400 (1888).

The final case is *Marrero*, which involved a collateral attack by several defendants who sought retroactive application of a provision that eliminated a no-parole eligibility requirement in effect when the defendants committed their offenses *and* when they were sentenced. 417 U.S. at 655-56. The repealing statute in that case included a saving clause that provided, "[p]rosecutions for any violation of law occurring prior to the effective date of (the Act) shall not be affected by the repeals or amendments made by (the Act). . . ." *Id.* at 656. Because the defendants committed a "violation of law . . . prior to the effective date of (the Act)," this Court correctly held that they were not entitled to the Act's benefits. *Id.* at 657-59.

Additionally, however, this Court acknowledged that lower courts have interpreted the saving statute to bar "the application of ameliorative criminal sentencing laws in repealing harsher ones in force at the time of the commission of an offense." *Id.* at 661. It is unclear why this Court discussed the saving statute in light of the plain language in the repealing statute. Because the holding was unnecessary, it might be considered dicta. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 363 (2006); *Cohens v. Virginia*, 6 Wheat. (19 U.S.) 264, 399-400 (1821). At a minimum, it was not necessary to the ultimate outcome in the

case, and this Court could reconsider the matter, as it should, without disturbing the result in *Marrero*.

Upon reconsideration, it is apparent that this Court referenced the triggering event for the saving statute as "the time of the commission of the offense" because the saving clause within the repealing statute referenced the "occurr[ence]" of a "violation of law." *See Marrero*, 417 U.S. at 661. As Section II(A) explains, the saving statute applies by its own terms only when a penalty is "incurred," and a penalty is not incurred when the offense is committed.

Because, by its own terms, the saving statute references when a penalty is "incurred," not when an offense is committed, and because its subject is a "repeal," and not a "repeal or amendment" (or some other variation), the statute has not abrogated the common law rule of amelioration. If Congress amends a statute by lowering the penalties, and if this statute is in effect at the time the penalty is incurred, *see* Section II, the saving statute, by its own terms, should not bar its application. Indeed, because the defendants in *Marrero* were sentenced prior to the statute's repeal, this Court correctly applied the saving statute in that case, and that is true regardless of the specific saving clause in the repealing statute. Whether the saving statute precludes the application of an ameliorative penalty amendment prior to the penalty's imposition, however, should be considered an open question in this Court, and, in light of the saving statute's text, history, and purposes, it should be answered in the negative.

C. The statutory principle that statutes in derogation of the common law must be strictly construed supports Mr. Dorsey's interpretation of the saving statute.

The saving statute's text, the legislative history, and this Court's precedents make clear that the saving statute, as applied, is in derogation of the common law's presumption of abatement. *Marrero*, 417 U.S. at 660; 1 U.S.C. § 109; Cong. Globe, 41st Cong., 3d Sess. 775. The same cannot be said with respect to the common law rule of amelioration, as discussed above. The saving statute's text does not refer to an "amendment," and the legislative history does not support the proposition that the saving statute was meant to preclude the application of a lower penalty at a time when that lower penalty was in effect. Moreover, to the extent this Court has stated that the saving statute bars the application of ameliorative sentencing laws, it has done so in an alternative holding which was unnecessary to the disposition of the case. *Marrero*, 417 U.S. at 657-59.

Because the saving statute is in derogation of the common law, it should be strictly construed. *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952); *Reisinger*, 128 U.S. at 401. As such, the saving statute should be interpreted to effect its purpose, while retaining other aspects of the common law. *United States v. Texas*, 507 U.S. 529, 534 (1993); *Isbrandtsen Co.*, 343 U.S. at 783. "When Congress does expressly repeal a statute, we should not read a saving clause so broadly that it encompasses much more than is

necessary to achieve its general purpose – preventing the abatement of prosecutions which, at common law, would otherwise have resulted from the repeal of a statute or from a change in the definition of an offense." *United States v. McGarr*, 461 F.2d 1, 4 (7th Cir. 1972).

Accordingly, this Court should construe the saving statute strictly as a presumption against abatement in cases of repeal, and a presumption against technical abatement in cases of amendment. It should not be interpreted to abrogate the common law rule of amelioration. Instead, ameliorative amendments to penalty provisions should apply prospectively upon their enactment in all cases in which the penalty has yet to be imposed.

D. Under the rule of lenity, Mr. Dorsey should have been sentenced under the Fair Sentencing Act's amended penalty provisions.

Mr. Dorsey maintains that the text of the saving statute is clear and unambiguous in that it has no application when Congress expressly "amends" a statute. *See* Section III(A), *supra*. The history and purposes of the statute confirm that it should not apply in a case, such as this one, that involves an ameliorative amendment to a criminal penalty provision in existence at the time punishment is imposed. *See* Section III(B) & (C), *supra*. Nonetheless, if this Court finds that the statute is ambiguous, the rule of

lenity requires that the statute be interpreted in Mr. Dorsey's favor.

Under the rule of lenity, "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 130 S.Ct. 2896, 2932 (2010). "[T]he rule has been applied not only to resolve issues about the substantive scope of criminal statutes, but to answer questions about the severity of sentencing." *United States v. R.L.C.*, 503 U.S. 291 (1992). It is "rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." *Id.* (quotations omitted).

Here, a lenient reading of the saving statute would favor Mr. Dorsey. Congress has recognized the unfairness in the prior version of § 841(b), and it has remedied that unfairness, at least partially, with the passage of the Fair Sentencing Act. The Fair Sentencing Act was in full force and effect when Mr. Dorsey was sentenced. To preclude its application in this case was, and would be, "gratuitously silly." *Holcomb*, 657 F.3d at 463 (Posner, J., dissenting).

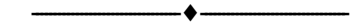
Instead, consistent with this Court's decision in *Hamm v. City of Rock Hill*, the lower courts should have applied the Fair Sentencing Act "to avoid inflicting punishment at a time when it can no longer further any legislative purpose, and would be unnecessarily vindictive." 379 U.S. at 313-16. *Id.* at 313; *see also Landgraf*, 511 U.S. at 276 n.30 ("the government should accord grace to private parties disadvantaged

by an old rule when it adopts a new and more generous one.").

Hamm involved the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 244 (1964), and whether its passage abated state convictions for trespass, based on sit-in demonstrations at segregated lunch counters. 379 U.S. at 307-08. This Court held that it did, despite the saving statute, noting that the saving statute should not apply to save a repealed statute when that statute undermines important public policy. *Id.* at 317. The same is true in this case. The Fair Sentencing Act corrected a sentencing scheme that adversely affected African-Americans for no sound reason. *See Kimbrough*, 552 U.S. at 97-98. While trafficking in crack cocaine is not an act of civil disobedience, Mr. Dorsey has not asked this Court, or any other court, to vacate his underlying conviction. He understands that his actions are as illegal today as they were two years ago. But that does not mean that his sentence should stand under an unfair provision that discriminated on the basis of race. *See Hamm*, 379 U.S. at 314-16.

Instead, "[t]he more lenient interpretation must prevail." *R.L.C.*, 503 U.S. at 308 (Scalia, J., concurring). The more lenient interpretation is to apply the Fair Sentencing Act to all those sentenced after the Fair Sentencing Act's enactment. To do otherwise would be "unnecessarily vindictive." *Hamm*, 379 U.S. at 313.

In the end, in light of its text, and based on its origins, its history, and its purposes, the saving statute should be construed strictly as a presumption against abatement, including technical abatement, and nothing more. It should not be construed to preclude the application of an ameliorative amendment at a time when that amendment was in full force and effect. *Steamship Co.*, 2 Wall. (69 U.S.) at 458-59; *Dennis*, 224 U.S. at 506-07; *Lewandowski*, 271 Ind. at 6, 389 N.E.2d at 707; *Schultz,* 435 Mich. at 533, 460 N.W.2d at 512; *In Re Estrada*, 63 Cal. 2d at 748, 408 P.2d at 953; *Oliver*, 1 N.Y.2d at 160, 134 N.E.2d at 201-02; *Wyman*, 66 Mass. at 238-39; *see also Turner*, 870 N.E.2d at 1085-86; *Macarelli*, 118 R.I. at 698, 375 A.2d at 947. In such an instance, the court should apply the lower penalties in effect at the time of sentencing. *Id.* Because Mr. Dorsey was sentenced after the Fair Sentencing Act's enactment, he should have been sentenced under its provisions.



CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed and this case should be remanded for resentencing under the Fair Sentencing Act.

Respectfully submitted,

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