No. 09-_____

IN THE

Supreme Court of the United States

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent..

APPLICATION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

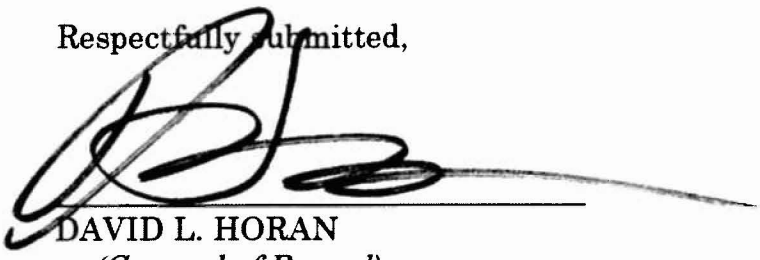
COMES NOW PETITIONER, CARLOS RASHAD GOULD, by and through his undersigned counsel, and moves for leave to proceed *in forma pauperis.* In support thereof, Petitioner would state:

1. Petitioner is an indigent inmate in the State of Texas.
2. On this date, Petitioner is filing a Petition for a Writ of Certiorari to the U.S. Court of Appeals for the Fifth Circuit.
3. Petitioner, who is without funds, seeks leave to proceed in this matter *in forma pauperis.*
4. The undersigned counsel was appointed by the U.S. District Court for the Northern District of Texas and by the Fifth Circuit under the

Criminal Justice Act.

WHEREFORE, Petitioner moves to proceed *in forma pauperis.*

Respectfully submitted,



DAVID L. HORAN
(Counsel of Record)
DAVID J. SCHENCK
PAUL F. THEISS
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515
Telephone: (214) 220-3939
Facsimile: (214) 969-5100

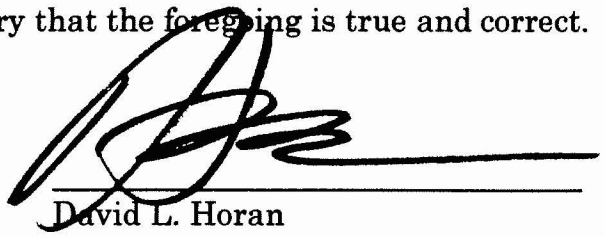
Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2009, one copy of the Application for Leave to Proceed *In Forma Pauperis* was served via UPS overnight delivery on all parties required:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, DC 20530-0001
(202) 514-2203
Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.



David L. Horan

No. 09-_____

IN THE

Supreme Court of the United States

CARLOS RASHAD GOULD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID L. HORAN
(Counsel of Record)
DAVID J. SCHENCK
PAUL F. THEISS
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515
Telephone: (214) 220-3939
Facsimile: (214) 969-5100

Counsel for Petitioner

QUESTION PRESENTED

Did the U.S. Court of Appeals for the Fifth Circuit correctly hold, in direct conflict with the Second Circuit (but in accordance with several other circuits), that a mandatory minimum sentence provided by 18 U.S.C. § 924(c)(1)(A) applies to a count when another count already carries a greater mandatory minimum sentence?

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PETITION FOR WRIT OF CERTIORARI

Carlos Rashad Gould respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the U.S. Court of Appeals for the Fifth Circuit is reported at No. 08-10857, 2009 WL 2258336. Pet. App. 1a-2a. The Fifth Circuit's order denying rehearing *en banc* is unreported. Pet. App. 3a.

JURISDICTION

The opinion of the U.S. Court of Appeals for the Fifth Circuit was issued on July 29, 2009. Pet. App. 1a. The Fifth Circuit's order denying rehearing *en banc* was issued on August 28, 2009. Pet. App. 3a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

The statutory provision involved is 18 U.S.C. § 924(c)(1)(A):

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

STATEMENT OF THE CASE

Gould pleaded guilty to Counts One and Three of the indictment in 2006. The factual resume supporting Gould's guilty plea admitted to the elements of Count One under 21 U.S.C. § 846 and of Count Three under 18 U.S.C. § 924(c)(1)(A). For Count One, the probation officer recommended an offense level of 28 and, based on a criminal history category of IV, a Guidelines range of 110 to 137 months. For Count Three, the probation officer recommended a range of 60 months under USSG § 2K2.4 and 18 U.S.C. § 924(c)(1)(A) to run consecutive to Count One's sentence.

At sentencing, Gould cited the decision by the U.S. Court of Appeals for the Second Circuit in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), and objected that, because of 18 U.S.C. § 924(c)(1)(A)'s introductory "except" clause, Count Three does not carry a 5-year mandatory minimum. Gould objected that this might impact his Guidelines range. The District Court—which had jurisdiction over the proceeding under 18 U.S.C. § 3231—overruled these objections. There is no suggestion that Gould did not preserve these objections for appeal.

The District Court calculated the Guidelines range to be 120 to 137 months for Count One and "60 months, to run consecutive to any other term of imprisonment," for Count 3. The District Court sentenced Gould to 137 months for Count One and 60 months for Count 3 and combined them for a 197-month term of

imprisonment. Gould reurged the objection that Count Three does not carry a mandatory minimum and that this might impact the Guidelines range. Gould further objected that the term of imprisonment is unreasonable. The District Court overruled these objections. The District Court never inquired about the correct Guidelines range in the event that Count Three carries no mandatory minimum. The District Court entered judgment on the sentence, and Gould appealed.

On appeal, relying on the unpublished decision in *United States v. Collins*, No. 06-30009, 2006 WL 2921225 (5th Cir. Oct. 12, 2006), as adopted by *United States v. London*, 568 F.3d 553 (5th Cir. 2009), the Fifth Circuit rejected Gould's argument that, because of the "except" clause, the 5-year mandatory minimum does not apply to Count Three. Pet. App. 1a-2a. The Fifth Circuit also rejected Gould's arguments of procedural and substantive unreasonableness. Pet. App. 2a. It affirmed Gould's sentence as a result. Pet. App. 2a. Rehearing *en banc* was later denied. Pet. App. 3a.

Gould now petitions this Court for a writ of certiorari.

SUMMARY OF THE ARGUMENT

This appeal concerns the proper interpretation and application of 18 U.S.C. § 924(c)(1)(A)'s "except" clause for mandatory minimum sentences involving drug and gun crimes. "Except to the extent that a greater minimum sentence is otherwise provided by ... any other provision of law," § 924(c)(1)(A) provides a 5-year mandatory minimum for possessing a firearm in furtherance of a drug-trafficking crime. Although the District Court applied this 5-year mandatory minimum to Count Three in sentencing Gould, doing so was erroneous. Under

§ 924(c)(1)(A)'s "except" clause, the 5-year mandatory minimum does not apply to Count Three because Count One carries a greater, 10-year mandatory minimum. The error renders Gould's sentence procedurally and substantively improper.

These conclusions are mandated by § 924(c)(1)(A)'s literal meaning, as the U.S. Court of Appeals for the Second Circuit made clear in *United States v. Whitley*, 529 F.3d 150 (2d Cir. 2008), debunking contrary decisions from several other circuits. Nonetheless, the Fifth Circuit relied on its unpublished decision in *United States v. Collins*, No. 06-30009, 2006 WL 2921225 (5th Cir. Oct. 12, 2006), as baldly adopted by *United States v. London*, 568 F.3d 553 (5th Cir. 2009), to reject Gould's argument under § 924(c)(1)(A) and *Whitley*. *See United States v. Gould*, No. 08-10857, 2009 WL 2258336, at *1 (5th Cir. July 29, 2009). The Second Circuit earlier rejected *Collins* in *Whitley* as being wrongly decided.

This Court has never addressed whether a § 924(c)(1)(A) mandatory minimum applies to a count when a greater mandatory minimum applies to another count. The issue impacts many cases because of § 924(c)(1)(A)'s significance and widespread use and has caused a split between (i) the Second Circuit on the one hand and (ii) the First, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits on the other hand. The government itself acknowledged this split and the issue's importance in opposing a petition for a writ of certiorari from the Seventh Circuit's decision in *United States v. Easter*, 553 F.3d 519 (7th Cir. 2009). *See* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 7, 9-10, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). Indeed,

recognizing this issue's importance and the need for resolution, the Solicitor General has authorized the filing of a petition for certiorari from the Second Circuit's decision in *United States v. Williams*, 558 F.3d 166 (2d Cir. 2009), which presents the same issue that Gould now presents. *See* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 7, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). This issue calls for *de novo* review and is the primary and threshold issue here.

The Court should grant a writ of certiorari, either separately or together with any writ of certiorari in *Williams*, to resolve the division among the circuits over this issue of exceptional national importance. The Court should then adopt the Second Circuit's interpretation of § 924(c)(1)(A), vacate Gould's sentence, and remand for resentencing.

I. THE COURTS OF APPEALS ARE DEEPLY SPLIT AS TO WHETHER A 18 U.S.C. § 924(c)(1)(A) MANDATORY MINIMUM APPLIES TO A COUNT WHEN A GREATER MANDATORY MINIMUM APPLIES TO ANOTHER COUNT.

This case presents the Court with a deep, well-developed conflict between the courts of appeals. On the one hand, the Second Circuit has held that a 18 U.S.C. § 924(c)(1)(A) mandatory minimum does not apply to a count when a greater mandatory minimum applies to another count. *United States v. Whitley*, 529 F.3d 150, 153, 158 (2d Cir. 2008); *see also United States v. Williams*, 558 F.3d 166, 167-68 (2d Cir. 2009). On the other hand, the First, Third, Fourth, Fifth, Sixth, Seventh, and Eighth Circuits have held that a § 924(c)(1)(A) mandatory minimum applies regardless of whether a greater mandatory minimum applies to another

count. *See United States v. Parker*, 549 F.3d 5, 10-12 (1st Cir. 2008); *United States v. Abbott*, 574 F.3d 203, 206-11 (3d Cir. 2009); *United States v. Studifin*, 240 F.3d 415, 417-24 (4th Cir. 2001); *United States v. Collins*, No. 06-30009, 2006 WL 2921225, at *1-2 (5th Cir. Oct. 12, 2006) (unpublished), *holding and reasoning adopted by United States v. London*, 568 F.3d 553, 564 (5th Cir. 2009); *United States v. Jolivette*, 257 F.3d 581, 585-87 (6th Cir. 2001); *United States v. Easter*, 553 F.3d 519, 524-27 (7th Cir. 2009); *United States v. Alaniz*, 235 F.3d 386, 386-90 (8th Cir. 2000). This conflict is squarely presented and ripe for the Court's immediate resolution.

Under § 924(c)(1)(A), anyone who possesses, brandishes, or discharges a firearm to further a drug-trafficking or violent crime shall, in addition to punishment for the drug-trafficking or violent crime, be sentenced to a certain term of imprisonment, unless any other provision of law provides a greater mandatory minimum:

> Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime–
>
> (i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

18 U.S.C. § 924(c)(1)(A). In other words, as the Second Circuit correctly held in *Whitley*, when "a greater minimum sentence is otherwise provided ... by any other provision of law" to which a defendant will be sentenced, the defendant is not subject to § 924(c)(1)(A)'s otherwise mandatory 5-, 7-, or 10-year sentences for possessing, brandishing, or discharging a firearm. *Whitley*, 529 F.3d at 158 (discussing § 924(c)(1)(A)).

II. THE GOVERNMENT HAS ACKNOWLEDGED THE CIRCUIT SPLIT AND THE IMPORTANCE OF THIS ISSUE, WHICH GOULD SQUARELY PRESENTS HERE.

A *pro se* defendant recently filed a petition for a writ of certiorari from the Seventh Circuit's decision in *Easter*. *See* Petition for a Writ of Certiorari, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). As Gould does here, the defendant has sought this Court's review of the issue whether § 924(c)(1)(A)'s mandatory minimum applies to a count when a greater mandatory minimum applies to another count. *Id.* at 2, 9-10.

The government has opposed the petition, arguing that the case, for two reasons, is "not a suitable vehicle for resolving the conflict among the courts of appeals over" this issue. *See* Brief for the United States in Opposition to Petition for a Writ of Certiorari at 10, *United States v. McSwain*, No. 08-9560 (*petition for cert. filed* March 26, 2009). First, the case arises in "the unusual posture of a decision by the court of appeals addressing the narrow issue of whether the

arguments petitioner advanced in his *pro se* response to his counsel's *Anders* brief warranted full briefing by counsel." *Id.* at 10-11. According to the government, the posture may "obscure this Court's review of the underlying statutory question." *Id.* at 11. Second, *McSwain*'s petitioner allegedly forfeited the § 924(c)(1)(A) argument by failing to raise it in the district court and, thus, would have to show plain error to get relief. *Id.*

That said, the government has agreed that § 924(c)'s "except" clause will require review by this Court. *See id.* at 7, 9-10. As the government explained, the "courts of appeals are divided on the meaning of the 'except' clause in Section 924(c)," and the "issue is an important and recurring one in federal prosecutions." *Id.* at 9-10. Thus, the "Solicitor General has authorized the filing of a petition for certiorari from the Second Circuit's decision" in *Williams*. *Id.* at 7.

Although *McSwain* may not be the proper vehicle for reviewing § 924(c)(1)(A), Gould's case is. There is no suggestion that he failed to preserve his objections for the appeal of this issue. It is the primary and threshold issue here and, contrary to *McSwain*, calls for *de novo* review.

III. THE SECOND CIRCUIT INTERPRETED § 924(c)(1)(A) CORRECTLY IN *UNITED STATES V. WHITLEY.*

In *Whitley*, the defendant violated § 924(c)(1)(A) by discharging a firearm during a violent crime. *See Whitley*, 529 F.3d at 151. The defendant also violated 18 U.S.C. §§ 922(g)(1) and 924(e) by possessing a firearm after having been convicted of at least three violent felonies or serious drug offenses. *See id.* The district court held that the count under § 924(c)(1)(A) carried a 10-year mandatory

minimum despite the other count's greater, 15-year mandatory minimum. *See id.* at 151-52.

Applying "what [§ 924(c)(1)(A)] literally says," the Second Circuit reversed the district court and remanded for resentencing because the count under § 924(c)(1)(A) did not have a mandatory minimum: "Read literally, as we believe the 'except' clause of subsection 924(c)(1)(A) should be, the clause exempts [the defendant] from the consecutive ten-year minimum sentence for discharging a firearm because he is subject to the higher fifteen-year minimum sentence provided by section 924(e)." *Id.* at 153, 158.

The government had urged the Second Circuit to reject § 924(c)(1)(A)'s literal meaning, arguing that it (i) was unsupported by the balance of the statute's text, design, and purpose; (ii) would produce illogical and distorted results that Congress did not intend; and (iii) had been rejected by other circuits. *Id.* at 153. The Second Circuit rejected each argument. *See id.* at 153-58.

A. § 924(c)(1)(A)'s Text, Design, and Purpose Support the Second Circuit's Holding.

Text. The government argued that the "except" clause provides that a court must impose one of § 924(c)(1)(A)'s mandatory minimums "unless some other statutory provision requires a higher minimum *consecutive* sentence for a *firearm* offense." *Id.* at 153 (internal quotation marks omitted). The Second Circuit rejected this textual argument because it "curiously departs from the wording of the 'except' clause," which does not contain the words "consecutive" or "firearm." *Id.*

Design. The government's "design" argument came from the Eighth Circuit's decision in *Alaniz*. *Id.* As the Second Circuit explained, the Eighth Circuit declined to read the "except" clause literally in *Alaniz*. *See id.* It worried that §§ 924(c)(1)(B) and 924(c)(1)(C), which provide enhanced penalties based on the type of weapon involved in an offense and based on prior convictions, would be "'grammatically and conceptually incomplete'" without § 924(c)(1)(A)'s "except" clause. *Id.* at 153-54 (quoting *Alaniz*, 235 F.3d at 389). The Eighth Circuit noted that § 924(c)'s prior version set these enhanced penalties in "'an undivided subsection,'" such that the prior version did not have any numbered or lettered subdivisions. *Id.* (quoting *Alaniz*, 235 F.3d at 388). According to the Eighth Circuit, § 924(c)'s current version grammatically and conceptually needs the "except" clause "'to link the remaining prefatory language in (c)(1)(A) to each sentence length set forth in subdivisions (c)(1)(B) and (c)(1)(C).'" *Id.* at 154 (quoting *Alaniz*, 235 F.3d at 389).

Noting "the objection that even a grammatical imperfection would be a dubious basis for adding ... a ... consecutive sentence contrary to the plain wording of a statute," the Second Circuit disagreed with the Eighth Circuit. *Id.* According to the Second Circuit, the "except" clause does not merely operate as a link between subsections. *See id.* First, removing the "except" clause from § 924(c)(1)(A) would not actually cause a grammatical problem; the Eighth Circuit never even articulated one. *See id.* Second, the Eighth Circuit's design rationale does not account for § 924(c)(1)(A)'s "broad phrase 'or by any other provision of law.'" *Id.* (quoting § 924(c)(1)(A)). "[I]f linking the various provisions of subsection (c)(1)

together was the sole purpose of the 'except' clause, the clause would have ended with the phrase 'provided by this subsection,' and the phrase 'or by any other provision of law' would have been unnecessary." *Id.* (quoting § 924(c)(1)(A)). Third, before Congress passed § 924(c)'s current version, the Department of Justice submitted its preferred version of the statute that included lettered and numbered subdivisions without the "except" clause. *See id.* As the Second Circuit noted, "[a]pparently the Department did not then think the 'except' clause was needed to avoid a grammatical problem." *Id.*

Purpose. In addition to containing no lettered or numbered subdivisions, § 924(c)'s prior version provided a 5-year mandatory minimum for anyone who "uses or carries" a firearm during a drug-trafficking or violent crime. *Id.* This Court held that this required "'active employment of the firearm by the defendant, a use that makes the firearm an operative factor in relation to the predicate offense.'" *Id.* at 154-55 (quoting *Bailey v. United States*, 516 U.S. 137, 143 (1995)). In response to this holding, Congress amended § 924(c) by extending its coverage to any person who "possesses a firearm" in furtherance of a drug-trafficking or violent crime. *Id.* at 155 (internal quotation marks omitted). The amendment also provided a series of increased minimum sentences. *See id.*

In *Whitley*, the government argued that reading the "except" clause literally to exempt a defendant from § 924(c)(1)(A)'s mandatory minimums when a greater mandatory minimum applies to another count would be inconsistent with the congressional purpose to expand the section's coverage and increase penalties. *See*

id. The Second Circuit rejected this argument, as it is not inconsistent with any intent to enhance firearm penalties "for Congress to have provided a series of increased minimum sentences and also to have made a reasoned judgment that where a defendant is exposed to two minimum sentences ... only the higher minimum should apply." *Id.* Rather, "such a sentencing pattern seems eminently sound." *Id.*

B. Applying § 924(c)(1)(A) As Written Does Not Cause "Illogical Results."

The government also argued in *Whitley* that reading the "except" clause literally would produce "illogical results" by, allegedly, punishing defendants who commit serious crimes less than defendants who commit lesser crimes. *Id.* The government offered this example:

> [A] defendant who brandished a firearm, resulting in a seven-year minimum consecutive sentence, *see* 18 U.S.C. § 924(c)(1)(A)(ii), would be subject to a twelve-year minimum sentence if he also possessed 500 grams of cocaine, resulting in five-year minimum sentence, *see* 21 U.S.C. § 841(b)(1)(B), but would be subject to only a ten-year minimum sentence if he possessed five kilograms of cocaine, resulting in a ten-year minimum sentence, *see* 21 U.S.C. § 841(b)(1)(A), because that sentence is a higher minimum than the brandishing minimum.

See id.

The Second Circuit dismissed this example, however, as an apparent anomaly that "disappears upon close scrutiny" and does not warrant rejecting § 924(c)(1)(A)'s "except" clause's literal meaning. *Id.* "The reason is that no court would be *required* to sentence the five-kilogram defendant to only the ten-year minimum." *Id.* After properly calculating the Guidelines range, a court could

impose a substantively reasonable sentence for brandishing the firearm that is below the statutory maximum. *See generally id.*

C. Decisions From Other Circuits Precede The Second Circuit's More Thorough Analysis In *Whitley*.

The government finally argued in *Whitley* that the Second Circuit should follow decisions from other circuits that have declined to read the "except" clause literally. *See id.* at 156 (citing *Studifin*, *Collins*, *Jolivette*, and *Alaniz*). Unpersuaded, the Second Circuit found "substantial grounds" for reading the "except" clause literally despite these contrary decisions. *Id.*

The *Whitley* court noted that this Court has repeatedly instructed lower courts "to give statutes a literal reading and apply the plain meaning of the words Congress has used." *Id.* (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The Court reversed a court of appeals just last year for "'contort[ing]' the 'plain terms'" of a criminal statute. *Id.* (quoting *United States v. Rodriquez*, 128 S. Ct. 1783, 1788 (2008)). Although courts may depart from a statute's literal meaning under certain circumstances, "other than the decisions cited above that have rewritten the 'except' clause in different ways to escape its plain meaning," the Second Circuit found no decision that ever rejected "the literal meaning of statutory language to the detriment of a criminal defendant." *Id.*

The Second Circuit also explained that the decisions from other circuits all originated from the "Eighth Circuit's reliance in *Alaniz* on the questionable and unexplained argument ... that a literal reading would render section 924(c) grammatically and conceptually incomplete." *Id.* at 157 (citing *Studifin*, 240 F.3d at

422-423; *Collins*, 2006 WL 2921225, at *1; *Jolivette*, 257 F.3d at 587; *United States v. Baldwin*, No. 00-1630, 2002 WL 726485, at *2 (6th Cir. Apr. 23, 2002)) (internal quotation marks omitted). It further noted that, contrary to the Fourth Circuit's concern in *Studifin*, reading the "except" clause literally does not displace § 924(c)'s requirement that "'no term of imprisonment imposed on a person under this subsection shall run concurrently with any other term of imprisonment ....'" *Id.* at 158 (quoting § 924(c)(1)(D)(ii)). A sentence imposed for violating section 924(c)(1)(A) can run consecutively to another sentence even when the sentence under section 924(c)(1)(A) has no mandatory minimum. *See id.*

As the Second Circuit correctly concluded, none of the government's arguments provides any basis for departing from § 924(c)(1)(A)'s plain meaning. *See id.* The statute's "except" clause plainly provides that § 924(c)(1)(A)'s mandatory minimums do not apply where "any other provision of law" subjects a defendant to a greater mandatory minimum. *See* § 924(c)(1)(A).

D. Decisions Following *Whitley* Have Further Deepened the Circuit Split.

After the Second Circuit's decision in *Whitley*, the circuit split over § 924(c)(1)(A)'s interpretation and application developed even further. The Second Circuit reaffirmed *Whitley* in *Williams*, whereas the First, Third, and Seventh Circuits issued decisions that conflict with the Second Circuit's decisions and align with the Fourth's, Fifth's, and Eighth's decisions. *Compare Williams*, 558 F.3d at 167-68, *with Parker*, 549 F.3d at 10-12, *Abbott*, 574 F.3d at 206-11, *and Easter*, 553 F.3d at 525-27.

IV. GOULD CAN OBTAIN RELIEF FOR THE FIFTH CIRCUIT'S IMPROPER APPLICATION OF § 924(c)(1)(A).

Over Gould's objection, the District Court erroneously applied § 924(c)(1)(A)'s 5-year mandatory minimum to Count Three. As the Second Circuit made clear in *Whitley* and *Williams*, a defendant is not subject to § 924(c)(1)(A)'s 5-year mandatory minimum when "a greater minimum sentence is otherwise provided ... by any other provision of law" to which he will be sentenced. *See* § 924(c)(1)(A). Here, "any other provision of law" includes 21 U.S.C. § 846, and the 10-year mandatory minimum for Gould's violation of § 846 (Count One) exceeds the 5-year mandatory minimum that would otherwise apply for his violation of § 924(c)(1)(A) (Count Three). Because this greater, 10-year mandatory minimum applies to Count One, no mandatory minimum applies to Count Three.

Erroneously applying § 924(c)(1)(A)'s 5-year mandatory minimum to Count Three rendered Gould's sentence procedurally improper. Count Three's "guideline sentence is the minimum term of imprisonment required by statute." USSG § 2k2.4(b) (setting forth the Guidelines for convictions under § 924(c)(1)(A)). Because the "except" clause exempts Count Three from a minimum term of imprisonment, this means that its properly calculated Guidelines sentence is 0 months, not 60 months as calculated by the District Court. *See Gall v. United States*, 128 S. Ct. 586, 597 (2007) (recognizing that procedural error includes miscalculating the proper Guidelines sentence). Gould's sentence resulted from this procedural error because there is no basis for concluding that the District Court contemplated the correct Guidelines range to be 0 months.

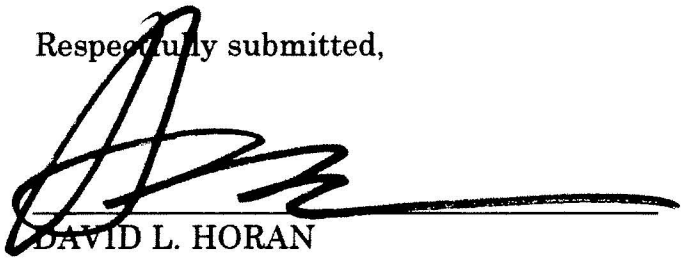
Erroneously applying § 924(c)(1)(A)'s 5-year mandatory minimum also rendered Gould's sentence substantively improper. First, because of its failure to contemplate the correct Guidelines range, the District Court failed to consider the extent to which Gould's 197-month sentence deviates from the properly calculated Guidelines range of 120 to 137 months. *See id.* at 597 (holding that a district court "must consider the extent of the deviation"). Second, in light of 18 U.S.C. § 3553(a)'s factors, the District Court did not have a sufficiently compelling justification for departing by 60 months from the top of the properly calculated Guidelines range.

These procedural and substantive improprieties, together or alone, require that Gould's sentence be vacated and remanded for further resentencing. But the Fifth Circuit never addressed them. Instead, the Fifth Circuit avoided them by relying erroneously on its adoption of the unpublished decisions in *Collins* to reject Gould's argument that, because of the "except" clause, the 5-year mandatory minimum does not apply to Count Three. Pet. App. 1a-2a.

CONCLUSION

The Court should grant this petition for a writ of certiorari, either separately or together with any writ of certiorari in *Williams*, to resolve the circuit split as to whether a § 924(c)(1)(A) mandatory minimum applies to a count when a greater mandatory minimum applies to another count. On review, the Court should vacate Gould's sentence and remand for further resentencing.

Respectfully submitted,



DAVID L. HORAN
(Counsel of Record)
DAVID J. SCHENCK
PAUL F. THEISS
JONES DAY
2727 N. Harwood Street
Dallas, TX 75201-1515
Telephone: (214) 220-3939
Facsimile: (214) 969-5100

Counsel for Petitioner

October 16, 2009

United States Court of Appeals, Fifth Circuit.
Carlos Rashad GOULD, Petitioner
v.
UNITED STATES OF AMERICA, Respondent
No. 08-10857
July 29, 2009

Before DAVIS, GARZA and PRADO, Circuit Judges.

PER CURIAM:*

Carlos Rashad Gould pleaded guilty to conspiracy to possess with intent to distribute 50 grams or more of cocaine base in violation of 21 U.S.C. §§ 841, 846 (Count One); and possession of a firearm in furtherance of a drug trafficking crime, in violation of 18 U.S.C. § 924(c) (Count Three). On resentencing following remand from this court, the district court sentenced Gould to 137 months in prison on Count One, within the advisory guidelines range, and to a mandatory consecutive sentence of five years on Count Three, for a total of 197 months. Gould now challenges that sentence. For the following reasons, we affirm.

Gould first contends that the district court committed procedural error by imposing a mandatory consecutive five-year term on the § 924(c) charge. Gould's contention is based on the so-called "exception" clause of § 924(c). In an unpublished opinion in 2006, we joined three other circuits to reject this same argument. *See United States v. Collins*, 205 F. App'x 196, 197-98 (5th Cir. 2006). While this appeal was pending, we adopted the reasoning and holding of *Collins* in

* Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

a published decision. *United States v. London*, __ F.3d __, No. 07-31092, 2009 WL 1362593, at *8 (5th Cir. May 18, 2009). Accordingly, we reject Gould's argument.

Gould next contends that this sentence was substantively unreasonable on several grounds. He first argues that the misapplication of the five-year minimum, which resulted in a total of 197 years, rendered his sentence substantively unreasonable. Given our disposition of his challenge to the five-year mandatory minimum, this argument necessarily fails.

Gould also challenges the substantive reasonableness of the sentence in light of his efforts while incarcerated to improve his education, the assistance he provided the Government in prosecuting others, and the disparity under the Sentencing Guidelines between sentences for crack cocaine offenses and powder cocaine offense. In light of the district court's careful consideration of the 18 U.S.C. § 3553(a) factors, the evidence regarding the facts of this case, and the deferential standard of review, we discern no abuse of discretion in the district court's choice of a within-guidelines sentence. *See Gall v. United States*, 128 S. Ct. 586, 597 (2007); *United States v. Mondragon-Santiago*, 564 F.3d 357, 360 (5th Cir. 2009).

AFFIRMED.

United States Court of Appeals, Fifth Circuit.
Carlos Rashad GOULD, Petitioner
v.
UNITED STATES OF AMERICA, Respondent
No. 08-10857
August 28, 2009

ON PETITION FOR REHEARING *EN BANC*

Before DAVIS, GARZA, and PRADO, Circuit Judges.

PER CURIAM:

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

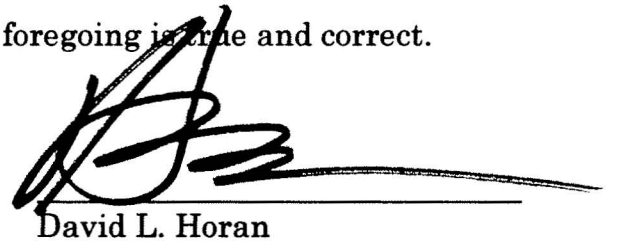
(X) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5th Cir. R. 35), the Petition for Rehearing En Banc is DENIED.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I certify that one copy of the Petition for Writ of Certiorari in *Carlos Rashad Gould v. United States of America*, No. 09-_____ was served via UPS overnight delivery on all parties required:

Solicitor General of the United States
Room 5614
Department of Justice
950 Pennsylvania Avenue, N. W.
Washington, DC 20530-0001
(202) 514-2203
Counsel for Respondent

I declare under penalty of perjury that the foregoing is true and correct.



David L. Horan
Counsel for Petitioner

Date: October 16, 2009