RECORD NO. 08-4475

In The
United States Court Of Appeals
For The Fourth Circuit

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

JASON EDWARD SIMMONS,
Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA AT ASHEVILLE

BRIEF OF *AMICI CURIAE* NORTH CAROLINA FEDERAL AND COMMUNITY DEFENDERS AND THE NORTH CAROLINA ADVOCATES FOR JUSTICE IN SUPPORT OF APPELLANT'S PETITION FOR REHEARING *EN BANC*

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STATUTES:

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INTEREST OF THE *AMICI*

North Carolina Federal and Community Defenders (the "Defenders") represent indigent defendants under the Criminal Justice Act in North Carolina's federal district courts and in this Court. The North Carolina Advocates for Justice ("NCAJ") is a nonprofit, nonpartisan association that includes more than 900 criminal defense attorneys who represent the accused in North Carolina's state and federal courts.

The decision in this case, which follows a remand from the Supreme Court, is particularly important to the Defenders and the NCAJ. The panel held that Simmons had a prior "conviction for a felony drug offense," warranting an enhanced sentence under 18 U.S.C. § 841, based on a North Carolina conviction that exposed him to *less than* one year of imprisonment. That holding could affect 70 cases pending in this Court (including 46 cases handled by the Defenders), numerous cases pending in this Circuit's district courts, and an untold number of cases yet to be indicted.[1]

INTRODUCTION

Many federal criminal sanctions—from convictions, to mandatory minimum sentences, to guidelines enhancements—turn on whether a defendant has a prior conviction for an offense punishable by imprisonment for a term exceeding one year. 18 U.S.C. §§ 922(g)(1), 924(e); 21 U.S.C. §§ 841, 802(44); U.S.S.G. §§ 2K2.1,

[1] *Amici* have filed a motion for leave to file this brief, which lists appeals potentially affected by the panel's decision

4B1.1, 4B1.2. In North Carolina, the maximum sentence for a conviction depends on the defendant's "offense class" and "prior record level," which provide two measures of his offense's severity. For certain offense classes, a North Carolina court may impose a prison term exceeding one year—*i.e.*, felony punishment—only if the state proves that the defendant is a recidivist. Otherwise the defendant's statutory maximum sentence falls below one year. N.C. Gen. Stat. § 15A-1340.16 to 1340.17.

In this case, the panel held that Simmons's prior North Carolina conviction, despite precluding felony punishment for Simmons himself, was nevertheless a "prior conviction for a felony drug offense" under 21 U.S.C. § 841(b)(1)(D). *United States* v. *Simmons*, --- F.3d ----, 2011 WL 546425 (4th Cir. Feb. 16, 2011). Simmons had not faced felony punishment in North Carolina because he was not a recidivist. *Id.* at *1 n.3. But the panel held that his conviction was for a felony drug offense because felony punishment could have been imposed on a hypothetical recidivist "with the worst criminal history." *Id.* at *6. The panel suggested that this same rule would apply to *all* federal provisions requiring proof of a prior felony conviction. *Id.* at *6 n.5.

This rule should not be allowed to stand. It directly conflicts with *Carachuri-Rosendo* v. *Holder*, which held that a defendant has not been "convicted of a[n] 'aggravated felony'" under 8 U.S.C. § 1229b(a)(3) unless his state "record of conviction" authorized felony punishment. 130 S. Ct. 2577, 2589 (2010). Under *Carachuri-Rosendo*, a state conviction is a conviction for a felony only if the "record

of conviction" authorized felony punishment for the *defendant* himself. *Id.* at 2587 n.12. Thus, a defendant whose North Carolina conviction could not have yielded felony punishment lacks a "conviction for a felony," 21 U.S.C. § 841(b)(1)(D), and should not face federal sanctions reserved for previously convicted felons.

ARGUMENT

I. The Panel's Decision Conflicts With *Carachuri-Rosendo*

En banc rehearing is warranted because the panel's decision conflicts with *Carachuri-Rosendo*. The panel's contrary holding overlooks that the statute at issue in this case, as in *Carachuri-Rosendo*, centers on the term "conviction."

A. Simmons was federally convicted under a law providing for an enhanced minimum sentence when the defendant has a "prior *conviction* for a felony drug offense." 21 U.S.C. § 841(b)(1)(D) (emphasis added). Simmons has a 1996 conviction for a North Carolina marijuana offense, which did not "subject *him* to [felony] imprisonment" because he was not a recidivist. 2011 WL 546425, at *1. But in 2009, this Court held that the 1996 conviction was for a felony drug offense because felony punishment would have been authorized for a hypothetical North Carolina recidivist with the worst possible criminal history. *United States* v. *Simmons*, 340 F. App'x 141 (4th Cir. 2009) (per curiam).

The Supreme Court remanded *Simmons*—and seven other decisions of this Court—for further consideration in light of *Carachuri-Rosendo*.[2] That case asked whether, due to Carachuri-Rosendo's second Texas misdemeanor conviction for drug possession, he had been "convicted of any aggravated felony" under 8 U.S.C. § 1229b(a)(3). Such a conviction would have barred discretionary relief from removal proceedings. The government argued that the second conviction was for an "aggravated felony" because, under federal and Texas law, a second drug conviction can trigger felony punishment. 130 S. Ct. at 2581-83. But Texas had not prosecuted Carachuri-Rosendo as a recidivist, so the government had to argue that he "*could have been* prosecuted as a felon and received [felony punishment]." *Id.* at 2582.

The Court rejected that "hypothetical approach." 130 S. Ct. at 2584. It reasoned that the statute asked whether Carachuri-Rosendo had "'been *convicted* of a[n] aggravated felony,'" and not whether felony punishment would have been authorized for "what . . . could have been charged." *Id.* at 2586 (quoting 8 U.S.C. § 1229b(a)(3)). Accordingly, Carachuri-Rosendo's second conviction was not a conviction for an

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[2] See *Simmons* v. *United States*, 130 S. Ct. 3455 (2010); *Watson* v. *United States*, 130 S. Ct. 3455 (2010); *Williams* v. *United States*, 130 S. Ct. 3464 (2010); *Smith* v. *United States*, 130 S. Ct. 3466 (2010); *Summers* v. *United States*, 131 S. Ct. 80 (2010); *White* v. *United States*, 131 S. Ct. 84 (2010); *Blackwood* v. *United States*, 131 S. Ct. 161 (2010); *Brandon* v. *United States*, 131 S. Ct. 508 (2010).

"aggravated felony" even though "the defendant's conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction." *Id.* at 2589.

Those principles establish that Simmons's 1996 conviction was not a "conviction for a felony drug offense." 21 U.S.C. § 841(b)(1)(D). Simmons's state record of conviction, like Carachuri-Rosendo's, did not authorize felony punishment. In fact, unlike Carachuri-Rosendo, Simmons *could not have been* prosecuted in a manner that would have authorized felony punishment. See *Carachuri-Rosendo*, 130 S. Ct. at 2582. Because Simmons's state record of conviction did not authorize and could not have authorized felony punishment, he lacks a prior "conviction for a felony drug offense." Under *Carachuri-Rosendo*, this should be an easy case.

B. On remand from the Supreme Court, however, the panel stood by this Court's initial ruling. It focused on 21 U.S.C. § 802(44), which defines "felony drug offense," rather than on 21 U.S.C. § 841(b)(1)(D), which requires "a prior conviction for a felony drug offense" as a prerequisite for enhanced punishment. Calling § 802(44) "offense-specific," the panel ruled that—unlike the Supreme Court in *Carachuri-Rosendo*—it need not consider "[t]he specific circumstances surrounding Simmons' conviction." 2011 WL 546425, at *4. On that view, it did not matter that Simmons's state *conviction* precluded felony punishment. The panel deemed his *offense* punishable as a felony because felony punishment would have been authorized for a hypothetical "defendant with the worst criminal history." *Id.* at 6.

That analysis overlooks that, however offense-specific the statute defining "felony drug offense" might be, § 841(b)(1)(D) requires proof of a *conviction* for such an offense before enhanced punishment may be imposed. That is just like *Carachuri-Rosendo*, where § 1229b(a)(3) required proof that the defendant was "convicted of any aggravated felony." A defendant whose North Carolina record of conviction did not authorize felony punishment simply does not have a "conviction for a felony."

Even if § 841(b)(1)(D) were offense-specific, the panel's reasoning would still be flawed. When state law imposes higher maximum sentences for recidivists, a defendant's criminal history is "100%" incorporated into the "offense of conviction." *United States v. Rodriquez*, 553 U.S. 377, 386 (2008). Thus, two North Carolina defendants who commit the same criminal act but have different prior record levels—and thus face different statutory maximum sentences—have committed different *offenses*. If the non-recidivist's offense class and prior record level do not authorize felony punishment, then his "offense" was not "punishable by imprisonment for more than one year." 21 U.S.C. § 802(44). The panel's contrary ruling overlooks how the Supreme Court interprets the term "offense."[3]

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[3] See *Rodriquez*, 553 U.S. at 389 (if the defendant did not actually face a recidivist enhancement, the government "may well . . . be precluded from establishing that a conviction was for a qualifying offense"); *Carachuri-Rosendo*, 130 S. Ct. at 2587 n.12 (confirming that the government *is* precluded from establishing a

II. This Case Is Exceptionally Important

En banc rehearing is also warranted due to this case's importance. Rehearing could limit the risk of Supreme Court intervention and bring fairness to this Court's treatment of North Carolina defendants.

A. The panel's decision to stand by this Court's pre-*Carachuri-Rosendo* holdings raises the possibility that the Supreme Court will intervene again. The Supreme Court has already remanded eight of this Court's cases for *Carachuri-Rosendo*. The panel's decision now suggests that this Court will again rule for the government in those cases and in dozens—perhaps hundreds—more. Careful attention to these cases by the en banc Court may reduce the likelihood that the Supreme Court will send them all back.

B. En banc rehearing could also do justice by ensuring that defendants whose North Carolina convictions precluded felony punishment are not unduly prosecuted and sentenced under harsh federal provisions intended only for previously convicted felons. Moreover, rehearing could avoid "denigrat[ing] the independent judgment" of the North Carolina General Assembly concerning which offenses warrant felony sentencing exposure. *Carachuri-Rosendo*, 130 S. Ct. at 2588 (noting that the government's position would undermine the prerogative of state prosecutors

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qualifying offense in that circumstance); *United States* v. *Pruitt*, 545 F.3d 416 (6th Cir. 2008) (same).

to decide whether to pursue recidivist enhancements). For offenses in classes H and I, the General Assembly authorizes felony punishment only if the state proves a requisite prior record level by a preponderance of the evidence and affords the defendant an opportunity to contest it. N.C. Gen. Stat. §§ 15A-1340.14(f), 15A-980. To respect the General Assembly's judgment that felony sentencing exposure is warranted only under those conditions, the Court should hear this case en banc.

CONCLUSION

This petition for rehearing en banc should be granted.

Respectfully Submitted,

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