No. 09-203

In the Supreme Court of the United States

MARTIN ESCOBAR, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State applied a recidivist enhancement in that second or subsequent conviction.

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OPINIONS BELOW

The decisions of the court of appeals (Pet. App. 1a-2a), the Board of Immigration Appeals (Pet. App. 3a-6a, 7a-11a), and the immigration judge (Pet. App. 12a-14a, 15a-19a) are all unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2009. The petition for a writ of certiorari was filed on August 17, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Under the Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.,* an alien who has "been convicted of a violation of * * * any law * * * of a State * * * relating to a controlled substance" is removable.

8 U.S.C. 1227(a)(2)(B)(i). Although certain aliens may seek discretionary cancellation of removal under 8 U.S.C. 1229b(a), an alien who has been convicted of an "aggravated felony" is ineligible for such relief. 8 U.S.C. 1229b(a)(3). The INA defines an "aggravated felony" by reference to a list of categories of qualifying criminal offenses. As relevant here, the list includes "illicit trafficking in a controlled substance * * *, including a drug trafficking crime (as defined in section 924(c) of title 18)," 8 U.S.C. 1101(a)(43)(B), whether the offense was "in violation of Federal or State law." 8 U.S.C. 1101(a)(43) (penultimate sentence). In turn, 18 U.S.C. 924(c)(2) defines a "drug trafficking crime" as, *inter alia*, "any felony punishable under the Controlled Substances Act [(CSA)] (21 U.S.C. 801 et seq.)."

One provision of the CSA, 21 U.S.C. 844(a), makes it "unlawful for any person knowingly or intentionally to possess a controlled substance" without a prescription. Although in most circumstances a defendant is subject to imprisonment for "not more than 1 year" for his first possession conviction under Section 844, "if [the defendant] commits such offense after a prior conviction under [chapter 13 of Title 21] * * *, or a prior conviction for any drug * * * offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for * * * not more than 2 years." *Ibid.*[1] The higher term of imprisonment for a second or subsequent conviction cannot, however, be imposed on a defendant unless certain procedural steps

[1] Some first possession offenses are subject to a felony sentence. See 21 U.S.C. 844(a) (first possession of more than five grams of substance containing cocaine base subject to five-year minimum sentence; first possession of flunitrazepam subject to imprisonment for up to three years).

have been followed. Section 851 of Title 21 provides that "[n]o person who stands convicted of an offense under [the CSA] shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court * * * stating in writing the previous convictions to be relied upon," and the defendant is afforded an opportunity to challenge the validity of the prior conviction in a hearing before the court. 21 U.S.C. 851(a) and (c).

2. a. Petitioner is a native and citizen of Mexico who has been a lawful permanent resident of the United States since 1990. Pet. App. 16a; Administrative Record (A.R.) 133. In 1997, he was convicted in Illinois state court for possession of cannabis, in violation of 720 Ill. Comp. Stat. 550/4(b) (West 2003), for which he was sentenced to six months of court supervision. Pet. App. 3a-4a; A.R. 98, 123-124, 151, 163. In 1998, he was again convicted in Illinois, this time for possession of a controlled substance (cocaine) in violation of 720 Ill. Comp. Stat. 570/402(c) (West 2003), and was sentenced to two years of probation. Pet. App. 4a; A.R. 98, 123-124, 153, 163.

Although Illinois has a recidivist statute applicable to possession of a controlled substance, see 720 Ill. Comp. Stat. 570/408 (West 2003), that sentencing enhancement is inapplicable when the prior conviction was for possession of cannabis, because cannabis is not considered a "controlled substance" under Illinois law, see *People* v. *Miller*, 450 N.E.2d 767, 778 (Ill. App. Ct. 1983), cert. denied, 465 U.S. 1033 (1984); *People* v. *Sanders*, 361 N.E.2d 884, 886-887 (Ill. App. Ct. 1977). Therefore, under Illinois law, petitioner's first conviction for cannabis possession could not be relied upon for

a recidivism enhancement in connection with petitioner's second state possession offense.

b. In January 2006, petitioner returned to the United States from a trip abroad. Pet. App. 16a. In view of his prior convictions, petitioner was considered an arriving alien applying for admission to the country. See 8 U.S.C. 1101(a)(13)(C)(v), 1182(a)(2)(A)(i)(II). The government charged petitioner with being an "arriving alien" who is inadmissible to, and therefore removable from, the United States for having been convicted of violating a law relating to a controlled substance. A.R. 161-163.[2] The charging document cited both Illinois possession convictions. A.R. 163.

At a hearing before an immigration judge (IJ), petitioner was represented by counsel and conceded the allegations and charge of removability lodged against him. Pet. App. 16a; A.R. 96-98. Petitioner sought cancellation of removal for permanent residents under 8 U.S.C. 1229b(a). Pet. App. 16a. The IJ found petitioner removable as charged and also ineligible for cancellation of removal because he had been convicted of an aggravated felony based on his two state drug possession offenses. *Id.* at 17a-18a.

The Board of Immigration Appeals (Board) dismissed petitioner's administrative appeal. Pet. App. 7a-11a. The Board agreed with the IJ that a state possession conviction, occurring after a similar prior conviction had become final, qualified as an "aggravated felony"

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[2] Petitioner asserts incorrectly that he was charged with being removable under "8 U.S.C. 1227(a)(2)(A)(i)(II)." Pet. 4. In fact, petitioner was charged under 8 U.S.C. 1182(a)(2)(A)(i)(II), which pertains to aliens seeking admission to the United States, rather than to aliens already admitted. See A.R. 163 (charging petitioner under INA Section 212(a)(2)(A)(i)(II)).

under 8 U.S.C. 1101(a)(43)(B) because it is punishable as a felony under the federal Controlled Substances Act (CSA), 21 U.S.C. 844(a). Pet. App. 8a-10a.

3. Petitioner then sought judicial review. After this Court's decision in *Lopez* v. *Gonzales*, 549 U.S. 47 (2006), the court of appeals remanded the case to the Board for further consideration in light of that decision. Pet. App. 4a. On remand, the Board followed its recent precedential decision in *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382 (B.I.A. 2007), review denied, 570 F.3d 263 (5th Cir. 2009), petition for cert. pending, No. 09-60 (filed July 15, 2009). In *Carachuri-Rosendo*, the Board held that it would follow the law (if any) of the relevant circuit regarding when a recidivist possession conviction would be considered an aggravated felony. See Pet. App. 5a. The Board observed (*ibid.*) that, in *Carachuri-Rosendo*, it had identified the relevant Seventh Circuit law as *United States* v. *Pacheco-Diaz*, 506 F.3d 545 (2007), reh'g denied, 513 F.3d 776 (2008) (per curiam). In *Pacheco-Diaz*, the Seventh Circuit held in the criminal sentencing context, following *Lopez*, that a second or successive state drug conviction qualifies as an "aggravated felony" regardless "whether the defendant was charged in state court as a recidivist," because the second possession offense could have been punished as a felony "[h]ad [the defendant] been prosecuted under federal law." *United States* v. *Pacheco-Diaz*, 513 F.3d 776, 779 (7th Cir. 2008) (per curiam) (denying rehearing). Applying that decision, the Board concluded that petitioner's second controlled substance conviction was an aggravated felony barring him from cancellation of removal. Pet. App. 5a-6a.

Petitioner's second petition for review was summarily denied by the Seventh Circuit. Pet. App. 1a-2a.

The court of appeals relied (*id.* at 2a) on its recent decision in *Fernandez* v. *Mukasey*, 544 F.3d 862 (7th Cir. 2008), petition for cert. pending, No. 09-5386 (filed July 15, 2009), in which the court applied *Pacheco-Diaz* in the immigration context. See *id.* at 866-874.

DISCUSSION

Petitioner seeks review (Pet. 17-25) of the court of appeals' determination that his second conviction under Illinois law for drug possession qualifies as an "aggravated felony." The courts of appeals have divided on the question whether a second or subsequent state conviction for possession of a controlled substance automatically qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B), or instead qualifies only if the State applied a recidivist enhancement in that second or subsequent conviction. Compare *Carachuri-Rosendo* v. *Holder*, 570 F.3d 263, 266-268 (5th Cir. 2009), petition for cert. pending, No. 09-60 (filed July 15, 2009); and *Fernandez* v. *Mukasey*, 544 F.3d 862, 867-869 (7th Cir. 2008), petition for cert. pending, No. 09-5386 (filed July 15, 2009), with *Alsol* v. *Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008); and *Rashid* v. *Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008).

Petitioner urges the Court to grant the petition for a writ of certiorari in *Carachuri-Rosendo*, and to hold this petition pending the outcome of that case. Pet. 26. As stated in the brief for the respondent in *Carachuri-Rosendo*, the government agrees that review by this Court is warranted to resolve the conflict among the courts of appeals on the issue presented and that *Carachuri-Rosendo* is an appropriate case for the Court's resolution of the issue. See Resp. Br. at 14-18,

Carachuri-Rosendo v. *Holder*, No. 09-60 (filed Nov. 16, 2009).[3]

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its disposition of the petition for a writ of certiorari in *Carachuri-Rosendo* v. *Holder*, petition for cert. pending, No. 09-60 (filed July 15, 2008), and then dispose of this case accordingly.

Respectfully submitted.

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NOVEMBER 2009

[3] We are serving petitioner with a copy of respondent's brief in *Carachuri-Rosendo*.