No. 10-918

IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN HENDERSON,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a prior Missouri disposition resulting in a one year suspended imposition of sentence, which is not an appealable disposition or considered a "conviction" under Missouri law, ought to be considered a "prior conviction" that has "become final" for purposes of the penalty enhancement provision of 21 U.S.C. §851, which increases the mandatory minimum sentence from ten or twenty years to one of life imprisonment without the possibility of parole.

2. Whether the due process clause of the United States Constitution requires the court to apply the rule of lenity in choosing between conflicting precedents of the court with regard to the interpretation of a sentencing statute where the issue has never been decided by the Court of Appeals *en banc* and where neither decision has been overruled.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

The parties to the proceeding below in the United States Court of Appeals for the Eighth Circuit were STEPHEN A. HENDERSON, Petitioner, represented by Richard H. Sindel, and UNITED STATES OF AMERICA, Respondent, represented by the Solicitor General of the United States.

Pursuant to Rule 29.6, Petitioner states that no parties are corporations.

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IN THE

SUPREME COURT OF THE UNITED STATES

STEPHEN HENDERSON, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR WRIT OF CERTIORARI

Petitioner Stephen A. Henderson prays that a writ of certiorari be granted to review the judgment of the Eighth Circuit Court of Appeals entered in *United States v. Stephen Henderson*, Case Number 09-3326, on July 30, 2010.

OPINIONS BELOW

The judgment and opinion of the Eighth Circuit Court of Appeals in *United States v. Stephen Henderson* is printed at Appendix (hereinafter "App.") A, p. 1-17, *infra*, and the opinion is reported at 613 F.3d 1177 (8th Cir. 2010).

The Statement of Reasons for sentencing by the United States District Court in the Eastern District of Missouri was filed under seal and has not been reported.

The order of the Eighth Circuit denying rehearing and rehearing *en banc*, filed September 10, 2010, is printed at App. B, p. 1, *infra*.

JURISDICTION

The judgment and opinion of the Eighth Circuit Court of Appeals were entered on July 30, 2010, affirming Petitioner's conviction on September 22, 2009. *See* App. A, pp. 1-17.

The Court of Appeals denied a timely petition for rehearing on September 10, 2010. *See* App. B, p. 1.

On December 2, 2010, Justice Alito signed an order extending the time for filing the petition for writ of certiorari to and including January 10, 2011.

The jurisdiction of this Court to review the Judgment of the Eighth Circuit is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

FEDERAL STATUTES

18 U.S.C. §922(g)(1)

(g) It shall be unlawful for any person—(1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

18 U.S.C. §3607

(a) If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and (2) has not previously been the subject of a disposition under this subsection; the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation.

21 U.S.C. §802(13)

As used in this subchapter: (13) The term "felony" means any Federal or State offense classified by applicable Federal or State law as a felony.

21 U.S.C. §841

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; (b) Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: (1)(A) In the case of a violation of subsection (a) of this section involving— (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of— (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed; or (II) cocaine, its salts, optical and geometric isomers, and salts of isomers; such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine

not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $8,000,000 if the defendant is an individual or $20,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

28 U.S.C. §1738

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the

attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

STATE STATUTES

Mich. Comp. Laws § 333.7411

(1) When an individual who has not previously been convicted of an offense under this article or under any statute of the United States or of any state relating to narcotic drugs, coca leaves, marihuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a controlled substance under section 7403(2)(a)(*v*), 7403(2)(b), (c), or (d), or of use of a controlled substance under section 7404, or possession or use of an imitation controlled substance under section 7341 for a second time, the court, without entering a judgment of guilt with the consent of the accused, may defer further proceedings and place the individual on probation upon terms and conditions that shall include, but are not limited to, payment of a probation supervision fee as prescribed in section 3c of chapter XI of the code of criminal procedure, 1927 PA 175, MCL 771.3c. The terms and conditions of probation may include participation in a drug treatment court under chapter 10A of the revised judicature act of 1961, 1961 PA 236, MCL 600.1060 to 600.1082. Upon

violation of a term or condition, the court may enter an adjudication of guilt and proceed as otherwise provided. Upon fulfillment of the terms and conditions, the court shall discharge the individual and dismiss the proceedings. Discharge and dismissal under this section shall be without adjudication of guilt and, except as provided in subsection (2)(b), is not a conviction for purposes of this section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime, including the additional penalties imposed for second or subsequent convictions under section 7413. There may be only 1 discharge and dismissal under this section as to an individual.

RSMo 557.011 (2000)

2. Whenever any person has been found guilty of a felony or a misdemeanor the court shall make one or more of the following dispositions of the offender in any appropriate combination. The court may: (3) Suspend the imposition of sentence, with or without placing the person on probation.

STATEMENT OF THE CASE

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) because a judgment affirming the conviction of Petitioner in the United States Court of Appeals for the Eighth Circuit was entered on July 30, 2010.

On July 7, 2009, Petitioner was found guilty in the United States District Court of the Eastern District of Missouri of one count of conspiracy to possess with the intent to distribute cocaine, in violation of 21 U.S.C. §841(a)(1) and 21 U.S.C. §846, and distributing cocaine in

violation of 21 U.S.C. §841(a)(1). Petitioner's pre-sentence report reflected two prior felony drug offenses that had been adjudicated by Missouri Courts. PSR ¶ 29–38. The first of the two offenses was a felony for illegal possession of a controlled substance. PSR ¶ 29. The Missouri Court that accepted his plea suspended the imposition of sentence and placed Petitioner on probation for a period of one year.[1] PSR ¶ 29. Petitioner's probation was never revoked. These two drug offenses were the only criminal incidents listed in Petitioner's PSR. The probation officer calculated his guideline criminal history category at a level II.

The government filed a notice of intent to pursue an enhanced sentence pursuant to 21 U.S.C. §851 on June 16, 2009 (R: 178).[2] On the first day of trial, the government

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[1] Long-standing precedent in Missouri law makes it clear that a suspended imposition of sentence is not an appealable disposition and is not a conviction. *State v. Lynch*, 679 S.W.2d 858, 860 (Mo. 1984); *Barnes v. State*, 826 S.W.2d 74, 75-76 (Mo. App. 1992). Courts have continually relied on this precedent in accepting guilty pleas in, and the legislature has relied on this precedent as it has written and re-written felony statutes.

[2] Congress has outlined procedures in 21 U.S.C. §851 that must be followed in order for a court to apply an enhanced sentence under § 841. Section 851 requires not only that an information be filed, but also that: "the court . . . inquire of the person with respect to whom the information was filed whether he affirms or denies that he has been previously convicted as alleged in the information, and shall inform him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence . . . If the person denies any allegation of the information of prior conviction, or claims that any conviction alleged is invalid, he shall file a written response to the information . . . The court shall hold a hearing to determine any issues raised by the response which would except the person from increased punishment . . Except as otherwise provided in paragraph (2) of this subsection, the United States attorney shall have

mentioned, in the context of speaking about other issues, "that [it filed] a criminal information detailing the defendant's two prior convictions, therefore, making this case a mandatory life sentence case in the event of conviction." (T1:15) Nobody in the courtroom disputed or corrected this false representation of the applicable law, i.e. that the mere *filing of the information* made a life sentence mandatory in the event of conviction. *Id.* Additionally, the court failed to notify the defendant of his right to contest the previous convictions, and also failed to engage in any other procedures statutorily required by §851 in order to apply §841's enhanced sentencing provisions.

On appeal, Petitioner argued that the court's failure to engage in §851's required procedures was prejudicial because when the state sentencing court suspended the imposition of any sentence, this resolution could not be considered a "prior conviction for a felony drug offense" which has "become final" for purposes of §841's sentencing enhancement provisions. 21 U.S.C. §841(b). The panel rejected this argument, finding that *United States v. Craddock*, 593 F.3d 699, 701 (8th Cir. 2010) should be followed despite a previous panel holding in *United States v. Stallings*, 301 F.3d 919 (8th Cir. 2002), which had never been overruled to the effect that a suspended imposition of sentence was not a prior conviction for purposes of 21 U.S.C. §841's penalty enhancement provisions. See App. A, pp. 11-12; App. C, p. 1.[3] In *Craddock*, the court ruled that,

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the burden of proof beyond a reasonable doubt on any issue of fact. At the request of either party, the court shall enter findings of fact and conclusions of law."

[3] An *en banc* proceeding is necessary to resolve a split within a Circuit. *See South Corporation v. United States*, 690 F.2d 1368, 1370 n.2

"to the extent that *Stallings* evinces a conflict in our precedent, 'we are free to choose which line of cases to follow.'" *Craddock*, 593 F.3d at 702 (citing *Meyer v. Schnucks Mkts., Inc.* 163 F.3d 1048, 1051 (8th Cir. 1998).[4] On appeal, Petitioner argued that the rule that a court is "free to choose" which conflicting precedent to follow should

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(1892)("If conflict appears among precedents, in any field of law, it may be resolved by the court en banc in an appropriate case."); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247 (1953)("Rehearings en banc . . . are to some extent necessary in order to resolve conflicts between panels. This is the dominant concern."). There has been no en banc proceeding to resolve this issue within the 8th Circuit. *See, e.g.*, *United States v. Ortega*, 150 f.3d 937 (8th Cir. 1998)(panel decision); *United States v. Franklin*, 250 F.3d 653, 665 (8th Cir. 2001)(same); *Stallings*, 301 F.3d at 919 (same); *United States v. Maxon*, 339 F.3d 656, 659 (8th Cir. 2003)(rehearing en banc denied)(same); *United States v. Slicer*, 361 F.3d 1085, 1087 (8th Cir. 2004)(same); *Craddock*, 593 F.3d at 701 (same); *United States v. Henderson*, 613 F.3d 1177 (8th Cir. 2010)(same). Since one panel is powerless to overrule the decisions of another panel, both lines of decision remain valid precedent within the Eighth Circuit. *See United States v. Betcher*, 534 F.3d 820, 823-24 (8th Cir. 2008).

[4] *Craddock* relied largely on a previous Eighth Circuit Court of Appeals case that attempted to distinguish *Stallings* from *Ortega*, 150 F.3d at 948, on the ground that the court had not reached the finality issue in that case. *See Maxon*, 339 F.3d at 659. However, this distinction is misleading. 21 U.S.C. §841 requires a "final conviction" for purposes of the statute. Thus, if a defendant can prove that that there is either: (1) no prior conviction; or (2) a prior conviction is not yet final, the prior proceeding cannot be used for enhancement purposes under the statute. *Ortega* held that a suspended imposition of sentence was a final conviction for the purposes of the statute. *Ortega*, 150 F.3d at 948. *Stallings*, however, held that a state law suspended imposition of sentence was not a conviction for the purposes of the federal statute, eliminating any need to address the finality issue. *Stallings*, 301 F.3d at 922. The finality issue was thus moot in *Stallings* once the court determined that no conviction existed. *Id.*

not be applied in a criminal context because lenity and due process require that the court accept the statutory interpretation that is more favorable to the defendant. The court of appeals ignored this argument in issuing its opinion.

REASONS FOR GRANTING THE WRIT

I. This Court should grant certiorari on the question of whether a prior Missouri disposition resulting in a one year suspended imposition of sentence, which is not an appealable disposition and which under Missouri law is not considered "a conviction," ought to be considered a "prior conviction for a felony drug offense" which has "become final" for purposes of the penalty enhancement provision of 21 U.S.C. §851(b), which increases the mandatory minimum sentence from ten or twenty years to one of life imprisonment without the possibility of parole.

A. This Court should grant certiorari on the question because the panel decision is in conflict with decisions of the Eighth, Ninth and Tenth Circuit Courts of Appeals and other lower courts.

A number of courts of appeals have ruled that suspended sentences not resulting in convictions under state law should not be considered convictions for purposes of federal statutes. In *Stallings*, 301 F.3d at 922, the Eighth Circuit specifically held that when the state sentencing court suspends the imposition of any sentence,

it is not a conviction for purposes of 21 U.S.C. §841(b). In *Stallings*, the defendant had been charged with a prior drug offense in California to which he pled guilty and was placed on probation, but imposition of sentence was suspended, and no judgment was ever entered against him. *Id.* at 922 (citing *United States v. Qualls*, 108 F.3d 1019 (9th Cir. 1993)). In ruling that this disposition could not be considered a conviction for purposes of the application of the provisions of 21 U.S.C. §841(b) and the draconian punishments embodied therein, the court looked to California law. *Id.* Because the probationary period had passed and the defendant's probation had not been revoked, the court ruled that there was no judgment of conviction, and the defendant "[did] not have a final or pending judgment against him in California." *Id.* The Court emphasized an important distinction in California state law that is also present in Missouri law: "[W]hen a sentencing court grants probation after a conviction, it may suspend the imposition of sentence, in which case no judgment of conviction is rendered, or it may impose sentence and order its execution to be stayed. In the latter case only, a judgment of conviction is rendered." *Id.* (citing *United States v. Robinson*, 967 F.2d 287 (9th Cir.1992)). *Stallings* has never been overruled.

The decision below is also in conflict with decisions in the Ninth and Tenth Circuits' holdings that state law deferred-adjudication dispositions cannot be considered convictions for purposes of applying federal law. In *Ramirez-Altamirano v. Holder*, 563 F.3d 800, 811-12 (9th Cir. 2009) and *Rice v. Holder*, 597 F.3d 952, 956-57 (9th Cir. 2010), the Ninth Circuit ruled that certain adjudications under state rehabilitative statutes aimed at first-time offenders could not be considered for purposes of

deportation statutes. Likewise, in *United States v. Stober*, the Tenth Circuit ruled that a deferred adjudication under an Oklahoma state statute was not a conviction for purposes of a federal receipt of a firearm. 604 F.2d 1274 (10th Cir. 1975).[5]

Though these cases involve different federal statutes, they directly contradict the holding of the panel in this case because they reflect an entirely different meaning of the term "conviction" and how it should be interpreted for purposes of the application of federal statutes than that reached by the panel decision in this case. In *Ramirez-Altamirano*, the court considered the effect of a provision under 18 U.S.C. §3607[6] establishing that an adjudication

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[5] At least one district court in the Tenth Circuit has applied *Stober* in the context of §841, finding that absent a final judgment, there was no previous conviction and thus the enhanced penalty provisions of §841(b) did not apply. *U.S. v. Alvarado,* 458 F.Supp.2d 1266 (D.N.M. 2006). Despite these decisions in the Eighth, Ninth, and Tenth circuits, a number of other circuit panels have ruled that suspended sentences should be considered convictions for purposes of §841. *See United States v. Cisneros*, 112 F.3d 1272, 1280 (5th Cir. 1997); *United States v. Mejias*, 47 F.3d 401, 402 (11th Cir. 1995); *United States v. Gomez*, 24 F.3d 924 (7th Cir. 1994) at 927- 28.) *But See United States v. Meraz*, 998 F.2d 182, 184 (3d Cir. 1993) (The prior offense was considered a conviction only because it was an appealable order.)

[6] "(a) Pre-judgment probation.--If a person found guilty of an offense described in section 404 of the Controlled Substances Act (21 U.S.C. 844)--
(1) has not, prior to the commission of such offense, been convicted of violating a Federal or State law relating to controlled substances; and
(2) has not previously been the subject of a disposition under this subsection;
. . . the court may, with the consent of such person, place him on probation for a term of not more than one year without entering a judgment of conviction. At any time before the expiration of the term of

under §3607, which is essentially the equivalent of a state-law suspended imposition of sentence, ought to not be considered a conviction "for any purpose." 563 F.3d at 807. The court determined that the Equal Protection Clause required that it apply the same rule to state-law adjudications that were analogous to a federal adjudication under §3607. *Id.*[7]

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probation, if the person has not violated a condition of his probation, the court may, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. At the expiration of the term of probation, if the person has not violated a condition of his probation, the court shall, without entering a judgment of conviction, dismiss the proceedings against the person and discharge him from probation. If the person violates a condition of his probation, the court shall proceed in accordance with the provisions of section 3565.

(b) . . . A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose."

[7] Petitioner has found no case evaluating whether a prior adjudication pursuant to 18 U.S.C. §3607 is considered a prior conviction for purposes of §841, but the plain language of the statute is clear that it should not be. 18 U.S.C. § 3607(b)("A disposition under subsection (a) ... shall not be considered a conviction for the purpose of a disqualification or disability imposed by law upon conviction of a crime, or for any other purpose."). Significantly, the disposition of Petitioner's case in Missouri was almost identical to what is defined in §3607. Petitioner pled guilty to a drug possession offense and received a suspended imposition of sentence, which under the law of the court in which he was convicted was not considered a final judgment or conviction. *See Lynch*, 679 S.W.2d at 860; *Barnes*, 826 S.W.2d at 75-76.

Ramirez-Altamirano and the other Ninth Circuit cases that follow its holding present an almost identical question as the one that is presented today, and one that is clearly encompassed by it; i.e., where a state statute provides for an adjudication which is the exact equivalent of the disposition provided for in §3607, should federal statutes that prescribe collateral consequences on the basis of prior convictions treat a disposition under that state statute in the same manner as they are required to treat a disposition under §3607? There is a clear circuit split on this issue. While the Ninth Circuit has repeatedly and consistently answered "yes" on equal protection grounds (*see Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000); *Paredes-Urrestarazu v. U.S. I.N.S.*, 36 F.3d 801 (9th Cir. 1994); *Garberding v. I.N.S.*, 30 F.3d 1187 (9th Cir. 1994)), a number of other circuits have disagreed. *See Ballesteros v. Ashcroft*, 452 F.3d 1153, 1157-58 (10th Cir. 2006); *Resendiz-Alcaraz v. Ashcroft*, 383 F.3d 1262, 1266-71 (11th Cir. 2004); *Madriz-Alvarado v. Ashcroft*, 383 F.3d 321, 328-31 (5th Cir. 2004); *Acosta v. Ashcroft,* 341 F.3d 218, 222-27 (3d Cir. 2003); and *Gill v. Ashcroft*, 335 F.3d 574, 577-79 (7th Cir. 2003).

Similarly, in *Stober*, the Tenth Circuit ruled that because state law did not recognize a deferred adjudication as a conviction, it should not be recognized as such for purposes of 18 U.S.C. §922(h), which made possessing a firearm a crime if committed by a person who had been previously convicted of a defined set of crimes "in any court." The court stated:

> Thus under the decisions of the Oklahoma state court, the defendant was not convicted in the state court during that state proceeding which became an

> element in the federal charge here considered. There was no conviction in the Oklahoma state courts, and no determination of guilt, says Oklahoma law. The fact that there was no determination of guilt would seem to be significant, together with the admonitions in the statute that no judgment be entered, and the procedure whereby the plea is not acted upon. The evaluation and characterization of its own proceedings by the state should be determinative. The state is free to attach what consequences it wishes to violations of its laws. If the defendant Stober does not stand convicted in Oklahoma by the Oklahoma courts before whom the proceedings were had, it is difficult to see how the federal court can hold that he was convicted in the Oklahoma courts for to do so is to have him convicted by the federal court.

Id. at 1276.

Even though there was a plea of guilty, the court made no findings of guilt. Any distinction from the Petitioner's state court proceedings is a matter of semantics more than a distinction of substance. The Court further went on to emphasize that the words "in any court" signified the legislature's intent that the court that adjudicated the original case should be the court that determined whether there was a conviction or not.[8]

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[8] Significantly, *Stober* was overruled in *Dickerson v. New Banner Inst. Inc.*, 460 U.S. 986, 991 n.6 (1983), but the legislature later superseded that decision by statute, indicating its intent that state, not federal law, govern what was considered a conviction. 18 U.S.C. § 922(g)-(h).

Stober is in direct conflict with the decision of the Eighth Circuit panel in this case because §841 presents a much stronger case for interpreting the term "conviction" in light of state law than did §922. An important difference between §922 and §841 is that §922 defines the underlying offense one must be convicted of in broad terms that can easily apply in any jurisdiction. Under §922(g)(1), the relevant conviction is for a crime "punishable by imprisonment of a term exceeding one year." 18 U.S.C. § 922(g)(1). Whereas under §841, the relevant conviction is for any felony, which is defined as, "[a]ny Federal or State offense classified by applicable Federal or State law as a felony." 21 U.S.C. §802 (13). Section §841 thus requires reference to state law in defining a felony itself. It only makes sense then that it would also rely on state law in defining the entire term "felony conviction."

Finally, the panel's decision conflicts with the decision in *Gubbels v. Hoy*, 261 F.2d 952, 954-55 (9th Cir. 1958), wherein the Ninth Circuit ruled that an adjudication by court martial could not be considered a conviction under 8 U.S.C. §1251(a)(4)(now codified at 8 U.S.C. §1227(2)(A)(1). The Court argued that certain protections contemplated by the statute were simply not available in a military tribunal proceeding and thus the harsh collateral consequence of deportation ought to not apply. *Id.* at 954-955. "[N]ot all of the constitutional guarantees extended to defendants prosecuted in civil courts are available to an accused tried by a military tribunal." Thus the harsh collateral consequences associated with a conviction should not be applied. *Id.* at 955. *Hoy* contradicts the decision of the panel in Petitioner's case because an adjudication under Missouri statutes providing for a suspended imposition of sentence similarly does not carry with it the guarantees

generally associated with civil court proceedings because there is no right to appeal such an adjudication in Missouri. *Lynch*, 679 S.W.2d at, 860; *Barnes*, 826 S.W.2d at 75-76.

What *Hoy, Stober, Stallings*, and *Ramirez-Altamirano* and the many cases that follow their holdings represent is the entirely reasonable concept that the courts, judges, attorneys and participants in a system within a particular jurisdiction are best able to determine to the true meaning of a guilty plea to a certain disposition within that jurisdiction. Underlying all of these cases is the acknowledgment of the very practical reality that a defendant's decision to plead guilty is often based largely not on his understanding of his guilt or innocence but on the probable consequences he will face if he pleads guilty when evaluated against the costs, consequences and risks of taking his case to trial, and what his attorney tells him the consequences will be. The Supreme Court itself has acknowledged this fact by allowing judges to accept pleas of guilt despite protestations of innocence. *North Carolina v. Alford,* 400 U.S. 25 (1970). This is not to say that a plea of guilty should have no consequences. It is only to point out that the many lower court decisions which look to state law in attempting to decipher the meaning of the word "conviction" have a sound basis in both logic and law. This Court should grant certiorari and provide lower courts with clarity and guidance on this issue.

B. This Court should grant certiorari because this is an important question that requires clarity from this Court because it affects a large number of people in a significant manner.

Implicit in a defendant's decision to plead guilty is the assumption that the sentence or outcome will be more lenient than if the defendant had been convicted at trial. In 1994, felony drug possession convictions in state courts were the product of a guilty plea in 94 percent of cases. Brian Ostrom and Neal Kauder, Drug Crime: the Impact on State Courts, Nat'l Ctr. for State Courts 5, (1999), at http://www.ncsconline.org/D_Research/csp/Highlights /DrugsV5%20No1.pdf (citing Felony Sentences in State Courts, U.S. Department of Justice, Bureau of Justice Statistics (1994)). Many states have provisions that attempt to limit the disparate impact and the stigma associated with a first-time felony conviction, making the defendants much more apt to plea than take a chance at trial. In Missouri, this occurs when imposition of sentence is suspended. As previously established *supra*, the resulting disposition is not considered a "conviction" under state law. *Lynch*, 679 S.W.2d at 860. Similarly, in California, when a court grants probation after a conviction, the trial court may suspend the imposition of sentence and no judgment of conviction is entered. *People v. Arguello*, 59 Cal.2d 475, 476 (Cal. 1963). Many other states have similar provisions. See *Hunter v. Commonwealth*, 695 S.E.2d 567, 569 (Va. App. 2010)(suspended imposition of sentence coupled with probation is "act of grace" on part of Commonwealth and legislature has afforded trial courts wide latitude in "fashioning rehabilitative programs for defendants"); *State of South Dakota v. Moeller*, 388 N.W.2d 872, 872 (S.D. 1986)("trial court, by an [o]rder [s]uspending [i]mposition of [s]entence, did not enter a judgment of conviction on the . . . offenses"); *Hall v. State of Alaska*, 145 P.3d 605, 607 (Alaska App. 2006)("Hall received a suspended imposition

of sentence for [his] crime, and his conviction was set aside at the end of a year's probation"); *Todd v. State of Texas*, 598 S.W.2d 286, 291 (Tex. Cr. App. 1980)(when judgment is suspended, conviction only becomes final when probation is revoked); Mich. Comp. Laws § 333.7411(when an individual who has not previously been convicted of an offense under this article . . . pleads guilty to . . . possession of a controlled substance . . . the court, without entering a judgment of guilt, may defer further proceedings and place the individual on probation . . . discharge and dismissal under this section shall be without adjudication of guilt and is not a conviction). Most states have similar provisions designed to afford first-time offenders the benefit of the doubt in simple drug possession cases. States choose to adopt these types of laws in order to give its citizens a second chance.

Under several panel decisions in many circuits regarding the federal enhancement statute for prior convictions, there is no second chance. *See United States v. Cisneros*, 112 F.3d 1272, 1280 (5th Cir. 1997); *United States v. Mejias*, 47 F.3d 401, 402 (11th Cir. 1995); *United States v. Gomez*, 24 F.3d 924, 927-28 (7th Cir. 1994). *But See United States v. Meraz*, 998 F.2d 182, 184 (3d Cir. 1993) (The prior offense was considered a conviction only because it was an appealable order.) Any person convicted under 21 U.S.C. §841 who has pled guilty to a state felony possession charge will spend a minimum of 20 years in prison, and maybe even a lifetime, because these panels have held that federal law should govern the term "prior conviction" and that interpretation includes all suspended sentences and guilty pleas under state law, even though Congress has not specifically spoken on this issue and the relevant state law directly contradicts the punitive application of the enhanced sentences.

The issue presented in this case is of worthy of review for several reasons. First, the prosecution of many drug offenders is discretionary and can be subject to either state or federal jurisdiction. State cases may therefore be transferred to federal prosecutors in order to subject defendants to exorbitantly stiffer penalties or facilitate the forfeiture of various assets. *See* 21 U.S.C. §881. For example, as a direct result of the takeover of drug prosecutions, the average time expected to be served in federal prison for drug offenses between 1988 to 2002 has increased from 39.3 months to 62.4 months. Bureau of Justice Statistics, Federal Criminal Case Processing, 2002 (January 2005), NCJ 207447 1, at http://bjs.ojp.usdoj.gov/content/ pub/pdf/fccp02.pdf. Second, as discussed *supra*, I, state laws that provide second opportunities for citizens are vitiated under the current rulings of several circuits. This is not an isolated issue related solely to Petitioner, but rather an important and fundamental principle that will undoubtedly affect thousands of drug offenders. Petitioner respectfully requests that this Court step in to resolve this issue.

C. This is an issue of vital importance that requires clarity from this Court because it has fundamental statutory and constitutional implica-tions.

In 18 U.S.C. §3607, the federal government has created its own version of a suspended imposition of sentence and made specific provisions requiring that such a disposition "shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose." This provision reflects the federal government's sound decision

to not count certain dispositions in applying the many collateral consequences convictions impose under federal law.

A federal court's failure to recognize similar decisions by state governments carries constitutional implications for a number of reasons. First, and as explained herein, it raises due process concerns because it applies the stricter of two interpretations of the statute, without any legislative guidance as to why it should do so. As already discussed, 21 U.S.C. §841(b) does not contain a definition of " prior conviction for a felony drug offense which has "become final" for purposes of the statute, and judicial decisions have established conflicting case law on this issue. Therefore, due to the conflicting precedent, the Courts have failed to make the scope of the statute "reasonably clear." As such, criminal defendants and attorneys have no fair notice regarding the correct interpretation of the statute within the circuit, or for that matter, nationwide. *United States v. Bass*, 404 U.S. 336, 348 (1971)(discussing 18 U.S.C. §922(g) and felons in possession of firearms). Second, it raises equal protection concerns because it draws an irrational line between people who were prosecuted for drug possession offenses federally and whose cases were adjudicated pursuant to §3607 from those who were prosecuted at the state level, and received almost identical dispositions under the state statutes. See *Lujan-Armendariz*, 222 F.3d at 728; *Paredes-Urrestarazu*, 36 F.3d at 801; *Garberding,* 30 F.3d at 1187.

Finally, the question raises fundamental concerns under 28 U.S.C. §1738, which requires that all acts of state courts, "shall have the same full faith and credit in every court within the United States and its Territories and

Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken." *See also In re Genesys Dataechnologies, Inc.*, 204 F.3d 124 (4th Cir. 2000)(certified question answered, 95 Haw. 33, 18 P. P.3d 895 (2001)). The federal courts' failure to recognize a state court's interpretation of its own actions when it suspends the imposition of any sentence under Missouri and other states' laws is a clear violation of the federal government's obligations under 28 U.S.C. §1738.

D. This is an issue of vital importance that requires clarity from this Court because the decision is in conflict with generally accepted concepts of law and justice.

It is a generally recognized proposition of law that when interpreting contracts, the expectations of the parties govern the subsequent interpretation of the meaning of certain terms. *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 217 (1985) (performance of a contract requires faithfulness and consistency with the justified expectations of the other party)(citing *Restatement (Second) of Contracts* § 205 (1981)). The decision below negates this principal by failing to uphold the understanding of the law that all parties to the original adjudication had with regard to the legal definition and consequences of a suspended imposition of sentence. While contract law is not criminal law, the same principles of justice are generally applicable with regard to statutory interpretation:[9] The parties' understanding of

[9] Similarly in conflict of laws, there exists the oft-applied concept that that law governs which had the nearest relationship to the transaction in issue. Restatement (Second) of Conflict of Laws § § 7,8. Applied here, the meaning of a state conviction ought to apply to state law.

the terms applies, and when there is doubt, laws, like contracts, are to be interpreted in favor of the non-drafting party.[10] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995)(common law rule of contract interpretation is that a court should construe reasonable meanings of a term against the interest of the drafting party); *see also Restatement (Second) of Contracts* § 206 (1981). These general principles would require that where a federal court attempts to decipher the meaning of an action in state court, it must look to state law because that is the law that, whether by statute or judicial act, governed the action itself, and which best establishes the parties' expectations and intents. However, this general principal of the law, applied by many lower courts, is ignored in the decision below and by similar decisions of many circuit courts. The lower courts require clarity on this issue.

E. This Court should grant certiorari on this question because the decision of the panel conflicts with decisions of this Court.

This court has repeatedly ruled that where a court is deciding on conflicting statutory interpretations, lenity should apply. *Moskal v. United States*, 498 U.S. 103, 131

And in a civil action based on diversity of citizenship, a federal court must apply the statutory and common law of the state in which it sits. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78-79 (1938). Applied here, the federal court should apply the law of the state in which the court sits i.e. Missouri law.

[10] The second part of this proposition is encompassed by the rule of lenity which, significantly, the Eighth Circuit failed to adopt in choosing between conflicting statutory interpretations or conflicting precedents. *See infra*, III.

(1990)(Scalia, J., dissenting); *United States v. Gradwell*, 243 U.S. 476, 485 (1917); *Bass*, 404 U.S. at 348. This means that in order for a Court to adopt the harsher interpretation, Congress must, "have spoken in language that is clear and definite." *Id.* (citing *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952)(internal quotations omitted). This Court has also made it clear that the principle of lenity "applies not only to interpretations of the substantive ambit of criminal prohibitions, but also to the penalties they impose." *Bifulco v. United States*, 447 U.S. 381, 387 (1980). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Ladner v. United States*, 358 U.S. 169, 178 (1958). In this case, not only was there conflicting precedent within the Eighth Circuit as to the meaning of "prior conviction for a felony drug offense" which has "become final" under §841(b), but there is also specific federal law as encompassed by §3607 clearly stating that a disposition on a drug possession case that does not result in a judgment should not be considered a conviction for "any purpose." 18 U.S.C. §3607. If Congress provided any clarity as to how Petitioner's state court disposition should be treated for purposes of this and other statutes imposing consequences of convictions, it did so in drafting §3607. Thus to the extent legislative language provided clarity, it implied that when a Missouri court suspends the imposition of a sentence, this decision cannot be considered a conviction. The decision of the panel is clearly in contravention to this court's rule of lenity.

II. This Court should grant certiorari on the question of whether the due process clause requires a court to apply the rule of lenity in choosing between conflicting precedents of that court with regard to the interpretation of a sentencing statute where the issue has never been decided en banc by the court of appeals with jurisdiction and where neither decision has been overruled.

A. This Court should grant certiorari with regard to this issue because courts of appeals and district courts need guidance on how to apply conflicting precedents in criminal cases.

Two panels of the Eighth Circuit ruled on the issue of whether a Missouri suspended imposition of sentence can be considered a conviction for purposes of §841(b) and the panels that have decided not to follow the rule announced in *Stallings* have done so primarily on the serendipitous proposition that, "under the rules of this circuit, we are 'free to cho[o]se which line of cases to follow." *Slicer*, 361 F.3d at 1087 n 1 (citing *Maxon*, 339 F.3d at 659); *Kostelec v. State Farm Fire & Cas. Co.*, 64 F.3d 1220, 1228 n. 8 (8th Cir.1995)); *Craddock*, 593 F.3d at 702 (citing *Meyer*, 163 F.3d at 1051. Significantly, this rule was not developed in the context of criminal law, but was simply lifted from a maxim originally espoused in civil appeals. When first applying this rule in the context of this conflict, the Eighth Circuit engaged in no analysis as to the applicability of the rule in the criminal context and whether specific rights and requirements relevant only in the context of a criminal proceeding require that a different standard apply in

choosing between conflicting precedents. *Id.* A criminal defendant's constitutional due process rights require that a criminal statute give a defendant fair warning of proscribed conduct and sufficient clarity as to the consequences of violating a criminal statute. *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964); *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979). The due process rights of a criminal defendant and the rule of lenity do not apply in the context of civil law, and as such the rule for choosing between conflicting precedents in a criminal case requires a different analysis than in the civil context. There is significant split among the circuits and other lower courts as to what rule the Circuit court should apply when precedents conflict on an issue on which neither the en banc court with jurisdiction nor the United States Supreme Court has spoken. There is some state court authority that if there are conflicting precedents, it is the court's duty to follow the decision that it perceives is based on the sounder reasoning. *Meade v. Com.*, 282 S.W. 781, 783 (1926); *Hammock v. State*, 46 S.W.3d 889, 892 (Tex. Crim. App. 2001). Circuit courts have held that the earlier opinion controls and is binding precedent. *Rios v. City of Del Rio, Tex.*, 444 F.3d 417, 425 (5th Cir. 2006)(petition for cert. filed, 75 U.S.L.W. 3001, 75 U.S.L.W. 3023 (U.S. June 23, 2006)); *European Community v. RJR Nabisco, Inc.*, 424 F.3d 175, 179 (2d Cir. 2005)(cert. denied, 126 S. Ct. 1045, 163 L. Ed. 2d 858 (U.S. 2006)); *Wright v. R.R. Donnelley & Sons Co. Group Benefits Plan*, 402 F.3d 67, 75 (1st Cir. 2005). Some circuit courts have held that the earlier precedent should be followed if it was settled precedent, as opposed to a subsequent deviation from it. *Burke-Fowler v. Orange County, Fla.*, 447 F.3d 1319, 1323 n. 2 (11th Cir. 2006); *U.S. v. Rodriguez-Aguirre*, 414 F.3d 1177, 1185 n. 10 (10th Cir. 2005). Still other state courts have asserted that it is the last impression that is

controlling. *Jolley v. Clemens*, 82 P.2d 51, 60-61 (4th Dist. 1938). *Parker v. Plympton*, 273 P. 1030, 1034 (1928); *Hornsby v. State*, 163 N.E. 923, 924 (1st Dist. Hamilton County 1928); *Bruner v. Automobile Ins. Co. of Hartford, Conn.*, 164 S.E. 134 (1932). Significantly, these rules have been developed almost exclusively in the context of civil litigation. Also, none of these cases have addressed the specific requirements of fair notice, lenity, and whether due process requires a different rule in the criminal context.

The Supreme Court has traditionally rejected cases where the reason for granting certiorari had to do with an intra-circuit conflict. *Davis v. United States*, 417 U.S. 333, 340 (1974); *Wisniewski v. United States*, 353 U.S. 901,902 (1957)("[I]t is primarily the task of a Court of Appeals to reconcile its internal difficulties."). As such, the Supreme Court has provided lower courts and courts of appeals with no guidance on the question of whether there are any due process implications if a panel of the court decides to follow the harsher of two conflicting precedents in a criminal case.

B. This Court should grant certiorari on this question because the practice of the Eighth Circuit and other circuits directly contradicts the requirement that the rule of lenity be considered in resolving conflicting interpretations of criminal statutes.

Although the rule of lenity traditionally applies to ambiguity within statutes, the rationale behind the rule, that due process requires fair notice to the defendant of the consequences of his actions, necessitates that lenity also apply to conflicting case-law precedent when both are

reasonable interpretations of the statute at issue. The decision of the panel in this case thus contradicts the statements of law by this Court in *Gradwell*, 243 U.S. at 485; *Bifulco*, 447 U.S. at 387; *Ladner*,, 358 U.S. at 178; *Bouie*, 378 U.S. at 350-51, and *Bass*, 404 U.S. at 348.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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