NO. 09-

IN THE SUPREME COURT OF THE UNITED STATES

October Term 2009

CLIFTON TERELLE McNEILL, Petitioner,	)
v.	)
UNITED STATES OF AMERICA, Respondent.	)

MOTION TO PROCEED IN FORMA PAUPERIS

The Petitioner, by and through undersigned counsel, asks leave to file a Petition for Writ of Certiorari without prepayment of costs and to proceed *in forma pauperis* pursuant to Rule 39 of the Supreme Court Rules. Counsel was appointed in the lower court pursuant to 18 U.S.C. § 3006.

This the 2nd day of July, 2010.

Respectfully submitted,

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v.

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Respondent.

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

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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)(1). 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) (emphasis added).

The Fourth Circuit Court of Appeals affirmed the district court's classification of Petitioner's North Carolina drug offenses as "serious drug offenses" under ACCA, even though at the time of Petitioner's federal sentencing, North Carolina's current sentencing law did not prescribe a maximum term of imprisonment of at least ten years for those state drug offenses. The Fourth Circuit held that since North Carolina did not apply its current sentencing law retroactively, the fact that Petitioner's drug offenses were punishable by imprisonment for at least ten years under the version of the law in effect at the time he committed these offenses qualified them as "serious drug offenses" under ACCA.

The question presented is:

> Whether the plain meaning of "is prescribed by law" which ACCA uses to define a predicate "serious drug offense" requires a federal sentencing court to look to the maximum penalty prescribed by current state law for a drug offense at the time of the instant federal offense, regardless of whether the state has made that current sentencing law retroactive.

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United States of America

Clifton Terelle McNeill

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Respondent.

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit rendered in this case on March 8, 2010.

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. App. 1, *infra*.

JURISDICTIONAL GROUNDS

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Petitioner's sentence issued on March 8, 2010. App. 1, *infra*. 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. App. 2, *infra*. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Armed Career Criminal Act's ("ACCA") 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) (emphasis added).

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) (emphasis added).

STATEMENT OF THE CASE

This case began on February 28, 2007, when police officers from Fayetteville, North Carolina arrested Petitioner following a traffic stop he initially eluded. During the arrest and search incident to that arrest, police found a firearm and 3.1 grams of cocaine base. Based on this incident, on May 22, 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). On August 18, 2008, Petitioner pleaded guilty to Counts I and II, pursuant to a plea agreement that called for dismissal of Count III at sentencing.

On January 13, 2009, the district court sentenced Petitioner to imprisonment for concurrent terms of 300 months on Count I and 240 months on Count II. The sentence for Count I reflected a designation of Petitioner as an armed career criminal and an upward departure above the armed career criminal range of 188 to 235 months' imprisonment. The district court found that Petitioner qualified for the Armed Career Criminal Act (ACCA) enhancement of 18 U.S.C. § 924(e) based on Petitioner's 1995 North Carolina convictions for common law robbery and felony assault, and five North Carolina Class H felony convictions from 1992 and 1995 for sale of cocaine and possession of cocaine for sale. Petitioner objected to reliance upon these five Class H drug felonies as ACCA predicates, an objection the court over-ruled. Petitioner timely appealed on January 13, 2009.

On appeal, Petitioner contended the district court erred in sentencing him as an armed career criminal.[1] Specifically, the district court erred by concluding Petitioner's 1992 and 1995 North Carolina Class H felony drug convictions were "serious drug offenses" because at the time of his federal sentencing those drug offenses were no longer punishable by a term of imprisonment of at least ten years under North Carolina's current sentencing law.

North Carolina's Structured Sentencing Act ("Structured Sentencing"), which became law on October 1, 1994, reduced the statutory maximum term of imprisonment for all Class H Felony drug offenses from ten years to thirty months. *See* N.C. Gen. St. §§ 15A-1340.4 (1993); 15A-1340.10*, et seq*.[2] North Carolina did not make Structured Sentencing retroactive; thus, the reduced Class H penalties only apply to the commission of a Class H drug felony on or after October 1, 1994. *See* N.C. Gen. St. § 15A-1340.10.

Petitioner contended the plain meaning of the phrase "is prescribed by law" within ACCA's "serious drug offense" definition required a federal sentencing court to look to the maximum penalty in effect at the time of the defendant's federal sentencing hearing, rather than the sentencing law in effect at the time of the state conviction, as the district court concluded. In support, Petitioner relied upon *United States v. Darden*, 539 F.3d 116 (2nd Cir. 2008), and *United States v. Morton*, 17 F.3d 911 (6th Cir. 1994). Both the Second and Sixth Circuits

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[1] Petitioner also challenged the procedural and substantive reasonableness of the district court's upward departure, a challenge the Fourth Circuit rejected, *see* App. 1 at 7-10. This petition does not seek review of that issue.

[2] The Fourth Circuit mistakenly stated twenty-five months was the maximum term of imprisonment for a Class H Felony at the highest criminal history level. App. 1 at 4. However, the correct amount is thirty months. *See* N.C. Gen. St. §§ 15A-1340.17(c),(d) (setting twenty-five months as the highest minimum term for a Class H felony and thirty months as the highest corresponding maximum).

concluded the phrase "is prescribed by law" required a focus upon the maximum term of imprisonment for an offense under current state law at the time of the federal sentencing. *Darden*, 539 F.3d at 122, 127; *Morton*, 17 F.3d at 915. Both also concluded that the Rule of Lenity required a resolution of any residual doubts regarding the application of the phrase "is prescribed by law" in favor of focusing upon a state's current sentencing law for an offense, not the old law in place at the time of the conduct underlying the previous conviction for that state offense. *Darden*, 539 F.3d at 128; *Morton*, 17 F.3d at 915.

The Fourth Circuit rejected the position of the Second and Sixth Circuits, and instead sided with the Fifth Circuit's decision from *United States v. Hinojosa*, 349 F.3d 200 (5th Cir. 2003). App. 1 at 5-6. The court below concluded that since North Carolina did not make Structured Sentencing retroactive, "North Carolina has two sentencing schemes – one governing offenses before . . . and another governing offenses committed after" the effective date of Structured Sentencing. *Id.* at 6. The Fourth Circuit stated, "McNeill's 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.* The court concluded, "McNeill was properly sentenced as an armed career criminal." *Id.* at 7.

On March 22, 2010, Petitioner filed a petition for rehearing and for rehearing *en banc*. The Fourth Circuit denied this petition on April 5, 2010. App. 2, *infra*.

MANNER IN WHICH THE FEDERAL QUESTION WAS RAISED AND DECIDED BELOW

The question of whether the plain meaning of ACCA's "serious drug offense" definition – specifically, the phrase "an offense under State law . . . for which a maximum term of

imprisonment of at least ten years is prescribed by law" – requires a focus upon a state's current statutory maximum for an offense at the time of federal sentencing was presented to the Fourth Circuit Court of Appeals. The Fourth Circuit rejected Petitioner's contention that his North Carolina drug offenses were not "serious drug offenses" at the time of the instant federal offense because North Carolina's current sentencing law did not prescribe a maximum penalty of at least ten years for those state offenses. Thus, the federal claim was properly presented and reviewed below and is appropriate for this Court's consideration. *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

REASONS FOR GRANTING THE WRIT

Petitioner respectfully submits the writ should issue because the Fourth Circuit Court of Appeals has "entered a decision in conflict with the decision" of two other United States circuit courts of appeals, S. Ct. R. 10(a). The question presented has not only divided the four circuit courts to address this issue, it is "an important question of federal law that has not been, but should be, settled by this Court . . .." S. Ct. R. 10(c). Finally, the Fourth Circuit's application of ACCA's "serious drug offense" definition contravenes this Court's established precedent for interpretation of criminal statutes. S. Ct. R. 10(c).

A. The Fourth Circuit's Application Of The Phrase "Is Prescribed by Law" Conflicts With The Second and Sixth Circuits' Construction Of ACCA's "Serious Drug Offense" Definition.

This Court should grant review to resolve a circuit split over the proper interpretation of the phrase "is prescribed by law" which comprises the temporal imprisonment standard for ACCA's definition of a "serious drug offense." S. Ct. R. 10(a). The Fourth Circuit, in Petitioner's case, and the Fifth Circuit, in *Hinojosa*, held that if the state did not make its current sentencing law retroactive, then a federal sentencing court should look to the state law in effect at

time of the predicate conviction and not the state law in effect at the time of federal sentencing. App. 1 at 6; *Hinojosa*, 349 F.3d at 205. These two decisions conflict with the Second and Sixth Circuits, which both hold the plain meaning of the phrase "is prescribed by law" requires a federal sentencing court to look to a state's current sentencing law to determine whether a prior state drug offense is a "serious drug offense" under ACCA. *Darden*, 539 F.3d at 128; *Morton*, 17 F.3d at 915.

The question presented has not only divided four circuit courts, it remains a latent issue in at least one other circuit. Within the Third Circuit Court of Appeals, Delaware has reduced the statutory maximum penalties for certain drug crimes to below ten years. *Compare* 16 Del. C. § 4751 (2010) *with* 16 Del. C. § 4751 (1987). Moreover, the issue of how to apply ACCA's definition of a "serious drug offense" will also confront the remaining circuit courts when a person faces sentencing for a § 922(g) violation within one of those remaining circuits and has one or more of the exact same state drug offenses as those at issue from the Second Circuit in *Darden* (New York), the Fourth Circuit in *McNeill* (North Carolina), the Fifth Circuit in *Hinojosa* (Texas), or the Sixth Circuit in *Morton* (Tennessee). For a person who faces sentencing in a circuit that follows the Second and Sixth Circuits, that offense will not count as an ACCA predicate. If another person, with the exact same offense of conviction as the first person – even the same date of offense – faces sentencing in a circuit that follows the Fourth and Fifth Circuits, that same offense will count as an ACCA predicate.

Thus, this Court's timely resolution will not only prevent expansion of the existing circuit split, it will also prevent the arbitrary imposition of ACCA's severe penalties among all the circuit courts for defendants with the exact same predicate convictions. Without such resolution,

the lack of a uniform federal standard for applying the "serious drug offense" definition will facilitate the further spread of arbitrary imposition of ACCA sentences.

B. This Court Has Not Yet Addressed This Important Issue Of Federal Law Which Has Divided Four Circuit Courts Of Appeals.

The absence of a uniform federal standard for applying ACCA's "serious drug offense" definition presents an important question of federal law this Court has not yet addressed. S. Ct. R. 10(c). This Court's resolution of the circuits' conflicting applications is especially crucial, considering the severe increase in statutory penalties mandated by ACCA: a mandatory minimum fifteen-year imprisonment term and an increase in the maximum term from ten years to life imprisonment. § 924(e)(1).

In light of ACCA's severe sentencing implications, this Court should grant certiorari to resolve a circuit split that hinges upon an interpretation of ACCA, as this Court has on several previous occasions. *See*, *e.g.*, *Taylor v. United States*, 495 U.S. 575 (1990) (establishing uniform federal standard for "burglary"); *Custis v. United States*, 511 U.S. 485, 490 (1994) (granting review to resolve circuit split over the extent to which ACCA permits collateral challenges to predicate convictions); *Logan v. United States*, 552 U.S. 23, 30 (2007) (resolving circuit split over whether a conviction which does not trigger a loss of civil rights nonetheless qualifies as an ACCA predicate); *United States v. Rodriquez*, 553 U.S. 377, 382 (2008) (resolving circuit split over whether recidivist enhancements factor into the "maximum term of imprisonment" inquiry for purposes of ACCA's "serious drug offense" determination).

C. The Fourth Circuit's Application of ACCA's "Serious Drug Offense" Definition Contravenes This Court's Established Precedent For Interpretation of Criminal Statutes.

The Fourth Circuit's application of ACCA's "serious drug offense" definition is wrong for four reasons; it: (1) distorts the plain meaning of the phrase "is prescribed by law"; (2) disregards ACCA's focus upon the instant felon-in-possession offense; (3) shifts the focus of the "serious drug offense" standard from the current state sentencing law for an "offense" to the timing of the offense conduct and an administrative decision regarding retroactivity of the state's current sentencing law; and (4) fails to apply the Rule of Lenity.

First, the Fourth Circuit's interpretation of ACCA's "serious drug offense" definition contravenes this Court's precedent requiring fidelity to the plain meaning of a statute. In accordance with this "cardinal canon" of statutory interpretation, "courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Specifically, the Fourth Circuit distorts the plain meaning of the phrase "is prescribed by law."

Here, Congress stated: "the term 'serious drug offense' *means* – an offense under State law . . . for which a maximum term of imprisonment of ten years of more *is prescribed by law*," § 924(e)(2)(A)(ii) (emphasis added). Use of the word "means" and the phrase "is prescribed" necessarily confines the "serious drug offense" inquiry to a state's current sentencing law at the time of the federal offense. *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).

Congress did not use the phrase "is or was prescribed," as the Fourth Circuit's application would require. *See 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 2010 WL 2160783, **7-8 (2010) ("[W]e have frequently looked to Congress' choice of verb tense to ascertain a statute's temporal reach."); *G.R. Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 117 (1983) (superseded in part by 18 U.S.C. § 921(a)(20)) (noting, "Congress carefully distinguished between present status and a past event" by use of the present and present perfect tenses in section 922).

Had Congress intended "is prescribed" to mean "is or was prescribed," it could have defined the temporal punishment component of a "serious drug offense" the same as a "violent felony" – "any crime punishable by imprisonment for a term exceeding [ten] years," § 924(e)(2)(B). However, Congress did not employ "crime punishable by," a temporally elastic phrase sufficiently ambiguous to permit the Fourth and Fifth Circuits' transformation of "is" to "was." *See Barrett v. United States*, 423 U.S. 212, 216-217 (1976) (emphasizing, "Congress knew the significance and meaning of the language it employed" in section 922). Rather, Congress chose a different phrase – "is prescribed by law" – and fidelity to this Court's plain meaning jurisprudence compels the conclusion that Congress meant what it said: "is" means "is."

Second, the Fourth Circuit's reliance upon an old, repealed sentencing law not only distorts the plain meaning of "is prescribed by law," it disregards ACCA's focus upon penalizing the instant felon-in-possession offense. ACCA applies to a person "who *violates* section 922(g)" and "*has*" three qualifying offenses, § 924(e)(1) (emphasis added). Use of the present tense words "violates" and "has" squarely places ACCA's focus on the status of a prior drug offense at

the time of the instant federal offense, not on the past status of that state offense. *Carr*, 130 S. Ct. at __, 2010 WL 2160783, *8 (recognizing that "a statute's undeviating use of the present tense is a striking indicator of its prospective orientation") (internal quotations and citation omitted). As this Court emphasized in *Rodriquez*, "when a defendant is given a higher sentence under a recidivism statute . . . 100% of the punishment is for the offense of conviction." 553 U.S. at 386.

In addition to Congress' consistent use of the present tense in ACCA and in the "serious drug offense" definition, Congress further demonstrated the intent to focus the ACCA determination at the time of federal sentencing by excluding from ACCA's scope, "[a]ny conviction which has been expunged, or set aside, or for which a person has been pardoned." § 921(a)(20). So long as the pardon or expungement does not expressly prohibit firearms possession, such a conviction cannot serve as violent felony under ACCA. *See id.* (applying pardon and expungement exclusion to "crime punishable by imprisonment for a term exceeding one year" as used in Title 18, Chapter 44, which encompasses § 924(e)).

Section 921(a)(20)'s exclusion of pardoned or expunged convictions from ACCA's scope demonstrates Congress intended the current status of a prior offense at the time of federal sentencing should determine whether that offense qualifies as an ACCA predicate. In fact, Congress added the expunged conviction exclusion to § 921(a)(20) in response to *Dickerson*, which had concluded a state's expungement of a conviction did not remove that conviction from § 922's scope, 460 U.S. at 115-17. *Caron v. United States*, 524 U.S. 308, 313 (1998) (noting, "Congress modified this aspect of *Dickerson,*" via this addition to § 921(a)(20)). Thus, regardless of whether a prior offense qualified as an ACCA predicate at some point in the past (prior to a pardon or expungement), ACCA's focus is on the qualifying status of an offense at the time of

federal sentencing. Similarly, reliance upon a state's current statutory maximum for a drug offense at the time of federal sentencing maintains fidelity to ACCA's focus upon the present status of an offense at the time of federal sentencing.

Third, the Fourth Circuit's distortion of ACCA's plain meaning and disregard of ACCA's focus on the present status of an offense shifts the "serious drug offense" standard from the "offense" of conviction to the impact an administrative decision whether to make a sentencing law retroactive has upon a particular defendant. As the Second Circuit explained thoroughly in *Darden*, "the key statutory terms [of the "serious drug offense" definition] are 'offense,' 'law' and 'maximum term.'" 539 F.3d at 124. Relying on this Court's opinion in the case of *Rodriquez*, the Second Circuit emphasized, "in *Rodriquez*, the Supreme Court explained that an 'offense' simply means the violation of a governing criminal statute." *Id.* (citing *Rodriquez*, 553 U.S. at 382). Here, as in *Darden*, the North Carolina governing law defining a Class H drug felony did not change in any meaningful way between the time Petitioner committed those felonies and when the district court sentenced him in the instant case.[3] *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").

Rather than focus upon the essential elements of the offense conduct, the Fourth Circuit, like the Fifth Circuit in *Hinojosa*, 349 F.3d at 205, shifts the focus from the statutory elements of the offense to the timing of the offense conduct and a state legislature's decision whether to retroactively apply sentencing reform. However, here, as in *Darden*, which addressed New

[3] *Compare* N.C. Gen. St. §§ 90-95(a)(1), (b)(1) (Michie 1993), *with* §§ 90-95(a)(1), (b)(1) (West 2008) (classifying possession with intent to distribute a controlled substance as a Class H Felony).

York's non-retroactive sentencing reform, "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. This is because the decision to make a sentencing change retroactive or not derives from administrative factors in the state's criminal justice system. *See id.* at 126 (concluding, "the non-retroactivity provision was almost surely enacted to combat problems of retroactive administration"). In North Carolina, this same administrative motive for not making Structured Sentencing retroactive is evident by the fact that the legislature advanced its effective date from January 1, 1995 to October 1, 1994, as part of an appropriations bill. *See* N.C. Gen. St. § 15A-1340.10, as amended by Ex. Sess., c. 24, § 14(b) (S.B. 150), eff. March 21, 1994. The fact that administrative concerns determined Structured Sentencing's effective date dispels as unreasonable any assumption that the effective date or retroactivity determination reflects North Carolina's normative judgment regarding the seriousness of an offense.

To further demonstrate the unreasonableness of relying upon the retroactivity of a particular state's current sentencing laws, it merits note that Delaware's sentencing reform laws permit the individual facing sentencing for crimes committed before the current law's effective date to choose between the old law and the current law. 11 Del. C. § 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 provisions of the Truth in Sentencing Act of 1989 rather than under the prior provisions of this title."). Similar to an administrative decision to establish the effective date of a state's current sentencing law, Delaware's choice to permit a person with a drug offense to choose between the old law and the current law does not reflect that state's

current normative judgment regarding the seriousness of a drug offense. Rather, the current statutory maximum set forth in the current law represents the state's present normative judgment regarding the qualitative seriousness of an offense.

Moreover, North Carolina's decision not to make Structured Sentencing retroactive does not mean, as the Fourth Circuit asserted, "North Carolina has two sentencing schemes," App. 1 at 6. Even the Fourth Circuit acknowledged the old North Carolina sentencing laws it relied upon to categorize Petitioner's North Carolina Class H felonies as ACCA predicates were "repealed" in 1993. *Id.* at 4 (citing, "N.C. Gen. St. § 15A-1340.1, *et seq*. (repealed 1993); N.C. Gen. St. § 14-1.1 (repealed 1993)"). As the Second Circuit emphasized, the old law, regardless of whether certain persons remain subject to it, is still old law. *See Darden*, 539 F.3d at 128 ("That a dwindling class of offenders may still be subject to the 'Old Law' does not alter the fact that it is the old law.") (internal quotations and citation omitted).

The Fourth Circuit's reliance upon the penalties under an old, repealed law to make the ACCA "serious drug offense" determination also fosters a logical contradiction and yields arbitrary results. The exact same predicate offense, in this case a Class H drug felony, will be considered a "serious drug offense" for a federal defendant who committed that drug felony just one day before the effective date of Structured Sentencing, but not for another federal defendant who committed the same Class H drug felony one day after Structured Sentencing's effective date. So, regardless of whether both defendants possessed a firearm on the same day and face federal sentencing on the same day before the same district court, that court will have to conclude that a Class H felony drug offense both "is" and "is not" a "serious drug offense." This result not only embodies a logical contradiction, it also unfairly creates an arbitrary distinction based upon

a fact irrelevant to any common-sense notion of seriousness or to the substantive elements of an offense. *See Darden*, 539 F.3d at 126 (reasoning, "the timing of the offense conduct" does not make a drug crime "more or less serious").

Fourth and finally, the Fourth Circuit failed to address and explain its rejection of Petitioner's contention at oral argument that the Rule of Lenity should apply to resolve any ambiguities within ACCA's "serious drug offense" definition in Petitioner's favor. As noted at oral argument, both the Second Circuit in *Darden*, and the Sixth Circuit in *Morton*, concluded this canon of statutory interpretation required resolution in favor of the interpretation which the plain meaning of the statute strongly supported. *See Darden*, 539 F.3d at 128 (concluding, "if any ambiguity remained . . . and there being a strong argument to interpret the statute in the way we do, we would apply the rule of lenity to reach the same conclusion"); *Morton*, 17 F.3d at 915 ("The question is at least ambiguous and therefore, under the rule of lenity, should be resolved in defendant's favor.") (citing *United States v. Bass,* 404 U.S. 336, 348 (1971) ("Where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.")).

Even if the Fourth Circuit's grammatical contortions with the phrase "is prescribed" and disregard of ACCA's focus upon the present federal offense arguably yield a permissible interpretation of ACCA's "serious drug offense" definition, the existing circuit split itself demonstrates there are at least two plausible interpretations for that definition. Given this statutory ambiguity and in light of ACCA's draconian impact upon sentencing penalties, the Fourth Circuit should have applied the Rule of Lenity to resolve the ACCA "serious drug offense" issue in Petitioner's favor. *Bass*, 404 U.S. at 348.

The Fourth Circuit's failure to apply or to even mention the Rule of Lenity also demonstrates the applicability of the rule. *Bifulco v. United States*, 447 U.S. 381, 402 (1980) ("That it would be extremely difficult to accept the Government's argument that Congress unambiguously intended a contrary result, however, is best evidenced by the fact that the rule of lenity is not mentioned, let alone applied, in any of the lower court opinions that have accepted the Government's position.").

In sum, North Carolina's current normative judgment of the seriousness of a Class H Felony – and its normative judgment since October 1, 1994 – is set forth in the penalties which Structured Sentencing prescribes, a maximum term of imprisonment of thirty months. Fidelity to the plain meaning of the phrase "is prescribed by law" and to ACCA's focus upon the status of a prior "offense" at the time of federal sentencing compels the interpretation of the "serious drug offense" definition which the Fourth Circuit rejected – the maximum penalty prescribed by current state law for an offense.

CONCLUSION

For each of the foregoing reasons, 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 2nd day of July, 2010.

Respectfully submitted,

_____

G. ALAN DuBOIS*
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