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IN THE SUPREME COURT OF THE UNITED STATES

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CLIFTON TERELLE MCNEILL, :

Petitioner : No. 10-5258

v. :

UNITED STATES :

- - - - - x

Washington, D.C.

Monday, April 25, 2011

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:00 a.m.

APPEARANCES:

STEPHEN C. GORDON, ESQ., Assistant Federal Public Defender, Raleigh, North Carolina; on behalf of Petitioner.

CURTIS E. GANNON, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondent.

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P R O C E E D I N G S

(11:00 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next this morning in Case 10-5258, McNeill v. United States.

Mr. Gordon.

ORAL ARGUMENT OF STEPHEN C. GORDON

ON BEHALF OF THE PETITIONER

MR. GORDON: Mr. Chief Justice, and may it please the Court:

When this Court construes a statute, the words of the statute matter, the purpose of the statute matters, and the results produced by that construction matter.

When Congress defined in the Armed Career Criminal Act a "serious" drug offense as one for which a State penalty of 10 years or more is prescribed by law, it meant for Federal courts to look to the law presently in effect in that State. This is the most natural reading of the statute, and words matter. It is also consistent with ACCA's purpose, which is punish the Federal firearms offense, and if we are going to punish --

JUSTICE SOTOMAYOR: Counsel, I -- I have just one problem, which is under your theory, I

1 understand it, if a State increases a penalty, makes  
2 what would have been a penalty for a misdemeanor now a  
3 felony, then that defendant is a career criminal, by  
4 your logic.

5 MR. GORDON: Uh --

6 JUSTICE SOTOMAYOR: So the person who  
7 thought that at the time they committed the crime they  
8 were committing a low-level crime is now a felon; is  
9 that your theory of the case?

10 MR. GORDON: If -- if a State were to  
11 increase a penalty -- say from originally it was 5  
12 years, increased it to 10 years, the defendant was  
13 convicted at a time when it was 5 years -- if the  
14 legislature increased the penalty, if the defendant  
15 possessed a firearm, yes, he would be facing --

16 JUSTICE SOTOMAYOR: What -- what -- what  
17 logic do you think there is in that, why Congress would  
18 want to punish someone now for -- for criminal activity  
19 that they thought was lesser, and the State thought was  
20 lesser, at an earlier time, less reprehensible?

21 MR. GORDON: Because the purpose of the  
22 Armed Career Criminal Act is not to enhance a sentence  
23 because of the prior conviction. It is because the  
24 Federal firearm offense at the time it was committed is  
25 more serious based on -- based on its repetitive nature,

1 as this Court has said. So therefore looking to, when  
2 the defendant commits the offense, what his status is at  
3 that time under the law we think makes sense and is  
4 consonant with the purpose of what ACCA is trying to do.  
5 ACCA is not trying to punish the State offense at the  
6 time.

7 And of course the converse, Your Honor, is  
8 that by adopting the government's reading, is  
9 individuals who at a time committed an offense when a  
10 State at that time viewed an offense as more serious but  
11 now has changed its view of the offense, does not view  
12 it as being as serious, that person also would receive a  
13 15-year mandatory minimum sentence.

14 JUSTICE GINSBURG: Mr. Gordon, the State  
15 does regard it -- it does -- prescribe 10 years for this  
16 defendant because it's made a -- made the change not  
17 retroactive. So a maximum of 10 years is prescribed for  
18 Mr. McNeill, and all others who committed the offense  
19 prior to the change in law. So it is -- it is the  
20 State's current position that for this offense the  
21 maximum is 10 years.

22 MR. GORDON: Yes, Justice Ginsburg, that's  
23 correct. Where we fundamentally disagree with the  
24 government and with the Fourth Circuit is on the  
25 significance of retroactivity. We -- the statute

1 requires -- or the statute directs us to look at the  
2 penalty that is prescribed for the offense, the offense  
3 in its generic context. It -- it is not about what the  
4 circumstances of the defendant were that produced the  
5 particular conviction for him.

6 No one who commits the trafficking offenses  
7 that Mr. McNeill committed today is going to be facing a  
8 10-year sentence. It's not going to happen to anyone  
9 who commits the offense from today forward. And we  
10 think that is where the statute directs us to look:  
11 What is the penalty for the generic offense?

12 JUSTICE ALITO: Suppose -- what would happen  
13 in this situation? A defendant is convicted under a  
14 State statute that says that anybody who sells between 1  
15 ounces -- 1 ounce and 5 ounces of a particular  
16 controlled substance is guilty of a felony and may be  
17 punished by imprisonment for a certain amount of time.

18 And then the State repeals that provision  
19 altogether and enacts a new provision that says anybody  
20 who sells between 1 ounces -- 1 ounce and 8 ounces is  
21 punishable by a certain penalty. And now the question  
22 comes up what -- what penalty does the court look at  
23 with respect to the earlier offense that no longer  
24 exists for which the defendant was convicted?

25 MR. GORDON: There -- there are two possible

1 answers, Justice Alito. First, the court could look to  
2 what the offense is now, could look back to what the  
3 defendant did consistent with Shepard and so forth, and  
4 see if the defendant's conviction contains the element  
5 of the -- the elements that apply to the present  
6 offense.

7           If the court could not do that, then the  
8 conviction would count for purposes of the defendant's  
9 criminal history. It would not count as an ACCA  
10 predicate, and the district court would then be limited  
11 to a 10-year sentence as opposed to a 15-to-life  
12 sentence.

13           So consistent with -- with its purpose, we  
14 think that the statute should be read as speaking to the  
15 time, not of the State conviction -- not of the State  
16 sentence.

17           JUSTICE GINSBURG: Mis --

18           MR. GORDON: Yes?

19           JUSTICE GINSBURG: Mr. Gordon, is this -- is  
20 this essentially an academic question? Because this  
21 district judge said that he would impose the same  
22 sentence as a variant even if he couldn't do it under  
23 the guidelines, even if it were an incorrect  
24 calculation. He said: This criminal record is violent  
25 and astonishing; essentially, I'm going to throw the

1 book at him, and I'm going to do it through a variant if  
2 that's no -- if there's no other way.

3 So isn't that -- I mean, isn't this an -- an  
4 exercise, essentially an academic exercise, if -- if  
5 your -- your client would end up in the same place?

6 MR. GORDON: Well, Justice Ginsburg, it may  
7 be an academic exercise for Mr. McNeill or for the Mr.  
8 McNeills of the world. The judge would -- if this Court  
9 were to agree with us, the judge could impose  
10 consecutive sentences on a remand and still achieve the  
11 same sentence, yes.

12 For someone whose only offense, however, is  
13 a 922(g) conviction, then it makes a huge difference  
14 because, rather than looking at a 15-year mandatory  
15 minimum penalty, the defendant would be looking at no  
16 more than 10 years. So, the judge's -- it would be  
17 significantly cabined in -- in that sense.

18 And the other, with respect to the Mr.  
19 McNeills of the world, the judge on a remand is still  
20 going to be required to calculate the guidelines  
21 correctly. And so if the guidelines change, if they go  
22 down in this case, for the judge to achieve a 300-month  
23 sentence, the judge is going to have to state reasons  
24 again and arguably more significant reasons to -- to  
25 achieve that same level if he's working from a lower



1 guideline range.

2 JUSTICE KAGAN: Mr. Gordon, there are other  
3 provisions in ACCA which seem to use the present tense  
4 in circumstances where it doesn't seem as though the  
5 statute truly means the present tense. So, a violent  
6 felony is one that "has as an element the use of  
7 physical force, is burglary, arson, or extortion,  
8 involves use of explosives;" and so on and so forth.  
9 But we would not look as to -- in interpreting that  
10 provision to the present day, would we?

11 MR. GORDON: Justice Kagan, I think you  
12 would, in this sense: For the violent felony provision,  
13 there is a generic offense. Let's take burglary. There  
14 is this existing thing right now called burglary. What  
15 a Taylor analysis does is it looks backward to what the  
16 defendant did. It looks to see what those elements are.  
17 It takes those elements and brings it forward, and if  
18 those elements fit in the box, then what he did is a  
19 burglary. If it does not, then it is not a burglary.  
20 The -- so, that's my essential answer to that. Is it --

21 JUSTICE SCALIA: Why is -- why is -- why is  
22 the present tense inadequate for the -- for the  
23 government's position in this case? Once it is conceded  
24 that the North Carolina law is not retroactive, the law  
25 reducing the number of years, it is the case that what

1 is the maximum term of imprisonment for the offense that  
2 he committed -- how many years ago was it, whatever --

3 MR. GORDON: Early '90s, Your Honor. Yes,  
4 '91, '92.

5 JUSTICE SCALIA: What is the maximum  
6 punishment for that offense which occurred at that time  
7 is the longer period. Why is -- I don't see why your  
8 argument requires us to ask what would be the term if he  
9 had committed the offense at a later date. The maximum  
10 term for his offense when he committed it is those years  
11 because the State did not retroactively reduce his  
12 sentence.

13 MR. GORDON: That's correct for Mr. McNeill.  
14 The penalty for him -- he would be facing an exposure of  
15 10 years. The penalty, however, that everyone else --  
16 the penalty that is currently prescribed in North  
17 Carolina for someone who commits McNeill's offenses is  
18 not 10 years and, and depending on where they fall in  
19 the prior record level, their maximum sentence is  
20 considerably less than 10 years.

21 So we do not think it's consonant with the  
22 statute to look to the circumstances of the individual  
23 defendant. Congress easily could have said "for which a  
24 penalty of 10 years or more is prescribed for the  
25 defendant." We think that would be a different case.

1 JUSTICE SCALIA: It's not just for the  
2 defendant; it's for anybody who committed it prior to  
3 the -- prior to the amendment of the statute.

4 MR. GORDON: That's correct.

5 JUSTICE SCALIA: Anybody that committed it  
6 then, the -- the -- it is an offense "involving  
7 manufacturing, distributing, or possessing with intent  
8 to manufacture or distribute a controlled...for which a  
9 maximum term of imprisonment of 10 years or more is  
10 prescribed by law." It is prescribed by law for any of  
11 those offenses that occurred between whenever that old  
12 statute was enacted and whenever this statute was  
13 enacted.

14 MR. GORDON: It is prescribed only if you  
15 take the offense out of the category of a generic  
16 offense. It is not -- it is -- it is not prescribed for  
17 the generic offense. It is prescribed for particular  
18 defendants who committed the offense at a certain point  
19 in time.

20 And, Justice Scalia, I think it raises a  
21 rather fundamental question, which is if we're going --  
22 if we really are punishing the Federal firearm offense  
23 and we are not punishing the defendant for the prior  
24 conviction, and we have two individuals who commit a  
25 922(g) offense and they have similar records, but they

1 sustain their State convictions on different days, do we  
2 want to treat them the same for purposes of where they  
3 -- of the Federal offense or do we want to distinguish  
4 them on the basis of the State convictions? Do we want  
5 the State convictions to really --

6 CHIEF JUSTICE ROBERTS: What if the State --

7 MR. GORDON: Yes, sir.

8 CHIEF JUSTICE ROBERTS: What if the State  
9 change is to abolish the offense altogether? Do we --  
10 do we not have any predicate offense for the defendant  
11 who committed the crime prior to the abolition of the  
12 State offense?

13 MR. GORDON: Your Honor, yes. If -- if, as  
14 I said earlier, you could not determine from the prior  
15 conviction whether there is any present State offense  
16 that might be called something different, but that has  
17 those drug trafficking elements that the statute  
18 requires, if you cannot determine, you know, from  
19 Shepard-approved documents and so forth, yes, we think  
20 for purposes of the armed career criminal enhancement  
21 only that that would disappear. That's correct.

22 I do want to stress, because I think it's  
23 important to stress, that --

24 JUSTICE SCALIA: Excuse me. That's --

25 MR. GORDON: Yes?

1 JUSTICE SCALIA: That's correct? You're  
2 happy with that? The person committed a felony when it  
3 was a felony, and the State later no longer makes it a  
4 felony, and it isn't counted for purposes of the Armed  
5 Career Criminal Act?

6 MR. GORDON: Only for purposes of the Armed  
7 Career Criminal Act, yes. It certainly would count as a  
8 prior conviction. It would count as a prior conviction,  
9 for example, for 922(g) purposes. This person could  
10 still be prosecuted for being a felon in possession,  
11 yes.

12 So, we do not -- our reading is not opening  
13 the jail house door for anybody. They are still facing  
14 a hefty 10-year sentence. The question is, in a statute  
15 that defers to the judgment of the States to determine  
16 seriousness, are we going to defer to the current State  
17 assessment of what seriousness is or are we going to  
18 look back to repeal the discarded judgments?

19 CHIEF JUSTICE ROBERTS: Well, but it strikes  
20 me that there's really no change in the State view of  
21 how serious it is. It was just an overall change in how  
22 they're going to look at sentencing. Under the prior  
23 regime, you're sentenced to a particular term, but in  
24 fact you serve a lot less. With the new treatment in  
25 sentencing, you're sentenced to what is a much -- a

1 smaller term, but you in fact are going to serve the  
2 whole thing. At the end of the day, there's no real  
3 change in how they view the seriousness of the offense.

4 MR. GORDON: That's correct, Mr. Chief  
5 Justice, arguably yes. But for purposes of the serious  
6 drug offense definition, what we have to use is the  
7 penalty. We have to look at the penalty as the State --  
8 as the State's proxy, if you will, for seriousness.

9 JUSTICE SCALIA: Are we looking at it  
10 because we want the States to determine the Federal  
11 sentence or are we looking at it because we evaluate the  
12 evil of the particular defendant on the basis of how --  
13 how much of a crime he was willing to commit?

14 And so long as it was a serious felony when  
15 he committed it, this is a bad actor. I don't care if  
16 the State changes its view. At the time, he was willing  
17 to commit a felony that put him in jail for 10 years,  
18 and that's what we're looking to, it seems to me, how  
19 bad an apple is this fellow that -- that we're talking  
20 about putting away? And that doesn't change simply  
21 because the State decides in the future that that same  
22 act will not be a felony. Well, people who perform that  
23 act in the future aren't so bad; they're just -- you  
24 know, just normal not-so-good people --

25 (Laughter.)

1 JUSTICE SCALIA: -- but they're not the kind  
2 of a person who's willing to -- to commit a felony that,  
3 you know, puts them away for 10 years.

4 It seems to me that that's what the Federal  
5 law is looking to. We're not giving over to the States  
6 the decision of -- of how long we should incarcerate  
7 somebody in a Federal prison.

8 MR. GORDON: Justice Scalia, if -- if that  
9 were indeed what Congress wanted, then it would have  
10 written the statute differently. There would be  
11 something in that definition about the defendant, and  
12 there's not. It's about the offense. So the -- the  
13 judgment that the State is making is about the  
14 seriousness of the offense itself, and as we made an  
15 effort to argue in our briefs, State views of drug  
16 offenses change.

17 JUSTICE SCALIA: I agree, it does refer to  
18 the seriousness of the offense. But it refers to the  
19 seriousness of the offense at the time the offense was  
20 committed in order to determine how bad a fellow this  
21 is, not -- not because we want the States to determine  
22 how long we're going to keep Federal prisoners in  
23 prison.

24 MR. GORDON: Justice Scalia, respectfully,  
25 I -- I don't agree with that. Respectfully --

1 JUSTICE SCALIA: That's the issue, though,  
2 really.

3 MR. GORDON: That is an issue, yes, Justice  
4 Scalia. But the issue is, do you look at the defendant.  
5 Do you say Congress was really talking about trying to  
6 get the Mr. McNeills any way we can or we are -- we are  
7 interested in people who commit an offense that the  
8 State currently regards as serious.

9 You will capture Mr. McNeills; you will also  
10 capture people who, you know, under the old Texas law  
11 that, you know, prescribed 99 years for someone who  
12 might have sold one or two marijuana cigarettes as well.

13 JUSTICE SCALIA: But you'll -- you'll put  
14 away for a long time somebody who really wasn't that bad  
15 a guy. He committed a misdemeanor, and when the State  
16 later makes it a felony, you -- he suddenly comes under  
17 ACCA. And I -- I can't believe that that's -- that's  
18 what -- what Congress had in mind just because the State  
19 now thinks that it's more serious. Who cares what the  
20 State thinks? We -- we want to know how bad an actor  
21 this particular defendant is.

22 MR. GORDON: In the case of a misdemeanor --  
23 Justice Sotomayor asked earlier about misdemeanors and  
24 felonies -- there may be some additional constitutional  
25 issues in terms of whether if it's a misdemeanor



1 conviction, even statutory reasons, if it's a  
2 misdemeanor conviction, whether it should count. I  
3 think it works that way in the violent felony prong, for  
4 example, where the term that you look at is was it 1  
5 year.

6 But that is -- that is not the proxy for  
7 seriousness because there is another provision, 18  
8 U.S.C. section 921(a)(20), that exempts 2-year  
9 misdemeanors. So -- so, the 1 year in the violent  
10 felony provision is not serving the same purpose that --  
11 that the 10 years is in the serious drug offense.

12 A reason that Congress may have had for  
13 doing that is to say that if we are going to hit  
14 somebody with 15 years, we want to make sure that they  
15 had their constitutional rights at the time they  
16 sustained the predicate conviction, had a right to  
17 counsel, indictment, jury, and so forth.

18 JUSTICE GINSBURG: I'm -- I'm not sure what  
19 you're urging now. Are -- are you modifying or  
20 retracting the answer you gave to Justice Sotomayor,  
21 that is, the case where the maximum was 5 years, but  
22 then at the time of the Federal offense the State has  
23 changed it so it's 10 years?

24 I -- I think you answered her question that  
25 it would work the same way, that what mattered is how

1 the State currently ranks the offense, not the offender.  
2 But now you seem to be saying there might be a different  
3 answer when the State increases rather than decreases  
4 the penalty.

5 MR. GORDON: What -- what I meant to say,  
6 Justice Ginsburg, is that if you are -- if you continue  
7 to be talking about a felony offense, if it goes from  
8 5 years to 10 years, it went from a felony to another  
9 felony, in that circumstance I -- I -- I will concede  
10 our reading of the statute would work to the detriment  
11 of that defendant, that -- that's correct.

12 What I was simply trying to say about the  
13 misdemeanor-felony is that there might be some  
14 additional constitutional issues that would not be  
15 present in -- if it went from 5 years to 10 years.

16 JUSTICE KENNEDY: In -- in the hypothetical  
17 where the penalty is increased, would there be an ex  
18 post facto problem?

19 MR. GORDON: Your Honor, I don't believe  
20 there would be. The defendant presumptively is on  
21 notice that the law has changed.

22 Now, if -- if the increase in the penalty  
23 were between the time that he commits the 922(g) offense  
24 and the time of the sentencing, yes, I think you have ex  
25 post facto concerns there. I think if you're talking

1 about between the time of the State offense and the time  
2 of the commission of the firearm offense, I don't think  
3 it raises the ex post facto concerns. Again, the  
4 defendant is on notice, he's presumed to know what the  
5 law is at the time he commits the Federal offense, and  
6 that's what we care about here.

7 I -- I would also like to return to the  
8 question of retroactivity for just a moment and note  
9 that in terms of the administerability of the Armed  
10 Career Criminal Act, the question of retroactivity would  
11 introduce, if the government's reading is adopted,  
12 problems that do not exist under reading ACCA speaking  
13 in the present tense. Under the government's approach,  
14 it is not simply that you can look at what the sentence  
15 was that the defendant received in State court. The  
16 government says retroactivity matters.

17 So you would still have to go to the present  
18 penalty, and then you would have to conduct an inquiry  
19 into what the, you know, what changes occurred in the  
20 law, were any of them retroactive, were they retroactive  
21 for a certain period of time, et cetera. So, it --

22 JUSTICE SOTOMAYOR: I'm sorry, how do you  
23 see that? I thought the government had two alternative  
24 positions, the first being that you look at the time --  
25 at the time of the offense, at the conviction or,

1     alternatively, it was arguing the way to take the  
2     position of the court below.  But if you're going to use  
3     the present tense then you look retroactively to see --  
4     then you look to see whether the State would  
5     retroactively apply the new sentence.

6                     MR. GORDON:  Yes, Your Honor.

7                     JUSTICE SOTOMAYOR:  You understood their  
8     brief differently?

9                     MR. GORDON:  Your Honor, I read the brief  
10    differently?  If -- and if my reading is incorrect, I  
11    apologize.

12                    JUSTICE SOTOMAYOR:  I'm sure they'll tell  
13    you.

14                    (Laughter.)

15                    MR. GORDON:  Yes, I'm sure they will.

16                    If there are no further questions, I would  
17    like to reserve the balance of my time.

18                    CHIEF JUSTICE ROBERTS:  Thank you,  
19    Mr. Gordon.

20                    Mr. Gannon.

21                    ORAL ARGUMENT OF CURTIS E. GANNON

22                    ON BEHALF OF THE RESPONDENT

23                    MR. GANNON:  Mr. Chief Justice, and may it  
24    please the Court:

25                    Petitioner was convicted under North

1 Carolina law of multiple offenses subject to a 10-year  
2 maximum term of imprisonment, and he actually received  
3 10-year sentences for his drug crimes. He now claims  
4 that those convictions are not ones for which the  
5 maximum term of imprisonment is at least 10 years for  
6 purposes of ACCA's definition of serious drug offense.

7 That result is incorrect, because the  
8 sentencing court should consider the offense and the  
9 punishment as they were defined by the body of law under  
10 which the defendant was convicted and sentenced.

11 This is the simplest approach, because the  
12 Court is already looking to the statute at the time of  
13 the underlying conviction in order to evaluate whether  
14 it satisfies the substantive component of the definition  
15 of a serious drug offense. And if I can start where  
16 Justice Sotomayor finished with my friend, we have one  
17 footnote in the first part of our argument, footnote 5,  
18 which clarifies an issue that isn't at stake here, which  
19 is that when we say that you need to look to the time of  
20 the underlying conviction, that that includes the time  
21 of the sentencing which could include some sentence  
22 modification proceedings.

23 If the State had amended the law in the  
24 meantime, made it retroactively applicable and the  
25 defendant were able to get his judgment or conviction

1 modified, then we would not insist that -- that he still  
2 had an offense that was subject to a 10-year maximum  
3 term of imprisonment. And we think that this approach  
4 is consistent with what the Court said in Rodriguez,  
5 where it was also evaluating the serious drug offense  
6 under ACCA and pointed us to the documents associated  
7 with the judgment of conviction.

8           It recognizes that the relevant question  
9 here is the body of law that applied to this particular  
10 defendant in his offense. And -- and it's the term  
11 "conviction" that actually points us to that in the  
12 statute. The question is what is the sentencing regime  
13 associated with the defendant's actual conviction, and  
14 the government's --

15           JUSTICE SOTOMAYOR: Could I -- just to  
16 clarify your point. If there's been a modification of  
17 law that would have entitled him to a retroactive change  
18 in his sentence, although I'm not quite sure how that  
19 works, because if there's a modification, I thought it  
20 would only apply to a defendant who had committed the  
21 crime at that earlier time but was convicted at the  
22 present time. This defendant wouldn't have his sentence  
23 modified.

24           MR. GANNON: Well, I think that this would  
25 be a highly extraordinary circumstance. There may be an

1 instance where the State legislature has actually  
2 amended the law, made it retroactive and said that it's  
3 applicable to people who had final convictions  
4 beforehand I --

5 JUSTICE SOTOMAYOR: Well, that's my  
6 question. Is your footnote related to that kind of  
7 individual only or are you saying -- or are you  
8 accepting your adversary's argument that the circuit  
9 below got it right? You look at the is as to what the  
10 sentence would be today --

11 MR. GANNON: The footnote --

12 JUSTICE SOTOMAYOR: -- if this person had  
13 committed the crime?

14 MR. GANNON: The footnote in part A of the  
15 government's brief is -- is not consistent with the  
16 court of appeals approach. We're saying that under our  
17 principal reading which is at the relevant time, at the  
18 time of the conviction, that that includes the  
19 sentencing associated with that conviction; and in  
20 certain unusual circumstances that may well include a  
21 sentence modification proceeding that occurred sometime  
22 after the fact. But in any event it's going to be a  
23 previous conviction that needs to be on the books at the  
24 time of the 922(g) offense.

25 JUSTICE SOTOMAYOR: I'm just trying to

1 clarify whether you mean that the -- the modification  
2 had to have occurred, meaning that he was convicted, he  
3 got 10 years, and somewhere for some State reason, that  
4 actual final judgment was amended to include 5.

5 MR. GANNON: Yes.

6 JUSTICE SOTOMAYOR: Are or are you talking  
7 about --

8 MR. GANNON: Yes.

9 JUSTICE SOTOMAYOR: -- accepting his  
10 argument that if he could apply for a change now --

11 MR. GANNON: It -- in -- we think that it  
12 has to be under the documents associated with his  
13 judgment of conviction. So it would matter that he had  
14 been successfully able to obtain modification of the --  
15 the judgment associated with his conviction. In those  
16 circumstances it would be appropriate to say that the  
17 body of law that applied to his conviction was one that  
18 specified only the lower punishment.

19 That's obviously not an issue here because  
20 the State hasn't made any of these relevant changes  
21 retroactively applicable to any offense that was  
22 committed before the first of October in 1994.

23 JUSTICE SOTOMAYOR: Is this the first time  
24 you're advancing the argument, the first part of your  
25 argument?



1 MR. GANNON: It --

2 JUSTICE SOTOMAYOR: It doesn't appear as you  
3 did -- if you did it below; am I correct?

4 MR. GANNON: We -- we did not advance this  
5 below. We weren't heard on the question at district  
6 court. The district judge adopted this argument in  
7 response to Petitioner's objection to the PSR which had  
8 taken this position. In the court of appeals,  
9 Petitioner relied upon the Sixth Circuit's decision in  
10 Morton, and we -- we responded the essentially the way  
11 the Fourth Circuit did, which is to say the Fifth  
12 Circuit has distinguished instances like that when the  
13 court has not -- when the State has not made the -- the  
14 intervening decrease in the sentence retroactively  
15 applicable. That's the interpretation that the Fourth  
16 Circuit adopted.

17 But the government has made this argument  
18 before in -- in the Second Circuit in Darden, in the  
19 Fifth Circuit in Hinojosa, in the -- in the Sixth  
20 Circuit in Morton in the 1994 decision. The government  
21 has made this lead argument that we're making today in  
22 addition to the fallback argument that the -- that the  
23 Fourth Circuit adopted here, and that the Fifth Circuit  
24 adopted in -- in Hinojosa.

25 But I would note that the lead argument that

1 we're making today has several advantages that make it  
2 preferable to the fallback argument. Some of them have  
3 already been brought up today. I already mentioned the  
4 fact that this is simpler, because it requires the judge  
5 to just look to one time to evaluate the substantive  
6 component of the definition and the -- the sentence  
7 component of the definition.

8 But this also prevents the types of problems  
9 that Justice Alito addressed earlier that may arise when  
10 the State has amended the definition of the offense. If  
11 you just look to the -- the actual offense at the time  
12 of the conviction, then you don't run into those sorts  
13 of problems, and the Fifth Circuit recognized this in  
14 its Allen decision and therefore ended up having to  
15 adopt what is essentially the government's lead argument  
16 here.

17 The Sixth Circuit which generally follows  
18 Petitioner's rule also ended up adopting the  
19 government's lead argument in the context of a  
20 guidelines determination, because it recognized that it  
21 -- it was unwilling to assume that a conviction simply  
22 disappears when the State has modified the definitions  
23 in such a way that you can't precisely translate into  
24 current terms what the underlying offense of conviction  
25 is.

1           The government's reading avoids that problem  
2 because it doesn't require you to recharacterize the old  
3 offense at all. It just says what was he convicted of?  
4 What was the maximum sentence associated with that  
5 offense at the time he was actually prosecuted? There's  
6 nothing hypothetical about it. And as the -- as the  
7 Court pointed out in Rodriguez, we would expect a lot of  
8 the documents association with a judgment of conviction  
9 to make this a relatively easy inquiry to answer what  
10 was the maximum sentence at the relevant time.

11           This -- the reading also avoids the  
12 difficulty that Justice Sotomayor pointed out that --  
13 that is associated with later increases in -- in the  
14 sentence. Under the government's view, if you committed  
15 an offense at a time when it was subject to a 10-year  
16 punishment, Congress has reasonably assumed that you are  
17 a dangerous person; but that Congress could also  
18 reasonably assume that there's a distinction between  
19 somebody who commits an offense at a time when it's  
20 subject to a 10-year term of imprisonment and someone  
21 else who commits that offense at a different time when  
22 it's subject to only a 30-month term of imprisonment.  
23 And so under North Carolina law, for instance, the --  
24 the felony of manufacture of methamphetamine went from  
25 being a class H felony which is subject to a 30-year

1 maximum term of imprisonment to being a class C felony  
2 -- excuse me, a 30-month maximum term of imprisonment,  
3 to a class C felony, which is subject to a 19-year  
4 maximum term of imprisonment on December 1st, 2004. And  
5 we think it's reasonable for Congress to assume that  
6 somebody who committed the crime of manufacturing  
7 methamphetamine in North Carolina at a time when it was  
8 subject to a 30-month maximum sentence is not as  
9 dangerous as somebody who was willing to commit the same  
10 offense at a time when it was subject to a 19-year  
11 maximum term of imprisonment.

12           And the government's approach by -- by  
13 requiring the court to look to the time of the  
14 underlying conviction and sentencing unifies the inquiry  
15 across both components of the definition of serious drug  
16 offense and the definition of violent felony that  
17 Justice Kagan alluded to in the earlier part of the  
18 argument, that the definition of violent felony includes  
19 present-tense references to whether a crime is burglary,  
20 the question of whether it is punishable by a -- by a  
21 term exceeding 12 months, which is necessary to  
22 establish that it's a felony is one that -- that we  
23 believe needs to be made at the time of the underlying  
24 conviction.

25           JUSTICE ALITO: What if the legislature

1 decreases the penalty because it really has taken a  
2 different -- a new look at the nature of the offense and  
3 has come to the conclusion that this really is not  
4 nearly as serious as we -- as we previously thought? So  
5 why should the prior judgment about the severity of the  
6 offense be taken into account under ACCA?

7 MR. GANNON: Well, Congress has given us a  
8 very objective and simple yardstick to look to and  
9 that's just what the maximum term of imprisonment is.  
10 And if -- if the State actually thinks that the previous  
11 offenses that were committed were less serious, then it  
12 could make the decreased maximum term of imprisonment  
13 retroactively applicable if -- if it wanted to  
14 demonstrate that -- that it really thought that those  
15 were mistakes. But that's not the approach that South  
16 Carolina has taken -- that North Carolina has taken  
17 here.

18 It has said that for crimes that were  
19 committed before October 1st, 1994, the prior sentencing  
20 regime still applies. And as the Chief Justice pointed  
21 out before, the State has not repudiated the judgment  
22 that these were serious offenses, not -- not -- not only  
23 with respect to when they were committed, but the entire  
24 shift to structured sentencing Petitioner  
25 acknowledges --

1 JUSTICE ALITO: But what if --

2 MR. GANNON: -- wasn't intended --

3 JUSTICE ALITO: What if they had repudiated  
4 their prior normative judgment? And -- and even -- what  
5 if they even had made it -- made the new sentence  
6 retroactive, but a particular defendant was no longer in  
7 prison, so wasn't on parole, so there was nothing --  
8 there was no way that this could have any effect on that  
9 person?

10 MR. GANNON: Well, it's possible that the  
11 State could -- could provide a mechanism by which he  
12 could have the documents associated with his prior  
13 judgment amended to reflect the fact that he -- he ought  
14 not to have been subjected to the -- to the greater term  
15 of imprisonment.

16 I think that that's probably the hardest  
17 case, somebody who once upon a time actually, like this  
18 Petitioner, did a 10-year term of imprisonment for --  
19 for the sentence, the State in retrospect concludes that  
20 the offense had not been that serious even at the time,  
21 and if he had been prosecuted today he -- he should have  
22 received only a 5-year maximum term of imprisonment.

23 I think -- I think that that's -- that's an  
24 instance where it -- it might be difficult to -- to --  
25 to find a way in the statute to say that ACCA doesn't

1 apply to him, that he did not have a previous conviction  
2 at the relevant point in time.

3 JUSTICE SCALIA: I'm not sure it's so hard.  
4 I -- I could find my way clear to saying that if it has  
5 been retroactively made a -- a -- a lesser offense, that  
6 that would qualify under -- under the statute. I don't  
7 know why you insist that his actual conviction be -- be  
8 altered.

9 MR. GANNON: Well, I -- I think that we  
10 would obviously still prevail under an approach like  
11 that. It would be an expansion of what we proposed in  
12 footnote 5. We think that the relevant inquiry starts  
13 with the conviction, but if -- if the court were to ask  
14 in the context of the body of law that applies to his  
15 offensive conviction, whether the State has changed its  
16 mind by doing -- by altering the precise yardstick that  
17 Congress has directed the court to look to, then -- then  
18 I think that -- that that would be an appropriate way to  
19 deal with it.

20 I'm not exactly sure how you get it out of  
21 the words of the statute, but it -- it would solve the  
22 problem for -- for cases like this of somebody who had  
23 been unable to take advantage of a sentence modification  
24 type of proceeding.

25 JUSTICE SOTOMAYOR: Can you tell us whether

1 changes in State sentences -- do the States routinely  
2 address retroactivity? Or do they leave it to their  
3 general common law? Or do you have any idea of what --

4 MR. GANNON: Several States have specific  
5 saving statutes like the Federal Government does in  
6 1 U.S.C. 109. At least three States have constitutional  
7 provisions that effectively are something like a saving  
8 statute. Sometimes they have background common law  
9 principles.

10 In any instance, these types of general  
11 provisions, except where the constitutional provisions  
12 exist, could be overcome by the State legislature in a  
13 particular statute, just as is the case with the Federal  
14 savings statute. A State legislature, if it wants to be  
15 express about the retroactive applicability of a change,  
16 would be able to do that.

17 There may be limitations under the ex post  
18 facto clause of its increasing the severity of  
19 punishment, but for something like a decrease, there --  
20 there would be fewer limitations.

21 If there are no further questions, we would  
22 urge the Court to affirm the judgment of the --

23 CHIEF JUSTICE ROBERTS: Thank you,  
24 Mr. Gannon.

25 Mr. Gordon, you have 6 minutes remaining.



1 REBUTTAL ARGUMENT OF STEPHEN C. GORDON

2 ON BEHALF OF THE PETITIONER

3 MR. GORDON: Thank you, Mr. Chief Justice.

4 First, the government talks about, again,  
5 the problems arising if -- if a statute is amended, and  
6 so forth. Again, I would like to analogize that to the  
7 violent felony prong of ACCA. Predicate convictions  
8 disappear. Things that were predicate convictions cease  
9 to be when this Court interprets a particular offense as  
10 not qualifying as a violent felony, then -- then  
11 individuals who had committed that offense it disappears  
12 as -- as a predicate. So it is -- it is not anomalous  
13 for that to happen.

14 The government speaks about looking to the  
15 time of the State proceeding. It is -- that -- that --  
16 that approach overlooks that changes to drug laws very  
17 well could reflect a normative judgment on the basis of  
18 the -- of the legislature, and the question is  
19 whether -- whether in the way it wrote the statute,  
20 Congress wanted -- wanted to defer to those State  
21 judgments.

22 Texas and New York changed their sentencing  
23 laws because they judged them to have been too harsh,  
24 that -- that they treated as more serious offenses  
25 than -- than those offenses actually were.

1                   We see that today with the issue of -- of  
2 crack cocaine. And under the government's reading,  
3 individuals may be hit with -- with an ACCA mandatory  
4 minimum on the basis of crack convictions sustained at a  
5 time when, you know, the view of crack is very, very  
6 different from what it is now. So we think that is an  
7 important consideration as well.

8                   The question of retroactivity, again, as we  
9 have argued in our brief, it does not -- the savings  
10 clause in North Carolina was a general savings clause,  
11 it applied to every single offense in the -- in the  
12 State. It was not a reflection of the -- of the  
13 legislature's judgment of seriousness. And if I -- if I  
14 may end on a point that I made earlier, the question for  
15 this Court really is when do you want to treat two  
16 individuals -- when do you -- when do you want to look  
17 at them?

18                   Do you want to look at them at the time of  
19 the Federal offense or do you want to look at them in  
20 terms of their prior State convictions and come to a  
21 conclusion that although they did exactly the same thing  
22 in the State court, one committed a serious drug  
23 offense, one did not. We think that is an absurd  
24 result. It's not a fair result, and we would ask the  
25 Court to reverse the judgment of the Fourth Circuit.

1 Thank you very much.

2 CHIEF JUSTICE ROBERTS: Thank you, counsel.

3 The case is submitted.

4 (Whereupon, at 11:40 a.m., the case in the  
5 above-entitled matter was submitted.)

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