No: _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2010

COREY HILL, Petitioner

vs.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

COUNSEL OF RECORD:

STEPHEN E. EBERHARDT
16710 Oak Park Avenue
Tinley Park, IL 60477
708-633-9100

QUESTION PRESENTED FOR REVIEW

Whether the District Court erred in not sentencing the Defendant-Petitioner pursuant to the "Fair Sentencing Act of 2010" where Petitioner was sentenced on December 2, 2010 after the effective date of the FSA and the amendments to the Sentencing Guidelines mandated by the FSA?

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I

JURISDICTION

The Seventh Circuit Court of Appeals issued an Order affirming the judgment of the District Court on April 7, 2011.

This petition is timely filed pursuant to Supreme Court Rule 13.3 in that it is being filed within ninety (90) days of the Circuit Court's final order.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

II

STATEMENT OF THE CASE

The prosecution was brought pursuant to 21 U.S.C. § 841(a). Jurisdiction in the District Court was pursuant to 18 U.S.C. §3231. The basis of jurisdiction in the Court of Appeals was conferred by 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

Defendant-Petitioner Corey Hill was arrested on June 19, 2008, (Tr. 30), and indicted was on July 17, 2008. [Doc. 7]. Petitioner thereafter proceeded to trial and was found guilty by a jury on April 22, 2009 of delivery of over 50 grams of cocaine base. (Tr. 250-251).

The first witness called by the Government was Gregory Spayth, an Aurora police officer (Tr. 17), who was assigned as an ATF task force officer. (Tr. 18). On March 28, 2007, Spayth and ATF Special Agent Mark Anton met with an informant by the name of Craig Burns. (Tr. 18). Burns made arrangements to purchase crack cocaine from the Petitioner. (Tr. 21).

After Burns was provided with recording equipment (Tr. 22), Burns sat on his porch to await the arrival of the Petitioner. (Tr. 23). About an hour later, officers observed the Petitioner arrive at Burns' home. (Tr. 23). Burns and the Petitioner entered Burns' residence. (Tr. 25). A short time later, Petitioner was seen leaving the residence and driving away. (Tr. 27). Officers deactivated the recording equipment and Burns gave the officers a clear plastic baggie containing a rock-like substance. (Tr. 27).

Craig Burns, a self-admitted dope dealer (Tr. 73) who faced 20 years in jail (Tr. 74,

92), testified under a grant of immunity. (Tr. 68-69). He stated that in October of 2005 he was involved in the purchase of drugs from a government informant. (Tr. 37-38). Based upon this incident, he agreed to cooperate with the ATF. (Tr. 38).

Burns testified that he had known the Petitioner since the mid-1990's. (Tr. 39). On March 28, 2007, he set up a drug deal with the Petitioner. (Tr. 40). In an un-recorded phone call, he told the Petitioner he wanted to purchase two-and-a-half ounces of crack cocaine. (Tr. 41). Burns later denied saying he asked for crack and testified that he "just asked for two-and-a-half." (Tr. 80-81).

Agents outfitted Burns with a video camera (Tr. 42) and gave him $1,900. (Tr. 43). Burns was told to wait on his porch until the Petitioner arrived. (Tr. 43). When the Petitioner arrived at Burns' home, Petitioner had a fix-a-flat can in his hand. (Tr. 47). Burns and Petitioner went into the house into Burns' bedroom so the children would not see what was going on. (Tr. 48). The Petitioner told Burns to give him "13". (Tr. 49). Petitioner untwisted the bottom of the can and put two ounces of drugs on the bed. (Tr. 50). This was not on the video, though, as the recording did not show Petitioner's or Burns' hands. (Tr. 77). The net weight of the drugs was later determined to be 53.3 grams. (Tr. 126, 135-136).

Burns asked Petitioner why he only had two ounces and Petitioner said "that was all he had left, and he had that for his powder heads." (Tr. 50). Burns put the drugs in his dresser. (Tr. 51). A short time later, Petitioner left. (Tr. 52). Burns went out to the porch and called the officers. (Tr. 52). When they arrived, he gave the officers the drugs - that Burns described as crack- and the rest of the money. (Tr. 53).

The recordings made by Burns were played for the jury. When Burns said to Petitioner "man, you ain't have two-and-a-half cuz?" (Tr. 66), Petitioner responded, "hell no, that's all I had left and I had that in powder for my powder heads." (Tr. 67). Burns understood that to mean that Petitioner only had two ounces of powder, not crack cocaine left. (Tr. 67). Burns testified that Petitioner gave him two ounces of crack cocaine. (Tr. 68). The Court sustained the defense objection to Burns' surmising that Petitioner's delay in delivering the cocaine was because Petitioner had to cook the power into crack. (Tr. 96). The Court later overruled the defense objection to the Government's argument that the reason it took Petitioner almost an hour to get to Burns' house was because Petitioner had to cook the powder into crack. (Tr. 199-200).

ATF Agent Mark Anton was next to testify. (Tr. 104). Anton interviewed Petitioner on June 19, 2008. (Tr. 108). Petitioner acknowledged that it was Petitioner in the video involved in selling the crack cocaine to Burns (Tr. 117, 229) and that Petitioner "knew this was coming" as Burns had informed him that Burns had cooperated with law enforcement. (Tr. 117).

Lt. Robert Coleman of the Will County Sheriff's Police and a DEA task force agent (Tr. 148, 151), who had no involvement in this particular case (Tr. 156, 168), provided testimony about how the substance received from Petitioner was crack cocaine based on how "it appears to be at this point." (Tr. 163). Upon further examination, after he "smelled it" and "felt it", Coleman concluded the substance was crack cocaine. (Tr. 164, 168).

The jury found Petitioner guilty of distribution of 50 grams or more of crack cocaine.

(Tr. 250-251).

The Appellant's sentencing was commenced on June 30, 2010 and completed on December 2, 2010. (Appendix C). The Court determined that it would use a 1-1 crack-to-powder cocaine ratio in determining the advisory Guideline range. (App. C; Tr. of December 2, 2010 at page 3). The Court determined the offense level to be 16 with a criminal history category of V resulting in an advisory Guideline sentence of 41-51 months. (App. C; Tr. of December 2, 2010 at pages 3-4).

The Government dismissed the 851 information. (App. C; Tr. of December 2, 2010 at page 4).

The question then became whether the provisions of the Fair Sentencing Act were applicable to Petitioner's sentencing thereby reducing the mandatory minimum sentence to five (5) from ten (10) years. (App. C; Tr. of December 2, 2010 at page 4-5). Relying on the Seventh Circuit's decision in *United States v. Bell*, 624 F.3d 803 (7th Cir. 2010), the District Court found that the Fair Sentencing Act did not retroactively apply to Petitioner. (App. C; Tr. of December 2, 2010 at page 8). But for the mandatory minimum of ten (10) years, the Court would have sentenced Petitioner "at the high end of the guideline range of 51 months." (App C; Tr. of December 2, 2010 at page 14).

The Petitioner was thereafter sentenced to 120 months imprisonment on December 2, 2010. Defendant's Motion to Reconsider his sentence was denied on December 9, 2010. (Attached App. B; Doc. 106). Notice of Appeal was timely filed on December 10, 2010.

The Seventh Circuit Court of Appeals affirmed the judgment of the District Court on

April 7, 2011. (Appendix A).

III

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The District Court Erred In Not Sentencing the Defendant-Petitioner Pursuant to the Provisions of the "Fair Sentencing Act of 2010".

This Court should grant the Writ to resolve a split between the Circuit Court's regarding the issue of whether the provisions of the "Fair Sentencing Act of 2010" apply to a Petitioner whose offense conduct predated the effective date of the legislation (August 3, 2010) but whose sentencing occurred after the effective date of the Act.

The Seventh Circuit Court of Appeals has decided that the FSA would not apply to a Petitioner, like Corey Williams, whose offense conduct occurred prior to August 3, 2010 but was sentenced thereafter. See *e.g. United States v. Fisher*, 635 F.3d 336 (7th Cir. 2011). Two Circuit Judges later dissented from the denial of rehearing *en banc*. *United States v. Fisher*, ___ F.3d ___, 2011 U.S. App. LEXIS 10561 (7th Cir. May 25, 2011).

The First Circuit has concluded that the new reduced FSA mandatory minimums would apply to a Petitioner such as Corey Hill whose offense conduct predated the passage of the FSA but was sentenced after the November 1, 2010 amendments to the Sentencing Guidelines. *United States v. Douglas*, ___ F.3d ___, 2011 U.S. App. LEXIS 10922 (1st Cir., May 31, 2011). More recently, the Eleventh Circuit Court of Appeals held that the FSA does apply if a Petitioner is sentenced after the effective date of the Act even if the offense conduct predated August 3, 2010. *United States v. Rojas*, ___ F.3d ___, 2011 U.S. App. LEXIS 12791 (11th Cir. June 24, 2011).

The plain terms of the Fair Sentencing Act, expressly and by necessary implication, indicate that Congress intended its ameliorative changes to be applied to defendants not yet sentenced as of August 3, 2010, the date the Act took effect.

On August 3, 2010, President Obama signed into law the Fair Sentencing Act of 2010, passed by Congress to "restore fairness to Federal cocaine sentencing." *See* Pub. L. No. 111-220, 124 Stat. 2372 (Preamble). The Act amends the Anti-Drug Abuse Act of 1986 ["1986 law"] by increasing the quantity thresholds that trigger the statutory mandatory minimum penalties for offenses involving cocaine base ("crack") under 21 U.S.C. §§ 841(b) and 960(b). The quantity triggering the five-year mandatory minimum was increased from 5 grams to 28 grams and the quantity triggering the 10-year mandatory minimum was increased from 50 grams to 280 grams. Pub. L. No. 111-220, § 2. These new quantity thresholds had the effect of reducing the statutory powder-to-crack ratio from 100-to-1 to approximately 18-to-1. For those defendants whose offenses involve more than 50 grams but less than 280 grams of crack, the Act also had the effect of reducing the statutory maximum penalty from life to forty years. The Act does not include a saving provision indicating that Congress intended the old law to apply to pending cases.

In section 8 of the Act, Congress gave the Sentencing Commission emergency authority, requiring action within no later than ninety days, to "make such conforming amendments to the Federal sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable

law." *Id.* § 8(2). On October 27, 2010, the Commission followed that directive by amending the Drug Quantity Table at USSG § 2D1.1 to reflect the 18-to-1 drug quantity ratio The Commission expressly stated that these amendments were intended to "account for" the Fair Sentencing Act's new mandatory minimum sentences, and further that its approach was intended to "ensure[] that the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionately reflected throughout the Drug Quantity Table." USSC, Notice of a temporary, emergency amendment to sentencing guidelines and commentary, USSG, App. C, Amend. 748 (Supp. Nov. 1, 2010).

In a letter dated November 17, 2010, the lead sponsors of the Fair Sentencing Act wrote a letter to Attorney General Eric Holder, urging him "to apply its modified mandatory minimums to all defendants who have not yet been sentenced, including those whose conduct predates the legislation's enactment." (App. D). Senators Durbin and Leahy point out that Congress' goal in passing the Act "was to restore fairness to Federal cocaine sentencing as soon as possible," and that "every day that passes without taking action to solve this problem is another day that people are being sentenced under a law that virtually everyone agrees is unjust." *Id.* They explain that "this sense of urgency is why we required the U.S. Sentencing Commission to promulgate an emergency amendment," and that the amended guideline will apply to "all defendants who have not yet been sentenced." *Id.* They

note the "absurd result," "inconsistent with the purpose of the Fair Sentencing Act," should defendants "continue to be sentenced under a law that Congress has determined is unfair for the next five years, until the statute of limitations runs on conduct prior to the enactment of the Fair Sentencing Act." *Id.*

Applying the Fair Sentencing Act in this case means that Petitioner faced a 60-month mandatory minimum sentence, rather than the 120-month mandatory minimum under the old law.

Unlike other statutes in which Congress has expressly stated that it intended for old law to apply to pending cases or to a particular category of cases, Congress included no such saving provision in the Fair Sentencing Act. To the contrary, Congress included language plainly indicating its intent to end immediately the discriminatory injustice wrought by the 100-to-1 ratio under the old law. As a result, the general saving statute of 1 U.S.C. § 109 did not preclude application of the Fair Sentencing Act in this case.

At common law, the repeal of a criminal statute, or its re-enactment with increased or decreased penalties, would have abated all prosecutions not yet final. *Bradley v. United States*, 410 U.S. 605, 607-08, 93 S.Ct. 1151 (1973). In 1801, Chief Justice Marshall expressed the rule of abatement as follows:

> But if subsequent to the judgment and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. . . . It is true that in mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective

> operation, affect the rights of parties, but in great national concerns . . . [the law] ought always to receive a construction conforming to its manifest import. . . . In such a case the court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of the law, the judgment must be set aside.

United States v. Schooner Peggy, 1 Cranch 103, 110 (1801).

The "reason for the rule," as later explained by this Court in *United States v. Chambers*, is that "[p]rosecution for crimes is but an application or enforcement of the law, and if the prosecution continues, the law must continue to vivify it." 291 U.S. 217, 226, 54 S.Ct. 439 (1934). Thus, a conviction "on direct review at a time when the conduct in question is rendered no longer unlawful by statute, must abate." *See Hamm v. City of Rock Hill*, 379 U.S. 306, 312, 85 S.Ct. 384 (1964) (citing *Bell v. Maryland*, 378 U.S. 226 (1964)).

Significantly, this "normal abatement rule covering pending convictions" "does not depend on the imputation of a specific intention to Congress in any particular statute." *Id.* at 313, 315. Rather, the rule generally "imput[es] to Congress an intention to avoid inflicting punishment at a time when it can no longer furnish any legislative purpose, and would be unnecessarily vindictive." *Id.* This rule "is to be read wherever applicable as part of the background against which Congress acts," thus it is "irrelevant that Congress" may not have specifically alluded to the question

whether pending prosecutions would be abated. *Id.* at 312-13.[1]

To prevent such abatements that might arise from legislative inadvertence, Congress passed the federal saving statute in 1871, now codified at 1 U.S.C. § 109. *See Hamm*, 379 U.S. at 314-15.

Section 109 provides in relevant part:

> 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.

While the federal saving statute supplies a general rule of statutory construction, this Court explained over one hundred years ago that it "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, 28 S.Ct. 313 (1908) (emphasis added). Thus, the rule does not

[1] In *Hamm*, this Court held that, in the absence of a saving clause and in light of Congress' purpose in enacting the Civil Rights Act of 1964, the "normal rule" of abatement applied to strike down pending state convictions for trespass resulting from sit-ins before its passage. 379 U.S. at 310-11. This Court also declined to preserve convictions for transporting liquor following the passage of the Twenty-first Amendment, which abolished Prohibition era laws. *United States v. Chambers*, 291 U.S. 217 (1934).

apply if by "necessary implication, arising from the terms of the law, as a whole, it results that the legislative mind will be set at naught by giving effect to the [saving statute]." *Id.* at 465; *see also Hertz v. Woodman*, 218 U.S. 205, 217, 30 S.Ct. 621 (1910) (general saving statute is a "rule of construction [] to be read and construed as part of all subsequent repealing statutes, in order to give effect to the will and intent of Congress").

In its most recent analysis of the general saving clause, this Court again recognized that a later enactment can "expressly or by necessary implication" supersede the general saving clause by indicating Congress's intent to abate prosecutions under the old law. In *Marrero v. Warden Lewisburg Penitentiary* 417 U.S. 653, 655-57, 94 S.Ct. 2532 (1974), this Court considered, on habeas corpus review, whether certain drug offenders sentenced under a law that made them categorically ineligible for parole could benefit from the Comprehensive Drug Abuse Prevention and Control Act of 1970, a new statute abolishing the restriction on parole. The new statute contained a saving clause specifically preserving the harsher penalties for "prosecutions for any violation of law occurring prior to the effective date of [the Act]." *Id.* at 656-57 & n.4.

Answering the narrow question whether sentencing "is part of the concept of 'prosecution,'" this Court held that the specific saving clause contained in the new statute preserved the parole restrictions for those sentenced under the old law. *Id.* at 657-58. It further held that ineligibility for parole is an element of "punishment" and

thus a "penalty, forfeiture, or liability" under 1 U.S.C. § 109 surviving the repeal. Focusing as it did on whether the parole restriction of the old law constituted a "penalty" under § 109 (and given the dispositive saving clause included in the new law), the Court in *Marrero* did not address whether the new statute either "expressly or by necessary implication" released or extinguished a previous harsher penalty. This Court nevertheless reaffirmed the principle that a later enactment can be viewed as superseding an earlier one when it "can be said by fair implication or expressly to conflict" with it. *Marrero*, 417 U.S. at 659 n.10 (citing *Great Northern Ry.*).

More recently, Justice Scalia emphasized, in his concurring opinion in *Lockhart v. United States*, 546 U.S. 142, 148, 126 S.Ct. 699 (2005), that the Court has consistently "made clear" that an earlier Congress cannot use an "express-statement provision" (such as the one contained in the general saving clause) to "nullify the unambiguous import of a subsequent statute." *Id.* (Scalia, J., *concurring*) (citing *Great Northern Ry.*, 208 U.S. at 465). He reiterated that "[a] subsequent Congress [] may exempt itself from such requirements by 'fair implication' – that is, *without* an express statement." *Id.* (Scalia, J., *concurring*) (emphasis in original) (citing *Marrero*, 417 U.S. at 659-60 n.10; *Hertz v. Woodman*, 218 U.S. at 218)). As Justice Scalia put it, a subsequent Congress need not use any "magical password" to indicate its intent "[w]hen the plain import of a later statute directly conflicts with an

earlier statute." *Id.*

The structure and language of the Fair Sentencing Act indicate, either by its express terms or by "necessary implication," that Congress intended the Act's ameliorative changes to apply as soon as possible, and to all pending cases. Most obviously, Congress passed the Fair Sentencing Act to "restore fairness" to crack sentencing, addressing longstanding concerns regarding the racially disparate impact of the 100-to-1 ratio contained in the 1986 law, which turned out to be without evidentiary basis. In addition (and unlike the statute at issue in *Marrero*), the Fair Sentencing Act does not include a specific saving provision. To the contrary, Congress expressly granted the Sentencing Commission emergency authority to promulgate amendments "as soon as practicable, and in any event not later than 90 days after the date of enactment of this Act," and specifically directed that it "*shall* [] make such conforming amendments to the sentencing guidelines as the Commission determines necessary to achieve consistency with other guideline provisions and applicable law." *See* Pub. L. No. 111-220, § 8 (Aug. 3, 2010).

Also significant is the fact that the provisions of the FSA are markedly different from those in H.R. 265, the House bill described as the "underpinnings" of S. 1789, the bill ultimately enacted as the Fair Sentencing Act of 2010. *See* 156 Cong. Rec. H6199, H6199-202 (daily ed. July 28, 2010) (statement of Rep. Jackson Lee). Unlike S. 1789, H.R. 265 contained a saving provision specifically stating that

"there shall be no retroactive application of any portion of this Act." *Id.* at H6202 (H.R. 265 sec. 11). In addition, H.R. 265 directed only that the Commission "in its discretion, *may* [] promulgate amendments" pursuant to its emergency authority, and only "*may* [] make such conforming amendments as the Commission determines necessary to achieve consistency with other guidelines and applicable law." *Id.* H6201 (H.R. 265 sec. 8) (emphasis added). H.R. 265 was not to be effective for 180 days after the date of its enactment. In contrast, S. 1789 contained *no* saving clause, contained *mandatory* directives to the Sentencing Commission, and was to be effective on the date signed by the President.

Following Congress' mandate, the Commission achieved consistency with the Fair Sentencing Act when it amended § 2D1.1 so that effective November 1, 2010, "the relationship between the statutory penalties for crack cocaine offenses and the statutory penalties for offenses involving other drugs is consistently and proportionately reflected throughout the Drug Quantity Table." USSG, App. C, Amend. 748 (Supp. Nov. 1, 2010). In addition to the provisions of the Fair Sentencing Act, Congress requires (and has required since 1984) that courts at every initial sentencing apply the guidelines that "are in effect on the date the defendant is sentenced." 18 U.S.C. § 3553(a)(4)(ii). Pursuant to this provision, and in conjunction with the emergency amendments Congress deemed necessary to "restore fairness" in sentencing crack offenders, Congress now *requires* courts to

calculate the advisory guideline range by applying the amended guideline reflecting the new 18-to-1 ratio at every base offense level, including for those whose offense conduct occurred before August 3, 2010. It would make no sense at all for Congress to require courts to apply the amended guideline to all defendants, resulting in advisory guideline ranges for all calibrated to the 18-to-1 ratio, while at the same time categorically preventing many of the least serious offenders from actually benefitting from their lower advisory guideline range due to the trumping operation of the old mandatory minimums. Such an interpretation would fundamentally undermine Congress' goal of reducing penalties for the least serious offenders.

As emphasized by Justice Scalia in 2005, Congress was not required to use any "magical passwords" to make its intent clear. Taken together, Congress' directive to the Commission in the Fair Sentencing Act to "achieve consistency" with applicable law and its directive to courts to apply the guidelines as amended in every case clearly demonstrate, either expressly or by "necessary implication," Congress' intent to "restore fairness" to all defendants not yet sentenced.

IV

CONCLUSION

For these reasons, Petitioner asks this Honorable Court to grant the Writ of Certiorari, reverse the decision of the Seventh Circuit Court of Appeals and Order the District Court to sentence Petitioner pursuant to the provisions of the “Fair Sentencing Act of 2010"..

Respectfully submitted,

COUNSEL OF RECORD:

STEPHEN E. EBERHARDT
16710 Oak Park Avenue
Tinley Park, IL 60477
708-633-9100

APPENDIX A

APPENDIX B

APPENDIX C

APPENDIX D

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COREY HILL, Petitioner

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NOTICE AND PROOF OF SERVICE

To: Honorable William K. Suter
Clerk of the Supreme Court
of the United States
1 First Street N.E.
Washington, D.C. 20543

Corey Hill
Register No. 22609-424
USP Terre Haute
P.O. Box 33
Terre Haute, IN 47808

Michael O. Lang
Assistant United States Attorney
219 S. Dearborn, 5th Floor
Chicago, IL 60604

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue NW
Washington, D.C. 20530-0001

Please take notice that I have mailed the original and ten copies of the Petition for Writ of Certiorari to the Clerk of the above court and that I am serving the United States Attorney, the Solicitor General and Petitioner with one copy each of the Petition by depositing the copies in the mail in Tinley Park, Illinois, in envelopes with sufficient prepaid postage and addressed as indicated above on this 2nd day of August, 2011.

_____
STEPHEN E. EBERHARDT
Counsel of Record