No. 10-5258

IN THE SUPREME COURT OF THE UNITED STATES

CLINTON TERELLE McNEILL, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in determining whether a prior state offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" for purposes of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e)(2)(B), a court should consider the maximum term prescribed by state law for petitioner's prior offense or instead should consider the maximum term that state law would prescribe for that offense if the offense were committed on the date of petitioner's federal sentencing.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-10a) is reported at 598 F.3d 161.

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2010. A petition for rehearing was denied on April 5, 2010 (Pet. App. 11a). The petition for a writ of certiorari was filed on July 2, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Eastern District of North Carolina, petitioner was convicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1). The district court sentenced petitioner to 300 months of imprisonment, to be followed by five years of supervised release. The court of appeals affirmed. Pet. App. 1a-10a.

1. On February 28, 2007, officers with the Fayetteville, North Carolina, Police Department tried to stop petitioner's vehicle for running a red light. Petitioner evaded the police for several miles. He then made an abrupt stop and fled from his vehicle. An officer tackled petitioner and found a .38 caliber Smith & Wesson revolver under petitioner's body. A search of petitioner uncovered 3.1 grams of crack cocaine, packaged for distribution, along with $369. Pet. App. 2a.

2. Petitioner pleaded guilty to one count of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1); and one count of possession with intent to distribute crack cocaine, in violation of 21 U.S.C. 841(a)(1). Pet. App. 2a-3a. On the former count, petitioner was subject to a mandatory minimum sentence of 15 years under the Armed Career Criminal Act of 1984 (ACCA), 18 U.S.C. 924(e), if he had "three previous convictions

* * * for a violent felony or a serious drug offense." 18 U.S.C. 924(e)(1). The Act defines a "serious drug offense" in relevant 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." 18 U.S.C. 924(e)(2)(A)(ii).

At the sentencing hearing, petitioner did not dispute that two of his prior convictions under North Carolina law for assault with a deadly weapon and common law robbery qualified as "violent felon[ies]" for ACCA purposes. Pet. App. 3a n.1. Petitioner did dispute, however, that additional prior convictions under North Carolina law qualified as "serious drug offense[s]" for ACCA purposes, including his convictions in November 1992 and April 1995 for possession with the intent to distribute cocaine. Id. at 4a; see C.A. App. 122, 124.[1] Petitioner argued that, under North Carolina law, the offense of possession with intent to distribute cocaine is not punishable by "a maximum term of imprisonment of ten years or more." 18 U.S.C. 924(e)(2)(A)(ii); see Pet. App. 4a.

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[1] Petitioner was convicted of several drug offenses under North Carolina law between 1991 and 2004. See C.A. App. 121-125. The court of appeals focused on petitioner's convictions in November 1992 and April 1995 for possession with the intent to distribute cocaine. Pet. App. 4a. Petitioner does not contend that, of his various drug convictions, any should be treated differently for ACCA purposes.

Under North Carolina law, petitioner's drug offenses are Class H felonies. When petitioner committed those offenses in 1992 and 1994, they were punishable by a maximum term of imprisonment of ten years. See Pet. App. 4a (citing N.C. Gen. Stat. § 14-1.1 (repealed 1993), and N.C. Gen. Stat. § 15A-1340.1 et seq. (repealed 1993)). North Carolina subsequently revised its sentencing laws, and Class H felonies are now punishable by a maximum term of imprisonment of 30 months. See Pet. 4; N.C. Gen. Stat. § 15A-1340.17; State v. Mullaney, 500 S.E. 2d 112, 114 (N.C. Ct. App. 1998) ("Under Structured Sentencing, the maximum possible term of imprisonment for a Class H felony is thirty months."). North Carolina did not, however, make the sentencing change retroactive. The reduced Class H penalties apply only to offenses committed on or after October 1, 1994, and petitioner committed his drug offenses in February 1992 and September 1994. See Pet. 4; C.A. App. 122, 124. Thus, under current North Carolina law, petitioner's drug offenses remain punishable by "a maximum term of imprisonment of ten years." 18 U.S.C. 924(e)(2)(A)(ii).

Before the district court, petitioner contended that when the ACCA defines a "serious drug offense" as one "for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added), it refers to the term of imprisonment prescribed by state law at the time of the federal sentencing -- not at the time of commission of the state offense.

C.A. App. 101-102. The district court rejected that contention and held that petitioner's prior convictions were for "serious drug offense[s]" under the ACCA. As a result, petitioner's advisory Guidelines range was 188 to 235 months of imprisonment (based on his criminal history category of VI and his total offense level of 31). Id. at 130. The district court varied upward from that range on the basis that petitioner's criminal history category of VI substantially underrepresented the seriousness of his criminal history and the likelihood of recidivism. Pet. App. 7a. The court sentenced petitioner to concurrent terms of imprisonment of 300 months on the count of being a felon in possession of a firearm and 240 months on the count of possession with intent to distribute crack cocaine. Ibid.

3. The court of appeals affirmed. Pet. App. 1a-10a. The court observed that "[w]hen North Carolina revised its sentencing scheme in 1994, it specifically provided that the revised sentences would not apply to crimes committed before the effective date of the revisions," i.e., October 1, 1994. Id. at 6a. The court therefore recognized that even if petitioner were sentenced in the present for his 1992 and 1994 drug offenses, he would be subject to a maximum term of imprisonment of ten years. Ibid. Accordingly, the court concluded that, assuming the statutory reference to the "maximum term [that] is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii) (emphasis added), refers to how petitioner's

offenses could have been punished by the State at the time of the federal sentencing proceeding, petitioner's prior drug offenses were punishable at the time of the federal sentencing proceeding by a maximum term of ten years' imprisonment under North Carolina law. Pet. App. 6a. The court noted that its reasoning was consistent with the Fifth Circuit's decision in United States v. Hinojosa, 349 F.3d 200 (2003), cert. denied, 541 U.S. 1070 (2004), but not the Second Circuit's decision in United States v. Darden, 539 F.3d 116 (2008). Pet. App. 6a.

DISCUSSION

Petitioner renews his contention (Pet. 6-16) that in determining whether a prior state offense is one "for which a maximum term of imprisonment of ten years or more is prescribed by law" under Section 924(e)(2)(B) of the ACCA, a court should not consider the maximum term prescribed by state law for petitioner's prior offenses. Rather, according to petitioner, the court should consider the maximum term that state law would prescribe for those offenses if they were committed on the date of petitioner's federal sentencing. In other words, petitioner claims that for ACCA purposes he should receive the benefit of intervening changes in state sentencing law that have not been made retroactive and thus do not apply to him as a matter of state law. The court of appeals correctly rejected petitioner's contention, and although there is some tension between the reasoning of the court below and the

reasoning of other courts of appeals, there is no square conflict presented by this particular case. Further review is therefore not warranted.

1. a. Petitioner is subject to the ACCA's mandatory minimum 15-year sentence if either of his two prior North Carolina convictions in 1992 and 1995 for possession with the intent to distribute cocaine qualifies as a conviction for a "serious drug offense." As relevant here, the ACCA defines a "serious drug offense" as "an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance * * * for which the maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). The government assumes here that the statute's use of the present tense -- i.e., "the maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2)(A)(ii) -- refers to the applicable state sentence at the time of the federal prosecution, not at the time of the underlying state prosecution.[2] In this case, as explained below, the

[2] There is some question whether Section 924(e)(2)(A)(ii) refers to the applicable state sentence at the time the defendant commits his federal offense or at the time the defendant is sentenced on that federal offense. Compare United States v. Klump, 536 F.3d 113, 120 (2d Cir. 2008) (applying the mandatory minimum sentence in 18 U.S.C. 924(c)(1)(B)(i) that was in effect at the time of the defendant's offense), with United States v. Darden, 539 F.3d 116, 122 n.8 (2d Cir. 2008) (stating that for ACCA purposes "courts should examine the state law in place at the time of the federal sentencing, not the state law in place at the time when the federal offense was committed"). That question, however,

applicable state sentence was a maximum term of imprisonment of 10 years both at the time of petitioner's state prosecution and at the time of his federal prosecution.

The question presented in this case is how to determine the applicable state sentence at the time of the federal prosecution. The court of appeals correctly held that, for purposes of the ACCA, the relevant maximum sentence is the maximum term prescribed by state law for petitioner's prior offense. Pet. App. 6a. At the time that petitioner committed his drug offenses, North Carolina prescribed a maximum term of imprisonment of 10 years for each of those offenses. Although North Carolina subsequently lessened that maximum term to 30 months, it did not make the change retroactive to offenses like petitioner's that were committed before October 1, 1994. Accordingly, at the time of petitioner's federal prosecution, a maximum term of imprisonment of 10 years "[was] prescribed" -- and still "is prescribed" -- by North Carolina law for petitioner's drug offenses.

Petitioner is therefore incorrect (Pet. 9) that the court of appeals disregarded the ACCA's plain language or failed to apply state sentencing law as it existed at the time of petitioner's federal prosecution. To the contrary, the court of appeals looked

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is not presented by the facts of this case. Here, the applicable state sentence under North Carolina law did not change between February 28, 2007, when petitioner committed his felon-in-possession offense, and January 13, 2009, when petitioner was sentenced on that federal offense.

to the maximum state sentence "prescribed" for petitioner's drug offenses at the time of his federal sentencing -- and that maximum state sentence "is" 10 years. 18 U.S.C. 924(e)(2)(A)(ii). As the Fifth Circuit explained in United States v. Hinojosa, 349 F.3d 200 (2003), cert. denied, 541 U.S. 1070 (2004), petitioner's prior convictions are for "serious drug offense[s]" under the ACCA "because if he were sentenced by the state court for those crimes today, he would still be subject to a maximum term of at least ten years." Id. at 205.

b. Under petitioner's approach, the relevant maximum sentence for ACCA purposes is the maximum term that state law would prescribe for his prior offenses if those offenses were committed on the date of his federal sentencing. Petitioner's approach would require that the federal sentencing court consider any intervening change in state sentencing law after the commission of a state offense, without regard to whether the change was made retroactive to the offense at issue or whether the change decreased or increased the maximum state sentence for the offense. For example, suppose that a defendant is convicted of a drug-related offense that at the time of conviction is a misdemeanor under state law. Under petitioner's approach, that state misdemeanor conviction nevertheless could serve as a predicate conviction under the ACCA, if the State increased the maximum sentence for that offense to 10

years or more before the defendant committed a violation of 18 U.S.C. 922(g).[3]

That consequence not only demonstrates the error in considering nonretroactive intervening changes in state sentencing law, but also demonstrates the error in petitioner's invocation (Pet. 15-16) of the rule of lenity. Petitioner advocates an approach that, depending on the nature of the intervening change in state sentencing law, would neither uniformly benefit nor uniformly disadvantage criminal defendants. See United States v. O'Neil, 11 F.3d 292, 301 n.10 (1st Cir. 1993) (declining to apply the rule of lenity because "[d]epending on the facts of any particular defendant's situation, a generous reading of the [statutory] provision can produce either a harsher or a more lenient result than a cramped reading will produce").

2. Petitioner asserts (Pet. 6-7) that the court of appeals' decision conflicts with decisions of the Second and Sixth Circuits. As an initial matter, petitioner recognizes (Pet. 6) that the decision below is consistent with the Fifth Circuit's decision in Hinojosa. In Hinojosa, the defendant was convicted in Texas state

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[3] Contrary to the suggestion of the Second Circuit, see United States v. Darden, 539 F.3d 116, 121 n.4 (2008), it would not offend the Ex Post Facto Clause to treat a prior conviction as a predicate for an enhanced sentence on a later crime even if the prior conviction would not have qualified as a predicate at the time the prior conviction was committed; all that is required is that the prior offense qualified as a predicate at the time of the commission of the later crime. See, e.g., Gryger v. Burke, 334 U.S. 728 (1948).

court of a drug offense for which the maximum sentence under state law at the time was 99 years. 349 F.3d at 204. After the defendant's conviction, the state law was amended to provide for a maximum sentence of 2 years. The defendant therefore argued at his federal sentencing that his state drug conviction "was not a 'serious drug offense' because at the time of his federal sentencing the maximum state sentence for th[e] offense was not at least 10 years." Ibid.

The Fifth Circuit rejected that argument. It observed that the state's "revised sentencing scheme specifically provides that the revised sentences do not apply to crimes committed before the effective date of the revisions." Hinojosa, 349 F.3d at 205. The Fifth Circuit therefore held that even looking to state law as it existed at the time of federal sentencing, the defendant's convictions were for "serious drug offense[s]" under the ACCA "because if he were sentenced by the state court for those crimes today, he would still be subject to a maximum term of at least ten years." Ibid.

On that basis, the Fifth Circuit distinguished the Sixth Circuit's decision in United States v. Morton, 17 F.3d 911 (1994), which involved an intervening change in Tennessee sentencing law between the time of the defendant's state convictions and the time of his federal sentencing. In Morton, the Sixth Circuit appeared to assume that the change in state sentencing law was retroactive:

"If defendant were sentenced today, therefore, he could not receive more than six years for those convictions." Id. at 914-915. The Fifth Circuit therefore found in Hinojosa that it was conducting the same inquiry as the Sixth Circuit in Morton by looking to "the the maximum sentence for a previous conviction at the time of federal sentencing, not at the time of conviction." 349 F.3d at 205. That is the same inquiry that the court of appeals conducted here. The court of appeals in this case, and the Fifth Circuit in Hinojosa, simply concluded that the intervening changes in state sentencing law did not apply retroactively to the offenses at issue.

Petitioner also claims (Pet. 7) a conflict with the Second Circuit's decision in United States v. Darden, 539 F.3d 116 (2008), which involved an intervening change in New York sentencing law between the time of the defendant's state convictions and the time of his federal sentencing. In Darden, the Second Circuit held that, following this Court's decision in United States v. Rodriquez, 128 S. Ct. 1783 (2008), the relevant state sentence for ACCA purposes depends on whether "an enhanced maximum term is punishment for the drug[-related] offense." Darden, 539 F.3d at 126 (emphasis in original). According to the Second Circuit, "[t]he question, at bottom, is whether, in punishing the earlier timed nature of the offense more severely, the state is meting out

extra punishment for the drug[-related] offense of conviction." Ibid.

The Second Circuit in Darden concluded that the change in New York sentencing law was not intended as a judgment about the seriousness of the offense conduct: "The Reform Act, and its legislative history, amply confirm that New York does not view drug crimes committed before [the effective date of the Act] as 'more serious' than drug crimes committed after that date." 539 F.3d at 126. Even assuming that were the correct inquiry, the Second Circuit's conclusion is open to question. A State's decision not to make a sentencing amendment retroactive could be taken to indicate its judgment that, taking into account various considerations, pre-amendment crimes are to be treated more seriously than post-amendment crimes.

Regardless, there is no clear conflict between Darden and the present case, because here the court of appeals did not consider whether North Carolina's change in its sentencing scheme represented a legislative judgment that drug crimes committed after October 1, 1994, were less serious than drug crimes committed before that date. In light of the court of appeals' discussion of North Carolina's Structured Sentencing Act, that Act's specific provision "that the revised sentences would not apply to crimes committed before the effective date of the revisions," and the State's creation of "two sentencing schemes" depending on the date

of an offense, the court of appeals might well have concluded that North Carolina's change in its sentencing scheme did represent a judgment that post-amendment crimes were to be treated less seriously than pre-amendment crimes. Pet. App. 6a.

Moreover, the Second Circuit's decision in Darden predates this Court's recent decision in Carachuri-Rosendo v. Holder, 130 S. Ct. 2577 (2010). In Carachuri-Rosendo, the Court considered whether an alien who had been repeatedly convicted of state drug possession offenses, but who had not been charged or sentenced as a recidivist in his second or subsequent proceedings, had been "convicted" of a state offense that was a "felony punishable under" the federal drug laws. 8 U.S.C. 1229b(a)(3); 18 U.S.C. 924(c)(2). The Court held that the alien had not been convicted of an offense punishable as a federal felony, because although recidivist drug possession is punishable as a felony under federal law, the alien was not charged or sentenced as a recidivist in state court. Carachuri-Rosendo, 130 S. Ct. at 2589.

Thus, in determining whether the alien's prior conviction met the applicable statutory definition, Carachuri-Rosendo focused on the statutory penalty actually applicable to the alien, not the sentence some hypothetical defendant might have faced under other circumstances. That focus is difficult to square with the approach taken by petitioner in the present case, which focuses on the penalty faced by a hypothetical defendant who commits state

offenses at the time of the federal prosecution. Although it arose under a different statutory provision, this Court's decision in Carachuri-Rosendo potentially bears on the proper method for determining the maximum term of imprisonment for ACCA purposes in this context. This Court's review therefore would be premature, pending further consideration of the question presented in the courts of appeals in light of Carachuri-Rosendo.

Finally, the question presented in this case does not appear to have arisen with any frequency since 1986, when the ACCA first provided that drug-related offenses could be used as predicate offenses. See Anti-Drug Abuse Act of 1986, Pub. L. 99-570, tit. I, § 1402, 100 Stat. 3207-39 (Oct. 27, 1986). For that reason as well, further review by this Court is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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