No.

In the Supreme Court of the United States

JOHN A. BARBOSA,
Petitioner,

v.

UNITED STATES OF AMERICA
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Court's decision in *United States v. Rodriquez*, which it clarified in *Carachuri-Rosendo v. Holder*, instructs lower courts to look to the record of conviction—including the charging document, the plea colloquy, and the judgment—when determining whether a prior state drug offense was punishable by imprisonment up to ten years or more, such that it constitutes a "serious drug offense" under the Armed Career Criminal Act ("ACCA") of 1984, 18 U.S.C. 924(e), and not to consider the punishment that the defendant hypothetically *could* have faced had he been charged differently. While some circuits have heeded that guidance, the First Circuit has not.

The question presented is:

Whether a prior Massachusetts state drug offense that carried a maximum term of imprisonment of two and a half years *as charged* can constitute a "serious drug offense" under the ACCA merely because prosecutors *could have charged* the defendant in a different state court where the offense carries a maximum term of imprisonment of ten years.

LIST OF PARTIES

The Petitioner is John A. Barbosa (“Barbosa”).

The Respondent is the United States of America.

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The Opinion of the United States Court of Appeals for the First Circuit was published at *United States v. Barbosa*, 896 F.3d 60 (1st Cir. 2018) and is reproduced in Appendix A at pp. 1-31.

JURISDICTION

The Opinion and Judgment of the First Circuit entered on July 16, 2018, 2018. *See* Appendix B at 1. Barbosa did not seek rehearing.

Barbosa timely invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). The United States District Court for the District of Massachusetts had jurisdiction under 18 U.S.C. § 3231. The First Circuit had jurisdiction under 28 U.S.C. § 1291.

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 924(e)(1) provides in pertinent part:

> (e)(1) In the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).

18 U.S.C. § 924(e)(2)(A)(ii) provides in pertinent part:

> (2) As used in this subsection—
>
> (A) the term "serious drug offense" means—
>
> ...
>
> (ii) an offense under State law, involving manufacturing, distributing, or possessing with intent to manufacture or distribute, a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802)), for which a maximum term of imprisonment of ten years or more is prescribed by law;

At the time relevant to this case, Massachusetts General Laws c. 94C, § 32(a), provided:

> (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class A of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years or in a jail or house of correction for not more than two and one-half years or by a fine of not less than one thousand nor more than ten thousand dollars, or by both such fine and imprisonment.

At the time relevant to this case, Massachusetts General Laws c. 94C, § 32A(a), provided:

> (a) Any person who knowingly or intentionally manufactures, distributes, dispenses, or possesses with intent to manufacture, distribute or dispense a controlled substance in Class B of section thirty-one shall be punished by imprisonment in the state prison for not more than ten years, or in a jail or house of correction for not more than two and one-half years, or by a fine of not less than one thousand nor more than ten thousand dollars, or both such fine and imprisonment.

Massachusetts General Laws c. 218, § 26, provides in pertinent part:

> The district courts . . . shall have original jurisdiction, concurrent with the superior court . . . .

Massachusetts General Laws c. 218, § 27, provides:

> The district court may impose the same penalties as the superior court for all crimes of which they have jurisdiction, except that they may not impose a sentence to the state prison; provided, however, that the divisions of the juvenile court department shall have the authority to hear cases and impose penalties in accordance with the provisions of sections fifty-two through eighty-four of chapter one hundred and nineteen, and section one through nineteen of chapter one hundred and twenty.

Massachusetts General Laws c. 279, § 23, provides:

> No sentence of a male convict to imprisonment or confinement for more than two and one half years shall be executed in any jail or house of correction.

STATEMENT OF THE CASE

I. PROCEEDINGS IN THE DISTRICT COURT

A. Offense Conduct and Guilty Plea.

On August 10, 2015, the New Bedford, Massachusetts police arrested Barbosa at the New Bedford Public Library pursuant to an arrest warrant for an offense arising out of a domestic violence incident. App. A, at 4-5. The police searched Barbosa's laptop bag during the arrest and found a firearm. *Id.* at 5. On November 12, 2015, Barbosa was indicted on one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). *Id.* He pled guilty to the indictment on December 19, 2016, with a condition that permitted him to appeal the denials of his pretrial motions. *Id.* at 6.

B. The Presentence Investigation Report.

The United States Probation Office classified Barbosa as an armed career criminal under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e), because, according to Probation, he had at least three prior convictions for either a "violent felony" or a "serious drug offense." *Id.* Probation's Presentence Investigation Report ("PSR") identified four prior Massachusetts convictions as ACCA predicate offenses: (1) a 1993 conviction for "Possession of Class A with intent to distribute"; (2) a 1995 conviction for "Assault with a Dangerous Weapon"; (3) a 2000 conviction for "Possession with intent to distribute cocaine," a Class B substance; and (4) a 2007 conviction for "Armed assault with intent to murder." *Id.*

C. The Relevant Laws Considered by the District Court.

i. The "Serious Drug Offense" Under the ACCA.

The ACCA provides that a defendant "who violates section 922(g) of this title and has three previous convictions . . . for a violent felony or a serious drug offense, or both, committed

on occasions different from one another . . . shall be fined under this title and imprisoned not less than fifteen years . . . ." 18 U.S.C. § 924(e)(1). The ACCA defines a "serious drug offense" as an offense under certain federal drug laws or "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).

ii. The Massachusetts Drug Offenses.

In Massachusetts, a person "shall be punished by imprisonment in the state prison for not more than ten years *or in a jail or house of correction for not more than two and one-half years*" if he is convicted of possessing either a Class A or a Class B substance with the intent to distribute. Mass. Gen. Laws ch. 94C, §§ 32(a), 32A(a) (emphasis added).

Massachusetts state prosecutors can prosecute a person for violating these statutes in either district court or superior court, but the penalties are different in each court. *See* Mass. Gen. Laws ch. 218, § 26 (establishing that district court and superior court have concurrent jurisdiction over most crimes). By law, the district court cannot impose a state prison sentence. Mass. Gen. Laws ch. 218, § 27. It can only sentence a person to serve time in a county jail or house of correction. *Id.* Additionally, the maximum penalty in district court is capped at two-and-a-half years' imprisonment. Mass. Gen. Laws ch. 279, § 23. By contrast, if a prosecutor presents the allegations to a grand jury, obtains an indictment, and thereby proceeds in superior court, the defendant would face a maximum sentence of ten years in state prison.[1]

[1] Barbosa's 1993 and 2000 drug offenses were prosecuted in the New Bedford district court. For his 1993 offense, he received a split sentence: 18 months in the house of correction, 59 days to serve, balance suspended for two years. For his 2000 offense, he was sentenced to serve 18 months committed in the house of correction. Both sentences resulted from guilty pleas, which were part of larger global resolutions of Barbosa's then-open cases.

D. Sentencing.

In response to the PSR, Barbosa objected to his classification as an armed career criminal. *See* App. A, at 23. He argued in pertinent part that his two state drug offenses were not ACCA predicates because he never faced "a maximum term of imprisonment of ten years or more." *See id.* at 27. Barbosa was prosecuted for both cases in state district court, where by law he only faced a maximum of two and a half years in a county jail or house of correction for each crime. *See id.*

At Barbosa's sentencing hearing in the District of Massachusetts, the court stated that "it seem[ed] a true stretch" to call Barbosa's prior convictions "serious drug crimes." App. C, at 8. However, the court indicated that it was bound by *United States v. Hudson*, 823 F.3d 11 (1st Cir. 2016), and ruled that Barbosa's two prior state drug convictions qualified as ACCA predicates. *Id.* at 7. With apparent reluctance, the court imposed the ACCA mandatory minimum sentence of 180 months' imprisonment:

> I think the use of the drug offenses in this circumstance [is] creating an unwarranted sentencing disparity, placing Mr. Barbosa in a situation of an unduly long sentence. I am supposed to impose a sentence that promotes respect for the law. In this circumstance, where these ***minor drug offenses*** from long ago are inflating the sentence, the sentence is—promotes cynicism for the law. I'm supposed to be imposing a just punishment. The punishment I am about to impose is not just here. . . . The sentence I am imposing is far in excess of what would be need to deter criminal conduct. . . . So I am required to impose a sentence that is sufficient but not greater than necessary to accomplish the goals of sentencing. I'm not able to do that here. I am required by law to impose a sentence that is far longer.

Id. at 10.

II. PROCEEDINGS IN THE COURT OF APPEALS

On appeal, Barbosa asked the First Circuit panel to reconsider its position on this issue in light of this Court's decisions in *United States v. Rodriquez*, 553 U.S. 377 (2008), and

Carachuri-Rosendo v. Holder, 560 U.S. 563 (2010). The panel denied Barbosa's request, citing the law of the circuit doctrine, and affirmed Barbosa's sentence.

REASONS FOR GRANTING THE PETITION

I. The Courts of Appeals Are Split on How to Apply *Rodriquez* and *Carachuri-Rosendo* When Determining "Serious Drug Offenses" Under the ACCA.

In *United States v. Rodriquez*, 553 U.S. 377, 382-83 (2008), this Court addressed whether the defendant's prior Washington state drug convictions qualified as "serious drug offense[s]" under the ACCA. The statute of conviction specified a maximum term of imprisonment of five years, but another statute allowed for a recidivist enhancement for "up to twice the term otherwise authorized." *Id.* at 381. The defendant's judgments of conviction listed the maximum term of imprisonment as ten years for each offense, but the state court ultimately sentenced the defendant to just 48 months in prison. *Id.*

In *Rodriquez*, the defendant argued that his state drug convictions were not "serious drug offenses" within the meaning of the ACCA because the statute defining the offense only permitted a maximum penalty of five years imprisonment, following the "categorical approach" set forth in *Taylor v. United States*. *Id.* at 387. Because any recidivist enhancement was separate from the actual offense, the defendant argued, it should not be considered in defining the maximum penalty for that offense. *Id.* at 384-86. The Court rejected this argument as contrary to the terms of the ACCA as well as "inconsistent with the way in which the concept of 'maximum term of imprisonment' is customarily understood by participants in the criminal justice process," namely, "What's the maximum term I face for the new offense?" *Id.* at 383.

The Court further explained that a federal court usually will not be required to engage in lengthy inquiries to determine the actual maximum term of imprisonment a defendant faced for past offenses, because such information is readily available from sources such as the sentence imposed, the judgment of conviction, the formal charging document, or the plea colloquy. *Id.* at 389. The Court observed that "[s]uch documents fall within the limited list of generally

available documents that courts already consult for the purpose of determining if a past conviction qualifies as an ACCA predicate." *Id.*

In *Carachuri-Rosendo v. Holder*, 560 U.S. 563 (2010), this Court further clarified its holding in *Rodriquez*. The defendant in *Carachuri-Rosendo* was a lawful permanent resident of the United States and had been convicted in Texas of two misdemeanor drug offenses, for which he spent a total of 30 days in jail. *Id.* at 566. Following the defendant's second drug conviction, the federal government initiated removal proceedings against him. *Id.* The government took the position that the defendant was not eligible to seek cancellation of those proceedings because his second drug conviction qualified as an "aggravated felony" conviction within the meaning of the Immigration and Nationality Act ("INA"). *Id.* at 566-67. The government argued that because the defendant *could* have been charged and convicted of a felony for his second drug offense, the latter conviction was effectively a conviction for an aggravated felony. *Id.* at 570.

The Court disagreed and held that this "hypothetical approach" to disqualifying offenses under the INA was inappropriate. *Id.* at 575-76. The Court stated that it was insufficient that a defendant's conduct *could* have been charged in a manner meeting the statutory definition under the INA, but in fact had not been so charged. *Id.* at 566-77. In a crucial footnote, the Court made clear that its holding was consistent with *Rodriquez*: "Linking our inquiry to the record of conviction comports with how we have categorized convictions for state offenses within the definition of generic federal criminal sanctions under the [ACCA]." *Id.* at 577, n.12 (adding that, in *Rodriquez*, "[w]e held that a recidivist finding could set the 'maximum term of imprisonment,' but only when the finding is a part of the record of conviction").

Furthermore, the Court noted that many states' criminal codes, like the federal criminal code, "authorize prosecutors to exercise discretion when electing to pursue a recidivist

enhancement." *Id.* at 579. If a federal judge were permitted to make his own hypothetical charging decision after the fact for the purposes of establishing a predicate offense under federal law, the Court observed, it "would denigrate the independent judgment of state prosecutors to execute the laws of those sovereigns." *Id.* at 580. This is the same logic that drove the Court's decision in *Rodriquez*, where it noted the need for deference to state lawmakers' judgments about what constitutes a serious drug offense under state law. *See Rodriquez*, 553 U.S. at 388.

A. Three Circuits Have Revisited Their "Serious Drug Offense" Precedents in Light of *Rodriquez* and *Carachuri-Rosendo*.

i. The Fourth Circuit.

In *United States v. Newbold*, 791 F.3d 455 (4th Cir. 2015), the defendant pleaded guilty in 2005 to being a felon in possession of a firearm. *Id.* at 456. At sentencing, the district court found that Newbold had the requisite three predicate offenses under the ACCA and sentenced him to the minimum mandatory fifteen-year sentence. *Id.* Newbold appealed, arguing that his prior drug convictions should not have counted as ACCA predicates. *Id.* at 457. He "contended that, for each previous conviction, he received a statutorily-prescribed, presumptive term of imprisonment of less than ten years." *Id.*; *see also id.* at 457 n.2 (citing N.C. Gen. Stat. § 15A-1340.4(f)(6) (1983) (repealed effective Oct. 1, 1994), which prescribed a presumptive sentence of three years for Newbold's particular offense, while the maximum term of imprisonment for *any* defendant was ten years). "Since there were no aggravating factors present in those cases that could have subjected him to punishment above the presumptive term, he argued the crimes were not serious drug offenses." *Id.* at 457.

After the Fourth Circuit denied his first appeal on this issue, *United States v. Newbold*, 215 F. App'x 289 (4th Cir. 2007), Newbold successfully petitioned this Court for review. This Court vacated and remanded to the Fourth Circuit to review Newbold's appeal in light of *United*

States v. Simmons, 649 F.3d 237 (4th Cir. 2011) (en banc) (relying on *Carachuri-Rosendo* to reject a hypothetical approach to determining predicates under the Controlled Substances Act), and *Miller v. United States*, 735 F.3d 141 (4th Cir. 2013) (holding that *Simmons* applies retroactively).

In the Fourth Circuit's second review of Newbold's case, it explained its rationale in his first appeal:

> In this pre-*Simmons* era, we adhered to the now-defunct rule that Newbold's previous convictions could be considered punishable by ten years if the sentencing law allowed for the possibility of any defendant—such as a defendant with the worst possible criminal history—to be sentenced to ten years' imprisonment for the same crime, regardless of the maximum punishment applicable to the circumstances of the instant defendant.

Newbold, 791 F.3d at 457. The court then proceeded to determine the maximum possible sentence that Newbold faced, and it found that "there [was] nothing in the record supporting the government's contention that his PWID offense was punishable by ten years." *Id.* at 463. "There is simply nothing to support the idea that Newbold ever faced more than the presumptive term of three years for the state court, PWID conviction that the government now seeks to use as a federal ACCA predicate." *Id.* Thus, the Fourth Circuit vacated Newbold's sentence pursuant to its holding in *Simmons* (which had relied on *Carachuri-Rosendo*).

ii. The Seventh Circuit.

In *United States v. Lockett*, 782 F.3d 349 (7th Cir. 2015), the Seventh Circuit reversed a fifteen-year ACCA sentence in light of *Rodriquez*. Like Barbosa, the defendant in *Lockett* pleaded guilty to one count of being a felon in possession of a firearm and was sentenced as an armed career criminal, in part because of prior drug convictions. *Lockett*, 782 F.3d at 350. The district court found that any of those drug convictions could qualify as a "serious drug offense" based on the Seventh Circuit's holding in *United States v. Perkins*, 449 F.3d 794 (7th Cir. 2006).

Id. at 351. On appeal, Lockett argued that his drug convictions should not have been counted as ACCA predicates "because the government never provided evidence from the record that he actually faced the Illinois recidivist enhancement that would bring his sentence for those convictions within the purview of the ACCA"—i.e., a maximum term of imprisonment of ten years or more. *Id.*

The Seventh Circuit reversed and remanded, noting that "the Supreme Court's decision in *Rodriquez* adds an evidentiary hurdle to our holding in *Perkins*." *Id.* at 352. "*Rodriquez* requires the government to provide evidence from the record that the defendant was in fact subject to the enhanced recidivist penalties that could elevate his sentence past the ten-year mark." *Id.* (citing *Rodriquez*, 533 U.S. at 388-89). The Seventh Circuit also acknowledged that this Court had "eliminated the possibility of a hypothetical approach in which a court could assume that a recidivist enhancement applied merely because it *could* apply." *Id.* (emphasis in original).

Bolstering its new position, the Seventh Circuit cited this Court's decision in *Carachuri-Rosendo*:

> As a closing remark, if there were any doubts as to the Supreme Court's intent to impose the evidentiary requirement we recognize today, we need only look to its recent opinion in *Carachuri–Rosendo v. Holder*. In *Carachuri–Rosendo*, the Court explained that "[in *Rodriquez*] [w]e held that a recidivist finding could set the 'maximum term of imprisonment,' but only when the finding is a part of the record of conviction." Thus, the evidentiary requirement is assuredly a part of the *Rodriquez* holding, and not mere dicta as the government seems to suggest.

Id. at 353 (citations omitted). The court then reversed Lockett's sentence.

iii. The Tenth Circuit.

The Tenth Circuit also revisited its precedent in the wake of *Carachuri-Rosendo*. Prior to *Carachuri-Rosendo*, the Tenth Circuit had interpreted *Rodriquez* to require that it approach questions of predicate offenses by "focus[ing] on the maximum statutory penalty for the offense,

not the individual defendant." *United States v. Hill*, 539 F.3d 1213, 1221 (10th Cir. 2008), *invalidated by United States v. Brooks*, 751 F.3d 1204, 1210 (10th Cir. 2014). In *Brooks*, the Tenth Circuit reversed course. "Based on *Carachuri-Rosendo*, our interpretation of *Rodriquez* in *Hill* was incorrect." *Brooks*, 751 F.3d at 1210. The court then held "that in determining whether a state offense was punishable by a certain amount of imprisonment, the maximum amount of prison time a *particular* defendant could have received controls, rather than the amount of time the worst imaginable recidivist could have received." *Id.* at 1213.

The Tenth Circuit subsequently extended *Brooks* and *Carachuri-Rosendo* to govern the definition of a "serious drug offense" under the ACCA. *See United States v. Romero-Leon*, 622 F. App'x 712 (10th Cir. 2015) (unpublished). In *Romero-Leon*, the defendant argued that, in light of *Brooks* and *Carachuri-Rosendo*, he was erroneously sentenced under the ACCA. *Id.* at 715. Specifically, he argued that "the maximum amount of prison time he could have received for his three 1999 drug offenses was nine years, meaning they did not qualify as 'serious drug offense[s]' under the ACCA." *Id.* at 716 (alteration in original). The defendant *could* have faced up to twelve years for the crimes charged, but only if the prosecutor alleged, and the court found, aggravating circumstances to warrant an increase. *Id.* at 716-18. And in Romero-Leon's case, the prosecutor never even pursued an enhancement. *Id.* at 718. Thus, the court found that Romero-Leon never faced more than nine years in prison and "[s]o, under *Brooks*, Romero-Leon's 1999 drug crimes should not have triggered enhancement under the ACCA." *Id.*

B. The First Circuit Has Repeatedly Ignored and Misinterpreted *Rodriquez* and *Carachuri-Rosendo* When Addressing "Serious Drug Offense" Questions.

The First Circuit has failed to follow this Court's decisions in *Rodriquez* and *Carachuri-Rosendo* on several occasions, even in the face of divergent decisions in other circuits. In 2002, the First Circuit held that a conviction under Mass. Gen. Laws ch. 94C, § 32A(a) qualifies as a

"serious drug offense" regardless of whether it was entered in district court or superior court. *United States v. Moore*, 286 F.3d 47, 48-50 (1st Cir. 2002). Moore had argued, as Barbosa does here, that that his drug convictions were not "serious drug offenses" because they were prosecuted in *district* court, which could only impose a maximum sentence of two-and-a-half years' imprisonment. *Id.* at 48-49. He urged the court to look "to sources beyond the statutory definition" of the offense—i.e., the record of his conviction—which would show that he never actually faced the requisite ten-year maximum. *Id.* at 49-50 (noting that, in support of his argument, Moore cited *United States v. Shepard*, 231 F.3d 56, 69 (1st Cir. 2000), *cert. denied*, 534 U.S. 829 (2001)).

The panel rejected Moore's argument, and his invitation to look beyond the statute. *Id.* (finding that *Shepard* was "inapposite" because it concerned "the conceptually different question of whether a crime is a 'violent felony'" under the ACCA). Instead, the court employed a categorical approach, looking only to the statutory language in § 32A(a). *Id.* at 49 (citing *Taylor v. United States*, 495 U.S. 575, 600 (1990)). Noting that one of the two alternative maximum punishments prescribed in § 32A(a) was ten years in prison, the court found that the *statute* "fits comfortably within the ambit of 'serious drug offense' as that term is defined in [the ACCA]." *Id.*

Yet in *Rodriquez*, this Court did what the First Circuit declined to do in *Moore*—it expressly held that, in making an ACCA "serious drug offense" determination, sentencing courts must look beyond the statutory definition of the offense and consider pertinent documents such as the judgment of conviction and the record of the plea colloquy.[2] *Rodriquez*, 553 U.S. at 388-89. *Rodriquez* even cited a later iteration of *Shepard*, the very case that *Moore* held was

[2] Relevant here, this Court observed that "in those cases in which the defendant pleaded guilty to the state drug charges, the plea colloquy will very often include a statement by the trial judge regarding the maximum penalty." *Rodriquez*, 553 U.S. at 389.

inapposite in determining whether an offense was a "serious drug offense." *Id.* ("Such documents fall within the limited list of generally available documents that courts already consult for the purpose of determining if a past conviction qualifies as an ACCA predicate.") (citing *Shepard v. United States*, 544 U.S. 13, 20 (2005)).

Nevertheless, relying on *Moore*, the First Circuit has quickly dispensed with appeal after appeal on this issue and, in the process, has either ignored or misinterpreted *Rodriquez* and *Carachuri-Rosendo*. In *United States v. Weekes*, the defendant also argued that his state district court drug convictions were not ACCA predicates because the maximum jail term he faced was two and a half years. 611 F.3d 68, 72 (1st Cir. 2010). The First Circuit's analysis was brief:

> [W]e rejected [this] argument in *United States v. Moore* and see nothing in the Supreme Court's intervening decision in *United States v. Rodriquez* to require us to revisit the issue. On the contrary, *Rodriquez* instructs us to look to "the maximum term prescribed by the relevant criminal statute," rather than external limitations on "the term to which the state court could actually have sentenced the defendant" in a particular case. The limits came from a mandatory guidelines regime in *Rodriquez*, but there is no apparent reason for a different rule when the restriction on a court's sentencing authority is more general, as here.

Id. (citations omitted).

But the First Circuit erred in deciding *Weekes*. It failed to discern any difference between the "mandatory guidelines regime in *Rodriquez*" and the very different *statutory* regime in Massachusetts. This Court observed in *Rodriquez* that the highest sentence in a guideline range "is generally not really the 'maximum term . . . prescribed by law' for the 'offense' because guidelines systems typically allow a sentencing judge to impose a sentence that exceeds the top of the guidelines range under appropriate circumstances." *Rodriquez*, 553 U.S. at 390. However, in *Weekes*, where the defendant was prosecuted in Massachusetts district court, the "maximum term . . . prescribed by law" for the offense was two and a half years in a jail or house of correction. The judge had no authority to impose a higher sentence.

The First Circuit next addressed the ACCA's treatment of Massachusetts state district court drug convictions in *United States v. Hudson*, 823 F.3d 11 (1st Cir. 2016), *cert. denied*, 137 S. Ct. 620 (2017). As in *Weekes*, the First Circuit addressed the defendant's argument in a cursory manner. *See id.* at 15. Moreover, the *Hudson* panel did not take into account *Carachuri-Rosendo*'s refinement of *Rodriquez*:

> *Hudson* offers no new or previously unaddressed reason to deviate from our prior holdings on the issue. He argues only that the Supreme Court's decision in *United States v. Rodriquez* represents a shift in authority that requires us to revisit *Moore*. This argument is not a novel one; we have already held that there is "nothing in the Supreme Court's intervening decision in *United States v. Rodriquez* to require us to revisit" our holding in Moore.

Id. (quoting *Weekes*, 611 F.3d at 72). Instead, it reaffirmed *Moore* and the flawed reasoning in *Weekes* without considering this Court's clear guidance in *Carachuri-Rosendo*.

Most recently, in *United States v. Lopez*, the defendant, who was also challenging his "serious drug offense" predicate, urged the court to reconsider its precedent in light of *Carachuri-Rosendo* and *Moncrieffe v. Holder*, 569 U.S. 184 (2013):

> In light of *Moncrieffe* and *Carachuri-Rosendo*, Lopez suggests that the dispositive question in determining whether a prior state conviction qualifies as a 'serious drug offense' within the meaning of the ACCA is the maximum sentence a defendant could have *actually* received under the charging circumstances, not the *hypothetical* maximum sentence were the case to have been prosecuted differently.

890 F.3d 332, 339 (1st Cir. 2018), *cert. denied*, 2018 WL 3611085 (U.S. Oct. 1, 2018) (No. 18-5380).

But the court distinguished *Lopez* from *Moncrieffe* and *Carachuri-Rosendo*, specifically noting that the defendant's record of conviction in *Carachuri-Rosendo* "contained no finding that he was charged with an offense that met the statutory definition of an aggravated felony under the INA." *Id.* at 340 n.9 (citation omitted). And in *Moncrieffe*, the defendant's conviction "did

not 'necessarily' involve facts that correspond to an offense punishable as a felony under the CSA." *Id.* (quoting *Moncrieffe*, 569 U.S. at 194-96) (internal quotation marks omitted). By contrast, said the court, "there is no dispute in the present case that Lopez was charged with a statute that prescribed a maximum punishment of ten years imprisonment." *Id.* at 340. The court failed to consider that Lopez was charged in district court and thus never *actually* faced the ten-year maximum.

The First Circuit construed *Carachuri-Rosendo* and *Moncrieffe* too narrowly. Those holdings extend beyond the unique facts of those cases and instruct courts to consider the maximum penalties that defendants *actually* faced at the time of their prior convictions. *See Moncrieffe*, 569 U.S. at 197 (rejecting the hypothetical prosecution approach); *Carachuri-Rosendo*, 560 U.S. at 566 (same).

The First Circuit also rejected Lopez's argument that the other circuit decisions supported his reading of *Rodriguez*, as interpreted by *Carachuri-Rosendo* and *Moncrieffe*. *Lopez*, 890 F.3d at 341. In doing so, the court narrowly interpreted those decisions to apply only in the context of applying state law recidivist enhancements. *See id.*

The First Circuit's artificially narrow analysis plainly misses the point clearly drawn from *Rodriquez* and *Carachuri-Rosendo*, which other circuits have recognized, which is that sentencing courts must look to the maximum penalty prescribed by law that the defendant *actually* faced, regardless of the sentencing regime.

II. Certiorari is Necessary Because the First Circuit Will Not Revisit This Issue Due to the Law of the Circuit Doctrine.

In its Opinion below, the First Circuit panel barely analyzed Barbosa's argument that his prior drug convictions should not count as "serious drug offenses." The court stated, "This contention is familiar: it has been made to us several times in essentially the same form by

defendants who, like the defendant in this case, were prosecuted for section 32A(a) offenses in district court. We have consistently rejected this contention." App. A, at 28. Responding to Barbosa's plea to abandon its precedent, the panel found that he had not established any "exceptions to the law of the circuit doctrine." *Id.* at 28-29. "If more were needed—and we doubt that it is—certain of our prior precedents have specifically discussed and distinguished *Rodriquez* and *Carachuri-Rosendo*." *Id.* at 29 (citing *Lopez*, 890 F.3d at 338-40 (discussing *Carachuri-Rosendo*); *Weekes*, 611 F.3d at 72 (discussing *Rodriquez*)).

As noted above, the First Circuit has fundamentally misconstrued the import of *Rodriquez* and *Carachuri-Rosendo*. Consequently, First Circuit precedent regarding what constitutes a "serious drug offense" stands on faulty ground and is fundamentally illogical. For how can a drug offense prosecuted at the discretion of the district attorney in a Massachusetts district court,[3] which cannot impose a sentence of more than two and a half years, qualify as a serious drug offense under the ACCA, which requires that the offender faced a maximum term of imprisonment of ten years or more? Only this Court can correct this egregious misinterpretation of the law.

[3] By choosing to charge Barbosa in the district court as opposed to the superior court, the state prosecutor plainly deemed the drug offenses *not* to be serious.

CONCLUSION

For the foregoing reasons, this Court should grant certiorari.

Respectfully submitted,

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