Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DORSEY *v.* UNITED STATES

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 11–5683. Argued April 17, 2012—Decided June 21, 2012*

Under the Anti-Drug Abuse Act (1986 Drug Act), the 5- and 10-year mandatory minimum prison terms for federal drug crimes reflected a 100-to-1 disparity between the amounts of crack cocaine and powder cocaine needed to trigger the minimums. Thus, the 5-year minimum was triggered by a conviction for possessing with intent to distribute 5 grams of crack cocaine but 500 grams of powder, and the 10-year minimum was triggered by a conviction for possessing with intent to distribute 50 grams of crack but 5,000 grams of powder. The United States Sentencing Commission—which is charged under the Sentencing Reform Act of 1984 with writing the Federal Sentencing Guidelines—incorporated the 1986 Drug Act's 100-to-1 disparity into the Guidelines because it believed that doing so was the best way to keep similar drug-trafficking sentences proportional, thereby satisfying the Sentencing Reform Act's basic proportionality objective. The Fair Sentencing Act, which took effect on August 3, 2010, reduced the disparity to 18-to-1, lowering the mandatory minimums applicable to many crack offenders, by increasing the amount of crack needed to trigger the 5-year minimum from 5 to 28 grams and the amount for the 10-year minimum from 50 to 280 grams, while leaving the powder cocaine amounts intact. It also directed the Sentencing Commission to make conforming amendments to the Guidelines "as soon as practicable" (but no later than 90 days after the Fair Sentencing Act's effective date). The new amendments became effective on November 1, 2010.

In No. 11–5721, petitioner Hill unlawfully sold 53 grams of crack in

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*Together with No. 11–5721, *Hill* v. *United States,* also on certiorari to the same court.

Syllabus

2007, but was not sentenced until December 2010. Sentencing him to the 10-year minimum mandated by the 1986 Drug Act, the District Judge ruled that the Fair Sentencing Act's 5-year minimum for selling that amount of crack did not apply to those whose offenses were committed before the Act's effective date. In No. 11–5683, petitioner Dorsey unlawfully sold 5.5 grams of crack in 2008. In September 2010, the District Judge sentenced him to the 1986 Drug Act's 10-year minimum, finding that it applied because Dorsey had a prior drug conviction and declining to apply the Fair Sentencing Act, under which there would be no mandated minimum term for an amount less than 28 grams, because Dorsey's offense predated that Act's effective date. The Seventh Circuit affirmed in both cases.

Held: The Fair Sentencing Act's new, lower mandatory minimums apply to the post-Act sentencing of pre-Act offenders. Pp. 10–20.

(a) Language in different statutes argues in opposite directions. The general federal saving statute (1871 Act) provides that a new criminal statute that "repeal[s]" an older criminal statute shall not change the penalties "incurred" under that older statute "unless the repealing Act shall so expressly provide." 1 U. S. C. §109. The word "repeal" applies when a new statute simply diminishes the penalties that the older statute set forth, see *Warden* v. *Marrero*, 417 U. S. 653, 659–664, and 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, see *United States* v. *Reisinger*, 128 U. S. 398, 401. In contrast, the Sentencing Reform Act says that, regardless of when the offender's conduct occurs, the applicable sentencing guidelines are the ones "in effect on the date the defendant is sentenced." 18 U. S. C. §3553(a)(4)(A)(ii).

Six considerations, taken together, show that Congress intended the Fair Sentencing Act's more lenient penalties to apply to offenders who committed crimes before August 3, 2010, but were sentenced after that date. First, the 1871 saving statute permits Congress to apply a new Act's more lenient penalties to pre-Act offenders without expressly saying so in the new Act. The 1871 Act creates what is in effect a less demanding interpretive requirement because the statute "cannot justify a disregard of the will of Congress as manifested, either expressly or by necessary implication, in a subsequent enactment." *Great Northern R. Co.* v. *United States,* 208 U. S. 452, 465. Hence, this Court has treated the 1871 Act as setting forth an important background principle of interpretation that requires courts, before interpreting a new criminal statute to apply its new penalties to a set of pre-Act offenders, to assure themselves by the "plain import" or "fair implication" of the new statute that ordinary interpretive considerations point clearly in that direction. Second, the Sen-

Syllabus

tencing Reform Act sets forth a special and different background principle in §3553(a)(4)(A)(ii), which applies unless *ex post facto* concerns are present. Thus, new, lower Guidelines amendments apply to offenders who committed an offense before the adoption of the amendments but are sentenced thereafter. Third, language in the Fair Sentencing Act implies that Congress intended to follow the Sentencing Reform Act's special background principle here. Section 8 of the Fair Sentencing Act requires the Commission to promulgate conforming amendments to the Guidelines that "achieve consistency with other guideline provisions and applicable law." Read most naturally, "applicable law" refers to the law as changed by the Fair Sentencing Act, including the provision reducing the crack mandatory minimums. And consistency with "other guideline provisions" and with prior Commission practice would require application of the new Guidelines amendments to offenders who committed their offense before the new amendments' effective date but were sentenced thereafter. Fourth, applying the 1986 Drug Act's old mandatory minimums to the post-August 3 sentencing of pre-August 3 offenders would create sentencing disparities of a kind that Congress enacted the Sentencing Reform Act and the Fair Sentencing Act to prevent. Fifth, not to apply the Fair Sentencing Act would do more than preserve a disproportionate status quo; it would make matters worse by creating new anomalies—new sets of disproportionate sentences—not previously present. That is because sentencing courts must apply the new Guidelines (consistent with the Fair Sentencing Act's new minimums) to pre-Act offenders, and the 1986 Drug Act's old minimums would trump those new Guidelines for some pre-Act offenders but not for all of them. Application of the 1986 Drug Act minimums to pre-Act offenders sentenced after the new Guidelines take effect would therefore produce a set of sentences at odds with Congress' basic efforts to create more uniform, more proportionate sentences. Sixth, this Court has found no strong countervailing considerations that would make a critical difference. Pp. 10–19.

(b) The new Act's lower minimums also apply to those who committed an offense prior to August 3 and were sentenced between that date and November 1, 2010, the effective date of the new Guidelines. The Act simply instructs the Commission to promulgate new Guidelines "as soon as practicable" (but no later than 90 days after the Act took effect), and thus as far as Congress was concerned, the Commission might have promulgated those Guidelines to be effective as early as August 3. In any event, courts, treating the Guidelines as advisory, possess authority to sentence in accordance with the new minimums. Finally, applying the new minimums to all who are sentenced after August 3 makes it possible to foresee a reasonably smooth tran-

Syllabus

sition, and this Court has no reason to believe Congress would have wanted to impose an unforeseeable, potentially complex application date. Pp. 19–20.

No. 11–5683, 635 F. 3d 336, and No. 11–5721, 417 Fed. Appx. 560, vacated and remanded.

BREYER, J., delivered the opinion of the Court, in which KENNEDY, GINSBURG, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C. J., and THOMAS and ALITO, JJ., joined.

SUPREME COURT OF THE UNITED STATES

Nos. 11–5683 and 11–5721

EDWARD DORSEY, SR., PETITIONER
11–5683 *v.*
UNITED STATES

COREY A. HILL, PETITIONER
11–5721 *v.*
UNITED STATES

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

[June 21, 2012]

JUSTICE BREYER delivered the opinion of the Court.

Federal statutes impose mandatory minimum prison sentences upon those convicted of federal drug crimes. These statutes typically base the length of a minimum prison term upon the kind and amount of the drug involved. Until 2010, the relevant statute imposed upon an offender who dealt in powder cocaine the same sentence it imposed upon an offender who dealt in one one-hundredth that amount of crack cocaine. It imposed, for example, the same 5-year minimum term upon (1) an offender convicted of possessing with intent to distribute *500* grams of powder cocaine as upon (2) an offender convicted of possessing with intent to distribute *5* grams of crack.

In 2010, Congress enacted a new statute reducing the crack-to-powder cocaine disparity from 100-to-1 to 18-to-1. Fair Sentencing Act, 124 Stat. 2372. The new statute took

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