NO. 10-5258

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 2010

CLIFTON TERELLE McNEILL,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION

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Contrary to the government's assertion that there is merely "some tension" between the lower court's decision in Petitioner's case and that of the Second Circuit's holding in *United States v. Darden*, 539 F.3d 116 (2nd Cir. 2008), Opp'n Br. 6, 12-13, the court below has in fact "entered a decision in conflict with the decision" in *Darden*. S. Ct. R. 10(c). Both of the state statutes at issue in Petitioner's case and in *Darden* prospectively reduced the maximum penalties for certain offenses, but they did not retroactively apply those reduced maximums to offense conduct which preceded the law's effective date. The issue presented here is the same as the issue decided in *Darden*, which the Second Circuit summarized as follows:

> The sole issue consolidated for disposition on appeal is whether a prior state conviction was 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 120-121. The Second Circuit answered this question in the negative, concluding that the standard to determine whether a prior state conviction qualifies as a "serious drug offense" is the maximum penalty "prescribed by current state law for the offense conduct, without regard to the date on which the defendant happened to commit the offense." *Darden*, 539 F.3d at 123. By contrast, here, the lower court held that "the date on which [Petitioner] committed his crime is critical to the determination of his sentence under North Carolina law." *United States v. McNeill*, 598 F.3d 161, 165 (4th Cir. 2010).The Fourth Circuit expressly acknowledged its holding was "contrary" to the Second Circuit's holding in *Darden*. *Id.* In support of this "contrary" holding, the court of appeals sided with the Fifth Circuit's decision in *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003), which the Fourth Circuit also described as "contrary" to the Second Circuit's resolution of the same issue in *Darden*. *McNeill*, 598 F.3d at 165. The Fourth Circuit's express recognition that it had adopted a "contrary" position regarding the same issue demonstrates that there is in fact a "square conflict presented by this particular case," Opp'n Br. 7.

The government also argues that review would be premature, suggesting this Court's decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), "potentially bears on the proper method for determining the maximum term of imprisonment for ACCA purposes [.]" Opp'n Br. 15. *Carachuri-Rosendo*, however, addressed a different federal sentencing statute, and a distinct issue, namely, whether a person who was "not charged or sentenced as a recidivist in state court" could receive a federal sentencing enhancement merely because federal law punished

recidivist drug possession as a felony. *Id.* at 2589. In Petitioner's case, the contextual focus is upon a state's maximum penalties applicable to a particular state offense at the time of the federal offense, not upon a particular defendant or a hypothetical defendant convicted of that particular state offense. Unlike the federal sentencing enhancement at issue in *Carachuri-Rosendo*, here the "serious drug offense" inquiry focuses upon the maximum penalty which "is prescribed" for a state offense. 18 U.S.C. § 924(e)(2)(A)(ii). This inquiry does not require a federal sentencing court to determine the maximum penalty for either a particular or a hypothetical defendant. Rather, the "serious drug offense" inquiry merely looks to maximum penalty for a particular state offense under current state law at the time of the federal offense.

Moreover, while it is true that *Darden* was decided before *Carachuri-Rosendo,* the Second Circuit did have the benefit of this Court's analytically-similar decision in *United States v. Rodriquez*, 553 U.S. 377 (2008). In *Rodriquez*, this Court emphasized that state law, not federal law, determined the maximum penalties for state offenses. *Darden*, 539 F.3d at 124. Thus, the government's assertion that this Court's review of the instant petition is premature because *Carachuri-Rosendo* might provide guidance for the interpretation of the "serious drug offense" definition, is at best overstated. In the context of the issue presented in this case, *Carachuri-Rosendo* is little more than a gloss on *Rodriquez* which was carefully considered by the *Darden* court. It is therefore unlikely that anything in *Carachuri-Rosendo* would have caused the Second Circuit to reach a different outcome in *Darden*. Accordingly, postponing review of this issue to allow lower court consideration of *Carachuri-Rosendo* within the "serious drug offense" context is neither warranted or needed. In sum, *Carachuri-Rosendo* does not supply a

good reason for this Court to decline review of the issue presented, an issue which has evenly divided four appellate courts.

Finally, the government asserts this Court should not resolve this circuit split over the proper interpretation of ACCA's "serious drug offense" definition because the issue "does not appear to have arisen with any frequency since 1986," when ACCA incorporated the current definition for a "serious drug offense." Opp'n Br. 15. However, the government fails to note that this issue has arisen with increased frequency since 1994, when the Sixth Circuit first addressed it in *United States v. Morton*, 17 F.3d 911 (6th Cir. 1994). Following *Morton*, the Fifth Circuit decided *Hinojosa* in 2004, the Second Circuit decided *Darden* in 2008, and the Fourth Circuit decided Petitioner's case in 2010. Now, since the state of Delaware has also reduced the maximum penalties for certain drug felonies to below ten years, the issue presented may soon arise within the Third Circuit. *See* Pet. 7, 13-14. Since this issue is now appearing with increased frequency and has the potential to arise in additional circuits, the time is ripe for this Court to resolve the existing circuit split.

CONCLUSION

Based on the foregoing, Petitioner respectfully requests a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

This the 19th day of November, 2010.

Respectfully submitted,

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