No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

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

PETITION FOR A WRIT OF CERTIORARI

PAUL D. CLEMENT
Solicitor General
Counsel of Record
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
ELIZABETH A. OLSON
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

[redacted] Page

QUESTION PRESENTED

The Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), provides for an enhanced sentence for felons convicted of possession of a firearm, if the defendant has three prior convictions for, *inter alia*, a state-law controlled substance offense "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. 924(e)(2)(A)(i). The question presented is:

Whether a state drug-trafficking offense, for which state law authorized a ten-year sentence because the defendant was a recidivist, qualifies as a predicate offense under the Armed Career Criminal Act, 18 U.S.C. 924(e) (2000 & Supp. IV 2004).

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes and guidelines:

Statutes and guidelines—Continued: Page

Blank Page

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

GINO GONZAGA RODRIQUEZ

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

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-17a) is reported at 464 F.3d 1072. The sentencing order of the district court (App., *infra*, 18a-28a) is unreported.

JURISDICTION

The court of appeals entered its judgment on October 5, 2006. A petition for rehearing was denied on January 12, 2007 (App., *infra*, 29a-30a). On March 29, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including May 12, 2007. On May 2, 2007, Justice Kennedy further ex-

tended the time to June 11, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

1. The relevant provisions of the Armed Career Criminal Act of 1984, 18 U.S.C. 924(e) (2000 & Supp. IV 2004), and of Washington's controlled-substances law are reproduced at App., *infra*, 31a-36a.

STATEMENT

Following a jury trial, respondent was convicted of being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1). At sentencing, the district court declined to impose an enhanced sentence under the Armed Career Criminal Act of 1984 (ACCA). Respondent instead was sentenced to 92 months of imprisonment, to be followed by three years of supervised release. The government appealed, and the court of appeals affirmed.

1. The ACCA mandates a minimum term of 15 years of imprisonment, and authorizes a maximum term of life imprisonment for anyone who has been convicted of being a felon in possession of a firearm and who has three previous convictions for "a violent felony or * * * serious drug offense, or both." 18 U.S.C. 924(e)(1) (Supp. IV 2004). The ACCA defines "serious drug offense" to include certain state-law controlled substance offenses "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).

2. a. Respondent has several state-law felony convictions, including two California convictions for burglary and three convictions in Washington State for delivery of a controlled substance. App., *infra*, 2a, 4a-5a. Upon his release from prison in Washington, respondent was placed on a term of community supervision, from

which he absconded. In April 2003, respondent was apprehended, and a search of respondent incident to arrest uncovered a bag of heroin and approximately $900 in cash. *Id.* at 2a-3a. In a subsequent search of the residence in which respondent was residing, officers found a semi-automatic pistol. *Id.* at 4a; Gov't C.A. Br. 12.

A grand jury in the Eastern District of Washington returned a one-count indictment charging respondent with being a felon in possession of a firearm, in violation of 18 U.S.C. 922(g)(1) and 18 U.S.C. 924(e) (2000 & Supp. IV 2004). Respondent was convicted following a jury trial. App, *infra*, 4a.

b. At sentencing, the government argued that, although respondent's felon-in-possession offense ordinarily carried a maximum sentence of ten years, the designation of respondent as an armed career criminal triggered a minimum sentence of 15 years, and a maximum life sentence, pursuant to 18 U.S.C. 924(e) (2000 & Supp. IV 2004). As predicate offenses for respondent's armed career criminal status, the government relied on respondent's prior burglary and controlled substance convictions. App., *infra*, 20a-23a.

With respect to each of the three prior drug offenses, respondent had been convicted of violating Revised Code of Washington § 69.50.401 (1994), which prohibits the manufacture, delivery, or possession with intent to manufacture or deliver a controlled substance. App., *infra*, 10a. For each offense, he had pleaded guilty to "Delivery of a Controlled Substance Narcotic from Schedule III-V," which is a class C felony. C.A. Supp. E.R. 128, 147, 182.

Under Washington law, a class C controlled-substances felony is generally punishable by a maximum sentence of five years. Wash. Rev. Code

§ 9A.20.021(1)(c) (1994). Under Washington's controlled substances law, however, "[a]ny person convicted of a second or subsequent [drug] offense" faces a maximum sentence that is double the term otherwise authorized, making the maximum sentence for a class C felony ten years. *Id.* § 69.50.408(a) and (b).[1] Because of his repeated drug convictions, three of respondent's drug offenses constituted "second or subsequent offense[s]" that subjected him to a ten-year maximum sentence under Washington law. See C.A. Supp. E.R. 129, 148, 183.

The district court denied the armed career criminal enhancement. The court agreed with the government that both of respondent's burglary convictions constituted "violent felonies" under the ACCA. App., *infra*, 5a, 20a-22a; see generally *Taylor* v. *United States*, 495 U.S. 575 (1990). The district court rejected, however, the use of respondent's Washington controlled substance convictions as predicates for an ACCA enhancement. Relying on *United States* v. *Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), the district court held that the "maximum term of imprisonment" for each

---

[1] The Revised Code of Washington § 69.50.408(a) and (b) (1994) provides:

> (a) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.
>
> (b) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs.

of the drug convictions had to be determined without reference to the recidivist sentencing provision. App., *infra*, 5a, 11a, 23a-27a.

In *Corona-Sanchez*, the Ninth Circuit had addressed, for federal sentencing purposes, whether a California petty theft offense constituted an "aggravated felony" under the Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*, which would increase the defendant's base offense level under Sentencing Guidelines § 2L1.2(b)(1)(A). See 291 F.3d at 1202, 1203, 1208-1211. That determination turned on whether the theft offense was punished by a term of imprisonment of "at least one year." 8 U.S.C. 1101(a)(43)(G); Sentencing Guidelines § 2L1.2(b)(1)(A). While the petty theft statute at issue in *Corona-Sanchez* provided a maximum sentence of only six months for first offenders, Corona-Sanchez, a recidivist offender, was sentenced to two years of imprisonment. *Corona-Sanchez*, 291 F.3d at 1208.

The en banc Ninth Circuit concluded that, in determining the length of the sentence for purposes of applying the unlawful-entry guideline, the state recidivism statute must be disregarded, and the court could consider only the six-month maximum that California law provided for the offense of conviction for a first offender. *Corona-Sanchez*, 291 F.3d at 1208-1209. In so holding, the court reasoned that, under *Taylor* v. *United States*, *supra*, courts were required "to examine the prior crimes by considering the statutory definetion of the crimes categorically, without reference 'to the particular facts underlying those convictions,'" and therefore the court was obligated to "consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Corona-Sanchez*, 291 F.3d at 1208-1209 (quoting *Taylor*,

495 U.S. at 600). The court of appeals also considered its approach to be consistent with "the Supreme Court's historic separation of recidivism and substantive crimes." *Id.* at 1209 (citing *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000); *Almendarez- Torres* v. *United States*, 523 U.S. 224 (1998)).

Without the ACCA enhancement, the district court imposed a prison sentence of 92 months, to be followed by three years of supervised release. See J. and Sentence, *reprinted at* C.A. E.R. 6-7.

3. The government appealed, and the court of appeals affirmed. App., *infra*, 1a-17a.[2] The court concluded that, under *Corona-Sanchez*, "when we consider the prison term imposed for a prior offense, 'we must consider the sentence available for the crime itself, without considering separate recidivist sentencing enhancements.'" *Id.* at 11a (quoting *Corona-Sanchez*, 291 F.3d at 1209). The court thus considered only the five-year penalty provided for Washington class C felony convictions generally, rather than the ten-year penalty applicable to drug recidivists like respondent. *Id.* at 12a, 16a. The court acknowledged, however, that its decision conflicted with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-470 (per curiam), cert. denied, 543 U.S. 967 (2004), and was in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (2006) (per curiam), and the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (2003). See App., *infra*, 16a-17a n.6.

---

[2] Respondent appealed his conviction, arguing that the district court erred in denying his motion to suppress evidence and that the evidence was insufficient to support his conviction. The court of appeals affirmed the denial of respondent's motion to suppress and upheld his conviction. App., *infra*, 1a-2a, 5a-10a.

The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 29a-30a.

REASONS FOR GRANTING THE PETITION

In this case, the Ninth Circuit applied its settled rule that recidivist enhancements to prior offenses must be disregarded in determining the maximum sentence that could have been imposed on a recidivist offender. Accordingly, the court held that respondent's prior drug-trafficking convictions were not "offense[s] * * * for which a maximum term of imprisonment of ten years or more is prescribed by law," 18 U.S.C. 924(e)(2), even though the court acknowledged that respondent could lawfully have been sentenced to ten years of imprisonment for each of his prior offenses. The court's approach is incorrect; it has been rejected by two other courts of appeals and is in tension with the analysis of a third circuit; and it has recurring importance for the proper and uniform application of the ACCA. More broadly, a variety of provisions in federal criminal and immigration law turn on the maximum punishment that was available for a prior offense of which a person was convicted. The Ninth Circuit's incorrect approach to determining the maximum punishment understates the seriousness of those prior convictions in many cases, and thus precludes accurate classification of their current legal status. Accordingly, this Court should grant the petition for a writ of certiorari and reverse the Ninth Circuit's decision.

1. The court of appeals' decision rests on an incorrect understanding of the law and this Court's precedent.

a. There is no dispute in this case that Washington law rendered respondent eligible for a maximum sen-

tence of ten years of imprisonment based on his repeated controlled-substance convictions. See App., *infra*, 10a-11a. The Ninth Circuit nevertheless disregarded that fact in applying the ACCA solely because respondent's maximum sentence for his prior state offenses was increased by his recidivism. Nothing in the ACCA justified the court's determination of the "maximum term of imprisonment * * * prescribed by law" without consideration of applicable recidivist enhancements.

The ACCA treats a federal defendant's prior drug offense as "serious" if the offense carried a maximum term of imprisonment of at least ten years "prescribed by law." 18 U.S.C. 924(e)(2)(A)(ii). On its face, Washington law prescribed a maximum sentence of ten years for respondent's drug-trafficking crimes. See Wash. Rev. Code §§ 9A.20.021(1)(c), 69.50.401, 69.50.408 (1994). The ACCA does not require that the maximum sentence rest exclusively on the elements or "facts underlying the prior offense." App., *infra*, 11a-12a n.3. Because respondent was a recidivist drug offender, the enhanced maximum sentence set forth by Section 69.50.408—and not the base maximum ordinarily provided by Section 9A.20.021(1)(c)—"prescribes [the] punishment for [his] offense." *Corona-Sanchez*, 291 F.3d at 1218 (Rymer, J., concurring in part and dissenting in part, joined by Kozinski, Kleinfeld, and T.G. Nelson, JJ.). The ACCA refers to the real maximum "prescribed by law" for respondent's prior offenses—not to a hypothetical maximum prescribed for a first offender.

This Court has long recognized that a recidivist enhancement does not impose additional punishment for the prior crime. *Nichols* v. *United States*, 511 U.S. 738, 747 (1994). Rather, it is a "stiffened penalty for the lat-

est crime, which is considered to be an aggravated offense because a repetitive one." *Gryger* v. *Burke*, 334 U.S. 728, 732 (1948). Like many other jurisdictions, Washington has imposed just such a "stiffened penalty" for recidivist drug offenders. *Id.* at 732. Read naturally, the ACCA's phrase, "maximum term of imprisonment," 18 U.S.C. 924(e)(2)(A)(i), refers to such enhanced penalties for recidivists, which are a common feature of the criminal justice system. See *Parke* v. *Raley*, 506 U.S. 20, 26-27 (1992) (noting that all 50 States and the Federal Government provide for recidivist enhancements).

In a comparable context, this Court has read statutory language referring to a "maximum" term to take into account recidivist enhancements. See *United States* v. *LaBonte*, 520 U.S. 751 (1997). In *Labonte*, the Court considered the meaning of the phrase "maximum term authorized" in 28 U.S.C. 994(h), which directed the United States Sentencing Commission to provide for sentences close to the maximum for certain recidivist offenders. *LaBonte*, 520 U.S. at 752-753. The Sentencing Commission promulgated a "Career Offender Guideline" to implement Section 994(h) that excluded any increases based on a defendant's prior convictions from the "maximum term authorized" for an offense. *Id.* at 754-755. This Court held that the Commission's action was inconsistent with the statute's text, reasoning that, "[w]here Congress has enacted a base penalty for first-time offenders or nonqualifying repeat offenders, and an enhanced penalty for qualifying repeat offenders, the 'maximum term authorized' for the qualifying repeat offenders is the enhanced, not the base, term." *Id.* at 759. The same statutory analysis applies here. When Congress in the ACCA referred to the "maximum term of imprisonment," it meant the maximum term including

any recidivist enhancements for which an offender qualified, not to a base, unenhanced term.

b. In holding otherwise, the court of appeals misread this Court's precedent. The court relied principally (App., *infra*, 11a-12a; see *Corona-Sanchez*, 291 F.3d at 1208-1209) on this Court's decision in *Taylor* v. *United States*, 495 U.S. 575 (1990). In *Taylor*, this Court held that the term "burglary," which is a "violent felony" under the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), refers to the "generic sense in which the term is now used in the criminal codes of most States, *Taylor*, 495 U.S. at 598, which must be determined by a "categorical approach, looking only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions," *id.* at 600. The Ninth Circuit reasoned that the "maximum term of imprisonment" must likewise be defined "categorically," by looking to "the sentence available for the crime itself, without considering separate recidivist sentencing enhancements." *Corona-Sanchez*, 291 F.3d at 1208-1209. That extension of *Taylor* was erroneous.

This Court has applied *Taylor* to determine whether the *elements* of a crime fit a categorical definition in a statutory scheme. For example, in *Taylor*, the Court construed "burglary" in the ACCA, 18 U.S.C. 924(e)(2)(B)(ii), to mean a "generic" form of the crime, and this Court then instructed courts to decide whether a particular state statute proscribed generic burglary by looking at the statute's elements, rather than at the particular conduct in which the defendant engaged. *Taylor*, 495 U.S. at 598, 600, 602. The Court, however, did not suggest that the "maximum" *penalty* for a crime should be determined by ignoring the maximum penalty to which a defendant was exposed as a result of a recidivist

enhancement. All *Taylor* requires is that courts refrain from looking to the "facts underlying" convictions. *Id.* at 600.

The Ninth Circuit erred in this case by going further and directing courts to ignore state law itself. App., *infra*, 11a (district court "could consider only the five-year maximum penalty"). But "nothing in *Taylor* suggests that [a court] must" "separate the recidivist enhancement from the underlying offense" and ignore the sentence authorized by state law. *Corona-Sanchez*, 291 F.3d at 1217 (Rymer, J., concurring in part and dissenting in part, joined by Kozinski, Kleinfeld, and T.G. Nelson, JJ.). Consideration of a recidivist enhancement to a prior state offense does not require a federal sentencing court to delve into the defendant's past unadjudicated conduct. Rather, it requires consideration only of court documents that reveal how the defendant's prior criminal record affected the maximum punishment he faced. This does not create the "collateral trials" and "evidentiary disputes" that *Taylor* sought to forestall. *Shepard* v. *United States*, 544 U.S. 13, 23 & n.4 (2005) (permitting resort to judicial records in *Taylor* analysis to determine whether a plea-based conviction was for a generic crime).

Finally, the Ninth Circuit's analysis finds no support in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), or *Almendarez-Torres* v. *United States*, 523 U.S. 224 (1998). In *Corona-Sanchez*, the Ninth Circuit relied on this Court's statement in *Apprendi* that "recidivism 'does not relate to the commission of the offense,'" *Apprendi*, 530 U.S. at 488 (quoting *Almendarez-Torres*, 523 U.S. at 244), and on the Court's holding in *Almendarez-Torres* that a recidivist enhancement "does not define a sepa-

rate crime." *Corona-Sanchez*, 291 F.3d at 1209 (citing *Almendarez-Torres*, 523 U.S. at 230, 239-247).

But those constitutional principles do not apply in the present context. *Almendarez-Torres* held that the fact of recidivism can be treated as a sentence enhancement, rather than as an element of an offense, and thus need not be charged in a federal indictment. *Apprendi* held that any fact other than recidivism that increases the otherwise-applicable maximum penalty is subject to the Fifth Amendment requirement of proof beyond a reasonable doubt and the Sixth Amendment right to a jury trial. Those cases thus define procedural requirements that apply to facts other than prior convictions that raise a maximum sentence. They do not purport to define for statutory purposes under the ACCA what *is* the maximum sentence. The fact that, as a matter of constitutional law, recidivism need not be treated as an element of a separate crime does not detract from the reality that recidivists, like respondent, face a greater "maximum term of imprisonment," 18 U.S.C. 924(e)(2)(A)(i), than first offenders. Indeed, if anything, *Almendarez-Torres* makes clear that recidivism is an entirely permissible basis for a sentence enhancement even when it is *not* treated as an element of the crime. *Apprendi*, 530 U.S. at 488 (discussing *Almendarez-Torres*).[3]

---

[3] Respondent has never contended in this case that the "maximum term of imprisonment" he faced under Washington law was defined by the upper end of the state sentencing guidelines range; rather, his sole contention was that recidivist enhancements could not be taken into account in determining the "maximum" penalty he faced. Accordingly, any such reliance on the guidelines maximum is waived.

In any event, ACCA's reference to the "maximum term of imprisonment * * * prescribed by law" should not be understood to refer to a

The Ninth Circuit's erroneous interpretation of this Court's precedent, which frustrates the federal interest

guidelines maximum that is lower than a statutory maximum. It is true that respondent's range under Washington's guidelines system was 43-57 months of imprisonment for each of his controlled-substance convictions in Washington. See C.A. Supp. E.R. 128-129, 147-148, 182-183. But the same judgments also state that the "[m]aximum [t]erm" he faced for each offense was ten years. *Ibid.* It does not matter that nearly a decade after entry of those judgments this Court held in *Blakely* v. *Washington*, 542 U.S. 296 (2004), that the "'statutory maximum' for *Apprendi* purposes" was the standard sentencing guidelines range, rather than the ten-year maximum authorized by statute for Blakely's felony. *Id.* at 303. *Blakely*'s use of the phrase "for *Apprendi* purposes," *ibid.*, made clear that the Court did not purport to establish the statutory maximum sentence for all purposes or for non-*Apprendi* purposes. *Blakely*, like *Apprendi*, speaks only to the *procedures* that must attend fact finding that raises a sentence above an otherwise-applicable maximum; it does not affect the statutorily established maximum term itself. And Congress, which enacted the pertinent language in the ACCA long before *Blakely* or *Apprendi*, see Career Criminals Amendment Act of 1986, Pub. L. No. 99-570, § 1402(b), 100 Stat. 3207-39, undoubtedly focused its attention on the maximum term that state statutes authorized for an offense under any circumstances (regardless of the procedures needed to find the relevant facts). The courts of appeals that have addressed the issue have thus concluded that, in determining whether a prior conviction is for a "crime punishable by imprisonment for a term exceeding one year" under 18 U.S.C. 922(g)(1), "the maximum sentence is the statutory maximum sentence for the offense, not the maximum sentence available in the particular case under the sentencing guidelines." *United States* v. *Murillo*, 422 F.3d 1152, 1154 (9th Cir. 2005) (rejecting the argument that *Blakely* affects the determination of the maximum potential sentence under 18 U.S.C. 922(g)(1)), cert. denied, 126 S. Ct. 1928 (2006); see *United States* v. *Harp*, 406 F.3d 242, 246-247 (4th Cir.) (*Apprendi* and *Blakely* pertain only to the "*process* by which the elements of [a] crime and other relevant facts must be determined," and do not prevent the defendant's prior drug crime from being punished by a prison term of more than one year) (quoting *United States* v. *McAllister*, 272 F.3d 228, 232 (4th Cir. 2001)), cert. denied, 126 S. Ct. 297 (2005).

in punishing recidivists who have proved to be a recurring threat to public safety, merits this Court's review.

2. The Ninth Circuit's holding that the ten-year maximum sentence authorized for each of respondent's prior convictions did not trigger the ACCA enhancement also conflicts with the decisions of other courts of appeals, as the Ninth Circuit itself acknowledged. See App., *infra*, 16a-17a n.6 ("We recognize that this conclusion is in conflict with the Seventh Circuit's decision in *United States* v. *Henton*, 374 F.3d 467, 469-70 (7th Cir. 2004), *cert. denied*, 543 U.S. 967, 125 S. Ct. 431, 160 L. Ed. 2d 336 (2004), and in tension with the Fifth Circuit's decision in *Mutascu* v. *Gonzales*, 444 F.3d 710, 712 (5th Cir. 2006) (per curiam), and the Fourth Circuit's decision in *United States* v. *Williams*, 326 F.3d 535, 539 (4th Cir. 2003).").

In *Henton*, *supra*, the defendant, like respondent here, claimed that his prior state conviction for possessing with intent to deliver cocaine did not qualify as an ACCA predicate offense because the state statute generally provided that the offense was punishable by three to seven years of imprisonment. The Seventh Circuit rejected that argument because the statute separately provided, like Washington law here, that "any person convicted of a second or subsequent offense under this act may be sentenced to imprisonment for a term up to twice the maximum term otherwise authorized." 374 F.3d at 469 (quoting Ill. Rev. Stat. ch. 56½, para. 1408(a) (1989)). The Seventh Circuit accordingly concluded that, "[b]ecause Henton was eligible for up to fourteen years' imprisonment, the district court properly concluded that the 1993 conviction qualifies as a 'serious drug offense' under ACCA." *Id.* at 470.

The Seventh Circuit recently reaffirmed its decision in *Henton*, explaining that:

> The [ACCA] inquires about the highest possible penalty. When Perkins continued selling cocaine despite his prior conviction, he exposed himself to a maximum of 14 years in prison. Federal law deems that a "serious" drug offense.

United States v. *Perkins*, 449 F.3d 794, 796 (7th Cir.), cert. denied, 127 S. Ct. 330 (2006). Thus, had respondent committed his federal offense within the Seventh Circuit, he would have received a minimum 15-year sentence under the ACCA, rather than the 92-month sentence imposed by the district court under *Corona-Sanchez*.

The Fifth Circuit likewise has expressly rejected the approach taken by the Ninth Circuit here. In *Mutascu*, *supra*, the Fifth Circuit held that a California conviction for petty theft constituted an aggravated felony "for which the term of imprisonment [is] at least one year," 8 U.S.C. 1101(a)(43)(G), because Mutascu was sentenced under the petty theft statute's recidivist sentencing provision to one year in prison. 444 F.3d at 711-712. In so holding, the Fifth Circuit expressly disagreed with *Corona-Sanchez*. *Id.* at 712 (citing *United States* v. *Sanchez-Villalobos*, 412 F.3d 572, 577 n.3 (5th Cir. 2005) (also disagreeing with *Corona-Sanchez*), cert. denied, 126 S. Ct. 1142 (2006)). The Fifth Circuit specifically rejected the Ninth Circuit's attempt to "atomize[]" the theft sentence "into its predicate offense," while ignoring the alternative sentence authorized by statute and actually applied based on Mutascu's prior conviction. *Ibid.*

Finally, the Ninth Circuit's decision is in tension with the Fourth Circuit's analysis in *Williams*, *supra*. In *Williams*, the government argued that, by virtue of the defendant's first drug trafficking offense, his second offense (under New Jersey state law) subjected him to a sentence of up to ten years of imprisonment, and therefore qualified as an ACCA predicate offense. 326 F.3d at 538. The Fourth Circuit disagreed, but only because, under the relevant New Jersey law, Williams was not automatically eligible for the higher recidivist sentence. Eligibility for such a sentence depended upon the State's compliance with certain procedural protections with which the State had not complied. *Id.* at 538-539. The Fourth Circuit concluded that the ACCA does not "allow[] us to overlook a state's procedures in determining what constitutes a serious drug offense." *Id.* at 540.

The Fourth Circuit's reasoning strongly suggests that, where the fact of a prior conviction automatically subjects a defendant to an enhanced penalty or where the procedural steps necessary to trigger the enhanced penalty are satisfied, the "maximum term of imprisonment * * * prescribed by law" for the offense would include a recidivist sentence.

Because *Corona-Sanchez* is an en banc decision of the Ninth Circuit and because the Ninth Circuit denied the government's petition for rehearing en banc in this case, which called that court's attention to the inter-circuit conflict, Gov't Pet. for Reh'g 14-17, there is little prospect of the Ninth Circuit receding from its position and the circuit conflict being resolved without this Court's intervention.

3. The question of whether recidivist sentences for a prior offense may be considered in determining the

"maximum term of imprisonment prescribed by law" under the ACCA, 18 U.S.C. 924(e)(2)(A)(ii), is a recurring and important question that merits an exercise of this Court's certiorari jurisdiction. The enhanced sentences prescribed by federal law for armed career criminals are an important law-enforcement tool in combating recidivist violent and drug-trafficking offenders, and, in the federal government's experience, the question whether a prior recidivist sentence triggers armed career criminal status arises with frequency.

Furthermore, as the *Corona-Sanchez* decision demonstrates, the same analytical question arises under the Sentencing Guidelines and immigration law. See 291 F.3d at 1203-1204; see also *Sanchez-Villalobos*, *supra* (Sentencing Guidelines); *Ferreira* v. *Ashcroft*, 382 F.3d 1045, 1050 (9th Cir. 2004) (immigration); *United States* v. *Ballesteros-Ruiz*, 319 F.3d 1101 (9th Cir. 2003) (Sentencing Guidelines); *United States* v. *Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (applying *Corona-Sanchez* in a Sentencing Guidelines case to the federal drug-possession statute, 21 U.S.C. 844), cert. denied, 538 U.S. 915 (2003).

The disparate enforcement of the ACCA in different federal circuits should be reconciled by this Court. Had respondent's case arisen within the Fifth or Seventh Circuit, his sentence would have been at least double the length that was imposed by the district court under *Corona-Sanchez*. Congress, by specifying lengthy minimum sentences for armed career offenders meeting certain criteria indicated a specific interest in ensuring that sentences for such offenders have a degree of uniformity. Such substantial inter-circuit disparity in federal sentences is hard to reconcile with that congressional

judgment and, in all events, merits this Court's intervention.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
ALICE S. FISHER
Assistant Attorney General
MICHAEL R. DREEBEN
Deputy Solicitor General
PATRICIA A. MILLETT
Assistant to the Solicitor General
ELIZABETH A. OLSON
Attorney

JUNE 2007