No. 10-5258

IN THE

# Supreme Court of the United States

CLIFTON TERELLE MCNEILL,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondents.*

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

## BRIEF OF PETITIONER CLIFTON TERELLE MCNEILL

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## QUESTION PRESENTED

The Armed Career Criminal Act (ACCA) applies to a person who "violates section 922(g)" and "has three previous convictions . . . for a violent felony or a serious drug offense." 18 U.S.C. § 924(e)(l). A "serious drug offense" is defined in relevant part as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii). The Fourth Circuit Court of Appeals affirmed the district court's classification of Petitioner's prior North Carolina drug convictions as "serious drug offenses" under ACCA, even though at the time of Petitioner's federal sentencing, those offenses carried less than ten years' imprisonment under North Carolina law. The Fourth Circuit held that because Petitioner's crimes had been punishable by ten years in prison at the time he sustained his state convictions, and because North Carolina did not apply its current lesser terms retroactively, Petitioner's convictions qualified as "serious drug offenses" under ACCA.

The question presented is: Whether the plain meaning of the phrase "is prescribed by law" in the ACCA definition of a "serious drug offense" requires a federal sentencing court to look to the maximum penalty prescribed by state law at the time of the federal sentencing, regardless of whether the state has made the law retroactive.

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## OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence is reported at 598 F.3d 161. (J.A. 126).

## JURISDICTION

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence was issued on March 8, 2010. (J.A. 126). On March 22, 2010, Petitioner submitted a request for rehearing and rehearing en banc which the Fourth Circuit Court of Appeals denied on April 5, 2010. (J.A. 137). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION INVOLVED

The Armed Career Criminal Act's sentencing penalties apply "[i]n the case of a person who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense . . . ." 18 U.S.C. § 924(e)(1).

ACCA defines a "serious drug offense" in pertinent part as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii).

## STATEMENT OF THE CASE

### A. Petitioner's Offense, Conviction, Sentencing, And Appeal.

On February 28, 2007, police in Fayetteville, North Carolina, arrested the Petitioner, Clifton Terelle McNeill, following a traffic stop. (J.A. 46). During a search incident to that arrest, the officers found a firearm and 3.1 grams of cocaine base in Petitioner's possession. (J.A. 46).

On January 2, 2008, a federal grand jury sitting in the Eastern District of North Carolina returned a three-count indictment that charged Petitioner with unlawful possession of a firearm by a felon, 18 U.S.C. § 922(g)(1), (Count I); possession with intent to distribute a quantity of cocaine base, 21 U.S.C. § 841(a)(1), (Count II); and possession of a firearm in furtherance of a drug trafficking crime, 18 U.S.C. § 924(c), (Count III). (J.A. 13, 27-28). On August 18, 2008, Petitioner pleaded guilty to Counts I and II, pursuant to a plea agreement that called for the dismissal of Count III at the time of sentencing. (J.A. 18, 31-40, 42, 80-81).

On January 13, 2009, the district court sentenced Petitioner to imprisonment for concurrent terms of 300 months on Count I, the felon-in-possession count, and 240 months on Count II. (J.A. 80-82). The sentence for Count I reflected both a designation of Petitioner as an armed career criminal under 18 U.S.C. § 924(e) and an upward departure above the sentencing guideline imprisonment range of 188 to 235 months. (J.A. 95-96, 98-100, 104, 118-125).

The district court found that Petitioner qualified for the Armed Career Criminal Act enhancement based on two 1995 convictions in North Carolina state court

for common law robbery and felony assault, and six North Carolina convictions Petitioner sustained between 1992 and 1995 for sale of cocaine and possession of cocaine for sale. (J.A. 47-53, 117-18). Petitioner conceded that his robbery and assault convictions qualified as ACCA predicates because they were "violent felonies," but he disputed that any of his drug convictions qualified as "serious drug offenses." (J.A. 71-72). With respect to the latter, Petitioner said that while his drug crimes had carried a maximum imprisonment term of at least ten years when he committed them, North Carolina had lowered its drug penalties by the time of his federal sentencing. (J.A. 71-72). Petitioner maintained that because of the change in the law, his violations did not qualify as "serious drug offenses" because they no longer carried ten-year penalties. (J.A. 71-72, 75-76). On this basis, Petitioner argued he had only two predicate convictions—the violent felonies—for purposes of the ACCA sentencing enhancement. (J.A. 71-72, 75-76, 117-18). Over-ruling Petitioner's objection, the district court said that "[u]nder the ACCA, a court looks to the maximum sentences for the offenses at issue at the time of the [prior] offense." (J.A. 118).

On January 13, 2009, Petitioner timely appealed his sentence to the United States Court of Appeals for the Fourth Circuit. (J.A. 106-07). On appeal, Petitioner repeated his claim that his North Carolina drug convictions were not "serious drug offenses" because at the time of his federal sentencing the offenses were no longer punishable by a term of at least ten years in prison.[1] (J.A. 128-32). Noting that

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1 Petitioner also challenged the procedural and substantive reasonableness of the district court's upward departure, a

ACCA defines a serious drug offense as one for which a ten-year imprisonment term "is prescribed by law," Petitioner argued the plain meaning of the phrase required a court to measure seriousness by the maximum penalty presently in effect and not by any term that might have applied at the time of the state conviction. (J.A. 129-30).

In support of his argument, Petitioner cited the Second and Sixth Circuit decisions in *United States* v. *Darden*, 539 F.3d 116 (2d Cir. 2008), and *United States* v. *Morton*, 17 F.3d 911 (6th Cir. 1994). (J.A. 130). In those cases, the circuit courts said that ACCA defines a serious drug offense by means of the maximum term of imprisonment that is in place at the time of the federal sentencing. *Darden*, 539 F.3d at 122, 127; *Morton*, 17 F.3d at 915. Both circuits also concluded that the rule of lenity required that any doubt about the maximum sentence that "is prescribed by law" be resolved in favor of looking at a state's current penalties. *Darden*, 539 F.3d at 128; *Morton*, 17 F.3d at 915.

The Court of Appeals rejected Petitioner's argument and declined to follow *Darden* and *Morton*. (J.A. 131-32). Instead, the Fourth Circuit adopted the position of the United States Court of Appeals for the Fifth Circuit. *Id.* (citing *United States* v. *Hinojosa*, 349 F.3d 200 (5th Cir. 2003)). Consistent with *Hinojosa*, the Fourth Circuit reasoned that because North Carolina had not made its current sentencing law retroactive, and because the state recognizes no statute of limitations for felony offenses, "[i]f [Petitioner] were tried and convicted today for his drug offenses committed in 1991, 1992, and

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challenge the Fourth Circuit rejected. (J.A. 132-36). Petitioner does not seek review of that issue.

September 1994, he would be subject to the higher sentences imposed by the pre-October 1994 sentencing statutes." (J.A. 132). The Fourth Circuit therefore concluded Petitioner "was properly sentenced as an armed career criminal," because his "previous felony drug convictions were punishable by a maximum term of imprisonment of at least ten years both at the time he committed the offenses and at the time of his federal sentencing." *Id.*

On March 22, 2010, Petitioner filed a petition for rehearing and for rehearing *en banc*. (J.A. 8). The Fourth Circuit denied the rehearing petition on April 5, 2010. (J.A. 137).

### B. On October 1, 1994, North Carolina Enacted Structured Sentencing As A "Truth In Sentencing" Reform, Lowering, In The Process, The Statutory Maximums For Petitioner's Prior Drug Offenses To Below Ten Years.

The central argument in the district court and in the Court of Appeals turned on a 1994 change in North Carolina's sentencing laws that substantially lowered maximum penalties for certain drug offenses. Beginning in the late 1980s, North Carolina confronted a crisis within its criminal justice system precipitated by prison overcrowding, threats of a federal takeover, and insufficient resources. In response, the state legislature re-instated discretionary parole, and the parole commission began "releasing inmates at an unprecedented rate." *The North Carolina Sentencing and Policy Advisory Commission: A History of Structured Sentencing*, at 2

(Aug. 2009) (*Commission Report*).[2] Combined with a generous day-for-day good-time credit, defendants "were serving only a fraction of the time that they received in court." *Id.* at 2-3. Since the existing statutes permitted wide judicial discretion, "judges imposed even longer sentences and defendants, counting on early release, refused probation and elected to serve an active sentence." *Id.* This fact further exacerbated over-crowding and increased the risk that the federal government would take control of the state prisons. *Id.* at 2-4.

In response to these problems, the state legislature created the North Carolina Sentencing and Policy Commission (Commission), to design and implement "truth in sentencing" reform. *Id.* at 8-9; N.C. Gen. Stat. § 164-35. The Commission's enabling legislation required it to "classify criminal offenses . . . on the basis of their severity," and "recommend structures for use by a sentencing court in determining the most appropriate sentence to be imposed in a criminal case." §§ 164-41(a), 164-42(a). To comply with this mandate, the Commission proposed legislation that established a grid with nine classes of felony offenses, ranked by severity of offense, and six recidivism levels called the "prior record levels." See §§ 15A-1340.12, 1340.14, 1340.17. The sentencing grid contained both minimum and maximum terms of imprisonment prescribed for a particular offense classification and prior record level. §§ 15A-1340.17(c)-(d); *Commission Report,* at 17-20.

Structured Sentencing set prior record levels on the basis of the severity of a defendant's past offenses.

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2 *available at* http://www.nccourts.org/Courts/CRS/Councils/spac/Documents/commission_history_aug2009.pdf (last accessed Feb. 9, 2011).

See § 15A-1340.14(c); *Commission Report*, at 13 ("The more serious the prior conviction, the higher the points assigned to the defendant."). It did not, however, affect offense definitions. The new law also eliminated the existing statutory maximums for lower level offenses such as the ones committed by Petitioner. Compare N.C. Gen. Stat. §§ 90-95(a)(1),-95(b)(1) (Michie 1993), with §§ 90-95(a)(1),-95(b)(1) (West 2008); see also §§ 14-1.1(7)-(8) (Michie 1993). For those offenses, Structured Sentencing eliminated the ten-year maximum term of imprisonment applicable under the old sentencing law, § 14-1.1(8) (Michie 1993), and instead prescribed thirty months as the highest possible sentence for Petitioner's class of offenses, the Class H felony. See §§ 90-95(a)-(b); 15A-1340.17(c)-(d).[3]

Like the old sentencing law which it replaced, Structured Sentencing contained a savings clause.

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3 Subsequent to the enactment of Structured Sentencing, North Carolina changed the classification for the offense of sale of a controlled substance from a Class H to a Class G felony. *See State* v. *Watkins*, 672 S.E.2d 43 (N.C. Ct. App. 2009) (noting that change in classification occurred after 1997 and prior to 2007). Since four of Petitioner's six drug offenses were for sale of cocaine, (J.A. 47-9), those offenses are Class G offenses under current North Carolina law. N.C. Gen. Stat. §§ 90-95(a)(1),-95(b)(1)(i). This re-classification is not pertinent to Petitioner's argument, because Structured Sentencing reduced the statutory maximum term of fifteen years for Class G offenses to below ten years. *Compare*, § 14-1.1(7) (Michie 1993) (maximum term of imprisonment for Class G offense is fifteen years), *with* §§ 15A-1340.17(c)-(d) (West 2008) (setting thirty-one months as highest minimum imprisonment term and thirty-eight months as highest corresponding maximum term for a Class G offense). Since the classification as G or H does not affect the issue presented, hereinafter Petitioner will refer to all six offenses as "drug offenses."

See N.C. Gen. Stat. §§ 15A-1340.10; 14-1.1 (Michie 1993). Thus, for purposes of prosecutions and sentencing, the new law applied only to offenses committed on or after the statute's effective date, October 1, 1994. § 15A-1340.10.

Although the savings clause made Structured Sentencing non-retroactive, the new law did have a bearing on offenses committed prior to October 1, 1994. For purposes of setting a defendant's prior record level, the recidivism-based penalties based on the seriousness of a defendant's past offenses, Structured Sentencing mandated looking to the *current* punishment prescribed for those offenses. See § 15A-1340.14(c). Accordingly, if Petitioner's prior record level were being set today in a North Carolina state court, the court would determine the severity of his 1990s drug offenses on the basis of their current statutory maximum penalties, not on the ten-year terms that applied at the time of Petitioner's convictions.

## SUMMARY OF ARGUMENT

I. The Armed Career Criminal Act, 18 U.S.C. § 924(e), provides an enhanced penalty for individuals who, inter alia, have three prior convictions for a "serious drug offense." The statute defines the term as "an offense under State law . . . for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A)(ii). To determine whether the defendant has committed a serious drug offense, ACCA requires a district court to look to the penalty that is currently prescribed for that offense and not to any earlier version of the law.

A. ACCA, by its plain language, measures seriousness in terms of the present status of an offense. Congress, using the present tense, directed

courts to look to the penalty that "is prescribed" for a crime, not to one that "was prescribed." The language of the statute thus demonstrates that it is the present punishment for a drug offense that determines the seriousness of that crime. Moreover, reading the statute in this way is consistent with ACCA's purpose to defer to the states' assessment of the seriousness of offenses within their jurisdictions. *United States* v. *Rodriquez*, 553 U.S. 377, 388 (2008).

B. The Fourth Circuit erroneously believed it could look to the penalties that applied at the time Petitioner committed his drug offenses because North Carolina did not make its current sentencing statute retroactive. The Fourth Circuit's approach reflects its misapprehension of what "an offense" is for ACCA purposes. *Rodriquez* teaches that the individual circumstances surrounding a crime, such as the date the defendant committed it, form no part of the offense itself. Additionally, when an offense date does determine the statutory maximum a defendant faces, it is not a penalty prescribed "for" the offense. The higher penalty has to do with the question of retroactivity and does not mean the date of commission has made the offense more serious.

II. The Fourth Circuit erroneously read North Carolina's decision to make its sentencing scheme non-retroactive as an affirmative declaration by the state that older offenses were more serious than newer ones. In truth, the state's retroactivity decision had nothing to do with the question of offense severity. Rather, North Carolina had administrative reasons for choosing to make its new law prospective only.

A. The Fourth Circuit mistakenly assumed that a state's retroactivity decision could ever include a normative judgment about the seriousness of an

offense. This mistaken assumption overlooked the fact that North Carolina used non-retroactivity merely as a savings clause to preserve existing prosecutions and avoid the abatement doctrine. See *United States* v. *Tynen*, 78 U.S. 88 (1871) (explaining common law of abatement); see also Comment, *Today's Law And Yesterday's Crime: Retroactive Application of Ameliorative Legislation*, 121 U. Pa. L. Rev. 120, 127-28 (1972).

Finally, retroactive application of Structured Sentencing would have raised ex post facto challenges, because the new law eliminated generous early-release provisions and established minimum imprisonment terms for offenses where such terms had not formerly existed.

B. The evidence shows that North Carolina had several administrative and budgetary reasons for determining that Structured Sentencing would only have prospective effect. The state needed to ensure adequate funding to implement the near-total revision of its sentencing laws and policies. As a "truth in sentencing" statute, moreover, the state expected that prisoners effectively would serve the same amount of time that they had served under the old law. The state had no need or impetus to make the new law retroactive.

C. Structured Sentencing's treatment of past offenses for purposes of establishing a "prior record level" is the clearest illustration that North Carolina's retroactivity decision did not say anything about offense seriousness. To set the prior record level under Structured Sentencing, a defendant's prior convictions are given point values based on the seriousness of those offenses. N.C. Gen. Stat. §§ 15A-1340.14, 15A-1340.17; see *Commission Report*, at 13. In assigning points, courts must use the current law's

offense classifications, regardless of whether a defendant committed the offense before or after the effective date. See § 15A-1340.14(c); see also *Watkins*, 672 S.E.2d at 52-53. Contrary to the Fourth Circuit's treatment of Petitioner's prior offenses, North Carolina gauges the seriousness of an offense on the basis of its present status. North Carolina's practice is consistent with ACCA's punishment of the instant offense and not of the defendant's past crimes. See *Rodriquez*, 553 U.S. at 385-86.

III. Petitioner reads § 924(e) as requiring a court to look at the current maximum sentence for an offense in order to determine the penalty that "is prescribed" for that offense. The Fourth Circuit, on the other hand, reads ACCA as requiring an additional inquiry into when the prior convictions occurred. The Fourth Circuit's approach raises three serious problems.

First, the Fourth Circuit's rule will result in the disparate imposition of ACCA's severe penalties. Two defendants may have the same offenses in their criminal history but may receive radically different federal sentences based only on the dates of the prior offenses.

Second, because the Fourth Circuit's reading of ACCA differentiates defendants with identical criminal histories, equal protection problems arise. See, *e.g.*, *Clements* v. *Fashing*, 457 U.S. 957, 967 (1982) ("[T]hose classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution."). Additionally, the Sixth Amendment is implicated when a court enhances a defendant's sentence based on a fact about a prior conviction. See *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000). In contrast, Petitioner's construction of ACCA raises no such constitutional questions.

Moreover, if the Fourth Circuit's reading of § 924(e) is adopted by this Court, the rule will prove difficult, if not impossible, to apply consistently. Statutes of limitations, for example, may make problematic a determination of the sentence a defendant faced for an offense. Moreover, in states such as Delaware where a defendant may choose between the old and new sentencing laws, the Fourth Circuit's approach potentially treats a prior offense as serious and not serious at the same time. See, *e.g.*, Del. Code Ann. tit. 11, § 4216(d). Taking the "prescribed" penalty for an offense from the law in effect at the time of the federal sentencing produces none of these potential difficulties in application.

## ARGUMENT

### I. THE PLAIN MEANING OF THE ARMED CAREER CRIMINAL STATUTE REQUIRES A FEDERAL SENTENCING COURT TO LOOK AT THE MAXIMUM PENALTY PRESCRIBED BY CURRENT STATE LAW TO DETERMINE WHETHER THE OFFENSE IS A "SERIOUS DRUG OFFENSE."

The Armed Career Criminal Act provides for enhanced punishment, including a mandatory minimum sentence of fifteen years, for felons who unlawfully possess a firearm after sustaining three convictions for either a violent felony or "serious drug offense." 18 U.S.C. § 924(e). ACCA defines a "serious drug offense" as "an offense under State law . . . for which a maximum term of imprisonment of ten years of more is prescribed by law." 18 U.S.C. § 924(e)(2)(A)(ii).

The statute's specification of "an offense" shows that the crime is to be viewed in its generic sense,

without regard to the date of its commission. Equally, § 924(e)'s use of the present tense to describe the maximum term of imprisonment—as a penalty that "is prescribed by law"—demonstrates that it is the state's current statutory maximum that is the proper measure of offense seriousness. To determine whether a particular state conviction constitutes a "serious drug offense" within the meaning of ACCA, therefore, a federal sentencing court must look to the penalty presently in effect for that offense. The "serious drug offense" inquiry is a narrow and straightforward one: the court identifies the offense of conviction and looks to whether, under current state law, the maximum imprisonment term is ten years or more.

### A. Congress' Use Of The Present Tense Demonstrates That "A Serious Drug Offense" Is Defined By Reference To The State Law In Effect At The Time Of The Federal Sentencing.

As well-articulated by the Second Circuit, the issue presented in this case is "whether a prior state conviction [is] a conviction for a 'serious drug offense' within the meaning of the ACCA, where state law prescribed a maximum sentence of at least ten years for the offense at the time of the state conviction but state law, prior to federal sentencing, prospectively reduced the maximum sentence to less than ten years for the same offense conduct." *Darden*, 539 F.3d at 124. The answer to this question requires a court to decide whether to apply a state's current sentencing laws or the laws in effect at the time the defendant sustained his state convictions.

ACCA's definition of a "serious drug offense" is written in the present tense. The statute's plain language thus establishes that it is a state's current penalty structure that determines seriousness. *United States* v. *Wilson*, 503 U.S. 329, 333 (1992) (emphasizing, "Congress' use of a verb tense is significant in construing statutes"); *Carr* v. *United States*, 130 S. Ct. 2229, 2236, (2010) ("[W]e have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."); *Dickerson* v. *New Banner Inst., Inc.*, 460 U.S. 103, 117 (1983) (noting, "Congress carefully distinguished between present status and a past event" by use of the present and present perfect tenses in § 922) (*superseded in part by* 18 U.S.C. § 921(a)(20)). Indeed, each court that has addressed the "is prescribed by law" language of § 924(e) has concluded that the statute speaks of the imprisonment term that an offense presently carries. See *Darden*, 539 F.3d at 121; *Morton*, 17 F.3d at 915; *United States* v. *Hinojosa*, 349 F.3d 200, 205 (5th Cir. 2003).

In defining a "serious" offense by reference to the applicable imprisonment term, Congress could have referred to the punishment that "is or was prescribed" for the crime; it chose not to do so. See *Barrett* v. *United States*, 423 U.S. 212, 216-17 (1976) (emphasizing, "Congress knew the significance and meaning of the language it employed" in § 922). The statute's use of the phrase "is prescribed" limits the "serious drug offense" inquiry to a state's current sentencing law. See *Burgess* v. *United States*, 553 U.S. 124, 130 (2008) ("As a rule, [a] definition which declares what a term 'means' . . . excludes any meaning that is not stated.") (internal quotation marks and citation omitted). The fact that a state conviction may have, at some point prior to the

defendant's federal sentencing, satisfied the definition of a "serious drug offense" is irrelevant. Congress' use of the present tense signals that it is the present status of a drug offense that determines whether or not it is "serious." *Carr*, 130 S. Ct. at 2237; (recognizing that "a statute's undeviating use of the present tense [is] a striking indic[ator] of its prospective orientation") (internal quotations and citation omitted) (second alteration in original).

ACCA's underlying purpose reinforces this plain reading of its statutory language. Section 924(e) defers to "state law as the measure of the seriousness of state offenses." *Rodriquez*, 553 U.S. at 388. By looking to state penalties, "Congress presumably thought—not without reason—that if state lawmakers provide that a crime is punishable by 10 years' imprisonment, the lawmakers must regard the crime as 'serious,' and Congress chose to defer to state lawmakers' judgment." *Id.* In *Darden*, the Second Circuit noted that "[i]n light of this statutory purpose," it was eminently reasonable for Congress to defer to the state lawmaker's *current* judgment rather than to the state lawmaker's discarded judgment." 539 F.3d at 122. "Thus," the court of appeals said, "a consideration of the statutory purpose confirms our plain reading of the statute's text: judges should examine the state law in place at the time of the federal sentencing." *Id*.

### B. Regardless Of Whether The Current State Law Applies Retroactively To The Date The Defendant Committed The State Offense, The Current Law Determines Whether That Offense Is "Serious" Under ACCA.

Because a federal sentencing court must look to current state law in order to determine whether a

state offense qualifies as an ACCA predicate, it is a simple matter for the court to determine whether the state offense under consideration carries a maximum penalty of at least ten years in prison. In the instant case, for example, Petitioner's six convictions are for drug offenses that, under North Carolina's statutory scheme, are "Class H" or "Class G" felonies. N.C. Gen. Stat. §§ 90-95(a)(1), (b)(1). At the time of Petitioner's 2009 federal sentencing, North Carolina law prescribed maximum penalties of less than ten years for these offense classes. § 15A-1340.17. Clearly, then, under the state's current penalty structure, none of Petitioner's drug crimes meets the ACCA definition of a "serious drug offense."

The Fourth and Fifth Circuits, however, have taken the inquiry one step further, to conclude that when a state's law is not retroactive, the federal court must look to the penalties in effect at the time the defendant committed his state offenses. See (J.A. 131-32) (Notwithstanding the lowered penalties prescribed by current North Carolina law, were Petitioner to be sentenced for his offenses today, "he would still be subject to a maximum term of at least ten years" by operation of the old law) (quoting *Hinojosa*, 349 F.3d at 205). By contrast, the Second and Sixth Circuits have determined that a state's retroactivity decision says nothing about its view of offense seriousness because it is the penalty provided in the current law that expresses that view. See *Morton*, 17 F.3d at 915; *Darden* 539 F.3d at 127-28.

The choice between these two competing interpretations turns in part on the question of whether the date of the commission of the crime is properly regarded as part of the "offense . . . for which" the maximum term is prescribed by law and is thus relevant to a determination of offense

seriousness. The answer to this question is found in this Court's recent decision in *Rodriquez* regarding the meaning of "an offense" and by ACCA's clear intent that federal courts defer to state judgments regarding the seriousness of state offenses.

*Rodriquez* established that "an offense" for purposes of § 924(e) is a crime in its generic form, without regard to the particular circumstances of its time or manner of commission. In short, "an offense" simply means "a violation of" state law. 553 U.S. at 383.[4] *Rodriquez*, in fact, emphasized that ACCA's "serious drug offense" definition focuses on "'the maximum term of imprisonment' prescribed for an 'offense,'" and not on "the circumstances of the particular [defendant] . . . ." *Id.* at 393 (citing *United States* v. *R.L.C.*, 503 U.S. 291, 295-96 (1992)). Contrasting ACCA with a sentencing provision for juveniles at issue in *R.L.C.*, *Rodriquez* reinforced the importance of looking at the ACCA determination of "an offense" as defined and punished by state law, rather than considering other factors that neither define nor comprise that offense. *Id.* at 392-93. Discussing the relevance of the juvenile statute at issue in *R.L.C.*, the *Rodriquez* Court said that "[b]ecause this provision focuses on the circumstances of the particular juvenile and not on the offense . . . it is not analogous to the ACCA provision that is before us in this case." *Id.* at 393.

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4 This Court's definition of "an offense" as a "violation of" state law comports with the definition of a "serious drug offense" contained in ACCA's legislative history. *See* H.R. Rep. No. 99-849, at 3 (1986) (referencing the addition of "serious drug offenses" as, "State and Federal Laws for which a maximum term of imprisonment of 10 years or more is prescribed").

Under *Rodriquez*, therefore, an ACCA analysis must look at "an offense" as it is defined by state law, without incorporating extraneous facts that do not bear on that definition. In Petitioner's case, sale of cocaine as defined by N.C. Gen. Stat. § 90-95(a)(1) constitutes a single offense, indivisible by time or circumstance.[5] Given the plain language of § 924(e)(2)(A)(ii), it is this statutory entity, and not Petitioner's particular violation of law, which constitutes the "offense" for purposes of the ACCA inquiry.

Viewed in terms of its statutory definition, sale of cocaine in North Carolina is the same offense today that it was when Petitioner sustained his convictions in the 1990s. The state law defining the offenses at issue did not change in the interval between Petitioner's state convictions and his federal sentencing. See *Darden*, 539 F.3d at 124 (noting, "the New York statutes defining the offense conduct, and setting out the felony classifications, have not been meaningfully amended since the state convictions"); compare N.C. Gen. Stat. §§ 90-95(a)(1), -95(b)(1) (Michie 1993), with §§ 90-95(a)(1), -95(b)(1) (West 2008). Thus, a defendant who sells cocaine in North Carolina today violates the same statute and (more significantly) commits the exact same *offense* that Petitioner committed.

The Fourth Circuit's error in this case resulted from its assumption that an offense's date of commission is a component of the offense itself. This is incorrect. See *United States* v. *Stuckey*, 220 F.3d

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5 The *only* elements of the offense of sale of cocaine are "(1) the sale or delivery of (2) a controlled substance (cocaine)." *State* v. *Neal*, 674 S.E.2d 713, 716 (N.C. Ct. App. 2009) (citing N.C. Gen. Stat. § 90-95(a)(1)).

976, 982 (8th Cir. 2000) ("Time is not a material element of a criminal offense unless made so by the statute creating the offense.") (citing *Ledbetter* v. *United States*, 170 U.S. 606, 612 (1898)). Because the date an offense occurred is not part of the violation of law comprising the offense, it does not inform the seriousness of the offense conduct. See *Darden*, 539 F.3d at 126 (reasoning that "the timing of the offense conduct" does not make a drug crime "more or less serious"). It is, therefore, a misapplication of *Rodriquez* to incorporate the date of commission into the definition of "an offense" when considering whether a particular conviction qualifies as an ACCA predicate.

Because the date it is committed does not make up a part of "an offense," when the commission date does expose the defendant to a higher statutory maximum (due to the non-retroactivity of current state law), it cannot be said, consistent with *Rodriquez,* that this higher penalty is prescribed *for* the "offense." See *Darden*, 539 F.3d at 125-26. A defendant may be subject to a higher statutory maximum solely because of offense timing, but if this penalty does not represent a normative judgment on the part of the state that earlier violations of the statute are more serious than current violations, it contravenes both the plain language of ACCA and the statute's underlying purpose to ignore the state's estimation of an offense's seriousness. In the words of the Second Circuit, "If a state determines that a drug-trafficking offense merits less than ten years' maximum imprisonment, but permits the imposition of a higher maximum sentence in an individual case for technical reasons that have no bearing on the state's current view of the seriousness of the offense, it would frustrate the purpose of the ACCA to conclude that

the drug-trafficking offense is a serious one." *Darden*, 539 F.3d at 126; see also *Chapman* v. *Houston Welfare Rights Org.,* 441 U.S. 600, 608 (1979) ("As in all cases of statutory construction, our task is to interpret the words of [the statute] in light of the purposes Congress sought to serve.").

For this reason, the Fourth Circuit's focus on an offense's date of commission is misguided. As the Second and Sixth Circuits have correctly held, both ACCA's purpose and its plain language focus on the current penalties provided by state law for the generic offense. Under a proper interpretation of § 924(e)(2)(A)(ii), a federal sentencing court need only identify the offense of conviction and determine whether current state law prescribes a penalty of ten years or more. The Fourth Circuit erred by broadening this narrow inquiry to include questions of retroactivity.

## II. THE FOURTH CIRCUIT ERRONEOUSLY ASSUMED THE NON-RETROACTIVITY OF NORTH CAROLINA'S STRUCTURED SENTENCING LAW MEANT NORTH CAROLINA VIEWED AN OFFENSE COMMITTED BEFORE THE LAW'S EFFECTIVE DATE AS MORE SERIOUS THAN THE SAME OFFENSE COMMITTED AFTER THAT DATE.

The central assumption the Fourth Circuit made in this case is that North Carolina's decision not to apply its current sentencing law retroactively reflected a conscious judgment by state lawmakers that older violations of the state's drug laws were more serious than newer violations of it. The assumption is necessary to the conclusion the Court of Appeals reached, because, under ACCA, only states have the authority to delineate levels of seriousness

among state offenses. A federal sentencing court has no such power. Thus, if the Fourth Circuit's assumption about the meaning of the retroactivity decision is incorrect—if North Carolina did not use retroactivity to draw a normative distinction between old and new offenses—there is no basis for a federal court to hold that North Carolina drug offenses committed before Structured Sentencing qualify as ACCA predicates while those that followed its enactment do not. In fact, as shown below, the Fourth Circuit's conclusion that North Carolina's retroactivity determination reflected a normative judgment is not correct.

First, the Fourth Circuit mistakenly assumed that a state's retroactivity decision could ever incorporate a normative judgment about the seriousness of an offense. The fact is that the prospective effect of a new law represents the default legislative practice at both the federal and state levels. Moreover, a state's retroactivity determination involves a decision about remedy; it does not negate the state's substantive judgment contained in the new law. Finally, the Fourth Circuit did not consider that retroactive application of Structured Sentencing would have very likely violated the *Ex Post Facto* Clause because it eliminated the old law's generous parole and gain-time provisions and imposed mandatory minimum imprisonment terms where none had existed before.

Second, even if a state could make a normative judgment through a retroactivity decision, the evidence shows that North Carolina did not do so here. Rather, its decision to apply Structured Sentencing prospectively derived from administrative concerns. Chief among these was the state's need to ensure sufficient resources for the overhaul of its criminal sentencing system.

Third, and most importantly, Structured Sentencing's recidivism provisions demonstrate that North Carolina's current law determines the seriousness of a prior offense, irrespective of when the defendant committed that offense. The Fourth Circuit's erroneous imputation of a normative dimension into North Carolina's retroactivity decision creates gradations of seriousness among state offenses that North Carolina does not recognize and would not endorse. In Petitioner's case, therefore, the Fourth Circuit overlooked the state's unified view of offense seriousness.

### A. A State's Decision Whether To Make A Sentencing Law Retroactive Is Wholly Unrelated To The State's View Of The Seriousness Of The Offense.

Properly understood, retroactivity determinations are remedial decisions that do not bring with them a state's judgment about the seriousness of particular offenses. Thus, in a very real sense, to even ask whether a state intended its retroactivity decision to draw distinctions between the seriousness of old and new offenses is to ask a meaningless question. "Seriousness" is simply not a concern when a state makes a retroactivity determination.

#### 1. Non-Retroactivity of New Laws Is Simply the Legislative Default.

At both the federal and state levels, new laws, by default, are not retroactive. The common legislative practice is to include within legislation "savings clauses" that are designed to address the common law doctrine of abatement. See *Tynen*, 78 U.S. 88 (explaining common law of abatement); see also Comment, *Today's Law And Yesterday's Crime: Retroactive Application of Ameliorative Legislation*,

121 U. Pa. L. Rev. 120, 127-28 (1972). In short, "[i]t is a general rule that statutes operate prospectively." *Id.* at 120. By its own terms, the savings clause North Carolina included within Structured Sentencing preserved the state's ability to prosecute and maintain existing prosecutions for offenses that preceded the law's effective date.[6] The savings clause did not presume to limit the new law's authority to classify the severity of pre-enactment offenses for purposes of recidivism enhancements. In fact, since savings clauses follow the default rule that "statutes operate prospectively," *id.* at 120, it necessarily follows that Structured Sentencing retains that classification authority as of its effective date. The Fourth Circuit incorrectly assumed that retroactive application of a law is the norm, and it compounded its error by holding that prospective application indicates a deliberate choice to distinguish pre-enactment and post-enactment offenses which are otherwise identical.

### 2. Retroactivity Involves a Remedial, Not a Normative, Decision

Moreover, as the Second Circuit emphasized in *Darden*, a retroactivity determination is remedial in nature. 539 F.3d at 127-28. Applying this Court's decision in *Danforth* v. *Minnesota*, 552 U.S. 264

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6 The savings clause reads: "This act becomes effective October 1, 1994, and applies only to offenses occurring on or after that date. Prosecutions for, or sentences based on, offenses occurring before the effective date of this act are not abated or affected by the repeal or amendment in this act of any statute, and the statutes that would be applicable to those prosecutions or sentences but for the provisions of this act remain applicable to those prosecutions or sentences." 1993 N.C. Sess. Laws c. 538, § 56 (*amended by* 1994 Ex. Sess. Laws c. 24, § 14(b)); *see also* N.C. Gen. Stat. § 15A-1340.10.

(2008), the Second Circuit explained that the decision whether to make a newly recognized legal right retroactive should not be confused with an assessment of the temporal scope of the legal right. *Darden,* 539 F.3d at 127-28 (citing *Danforth*, 552 U.S. at 290-91 (clarifying that "retroactivity . . . is primarily concerned . . . with the availability or non-availability of remedies")). Retroactivity involves a decision about remedy, not a decision about harm. It is therefore irrelevant to ascertaining a state's view of the seriousness of a given offense. In *Darden*, the court of appeals held that "the legislative history of the [New York Drug Law] Reform Act amply confirms that the purpose of the Reform Act was to replace the harsh Rockefeller sentencing laws with more appropriate sentencing laws, not to recognize a new class of drug offenses that were less serious *because* they were committed after the statute's effective date." 539 F.3d at 126-27 (emphasis in original).

### 3. Retroactive Application of Structured Sentencing Would Raise Serious *Ex Post Facto* Concerns.

Finally, North Carolina could not have retroactively applied Structured Sentencing without risking *ex post facto* challenges from persons who had been prosecuted and sentenced under the old law. See *Weaver* v. *Graham*, 450 U.S. 24, 33 (1981) (explaining *ex post facto* violation is a provision which "substantially alters the consequences attached to a crime already completed, and therefore changes 'the quantum of punishment'"). For those already serving prison terms at the time of Structured Sentencing's enactment, retroactive application would have increased imprisonment time because Structured Sentencing eliminated the old law's generous parole

provisions and 'day-for-day' gain-time credits. *Id*. at 35-36 (holding that a "new provision [which] constricts the inmate's opportunity to earn early release . . . runs afoul of the prohibition against *ex post facto* laws"); see also *Teasley* v. *Beck*, 574 S.E.2d 137, 139 n.1 (N.C. Ct. App. 2002) (summarizing North Carolina's parole and gain-time provisions repealed by Structured Sentencing).

Applying Structured Sentencing retroactively to offenders not yet prosecuted or sentenced would have been equally problematic. Under the old law, "judges were not bound by presumptive dispositions in most instances; it was within their discretion whether to order a prison or probationary sentence." *Commission Report,* at 3. Under Structured Sentencing, each combination of offense class and prior record level yields a particularized statutory minimum and maximum sentence that did not exist under the old law. See N.C. Gen. Stat. §§ 15A-1340.17(c)-(d). Since Structured Sentencing eliminated parole and severely restricted gain-time, "all offenders sentenced under the new law [would] serve 100 percent of the minimum term." See Ronald F. Wright, *Counting the Cost of Sentencing in North Carolina*, 29 Crime & Just. 39, 86-87 (Univ. Chicago 2002) (*Counting the Cost*); *Commission Report*, at 17 (emphasizing that under Structured Sentencing, "[i]nmates would be allowed to earn time off the maximum sentence but would never serve less than the minimum sentence").

Although Structured Sentencing reduced the statutory maximums for several offense classes, it effectively increased the minimum sentence for an offense from no imprisonment to one of active incarceration. *Ex post facto* concerns would therefore have arisen from retroactive application of

Structured Sentencing because defendants would have faced higher statutory mandatory minimums under the new law. *Miller* v. *Florida*, 482 U.S. 423, 431-34 (1987) (holding retroactive application of state's amended guideline sentencing scheme violated *Ex Post Facto* Clause).

### B. North Carolina Made Structured Sentencing Non-Retroactive For Administrative Reasons And Not Because Of A Legislative Judgment That Pre-Structured Sentencing Offenses Were More Serious Than Offenses Committed After The Law's Enactment.

Even if, *arguendo*, a state's non-retroactivity decision could speak to the question of offense seriousness, North Carolina made no such statement in its decision. Structured Sentencing created significant administrative and budgetary issues generated by the near-total revision of sentencing laws and policies, and these are the reasons the state did not make its new law retroactive.

#### 1. North Carolina's Retroactivity Decision Was Driven by Financial and Other Administrative Concerns.

Primarily, North Carolina needed to ensure that its prison system had adequate funding so as to minimize the risk of a federal take-over. See *Commission Report*, at 20-21 (emphasizing, "[r]esource considerations played a large role in the Commissions work," in order to "ebb the tide of prison overcrowding"). The legislature conditioned the implementation of Structured Sentencing upon predictive models of future prison populations and upon the resources available to finance prison

construction to keep pace with the projected growth of the prison population. *Id.* at 20-22; N.C. Gen. Stat. § 164-40. The legislature also required a "fiscal note" to predict increased prison population in order to accurately forecast future prison construction costs. § 164-43; see *Counting the Cost*, 29 Crime & Just. at 81.

The fact that administrative and budgetary concerns dictated Structured Sentencing's effective date dispels any assumption that the law's effective date and its non-retroactivity derived from a judgment about offense severity. Indeed, the North Carolina legislature advanced the law's effective date from January 1, 1995 to October 1, 1994, as part of an appropriations bill. See N.C. Gen. Stat. § 15A-1340.10 (*amended by* 1994 N.C. Ex. Sess. Laws, c. 24, § 14(b)); see also *Commission Report*, at 23 (explaining the legislature set Structured Sentencing's effective date, "[i]n order to provide adequate appropriations"). It strains logic to conclude that the state moved the date of enactment forward so as to make drug offenses committed in the last three months of 1994 less serious than those committed earlier.

**2. There Was No Penological Need for North Carolina to Make Structured Sentencing Retroactive.**

North Carolina designed Structured Sentencing as a "truth in sentencing" reform. Structured Sentencing calculated the minimum and maximum imprisonment terms for an offense in accordance with the average time that was actually served for the same offenses under the old law. See *Counting the Cost*, 29 Crime & Just. at 64 (noting that Structured Sentencing "included lower-level drug crimes in the structure . . . without changing the average time

served for those crimes under the [old law]"); *Commission Report*, at 5, 17 (explaining that to determine the prescribed minimum and maximum sentences, the Commission "reviewed current and historical sentencing practices and time served in North Carolina and looked at average sentence lengths in other states"). Since Structured Sentencing was essentially punishment neutral, and because it primarily eradicated the artificially high statutory maximums and sentences that bore no relation to the time defendants realistically spent in prison, North Carolina had no need to give the new law retroactive effect in order to achieve equivalent punishment between old and new offenders.

The reasons supporting North Carolina's retroactivity determination are not idiosyncratic. Other states have been similarly motivated by administrative rather than normative concerns in deciding to make their sentencing reforms prospective. Just as the Second Circuit observed when addressing the non-retroactivity of New York's new sentencing laws, for North Carolina "there is no reason to believe that the non-retroactivity [decision] . . . reflects a state legislative view" that pre-Structured Sentencing offenses "were categorically more serious than those taking place after [Structured Sentencing]." *Darden*, 539 F.3d at 127 (internal quotation marks omitted). Rather, the "non-retroactivity provision was almost surely enacted to combat problems of retroactive administration." *Id.* at 126.

### C. Structured Sentencing's Recidivism Provisions Conclusively Demonstrate That Offense Date Plays No Part In North Carolina's Current Judgment About The Seriousness Of That Offense.

Importantly, North Carolina makes the state's current law the measure of an offense's seriousness when that offense is considered for recidivist purposes. Through Structured Sentencing, North Carolina created recidivism enhancements that are determined by ascribing a point value to prior convictions based on the seriousness of the offenses. N.C. Gen. Stat. §§ 15A-1340.14, 15A-1340.17; see *Commission Report*, at 13 ("The more serious the prior conviction, the higher the points assigned to the defendant."). Courts must use the current law's offense classifications, regardless of whether a defendant committed the offense before or after Structured Sentencing's effective date. See § 15A-1340.14(c) (clarifying that for calculating criminal history record level under Structured Sentencing, i.e., recidivism enhancements, a sentencing court must use the current classification of an offense, even though the conviction for that offense preceded enactment of Structured Sentencing); see also *Watkins*, 672 S.E.2d at 52-53 (applying Structured Sentencing classification for sale of cocaine (a class G felony) to pre-Structured Sentencing conviction for sale of cocaine (then, a class H felony)). Thus, North Carolina has determined that for purposes of imposing recidivism enhancements, offense severity does not depend on the date a person commits that offense.

Structured Sentencing's recidivism provisions evince North Carolina's decision that its current law, not the old law, determines the seriousness of an

offense, including those committed prior to the current law's effective date. This determination not only proves the error of the Fourth Circuit's assumption about the retroactivity decision, it accords with ACCA's plain language which requires that a state's current law determines the penalty which "is prescribed" for "an offense."

Finally, ACCA, interpreted in light of its purpose, leaves no ambiguity with respect to Petitioner's prior offenses: the maximum sentence that "is prescribed" by state law for these offenses is less than ten years. However, if any ambiguity remained between this reading of the statute and that advanced by the Fourth Circuit, the rule of lenity would compel the adoption of Petitioner's interpretation since the contrary interpretation would increase Petitioner's punishment in a manner not clearly intended by the statute. See *United States* v. *R.L.C.*, 503 U.S. 291, 305 (1992); *United States* v. *Bass*, 404 U.S. 336, 348 (1971) ("[W]here there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.").

## III. UNLIKE PETITIONER'S READING OF THE ACCA STATUTE, THE FOURTH CIRCUIT'S APPROACH TO DETERMINING "SERIOUS DRUG OFFENSES" RESULTS IN ARBITRARY AND INEQUITABLE IMPOSITION OF ACCA'S PENALTIES AND RAISES SERIOUS CONSTITUTIONAL CONCERNS.

Petitioner's straightforward reading of § 924(e) is simple to apply and yields equitable outcomes. A federal court can easily determine whether a prior state conviction qualifies as "serious drug offense"

simply by looking to the statutory maximum prescribed for the offense by current state law.

In contrast, the Fourth Circuit's construction of ACCA requires a court to take an extra step and ask when the prior convictions occurred. Not only is the Fourth Circuit's reading of the "serious drug offense" definition erroneous as a matter of statutory interpretation, it is also unworkable and unwise in a practical sense. If adopted, this reading will: (1) produce arbitrary results based on illogical distinctions between identical offenses; (2) raise constitutional concerns in the areas of due process, equal protection, and the Sixth Amendment; and (3) embroil federal courts in the mare's nest of a state's legislative history in search of an elusive answer regarding retroactivity, a fruitless venture that will waste judicial resources and produce inconsistent results.

First, the Fourth Circuit's construction of the "is prescribed by law" language creates inequities. The unfortunate defendant who commits the offense one day prior to the state law's effective date faces a fifteen-year mandatory minimum sentence, whereas a person who commits the same crime one day later will not have that exposure. The Fourth Circuit's reading of ACCA requires a federal court to view the same offense as serious in one case and not in another. It is a familiar rule of statutory construction that courts should not read a law in a way that produces arbitrary outcomes. *Griffin* v. *Oceanic Contractors*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available."). Petitioner's case demonstrates that the Fourth Circuit's reading of

ACCA produces such outcomes in the real world. The state drug offenses that made Petitioner an armed career criminal and exposed him to no less than fifteen in years in prison cannot have the same consequence for anyone convicted of those offenses today.

Second, the Fourth Circuit's rule implicates several constitutional rights. The Court of Appeals' approach raises serious equal protection concerns because it mandates separate treatment of federal criminal defendants with identical criminal histories. The irrational distinction, based on nothing more than offense dates, results in disparate treatment between similarly situated individuals. See, *e.g.*, *Clements,* 457 U.S. at 967 ("[T]hose classifications which are invidious, arbitrary, or irrational offend the Equal Protection Clause of the Constitution.").[7]

Moreover, the Fourth Circuit's rule requires a federal sentencing court to enhance a defendant's sentence based on a fact about a prior conviction that is not always apparent on the face of the conviction. In the present case, Petitioner's convictions preceded Structured Sentencing, so the sentencing court could easily find that Petitioner's offense dates also preceded the new law's enactment. In other cases, however, sentencing courts may encounter individuals with convictions that occurred soon after Structured Sentencing went into effect. Those cases will require district courts to make factual findings

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7 Classifications that would violate the Fourteenth Amendment's Equal Protection Clause violate the Fifth Amendment's Due Process Clause as a matter of law. *See Johnson* v. *Robison*, 415 U.S. 361, 364 n.4 (1974). Accordingly, the Fourth Circuit's rule raises concerns under the Due Process Clause, though the relevant case law speaks in terms of the Equal Protection Clause.

on matters that in all likelihood will not have been litigated at the state level. Imposing an ACCA sentence based on judicial fact-finding of this kind creates strong tensions with the Sixth Amendment. See *Apprendi*, 530 U.S. at 490; *Darden*, 539 F.3d at 123 n.11. It is familiar that a statute should not be construed so as to raise "serious constitutional problems." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Reading § 924(e) as requiring that the penalty in effect at the time of the federal sentencing be used to measure an offense's seriousness raises none of the Due Process Clause or Sixth Amendment concerns implicated by the approach the Fourth Circuit employed in this case.

Third, using the Fourth Circuit's approach will prove vexing. The rule the Court of Appeals announced appears to be simple only because North Carolina made simple sentencing reforms. Effectively, the state changed only the statutory maximums for its felonies. That, coupled with the fact that North Carolina has no statute of limitations, permitted the Fourth Circuit to compute with relative ease the sentence Petitioner would have faced had he been punished today. Other states, however, may change their sentencing practices in ways that make difficult and cumbersome, if not impracticable, the Court of Appeals' reading of ACCA. Were a state, for example, to have a statute of limitations for crimes, a federal sentencing court would need to determine whether the particular offense still fell within the statute, an inquiry that might involve complicated questions in areas such as state tolling provisions.

Moreover, in some states, it may be impossible to apply the Fourth Circuit's rule. Delaware, for example, permits an individual who committed

crimes prior to June 1990 to choose, for sentencing purposes, between the law in place at the time of the offense and the law in force at the time of sentencing. Del. Code Ann. tit. 11, § 4216(d) ("Any individual convicted of a crime on or after January 1, 1990, which crime occurred prior to June 30, 1990, may elect to be sentenced under the provision of the Truth in Sentencing Act of 1989 rather than under the provisions of this title."). Under the Fourth Circuit's approach, a Delaware conviction would simultaneously be for a serious offense and for a non-serious offense. It would be difficult, if not impossible, to apply ACCA in such a situation.[8] To avoid this result, an approach other than the one used by the Court of Appeals would be necessary.

Finally, the unique complexities of a particular state's savings clauses will invariably yield inconsistent interpretations by federal courts. Indeed, in *Hinojosa*, the Fifth Circuit appears to have misunderstood the retroactivity provision from the Tennessee law at issue in the Sixth Circuit case of *Morton*. See *Hinojosa*, 349 F.3d at 205 ("This case is

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8 Delaware is not the only state that permits a defendant facing punishment for an offense committed prior to the effective date of a new criminal provision to elect between the old law and the new law. *See Today's Law And Yesterday's Crime*, 121 U. Pa. L. Rev. at 129 nn.66 & 68 ("In a number of jurisdictions, if a change in law mitigates the former punishment, the lower penalty may be imposed either at the defendant's election, or with his consent, at the court's election, or automatically."); *see also* Ky. Rev. Stat. Ann. § 446.110 (West 2006) (permitting imposition of lower penalty with defendant's consent); 5 Ill. Comp. Stat. Ann. 70/4 (West 2005) (same); W. Va. Code Ann. § 2-2-8 (West 2006) (same). Thus, the impossibility of applying the Fourth Circuit's rationale to the ACCA determination is not limited to one state.

distinguishable from *Morton*, however. Texas' revised sentencing scheme specifically provides that the revised sentences do not apply to crimes committed before the effective date of the revisions."). Tennessee only gave retroactive effect for those sentenced after the effective date of the state's law for offenses committed within a certain time period prior to that effective date. See Tenn. Code Ann. § 40-35-117(b). For those who committed offenses outside of that time period, the old law applied. § 40-35-117(c). Thus, as the Second Circuit correctly observed, "the Tennessee statute is not retroactive in the relevant sense." *Darden*, 539 F.3d at 123 n.9. The apparent difference in understanding by the appellate courts regarding the retroactivity of one state's law illustrates a difficulty that can be avoided by simply referring to a state's current law. See *United States* v. *Santana*, No. 09-CB-1022, 2011 WL 260744, at *8 (S.D.N.Y. Jan. 20, 2011) (listing states that permit partial retroactive application of a new law mitigating punishment).

Under Petitioner's plain-language reading of ACCA, it cannot be disputed whether or not a state deems one of its drug offenses to be serious. The present penalty for the crime answers that question. Under Petitioner's reading, moreover, disparate application of the statute is avoided. When a serious drug offense is determined with reference to the current state law, a given offense will be deemed "serious" in all cases or in none, and it will thus be a predicate in all cases or in none. Petitioner's reading does not require sentencing courts to treat the same offense differently depending upon the particular defendant or to find facts about prior convictions. It raises no constitutional concerns in ACCA's application. Petitioner's approach to determining

offense seriousness is simple, consistent, and equitable. He respectfully urges this Court to adopt that reading of the ACCA text.

## CONCLUSION

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

Respectfully submitted,

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## STATUTORY APPENDIX

### Title 18, Section 924(e):

**(e)(1)** In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

**(2)** As used in this subsection--

**(A)** the term "serious drug offense" means--

**(i)** an offense under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46, for which a maximum term of imprisonment of ten years or more is prescribed by law; or

**(ii)** an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

**(B)** the term "violent felony" means any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive

device that would be punishable by imprisonment for such term if committed by an adult, that--

**(i)** has as an element the use, attempted use, or threatened use of physical force against the person of another; or

**(ii)** is burglary, arson, or extortion, involves use of explosives, or otherwise involves conduct that presents a serious potential risk of physical injury to another; and

**(C)** the term "conviction" includes a finding that a person has committed an act of juvenile delinquency involving a violent felony.