No. 11-1201

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

ALBERT HUGHES,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

Gregory G. Katsas
Anthony J. Dick*
Counsel of Record
JONES DAY
51 Louisiana Ave NW
Washington, D.C. 20001
(202) 879-3939

*Not admitted to practice in Washington, D.C.
Practice supervised by members of the D.C. Bar.

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1 U.S.C. § 109 Repeal of statutes as affecting existing liabilities

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.

18 U.S.C. § 3553 (a) Factors To Be Considered in Imposing a Sentence —

The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

…

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

…

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced[.]

18 U.S.C. § 3742(g) Sentencing Upon Remand —

A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date[.]

INTEREST OF AMICUS CURIAE

This brief is submitted pursuant to the Court's order appointing Anthony J. Dick to brief and argue this case as *amicus curiae* in support of the judgment below.

INTRODUCTION

In *Dorsey v. United States*, the Supreme Court held that the reduced penalties of the Fair Sentencing Act ("FSA" or "Act") apply retroactively to drug offenders who committed their crimes before the Act's effective date, but who received their initial sentences after that date. *Dorsey* did not, however, address the circumstances of the present case, where the defendant committed his crime *and* received his initial sentence before the Act's effective date, and now faces sentencing on remand after an appeal.

The Court found *Dorsey* to be a "difficult" case because "relevant language in different statutes argue[d] in opposite directions." 132 S. Ct. 2321, 2330 (2012). On the one hand, the Fair Sentencing Act fell under the "federal saving statute" of 1871, which provides that whenever a new law reduces the penalty for a pre-existing criminal offense, the reduced penalty does not apply retroactively to those who committed the offense before the new law was enacted. 1 U. S. C. § 109. On the other hand, another provision in the more recent Sentencing Reform Act of 1984 states that in an "initial sentencing," 132 S. Ct. at 2332, the applicable Sentencing Guidelines "are the ones 'in effect on the date the defendant is sentenced.'" *Id*. at 2331 (quoting 18 U. S. C. § 3553(a)(4)(A)(ii)).

By a 5-to-4 vote, the Court held that, in light of what the Court described as the newer "background sentencing principle" of the Sentencing Reform Act, *id*. at

2332, Congress intended the reduced penalties of the Fair Sentencing Act to apply for offenders who committed their crimes before the effective date of the Act but who received their initial sentences after that date. For offenders who had already been sentenced before the Act's effective date, however, the newly reduced penalties would not apply. *See id*.

This case differs sharply from *Dorsey* because here the defendant committed his crime *and* received his initial sentence before the effective date of the Fair Sentencing Act; accordingly, all of the relevant statutory language indicates that he must remain bound by the law that applied at that time. The Supreme Court in *Dorsey* relied on a provision of the Sentencing Reform Act that applies during initial sentencing. But that provision contains a clear exception for "sentencing on remand," under which courts must "apply the guidelines . . . that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date." 18 U.S.C. § 3742(g)(1). Because this language does not displace but rather confirms the federal saving statute's presumption against retroactivity, there is no basis for Hughes to claim the benefit of the reduced penalties of the Fair Sentencing Act.

STATUTORY BACKGROUND

A. The Federal Saving Statute and the Presumption Against Retroactivity

The federal saving statute provides that a new criminal statute that "repeal[s]" an older criminal statute shall not change the penalties "incurred" under the older statute "unless the repealing Act shall so expressly provide." 1 U. S. C. § 109. In *Dorsey*, the Supreme Court acknowledged that the word "repeal" applies when a new statute reduces the penalties that the older statute set forth. *See* 132 S. Ct. at 2330-31 (citing *Warden v. Marrero*, 417 U. S. 653, 659-664 (1974); *United States v. Tynen*, 11 Wall. 88, 92 (1871)). *Dorsey* also acknowledged that "penalties are 'incurred' under the older statute when an offender becomes subject to them, i.e., commits the underlying conduct that makes the offender liable." *Id*. at 2331 (citing *United States v. Reisinger*, 128 U. S. 398, 401 (1888); *Great Northern R. Co. v. United States*, 208 U. S. 452, 464-470 (1908)).

B. The Sentencing Reform Act of 1984 and the Anti-Drug Abuse Act of 1986

Congress created the federal Sentencing Commission in the Sentencing Reform Act of 1984, 98 Stat. 1987. For drug offenses, the Commission was authorized to create a set of "Base Offense Levels" depending on the type and quantity of drugs possessed. Using the base offense level as a starting point, judges could then modify the sentence in each case based on a variety of individualized sentencing factors. *See* USSG § 2D1.1.

Shortly after the Sentencing Reform Act, Congress passed the Anti-Drug Abuse Act of 1986 ("ADAA"), 100 Stat. 3207, which curtailed the discretion of the Sentencing Commission by imposing 5- and 10-year mandatory minimum sentences for possession with intent to distribute certain types of drugs, including crack and powder cocaine. "[B]ecause of crack's potency, its highly addictive nature, its affordability, and its increasing prevalence," Congress set the mandatory minimums to be triggered by much lower quantities of crack as compared to powder. *United States v. Levy*, 904 F.2d 1026, 1032 (6th Cir. 1990) (internal quotation marks and citation omitted). As relevant here, the statute provided a mandatory minimum of 5 years for possession with intent to distribute more than 5 grams of crack, and 10 years for more than 50 grams. *See* 21 U. S. C. § 841(b)(1)(A) (2006 ed.). By contrast, the 5- and 10-year mandatory minimums for powder cocaine were set at 500 and 5,000 grams, respectively. *Id.*

C. The Fair Sentencing Act of 2010

In response to concerns over the disparity between crack and powder cocaine sentences, Congress enacted the Fair Sentencing Act of 2010 (FSA), 124 Stat. 2372, which increased the amount of crack necessary to trigger the mandatory minimums. The quantity of crack for the 10-year minimum increased from 50 to 280 grams, while the 5-year minimum went from 5 to 28 grams. *Id.* § 2(a). The Fair Sentencing Act also instructed the Commission 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). And it directed the Commission to "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 new Act took effect. *Id.* § 8(1).

The Fair Sentencing Act took effect on August 3, 2010. The Act is silent about the extent, if any, to which it applies retroactively to offenses committed prior to that date.

PROCEDURAL HISTORY

In March 2008, Albert Hughes's girlfriend called 911 to report domestic violence. When police arrived at the apartment they saw marijuana and cocaine in plain view, prompting a search that turned up 64 grams of crack and 116 grams of powder cocaine, along with two loaded firearms. Hughes pled guilty to gun and drug charges, including possession with intent to distribute more than 50 grams of crack.

The district court imposed its initial sentence on April 30, 2009. Because the Fair Sentencing Act had not yet become law, Hughes was subject to the 10-year mandatory minimum under 21 U. S. C. § 841(b)(1)(A). Hughes also received a 5-year mandatory sentence enhancement under 18 U.S.C. § 924(c) for possessing a firearm in furtherance of a drug-trafficking crime. On direct appeal, his sentence

was vacated under *United States v. Almany*, 598 F.3d 238 (6th Cir. 2010), which held that the Section 924(c) firearm enhancement did not apply when a defendant was already subject to a longer mandatory minimum. *See United States v. Hughes*, 392 Fed. Appx. 382, 388 (6th Cir. 2010) (unpublished) (remanding "for resentencing in light of *Almany*"). Shortly thereafter, however, the Supreme Court effectively overruled *Almany* in *Abbott v. United States*, 131 S. Ct. 18 (2010). As a result, Hughes proceeded to resentencing under the same statutory mandatory minimums that had applied when he was initially sentenced.

At resentencing on January 28, 2011, the district court reimposed the same sentence that Hughes had received at his initial sentencing. (R. 74: Resent. Tr. at 14-15.) The court noted the recent enactment of the Fair Sentencing Act, but followed *United States v. Carradine*, 621 F.3d 575 (6th Cir. 2010), which held that the Act's reduced penalties did not apply retroactively to offenses committed before the Act's effective date. The district court alternatively held that the reduced penalties of the Fair Sentencing Act did not apply in light of 18 U.S.C. § 3742(g)(1), which provides that defendants being sentenced on remand remain subject to the Guidelines that applied at the time of their initial sentencing. In support of this conclusion, the court reasoned that "it would be odd indeed to apply the guidelines in effect at the time of the original sentencing but a mandatory

minimum by statute that came along later." Sent. Tr. at 10. Hughes then initiated the present appeal.

While the appeal was pending, the Government abandoned its previous position that the Fair Sentencing Act does not apply retroactively, and began asserting the opposite. After the Supreme Court agreed with the Government's position in *Dorsey*, the Government asked this court to remand Hughes's case so that he could be resentenced in accord with the reduced penalties of the Fair Sentencing Act. In making this request, the Government did not address the possibility that Section 3742(g)(1) might distinguish *Dorsey* from cases involving resentencing on remand. As a result, the Court appointed an amicus to defend the district court's judgment that Section 3742(g)(1) requires Hughes to be sentenced under the same law that applied during his initial sentencing.[1]

ARGUMENT

The Court in *Dorsey* relied on "six considerations, taken together," 132 S. Ct. at 2331, which it thought indicated that the reduced penalties of the Fair Sentencing Act should apply retroactively to defendants who committed their crimes before the effective date of the Act, but who received their initial sentences after that date. None of those six factors supports the defendant in this case, where

[1] Because the law that applied at the time of Hughes's initial sentencing is no more stringent than the law that applied at the time of his criminal offenses, there is no question presented under the *Ex Post Facto* Clause of the Constitution. *See, e.g., United States v. Bordon*, 421 F.3d 1202, 1207 (11th Cir. 2005).

both the offense and the initial sentence occurred before the Act's effective date. The following sections address each of the six *Dorsey* factors in turn.

I. The Federal Saving Statute Remains in Effect Unless Congress Clearly Intended to Abrogate It

Dorsey reaffirmed that under the general saving statute, 1 U.S.C. § 109, the background presumption is that criminal penalties are determined by the law that was in effect at the time of the offense, notwithstanding any subsequent changes to the penal statute. That presumption may be rebutted only if "ordinary interpretive considerations point clearly" to the conclusion that Congress intended to apply the reduced penalties retroactively. *Dorsey*, 132 S. Ct., at 2332.

The Court in *Dorsey* concluded that Congress clearly indicated its intent to apply the Fair Sentencing Act's reduced penalties retroactively for "initial sentencing." *Id.* For resentencing on remand, however, the analysis is quite different. In this context the clear-statement rule is an insuperable obstacle, because Congress has indicated that all offenders should remain bound by the sentencing law that applied at the time of their original sentencing. Thus, where the original sentence was imposed prior to the Fair Sentencing Act's effective date, the Act's reduced penalties do not applying on resentencing.

II. Congress Has Clearly Indicated that Sentencing on Remand Should Be Governed by the Same Law that Applied During the Original Sentencing

The most important factor in the Court's analysis in *Dorsey* was the provision in the Sentencing Reform Act requiring sentencing courts to apply the Guidelines "in effect on the date the defendant is sentenced." 18 U. S. C. § 3553(a)(4)(A)(ii). The Court interpreted this language to create a new "background sentencing principle," under which courts should apply penalties in effect at the time of sentencing, even if the penalties were not in effect at the time of the offense. *Dorsey*, 132 S. Ct., at 2332.

For "sentencing on remand," however, the very same statutory provision relied on in *Dorsey* contains an explicit exception. Section 3553(a)(4)(A)(ii) states that sentencing courts shall apply the Guidelines "that, *except as provided in section 3742(g)*, are in effect on the date the defendant is sentenced" (emphasis added). The cited exception in turn provides that "[a] district court to which a case is remanded . . . shall apply the guidelines . . . that were in effect *on the date of the previous sentencing* of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date." 18 U.S.C. § 3742(g)(1) (emphasis added).[2] As this Court has made clear, "[sections] 3553(a)(4)(A) and 3742(g)(1) together . . . express Congress's intent that the

[2] Section 3742(g)(1) was enacted in April 2003 as part of the PROTECT Act, 117 Stat. 650.

district court at resentencing apply the Guidelines that were in effect at the time of the defendant's original sentencing." *United States v. Taylor*, 648 F.3d 417, 424 (6th Cir. 2011); see also *United States v. Williams*, 411 F.3d 675 (6th Cir. 2005).

In light of Section 3742(g)(1), the "background sentencing principle" relied upon in *Dorsey* is subject to an important limitation: If new penalties are enacted after an offender's initial sentence has already been imposed, they do not apply to that offender during any subsequent sentencing on remand. Instead, the offender remains subject to the penalties that applied at the time of initial sentencing.

For the present case, the implications of this rule are clear: Because Hughes received his original sentence before the effective date of the Fair Sentencing Act, he remains bound by the pre-Act penalties that applied at that time. Section 3553(a)(4)(A) does not indicate a contrary result but rather *confirms* that the original sentencing law should apply, and thus further *reinforces* the venerable presumption against retroactivity set forth in the federal saving statute.

The "background sentencing principle" relied on in *Dorsey* was based purely on the language in Section 3553(a)(4)(A) instructing courts to apply the "Guidelines" in effect at the time of sentencing. Thus, in order to prevent that new principle from applying during sentencing on remand, it would be enough if Section 3742(g)(1) simply referred to the Guidelines and nothing else.

In fact, however, Section 3742(g)(1) tells court not only to apply the "Guidelines" that were in effect on the date of the original sentence, but also to apply "any amendments thereto by any act of Congress that was in effect on such date." By instructing courts to apply sentencing statutes that were "in effect" on "the date of the previous sentencing," Section 3742(g)(1) makes clear that the courts should *not* apply sentencing statutes that were *not* yet effective on that date. And, as explained above, the FSA was not yet effective on the date of Hughes's initial sentencing.

In contrast, the Anti-Drug Abuse Act of 1986 *was* in effect on the date of Hughes's initial sentencing. Congress enacted the ADAA to amend the Guidelines that were being formulated by the Sentencing Commission pursuant to the Sentencing Reform Act of 1984. "While Congress was considering adoption of the [ADAA], the Sentencing Commission was engaged in formulating the Sentencing Guidelines . . . using an empirical approach based on data about past sentencing practices." *See Kimbrough v. United States*, 552 U.S. 85, 96-97 (2007). Once the ADAA passed, however, the Commission was required to deviate from its "empirical approach," and instead to "employ[] the [ADAA's] weight-driven scheme . . . for drug-trafficking offenses." *Id.* Because the mandatory minimums enacted in the ADAA altered the permissible scope of the Guidelines ranges, each new set of Guidelines promulgated between 1986 and 2010 was required to, and

did, take the minimums into account. Thus, as long as the minimums remained in effect, they served as lasting amendments to the Guidelines. Because these "amendments" were in effect at the time of Hughes's original sentencing, they apply on resentencing under Section 3742(g)(1).

III. The Language of the Fair Sentencing Act Does Not Indicate that Congress Intended the Act to Apply Retroactively During Sentencing on Remand

The Court in *Dorsey* further relied on language in the Fair Sentencing Act instructing the Sentencing Commission "to promulgate 'as soon as practicable' . . . 'conforming amendments' to the Guidelines that 'achieve consistency with other guideline provisions and applicable law.'" 132 S. Ct., at 2332 (quoting 124 Stat. 2374). According to *Dorsey*, the phrase "applicable law" referred to the newly reduced mandatory minimums of the Fair Sentencing Act. Thus, in order to make the Guidelines "consistent" with these new mandatory minimums, the Commission was required to promulgate amendments to the Guidelines taking into account the lower mandatory minimums; and the Commission was required to extrapolate from these fixed minimums in order to set "proportional[]" Guidelines ranges for offenses involving "small amounts of crack that did not fall within the scope of the mandatory minimum provisions." *Id*. at 2332-33.

Because the new Guidelines amendments would necessarily apply retroactively to all future initial sentencing proceedings under the terms of Section 3553(a)(4)(A), the Court concluded that Congress must have wanted the

mandatory minimums themselves to have similar retroactive effect. In reaching this conclusion, the Court noted that it would be impossible to "achieve consistency" with a Guidelines scale based on the new mandatory minimums, as long as the old mandatory minimums remained in effect. 132 S. Ct. at 2333.

When it comes to resentencing on remand, however, the situation is quite different: Section 3553(a)(4)(A) expressly indicates that resentencing should be based not on the new Guidelines, but instead on whatever Guidelines applied at the time of the defendant's previous sentencing, in accordance with Section 3742(g)(1). Thus, if the defendant received his initial sentence before the Fair Sentencing Act, then the old Guidelines will apply during sentencing on remand, which will match perfectly with the old mandatory minimums. Under these circumstances, there is simply no need to replace the old mandatory minimums in order to "achieve consistency" between the two. To the contrary, the only way to "achieve consistency" is to apply the pre-FSA law—as reflected in the applicable statutes and guidelines—that was effective on the date of the initial sentencing. The district court recognized as much when it noted that "it would be odd indeed to apply the guidelines in effect at the time of the original sentencing but a mandatory minimum by statute that came along later." (R. 74: Resent. Tr. at 10.)

IV. Applying the Old Mandatory Minimums for Sentencing on Remand Would Not Create Sentencing Disparities of a Type that Congress Sought to Avoid

The Court in *Dorsey* noted that failing to apply the new mandatory minimums to the sentencing of pre-FSA offenders would create disparities of a type that Congress sought to avoid: A pre-FSA offender would receive a much greater sentence than an identical post-FSA offender even though the two received their sentences at exactly the same time. *Dorsey*, 132 S. Ct., at 2333.

Applying the old mandatory minimums during sentencing on remand, however, would not create any such disparities: Every offender would simply be subject to the law that applied at the time of his or her *initial* sentencing, as expressly required by Section 3742(g)(1). If the defendant was sentenced after the effective date of the Fair Sentencing Act, then he would receive the benefit of the reduced mandatory minimums. If not, then not. The only disparity would be between those who received their initial sentences before the Act's effective date, and those who received their initial sentences after that date—which is exactly what the Court endorsed in *Dorsey*. *See* 132 S. Ct. at 2335 (noting that "this particular new disparity (between those pre-Act offenders already sentenced and those not yet sentenced as of August 3) cannot make a critical difference"); *see also id.* (noting that "the ordinary practice is to apply new penalties to defendants not yet sentenced, while *withholding that change from defendants already sentenced*" (emphasis added)).

Moreover, ignoring the operation of Section 3742(g)(1) in this case would result in exactly the type of arbitrary disparities that the Court disfavored in *Dorsey* because identical pre-Act offenders undergoing initial sentencing at exactly the same time "would receive radically different sentences" if some of them happened to face resentencing on remand at a later date after the Fair Sentencing Act was passed. *See* 132 S.Ct. at 2333. Just because some defendants are subject to resentencing for the same crime at a later date, there is no reason why a different set of penalties apply should apply to them.

The facts of this case illustrate how strange it would be to ignore the sentencing law that applied at the time of the original sentence, because here the defendant's original sentence never should have been vacated in the first place. Not only was the vacatur based on grounds completely unrelated to his mandatory-minimum crack sentence, but those grounds turned out to be legally erroneous under the Supreme Court's subsequent decision in *Abbott*. Thus, because Hughes's original sentence was perfectly lawful all along, it was eminently sensible for the district court to reimpose the sentence on its original terms.

In a sense, it is true that applying Section 3742(g)(1) in this case "would involve imposing upon the pre-Act offender a pre-Act sentence at a time after Congress had specifically found in the Fair Sentencing Act that such a sentence was unfairly long." *Dorsey*, 132 S.Ct. at 2333. But this is an inherent feature of

both the federal saving statute and Section 3742(g)(1), which apply in every case where a defendant receives an initial sentence and then faces resentencing after Congress or the Sentencing Commission has reduced the penalty. By its terms, Section 3742(g)(1) not only authorizes this result, but compels it as well.

V. Applying the Old Mandatory Minimums During Sentencing on Remand Would Not "Make Things Worse"

The Court in *Dorsey* noted that failing to apply the Fair Sentencing Act's reduced mandatory minimums retroactively would "make matters worse" by creating dramatic sentencing "cliffs"—*i.e.*, vast disparities between the pre-Act mandatory minimums and the reduced post-Act Guidelines. These "cliffs" would cause slight differences in the quantity of crack possession to result in enormous jumps in sentences because of the difference between the newly lowered Guidelines range and the old mandatory minimums. In order to avoid this result, the Court held that the old mandatory minimums cannot be applied to pre-Act offenders who had not yet been sentenced, and whose initial sentencing would thus be governed by the post-Act Guidelines under Section 3553(a)(4)(A).

This concern is not relevant for resentencing on remand, where Section 3742(g)(1) makes clear that the applicable Guidelines will be those that were in effect at the time of the initial sentencing. Thus, if the pre-FSA mandatory minimums apply because they were in effect during the initial sentencing, then the pre-FSA Guidelines will apply for the same reason. The consistent application of

pre-FSA sentencing laws would produce no "cliffs" or other anomalies to worry about.

VI. Unlike in *Dorsey*, Here There Are Strong Countervailing Considerations Against Applying the Fair Sentencing Act During Sentencing on Remand

Finally, the Court in *Dorsey* stated that it had found "no countervailing considerations" cutting against the retroactive application of the Fair Sentencing Act. Here, by contrast, there are several countervailing considerations, including most obviously the fact that the Section 3553(a)(4)(A), Section 3742(g)(1), and the federal saving statute all cut in the same direction. Moreover, it would be odd to think that Congress intended for FSA coverage to turn not on the date of the defendant's offense, and not on the date of the defendant's sentencing, but on the fortuity of whether the defendant's original sentence was set aside on reasons entirely unrelated to the FSA.

Such a regime would create a strange and arbitrary type of disparity, as illustrated by the situation of two offenders who committed their crimes at the same time, and who received their initial sentences at the same time, before the enactment of the Fair Sentencing Act. If one of the defendants were to have his sentence vacated on appeal for reasons unrelated to the FSA, causing his case to be remanded for resentencing after the Act's effective date, is there any conceivable reason why he should receive the benefit of the Act while the other should not? Given the stable background principle that resentencing should be governed by the

same law that applied during initial sentencing, it cannot be said that Congress "clearly" intended the Fair Sentencing Act to establish a contrary rule.

To be sure, applying Section 3742(g)(1) will result in one arguable disparity: The reduced penalties of the Fair Sentencing Act will apply to offenders receiving initial sentences after the Act's effective date, but not to those initially sentenced before the Act's effective date. But as the Supreme Court itself explained in *Dorsey*, that kind of disparity is inevitable whenever Congress passes a statute reducing the penalties for an offense, because there must always be some cut-off point to determine who will receive the benefit of the new reduction. See *Dorsey*, 132 S. Ct. at 2355 (noting that some "disparities, reflecting a line-drawing effort, will exist whenever Congress enacts a new law changing sentences"); *see also id.* ("[T]his particular new disparity (between those pre-Act offenders already sentenced and those not yet sentenced as of August 3) cannot make a critical difference"). The old federal saving statute based the cut-off point on the time of the offense. According to *Dorsey*, the Sentencing Reform Act created a new cut-off point, based on the time of initial sentencing. But once an initial sentence is meted out, Section 3742(g)(1) makes clear that the governing law becomes fixed as of that time, thus making any subsequent changes inapplicable upon resentencing.

CONCLUSION

For the foregoing reasons, the judgment of the District Court should be affirmed.

Dated: March 8, 2013

Respectfully Submitted,

/s/ Anthony J. Dick
Anthony J. Dick

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C) OF THE FEDERAL RULES OF APPELLATE PROCEDURE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of this brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), this brief includes 4,621 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned has relied upon the word count of this word-processing system in preparing this certificate.

Dated: March 8, 2013

/s/ Anthony J. Dick

Anthony J. Dick
JONES DAY
51 Louisiana Avenue NW
Washington, D.C. 20001
(202) 879-7679

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Brief of Court-Appointed *Amicus Curiae* in Support of the Judgment Below with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to the appropriate counsel. If any parties or their counsel of record are not registered users, I have served them by placing a true and correct copy of the foregoing document in the United States mail, postage prepaid, to their address of record.

Dated: March 8, 2013

/s/ Anthony J. Dick

Anthony J. Dick
JONES DAY
51 Louisiana Avenue NW
Washington, D.C. 20001
(202) 879-7679