No. 10-5258

IN THE

Supreme Court of the United States

CLIFTON TERELLE MCNEILL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF OF PETITIONER CLIFTON TERELLE MCNEILL

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April 18, 2011

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
ARGUMENT	1
I. THE TEXT OF ACCA DOES NOT SUPPORT THE GOVERNMENT'S READING OF THE "SERIOUS DRUG OFFENSE" DEFINITION.	1
A. The "Serious Drug Offense" Definition Has A Plain Meaning.	1
1. "Is prescribed" means that current state law provides the standard for determining the maximum imprisonment term for an offense.	1
2. Under its plain meaning, a "serious drug offense" for ACCA purposes is a generic offense and not an individual defendant's crime.	3
B. ACCA Focuses On The Defendant's Federal Firearm Offense, Not On The Defendant's Prior State Convictions.	5
C. The Government's Contextual Argument Conflates The "Violent Felony" And "Serious Drug Offense" Standards.	8
1. The "violent felony" determination is not wholly backward-looking.	9
2. The "serious drug offense" and "violent felony" provisions have material distinctions.	10
II. ACCA BASES THE "SERIOUS DRUG OFFENSE" PREDICATE ON A STATE'S CURRENT VIEW OF SERIOUSNESS.	11

TABLE OF CONTENTS—continued

A. Legislative Judgments Concerning The Seriousness Of Drug Offenses Change Over Time. 12

B. The Government's Interpretation Of ACCA Requires Federal Courts To Impose Mandatory Minimum Sentences Based On Repudiated And Outdated Laws. 14

III. A STATE'S RETROACTIVITY DECISIONS ARE UNRELATED TO ITS ASSESSMENTS OF OFFENSE SERIOUSNESS. 15

IV. USING A STATE'S CURRENT LAW TO MAKE THE "SERIOUS DRUG OFFENSE" DETERMINATION IS SIMPLER, CONSISTENT WITH ACCA'S PLAIN LANGUAGE AND PURPOSE, AND IS MORE EQUITABLE THAN THE GOVERNMENT'S RETROACTIVITY-BASED APPROACH. 18

A. The Government's Approach Suffers The Same Infirmities Inherent In The Fourth Circuit's Rule. 18

B. Petitioner's Approach To The "Serious Drug Offense" Determination Is Simple And Fair. 19

CONCLUSION 22

TABLE OF AUTHORITIES

CASES Page

Begay v. *United States*, 553 U.S. 137 (2008) 9
Carachuri-Rosendo v. *Holder*, 130 S. Ct. 2577 (2010) 3, 5
Chambers v. *United States*, 555 U.S 122 (2009) 9
Conn. Nat'l Bank v. *Germain*, 503 U.S. 249 (1992) 1
Consumer Prod. Safety Comm'n v. *GTE Sylvania, Inc.*, 447 U.S. 102 (1980) 3
Dickerson v. *New Banner Inst., Inc.*, 460 U.S. 103 (1983) 2
Lopez v. *Gonzalez*, 549 U.S. 47, 55 (2006) 5
In re Cruz, 134 P.3d 1166 (Wash. 2006) 6
Kimbrough v. *United States*, 552 U.S. 85 (2007) 14
Mallett v. *United States*, 334 F.3d 391 (6th Cir. 2003) 20
Nijhawan v. *Holder*, 129 S. Ct. 2294 (2009) 3
Taylor v. *United States*, 495 U.S. 575 (1990) 9
United States v. *Allen*, 282 F.3d 339 (2002) 20
United States v. *Bean*, 537 U.S. 71 (2002) 11
United States v. *Darden*, 539 F.3d 116 (2d Cir. 2008) 2, 13
United States v. *Hinojosa*, 349 F.3d 200 (5th Cir. 2003) 2, 13
United States v. *McGlory*, 968 F.2d 309 (3d Cir. 1992) 7
United States v. *McNeill*, 598 F.3d 161 (4th Cir. 2010) 2
United States v. *Morton*, 17 F.3d 911 (6th Cir. 1994) 2

TABLE OF AUTHORITIES—continued

Page

United States v. *Pressley*, 359 F.3d 347 (4th Cir. 2004) 6
United States v. *Rodriquez*, 553 U.S. 377 (2008) ..... *passim*
United States v. *Romero*, 122 F.3d 1334 (10th Cir. 1997) 7
United States v. *Wilson*, 503 U.S. 329 (1992) 2

STATUTES

18 U.S.C. § 921(a)(20) 7
§ 924(e)(2) 2, 10
§ 922(g)(1) 5
21 U.S.C. § 841(b)(1)(A) 7
N.C. Gen. Stat. § 14-1.1 14
N.C. Gen. Stat §§ 15A-1340.17(c)-(d)..... 5, 15
N.C. Gen. Stat. §§ 90-95(a)-(b)..... 14, 15
Pub. L. No. 111-220, 124 Stat. 2372..... 14

LEGISLATIVE HISTORY

Senate Research Center, Bill Analysis of S.B. 1067, 73d Leg., Reg. Sess. (Tex. 1993) 13

OTHER AUTHORITIES

Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 Yale J. on Reg. 235 (1997) 13

ARGUMENT

I. THE TEXT OF ACCA DOES NOT SUPPORT THE GOVERNMENT'S READING OF THE "SERIOUS DRUG OFFENSE" DEFINITION.

The government does not dispute that in the Armed Career Criminal Act, Congress defined a "serious drug offense" by using the present tense. U.S. Br. 11, 17. The statute's plain meaning thus provides no support for the government's contention, made here for the first time, that "[t]he relevant time for evaluating the 'maximum term of imprisonment' associated with a defendant's conviction for a potential predicate offense is the time of the sentencing for that conviction." U.S. Br. 17. The government does not argue that its reading of 18 U.S.C. § 924(e)(2)(A)(ii) derives from the language of the text. Instead, the government invites this Court to construe the "serious drug offense" definition on the basis of the statute's context and structure. For the following reasons, this Court should decline the government's invitation.

A. The "Serious Drug Offense" Definition Has A Plain Meaning.

1. "Is prescribed" means that current state law provides the standard for determining the maximum imprisonment term for an offense.

A "cardinal cannon" of statutory construction demands that "courts must presume that a legislature says in a statute what it means and means in a statute what it says." *Conn. Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-54 (1992). In the Armed Career Criminal Act (ACCA), Congress defined a "serious drug offense," in relevant part, as one for

which a maximum term of imprisonment of ten years or more "is prescribed" by state law. 18 U.S.C. § 924(e)(2)(A)(ii). By employing the present tense, Congress required that a sentencing court look to the penalty a state currently prescribes for an offense, irrespective of the punishment in effect at the time of the defendant's state conviction. It is worth noting that none of the four circuit courts of appeal that have addressed the "serious drug offense" definition—even the two circuits that reject Petitioner's position in this case—has taken the government's novel position that ACCA speaks to the penalty in place at the time of the defendant's state crime. See *United States* v. *McNeill*, 598 F.3d 161, 165 (4th Cir. 2010); *United States* v. *Darden*, 539 F.3d 116, 121 (2d Cir. 2008); *United States* v. *Hinojosa*, 349 F.3d 200, 205 (5th Cir. 2003); *United States* v. *Morton*, 17 F.3d 911, 915 (6th Cir. 1994). No court has aligned with the government because the meaning of the phrase "is prescribed by law" is obvious.

"Congress' use of a verb tense is significant in construing statutes," *United States* v. *Wilson*, 503 U.S. 329, 333 (1992), especially in the criminal provisions addressing firearm violations, *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 116 (1983). This Court emphasized in *Dickerson* that Congress, through its use of verb tense, "carefully distinguished between present status and a past event" for purposes of 18 U.S.C. § 922(g)(1), the statute prohibiting convicted felons from possessing firearms. *Id.* Congress' use of the present tense to specify the penalty provided for a serious drug offense is no less significant in § 924(e)(2)(A)(ii).

The government simply does not address this Court's plain meaning jurisprudence. Instead, it

argues that ACCA's context and structure support its reading, even though the starting point and touchstone of any analysis is a statute's language. *Consumer Prod. Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). Here, the government has failed to advance any argument that the ordinary meaning of the words used in § 924(e)(2)(A)(ii) is so unclear that resort to other modes of statutory interpretation is required. See *id.* (stating, "Absent a clearly expressed legislative intention to the contrary, th[e] language must ordinarily be regarded as conclusive").

2. Under its plain meaning, a "serious drug offense" for ACCA purposes is a generic offense and not an individual defendant's crime.

ACCA requires sentencing courts to look to the maximum imprisonment term the law prescribes for "an offense." As this Court clarified in *United States* v. *Rodriquez*, "an offense" means "a violation of" state law. 553 U.S. 377, 382-83 (2008) Accordingly, a "serious drug offense" determination is a categorical, and not a defendant-specific, inquiry. *Id.* at 393; see also, *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577, 2587 n.11 (2010); *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2300 (2009) (noting that ACCA requires a "categorical" and not a "circumstance-specific" approach).

In its discussion, the government paraphrases § 924(e)(2)(A)(ii) as providing for "the 'maximum term of imprisonment' associated with a defendant's conviction for a potential predicate offense." U.S. Br. 17. In truth, the "serious drug offense" definition does not address "a defendant's conviction"; rather, it addresses "an offense." The difference matters.

The government's reference to "a defendant's conviction for a potential predicate offense" suggests that determining the penalty prescribed for "an offense" is the same as determining the maximum penalty a particular defendant faced. In fact, factors such as offense date are particular only to the individual defendant. Such factors are not components of the generic offense, and they do not contribute to offense "seriousness" within the meaning of ACCA's "serious drug offense" definition. Although the date a defendant commits the offense might ultimately affect the length of that person's sentence, it is not, consistent with *Rodriquez*, part of the "maximum term" of imprisonment for the "offense." See 553 U.S. at 393 (contrasting provision that "clearly focuses on the circumstances of the particular [defendant]" from ACCA's focus on "the offense").[1]

That Petitioner received a ten-year sentence under North Carolina's former sentencing laws is irrelevant to the question of whether his prior convictions are for "serious drug offenses" within the meaning of ACCA. It would indeed be "hard to accept the proposition that a defendant may lawfully be sentenced to a term of imprisonment that exceeds the 'maximum term of imprisonment . . . prescribed by law,'" U.S. Br. 15 (internal punctuation and citation omitted), but that is not what happened in Petitioner's case. Petitioner was not sentenced in

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1 Looking to the generic offense is further bolstered by ACCA's use of the phrase "for which" that links the maximum imprisonment term to the offense. The relevant question that the statute asks is, "What is the maximum imprisonment term prescribed by state law *for* the *offense* of conviction, *i.e.* the 'violation of' state law?" *See Rodriquez*, 553 U.S. at 383.

accordance with the penalties that North Carolina law currently "prescribes" for the *offenses* he committed. Rather, he received "the maximum term of imprisonment" that the state prescribed in the 1990s, when Petitioner sustained his convictions. That fact does not inform the penalty North Carolina "prescribes" for those offenses now. See *Carachuri-Rosendo,* 130 S. Ct. at 2582 ("Despite the fact that the *Lopez* petitioner had been punished as a felon under state law–and, indeed, received a 5-year sentence–the conduct of his offense was not punishable as a felony under federal law, and this prevented the state conviction from qualifying as an aggravated felony for immigration law purposes.") (citing *Lopez* v. *Gonzalez*, 549 U.S. 47, 55 (2006)).

In *Rodriquez*, the defendant's convictions categorically qualified because the offense of conviction included a recidivist enhancement that set the maximum imprisonment term at ten years. 553 U.S. at 393. Here, current North Carolina law prescribes a maximum of thirty-eight months' imprisonment for Petitioner's crimes, even with every possible recidivist enhancement applied. See N.C. Gen. Stat. §§ 15A-1340.17(c)-(d) (setting thirty-one months as the highest aggravated minimum term and thirty-eight months as the corresponding highest maximum for a Class G offense at the highest criminal history category). Petitioner's prior offenses, categorically, are not "serious drug offenses" under ACCA.

B. ACCA Focuses On The Defendant's Federal Firearm Offense, Not On The Defendant's Prior State Convictions.

ACCA addresses the defendant's violation of 18 U.S.C. § 922(g)(1); it does not punish the defendant's prior convictions or status as a recidivist. See

Rodriquez, 553 U.S. at 385-86 (noting, "This Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant") (internal quotations and citations omitted).[2] Section 924(e) focuses on the instant federal offense by use of the present tense to describe the two components that must exist in order to impose ACCA's penalties. Under the statute, an armed career criminal is "a person who ***violates*** section 922(g) . . . and ***has*** three previous [qualifying] convictions . . . " § 924(e)(1) (emphasis added). The present-tense verbs indicate the "previous convictions" must qualify as ACCA predicates at the time of the present federal firearms violation. See, *e.g.*, *United States* v. *Pressley*, 359 F.3d 347, 350 (4th Cir. 2004) (stating, "[T]he plain text dictates [the § 922(g)] violation serves as the event which the 'previous convictions' must precede."). Had Congress intended to place the ACCA determination in the past, it could have used the present perfect tense, as it did in § 922(g)(1), which applies to "any person . . . who ***has been convicted*** in any court of a crime

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2 The government relies heavily on the fact that this Court occasionally used the past tense when referring to the prescribed imprisonment term that applied in *Rodriquez*. U.S. Br. 21-23 (citing *Rodriquez*, 553 U.S. at 381-83). However, *Rodriquez* did not address the temporal issue presented here. Rather, this Court considered whether Washington's recidivist law formed part of the "relevant law" that determined the maximum imprisonment term for an offense. *Rodriquez*, 553 U.S. at 381-83. Indeed, the issue presented here could not have existed in *Rodriquez*, because Washington had not altered that recidivist law since its enactment in 1971. See *In re Cruz*, 134 P.3d 1166, 1168 (Wash. 2006) ("The substance and wording of the [recidivism] statute is the same today as it was in 1971").

punishable by imprisonment for a term exceeding one year." (emphasis added).[3]

Put another way, the overall context of ACCA makes it clear that the status of a state conviction as an ACCA predicate is not frozen at the time the conviction is sustained. Subsequent events can transform a prior conviction from one that qualifies as an ACCA predicate to one that does not. For example, a conviction which has been expunged, set aside or for which the defendant has been pardoned cannot be used as an ACCA predicate. 18 U.S.C. § 921(a)(20). Accordingly, whether a particular conviction qualifies as an ACCA predicate can only be determined as of the date of the federal sentencing. Petitioner's assertion that the penalty for a "serious drug offense" must be determined based on a state's current sentencing law is thus wholly consistent with ACCA's directive that the predicate status of prior convictions be determined as of the time of the

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3 Two of the appellate-court cases the government relies upon to support its reading of § 924(e)(2)(A)(ii) interpreted other statutes and looked at the use of the present perfect tense in those statutes. See *United States* v. *Romero*, 122 F.3d 1334, 1342 (10th Cir. 1997) (explaining that use of the phrase "has been convicted" in 18 U.S.C. § 3559(c), the federal three strikes law, "clearly indicate[d] the time of conviction" provided the relevant point in time); *United States* v. *McGlory*, 968 F.2d 309, 349-50 (3d Cir. 1992) (applying plain meaning of phrase "after two or more convictions for a felony drug offense have become final," 21 U.S.C. § 841(b)(1)(A), to conclude felony status of a prior conviction is evaluated at the time of that conviction); see U.S. Br. 34-35.

federal proceedings, not at the time they were originally sustained.

This is also consistent with the idea that "100% of the [ACCA] punishment" is for the federal firearm offense and none is for the predicate offenses. *Rodriquez*, 553 U.S. at 386. Given ACCA's evident intent to punish those who possess a firearm after committing three serious offenses, it makes sense to predicate that very harsh punishment on convictions that are viewed as serious at the time of the federal offense, rather than on convictions which were once viewed as serious but now no longer are. A reading which irrevocably fixes the seriousness of a prior conviction at the time it is sustained is thus contrary to ACCA's structure and purpose.

C. The Government's Contextual Argument Conflates The "Violent Felony" And "Serious Drug Offense" Standards.

The government contends ACCA's "context" and "overall structure" demonstrate that the penalty in effect at the time of the defendant's state conviction should be used to define a "serious drug offense." U.S. Br. 18, 23. Specifically, the government asserts that because this Court "has considered the time of the underlying conviction" to decide whether an offense "'is burglary' for purposes of the definition of 'violent felony,'" the penalty in effect at the time of the underlying conviction must also govern the determination of a "serious drug offense." U.S. Br. 23-24. The government's argument is wrong, for two reasons. First, contrary to the government's claim, the "violent felony" determination is not wholly backward-looking. Second, even if it were, that fact would not warrant disregarding the present-tense meaning of the "serious drug offense" definition.

1. The "violent felony" determination is not wholly backward-looking.

A "violent felony" determination under ACCA has two distinct components that the government conflates. Identifying the offense, the first component of the determination, necessarily requires looking to the time of the conviction, because the offense, itself, exists only in the past. Identifying, however, whether the offense *is* an ACCA predicate, the second component of the inquiry, requires a court to apply the generic, current, offense definition.

To illustrate, in *Taylor* v. *United States*, this Court adopted a unified federal standard for the violent felony predicate of "burglary." 495 U.S. 575 (1990). *Taylor* looked to a "generic burglary" definition free of the permutations of the various state laws. *Id.* at 599. The question in *Taylor* was whether the defendant's offense constituted a burglary, that is, whether it met the generic definition. The inquiry is present-day: it takes what the defendant did and asks, "Is what the defendant did 'burglary?'"

If the government's construction of the "serious drug offense" definition were applied to violent-felony determinations, it would seem logical to look to the characterization of the crime in effect at the time of the defendant's underlying conviction, but no one would suggest that approach to be valid. For example, no federal court sentencing someone today would say that drunk-driving or failure-to-report-for-service-of-sentence convictions are violent felonies because they were sustained prior to this Court's decisions in *Begay* v. *United States*, 553 U.S. 137 (2008), and *Chambers* v. *United States*, 555 U.S 122 (2009).

2. The "serious drug offense" and "violent felony" provisions have material distinctions.

Even if the government were correct that "violent felony" determinations are past-focused, that fact would not dictate a similar focus for purposes of defining a "serious drug offense." The process of identifying a "serious drug offense" contains an extra step that a violent-felony inquiry does not require.

A "violent felony" consists of its elements, elements that relate to force or to offenses similar in kind to burglary, arson, extortion, or explosives offenses. 18 U.S.C. § 924(e)(2)(B)(ii). The threshold felony-status requirement ("crime punishable by imprisonment for a term exceeding one year," § 924(e)(2)(B)) merely duplicates the definition for a § 922(g)(1) offense. All "violent felonies" qualify as ACCA predicates.

All drug offenses, however, are not "serious." Like a violent felony, a "serious drug offense" must contain certain offense elements (specifically, the "manufacturing, distributing, or possessing with intent to distribute, a controlled substance."). 18 U.S.C. § 924(e)(2)(A)(ii). Once the elements are identified, a violent-felony inquiry is at an end, but a "serious drug offense" inquiry is not. Even if the defendant's drug offense contains the requisite elements, it must also carry a maximum prison sentence of at least ten years. *Id.* Only those drug offenses which meet *both* the elements and penalty prongs are "serious drug offenses" under ACCA. Even if both the "serious drug offense" and "violent felony" provisions require looking to the past offense to identify what the defendant did, there is no reason why the past state penalty for a drug offense must be considered.

The government characterizes § 924(e)(2)(A)(ii) as an "outlier" because, unlike the violent-felony definition, the subsection uses the phrase "maximum term of imprisonment that is prescribed by law," rather than "punishable," to describe the qualifying penalty. U.S. 33-34. The significance, however, is not that the "serious drug offense" definition is an outlier, but that Congress did not intend that it be functionally indistinguishable from the "violent felony" definition. See *United States* v. *Bean*, 537 U.S. 71, 76 n.4 (2002) ("The use of different terms within related statutes generally implies that different meanings were intended") (internal quotations and citation omitted). Thus, even if, *arguendo*, a violent-felony inquiry were entirely retrospective, it does not mean that Congress intended a serious-drug-offense inquiry to be so as well.

II. ACCA BASES THE "SERIOUS DRUG OFFENSE" PREDICATE ON A STATE'S CURRENT VIEW OF SERIOUSNESS.

The government criticizes Petitioner for offering no suggestion as to "why Congress would have wanted to look to the time of the prior conviction to determine the punishment associated with a potential 'violent felony,' but to the time of the ACCA sentencing proceeding to determine the penalty associated with a potential 'serious drug offense.'" U.S. Br. 25. Petitioner submits that there are several compelling reasons for Congress to have chosen this structure.

As noted above, unlike violent felonies, not all drug offenses are "serious" for ACCA purposes. ACCA looks to state law statutory maximums that pertain to drug-trafficking offenses as a proxy for seriousness. Because of the relevance of state penalties, this Court recognizes that between violent felonies and serious drug offenses, state law plays a

more prominent role with respect to the latter. See *Rodriquez*, 553 U.S. at 387 (stating that "the meaning of 'burglary' for purposes of ACCA does not depend on the label attached by the law of a particular [s]tate, [citation omitted], but the 'maximum penalty prescribed by law' for a state offense necessarily depends on state law."). A "serious drug offense" assessment requires a deference to state judgments in a way that a "violent felony" analysis simply does not.

Moreover, the seriousness of a drug offense derives not from its elements, but from the state's view of the seriousness of the offense, codified in the statutory maximum. Because a state's judgment regarding the relative severity of drug offenses can change over time, looking at the state's present view of offense seriousness provides the proper deference to the state's power to define a "serious drug offense."

A. Legislative Judgments Concerning The Seriousness Of Drug Offenses Change Over Time.

In contrast to a violent felony, the elements of which are determined by the defendant's actions at the time of the offense, a drug offense is "serious" because of the maximum term of imprisonment a state sees fit to prescribe for it. A state's judgment regarding the seriousness of drug offenses can change over time, and the government agrees that a state's evolving judgment in this area "undoubtedly reflect[s] fluctuations over time in the degree of seriousness attached to particular offense conduct, as state legislatures make different policy judgments." U.S. Br. 37-38.

Judgments about drug offenses change in ways that opinions about violent crimes simply do not. From

Old Testament times, there has been societal condemnation of the kinds of violent conduct identified by ACCA. The same cannot be said for drug crimes.[4]

For example, changing views of offense seriousness prompted New York's legislature to reform that state's "inordinately harsh" Rockefeller drug laws. See *Darden*, 539 F.3d at 126-27 ("The consistent view of [] state lawmakers was that the Rockefeller drug-sentencing laws were too severe, then as now."). New York's new law "reflected a categorical rejection of the harshness of the Rockefeller sentencing laws" by the state. *Id.* at 127.

The Texas sentencing reform law summarized by the Fifth Circuit in *Hinojosa* drastically reduced the statutory maximum for low-level drug offenses. 349 F.3d at 204. Specifically, the law Texas enacted in 1994, reduced the statutory maximum for delivery of less than one gram of cocaine from ninety-nine to just two years' imprisonment. *Id*. The legislative record indicated the reform law revised the statutory imprisonment terms for "crimes according to their relative severity." Senate Research Center, Bill Analysis of S.B. 1067, 73d Leg., Reg. Sess., at 19 (Tex. 1993).

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4 As Judge Torruella has noted, "[d]rug enforcement policy involves the consideration of issues as diverse as international and national politics, law enforcement, sociology, economics, organizational dynamics, and penology, to mention only the most salient. In addition, there are complex scientific, pharmacological and health questions, and, of course, moral quandaries, raised by the various policy choices and alternatives." Juan R. Torruella, *The "War on Drugs": One Judge's Attempt at a Rational Discussion*, 14 Yale J. on Reg. 235, 238 (1997).

Changing views of drug offenses also occur at the federal level, as evidenced by the recent Fair Sentencing Act (FSA), which Congress enacted, "to restore fairness to Federal cocaine sentencing." See Pub. L. No. 111-220, 124 Stat. 2372 (2010) (Preamble). Congress designed the FSA to ameliorate the 100-to-1 sentencing disparity between powder and crack cocaine offenses that had been enshrined into law by the Anti-Drug Abuse Act of 1986, a disparity that some saw as racially discriminatory. See *Kimbrough* v. *United States*, 552 U.S. 85, 94-100 (2007).

B. The Government's Interpretation Of ACCA Requires Federal Courts To Impose Mandatory Minimum Sentences Based On Repudiated And Outdated Laws.

The foregoing examples demonstrate that legislative views about drug offenses can and do change in ways that views about violent felonies do not. One can reasonably conclude that Congress, having deferred to the states to determine the seriousness of a drug offense, would have intended to use the states' most current understanding of that seriousness before an ACCA sanction is imposed in a federal court.

In contrast, the government's reading of § 924(e)(2)(A)(ii) has the potential to so distort the very idea of a "serious drug offense" that the term ceases to have any real meaning. North Carolina law provides an example. At the time of Petitioner's state drug offenses, state law prescribed a maximum sentence of imprisonment of ten years irrespective of how small the quantity of drugs involved in the trafficking offense. N.C. Gen. Stat. §§ 90-95(a)-(b); § 14-1.1(8). Under the state's current law, possession

with intent to sell or deliver less than twenty-eight grams of cocaine carries a maximum sentence of imprisonment for thirty months, and a maximum of thirty-eight months for a completed sale. §§ 90-95(a)-(b) (classifying possession with intent to distribute as a Class H offense, and sale of a cocaine as a Class G Offense); §§ 15A-1340.17(c)-(d) (statutory imprisonment tables). The government would thus have it that the distribution of, say, one gram of cocaine prior to the enactment of Structured Sentencing be deemed a serious drug offense, but the distribution of twenty-seven grams after its enactment not be. The result is absurd, without any connection to the actual "seriousness" of the offenses at issue.

In addition, the government's approach would force federal courts to sentence defendants based on a view of "seriousness" that a state may have rejected years, or even decades, ago. And, because ACCA imposes a statutory minimum sentence, a federal sentencing court would have no ability to ameliorate, through a downward departure or variance, the effect of using a repudiated sentence. The government does not explain why, in a statute deferring to state judgments, Congress would have intended for ACCA to enshrine a view of seriousness that the state itself no longer holds. It also does not explain why Congress would have wanted to allow the federal government to use outdated state views as the basis for obtaining fifteen-year mandatory minimum sentences.

III. A STATE'S RETROACTIVITY DECISIONS ARE UNRELATED TO ITS ASSESSMENTS OF OFFENSE SERIOUSNESS.

The government argues that even if this Court construes § 924(e)(2)(A)(ii) as requiring use of the

current penalty for determining a "serious drug offense," "[P]etitioner cannot prevail unless the maximum penalty under 'current state law' should be determined without regard to whether the current law applies retroactively to the date the defendant committed the state offense." U.S. Br. 37 (internal punctuation and citation omitted). The government maintains that because North Carolina did not make its Structured Sentencing scheme retroactive, Petitioner would still be subject to ten-year maximum sentences for the drug offenses he committed. U.S. Br. 41. This reading, a mirror of the Fourth Circuit's construction of § 924(e)(2)(A)(ii), has a superficial appeal, but it ignores that not every factor that determines a defendant's individual punishment is relevant to the "maximum term" of imprisonment that "is prescribed" for "an offense" under § 924(e)(2)(A)(ii).

In *Rodriquez*, this Court held that a recidivism enhancement for a second drug offense constituted the "maximum term of imprisonment" under a state statute that provided a lower sentence for first offenders. *Rodriquez*, 553 U.S. at 382-83. The Court reasoned, "an offense committed by a repeat offender is often thought to reflect greater culpability and thus to merit greater punishment." *Id.* at 385. *Rodriquez* thus stands for the proposition that the "maximum term of imprisonment" the "law prescribes" for "an offense" includes those factors, such as recidivism, that are relevant to the seriousness of an offense. *Id.* at 382-83, 385-88. Accordingly, if a particular factor "has no bearing on the seriousness of an offense," *id.* at 385, it is not part of the "maximum term of imprisonment" the law "prescribes" for that "offense."

As Petitioner demonstrated in his opening brief, North Carolina's decision not to make Structured

Sentencing retroactive did not speak to the state's view about the seriousness of criminal offenses.[5] Pet. Br. 20-29. Use of the kind of general savings clause North Carolina employed is a purely administrative, ministerial decision. It makes the offense date *the* critical factor in determining a defendant's punishment, true, but that date has no bearing on whether the offense is serious. It cannot be overemphasized that a crime committed by someone on Monday is not more serious than the same crime committed by someone else on Wednesday.

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5 The government appears to concede that retroactivity is unrelated to seriousness. In its brief, the government writes that "Petitioner first contends (Br. 22) that a State's decision about whether to make a sentencing law retroactive 'is wholly unrelated to the State's view of the seriousness of the offense,' because there are usually reasons other than the offense's perceived seriousness that counsel against making a change retroactive. *While that may be true*, it does not change the reality that the intervening changes in the law on which petitioner wants to rely are inapplicable to the 'serious drug offense[s]' that he 'committed on occasions different from one another in 1991, 1992, and 1994." U.S. Br. 38 (emphasis added; citation omitted).

IV. USING A STATE'S CURRENT LAW TO MAKE THE "SERIOUS DRUG OFFENSE" DETERMINATION IS SIMPLER, CONSISTENT WITH ACCA'S PLAIN LANGUAGE AND PURPOSE, AND IS MORE EQUITABLE THAN THE GOVERNMENT'S RETROACTIVITY-BASED APPROACH.

A. The Government's Approach Suffers The Same Infirmities Inherent In The Fourth Circuit's Rule.

The government asserts that "[a]lthough [Petitioner] contrasts the administrability of his approach with that of the court of appeals . . ., he does not claim that his rule is easier to apply than the one the district court applied here." U.S. Br. 26. The government, however, advocates for a construction of the "serious drug offense" definition that is identical in all meaningful respects to that of the Fourth Circuit, not the district court. Consequently, every deficiency in the Court of Appeals' approach that Petitioner identified in his initial brief is equally applicable to the government's reading of § 924(e)(2)(A)(ii). Pet. Br. 31-35.

The government, in footnote 5 of its brief, states that "if a State subsequently lowered the maximum penalty and made that reduction available to defendants previously sentenced as of the same date as the defendant now at issue, the defendant could plausibly look to that reduced maximum as stating the law applicable to his previous conviction." U.S. Br. 18 n.5. Under the government's construction of § 924(e)(2)(A)(ii), therefore, a federal court must always look to the current sentencing law of a state to determine whether or not that law is retroactive. The fact that the court may ultimately opt for the old law does not preclude the need first to rule out the

relevance of the current law to the penalty the state prescribes for an offense. As with the Fourth Circuit's rule, the government's approach has the potential to embroil federal courts in the complexities of state retroactivity policies. Inevitably, as evidenced in the differing conclusions about the relevance of retroactivity in *Morton*, inconsistent interpretations of state law will arise. Pet. Br. 34-35 (citing *Hinojosa*, 348 F.3d at 205 and *Darden*, 539 F.3d at 123, n.9). In turn, conflicting interpretations will result in the arbitrary imposition of ACCA's severe penalties.

As noted above, a retroactivity-based approach makes the offense date the critical factor in determining whether a drug offense is serious for purposes of ACCA. As a result, in cases where two defendants appear before the same federal court and have the exact same drug offense, one committed a day before the effective date of a state's current law and the other on that date, the court will have to say the same offense both is and is not "serious." The result is not only contradictory logically, it requires the disparate imposition of ACCA's severe penalties.

B. Petitioner's Approach To The "Serious Drug Offense" Determination Is Simple And Fair.

Unlike the government's retroactivity-based approach, Petitioner's straightforward application of the plain meaning of the "serious drug offense" definition permits a court to simply look to current state law to determine whether a prior drug offense is a "serious" one or not. Taking a state's current sentencing law as the sole source of the "serious drug offense" determination ensures a unified standard for federal courts to apply and gives meaningful deference to a state's judgments about offense severity.

The government characterizes Petitioner's reading of § 924(e)(2)(A)(ii) as being "a hypothetical inquiry" that asks what sentence a defendant would receive "if his prior offense had not been committed until the time of his federal sentencing." U.S. Br. 41. In fact, Petitioner would require a court to take two simple steps: (1) identify the generic offense; and (2) look to a state's current law to determine the maximum imprisonment term prescribed for that offense. This approach, unlike the government's, does not require a court to sort through a state's retroactivity policies to determine which version of a state law controls; retroactivity is simply irrelevant under Petitioner's reading of the statute.

The government believes applying the current state penalty to a prior conviction "presents considerable potential difficulties" if a state reformulates a defendant's prior offense between the conviction and the federal sentencing proceeding. U.S. Br. 27. As an initial observation, it does not appear that such reformulations occur frequently, as the government has cited only two cases from almost ten years ago that presented this situation. U.S. Br. 27-28 (citing *United States* v. *Allen*, 282 F.3d 339 (2002); *Mallett* v. *United States*, 334 F.3d 391 (6th Cir. 2003)). And, regardless of frequency, the same difficulties would apply under the government's retroactivity-based approach where the current law retroactively applied to old, re-formulated offenses. More important, in cases where a federal court cannot categorically determine that a prior offense is "serious," and therefore decides that ACCA cannot apply, that court could still imprison the defendant for up to ten years under § 922(g)(1).

Finally, the government asserts that Petitioner's reading leads to "troubling" results if the federal

sentencing date rather than the federal offense date provides the point at which to measure the seriousness of a predicate drug offense. U.S. Br. 30; see also U.S. Br. 19 n.6 (noting that amici contend the seriousness of a predicate offense is measured at the time of the federal offense, citing NACDL Amicus Br. 5). While Petitioner has proposed the federal sentencing date as the proper time to determine whether a prior conviction is for a predicate serious drug offense, using the date of the defendant's federal firearm violation would also comport with the plain meaning of the statute. In fact, at oral argument in the court below, Petitioner suggested that the date of the § 922(g)(1) offense could be the relevant time to assess the seriousness of a prior drug offense. See *United States* v. *McNeill,* No. 09-4083, Pet. Rehrg. *En Banc*, at 14, (4th Cir. Mar. 22, 2010). Pegging the term of imprisonment "prescribed by law" to the date of the federal offense, rather than the date of the federal sentencing hearing, erases the government's concern for the similarly-situated defendants it hypothesizes. In contrast, all of the problems arising from using the date of the state offense, the reading advocated by the government, remain.

CONCLUSION

This Court should reverse the decision of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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April 18, 2011 * Counsel of Record