No. 11-79

In the Supreme Court of the United States

JORGE ALBERTO GARCIA, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a state crime is an "aggravated felony" if, inter alia, it is equivalent to a "felony punishable under the Controlled Substances Act." 8 U.S.C. 1101(a)(43)(B); 18 U.S.C. 924(c)(2). Under the Controlled Substances Act, possession of an unspecified quantity of marijuana with intent to distribute is a felony punishable by up to five years of imprisonment. If, however, the defendant shows that he distributed only "a small amount of marihuana for no remuneration," the offense is treated as a misdemeanor. 21 U.S.C. 841(b)(1)(D) and (4).

The question presented is whether, when a defendant is convicted in state court of possession of marijuana with intent to deliver and the record of conviction does not disclose the quantity of marijuana or the amount of remuneration (if any), the defendant has established that he has not been convicted of an aggravated felony merely because of the possibility that the offense might have involved "a small amount of marihuana for no remuneration."

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-14a) is reported at 638 F.3d 511. The decisions of the Board of Immigration Appeals (Pet. App. 15a-21a) and the immigration judge (Pet. App. 25a-43a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 28, 2011. A petition for rehearing was denied on June 1, 2011 (Pet. App. 44a-45a). The petition for a writ of certiorari was filed on July 18, 2011. 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.*, certain inadmissible aliens may seek the discretionary relief of cancellation of removal. 8 U.S.C. 1229b(a). An alien who has been convicted of an "aggravated felony" is ineligible for that relief. 8 U.S.C. 1229b(a)(3). An alien bears the burden of establishing his eligibility, including that he "has not been convicted of any aggravated felony." *Ibid.*; see 8 U.S.C. 1229a(c)(4)(A)(i). "If the evidence indicates that one of more of the grounds for mandatory denial of the application for relief," such as conviction of an aggravated felony, "may apply, [then] the alien [has] the burden of proving by a preponderance of the evidence that such grounds do not apply." 8 C.F.R. 1240.8(d).

As relevant here, an aggravated felony 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.* For these purposes, a "felony" is a crime punishable by more than one year of imprisonment. 18 U.S.C. 3559(a); see 21 U.S.C. 802(13). Any criminal attempt to commit a crime that is an aggravated felony is itself an aggravated felony. 8 U.S.C. 1101(a)(43)(U).

One provision of the CSA, 21 U.S.C. 841(a)(1), prohibits possession of a controlled substance with intent to distribute. The CSA also prohibits attempting to commit that offense and imposes the same penalties for the attempt as for the substantive offense. 21 U.S.C. 846.

Those penalties vary based on the type and amount of the controlled substance involved, as well as other factors. See generally 21 U.S.C. 841(b)(1)(A)-(E) (2006 & Supp. III 2009). If the controlled substance is marijuana and weighs "less than 50 kilograms," the maximum penalty is five years of imprisonment, "except as provided in paragraph[] (4) * * * of this subsection." 21 U.S.C. 841(b)(1)(D). Paragraph (4), in turn, provides that "any person * * * distributing a small amount of marihuana for no remuneration shall be treated as provided in" 21 U.S.C. 844 and another statute not relevant here. 21 U.S.C. 841(b)(4). Section 844 prohibits the simple possession of controlled substances. The maximum term of incarceration under Section 844 for simple possession of marijuana is one year, but longer sentences are possible for recidivists when the government follows certain procedures. See 21 U.S.C. 844(a), 851.

2. Petitioner is a native and citizen of Mexico. In 1995, he became a lawful permanent of the United States. Pet. App. 2a, 16a.

In 1998, pursuant to a plea of no contest, petitioner was convicted in Michigan state court of attempted possession of marijuana with intent to deliver. Pet. App. 28a-29a, 85a-89a; see Mich. Comp. Laws Ann. §§ 333.7401(2)(d)(iii) (West Supp. 1998) (Pet. App. 78a-82a); *id.* § 750.92 (West 1991) (Pet. App. 83-84a). The court imposed a $500 fine and additional liabilities of $710. Pet. App. 88a.

The facts underlying the conviction are not clear from the record. Although petitioner has testified to various events occurring on January 16, 1998 (Administrative Record 155-157, 207-209 (A.R.)), he was charged with crimes occurring both at that time (A.R. 315-320) and also on March 25, 1998 (A.R. 322-325; Pet. App. 33a,

35a-36a; see also A.R. 196-197). The two cases were resolved when petitioner pleaded guilty in the initial case to attempted possession with intent to deliver marijuana, which was alleged in an amended charge. A.R. 322, 531. The allegations in the amended charge do not appear in the record.

3. In 2005, after traveling abroad, petitioner returned and applied for admission to the United States. He was eventually charged with being inadmissible on three grounds: (1) he had been convicted of a controlled substance offense, a ground of inadmissibility specified in 8 U.S.C. 1182(a)(2)(A)(i)(II); (2) immigration officials had reason to believe that petitioner is or has been an illegal drug trafficker, as set forth in 8 U.S.C. 1182(a)(2)(C); and (3) petitioner lacked necessary travel documents, as set forth in 8 U.S.C. 1182(a)(7)(A)(1)(I). Pet. App. 27a-28a. Petitioner conceded removability on the first ground. After reviewing the evidence, the immigration judge (IJ) found that petitioner was inadmissible (and therefore removable) on all three grounds. *Id.* at 29a, 33a-36a. His removability is no longer in dispute. *Id.* at 3a.

Petitioner sought the discretionary relief of cancellation of removal. Pet. App. 29a, 33a, 37a.[1] The IJ concluded that petitioner's Michigan conviction was an aggravated felony and barred petitioner from obtaining cancellation of removal. *Id.* at 39a-40a, 43a; see p. 2, *supra*.

The IJ reasoned primarily that petitioner's conviction was an aggravated felony because it was for a "felony punishable under the [CSA]." 18 U.S.C. 924(c)(2);

[1] Petitioner also sought another form of relief, a waiver under 8 U.S.C. 1182(h), for which he is not eligible and which is not at issue here. Pet. App. 13a, 29a, 33a, 36a-37a.

see 8 U.S.C. 1101(a)(43)(B); Pet. App. 40a.[2] The federal equivalent to petitioner's Michigan offense is attempted possession of marijuana with intent to distribute. See 21 U.S.C. 841(b)(1)(D), 846. The maximum sentence for that federal offense is greater than one year of imprisonment, see *ibid.*; Pet. App. 40a, making the offense a "felony punishable under the [CSA]." The IJ noted that petitioner had *not* been convicted under Mich. Comp. Laws Ann. § 333.7410(7) (West 1992), a provision specific to non-remunerative, non-commercial distribution of marijuana. Pet. App. 40a; see also *id.* at 33a. The IJ made no findings of his own regarding either the quantity of marijuana involved in petitioner's offense or the nature of the distribution of which petitioner had been convicted.[3]

In the alternative, the IJ also concluded that, even if petitioner were eligible for relief, he would exercise his discretion to deny the application for cancellation of removal on the merits, mainly because the judge believed

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[2] The IJ also observed that petitioner's offense could qualify as an aggravated felony if it contained a "trafficking" element. Pet. App. 39a-40a. That prong of the definition is not at issue here. See *id.* at 6a.

[3] The record does not indicate the actual quantity of marijuana involved in petitioner's conviction. Pet. App. 8a. Petitioner at one point said he "th[ought] it was [a] small amount" but, when asked how much this amount was, he added that "[n]o one [has] ever seen it" and that he did not know the amount that he had been told. A.R. 184. In any event, it is not apparent whether this statement even referred to the offense of conviction. Petitioner was the subject of two separate criminal proceedings concerning marijuana delivery on two different dates, A.R. 322-325, 531-532, and he eventually pleaded guilty in the original case but to an amended charge. A.R. 322, 531. Police reports and affidavits show that the house where petitioner was arrested on January 16, 1998, had, on the same day and on other days, been the location of marijuana sales. A.R. 315-320, 397-399.

that petitioner had not been truthful about his arrest record. Pet. App. 32a-33a, 36a, 38a-39a, 41a-43a.

4. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 15a-21a.

Petitioner's main contention before the Board was that a Michigan conviction for attempted possession of marijuana with intent to deliver might involve "a small amount of marihuana for no remuneration," 21 U.S.C. 841(b)(4), which if true would make the offense only a misdemeanor under the CSA. Petitioner argued that as a result, a conviction under that Michigan statute is not a "felony punishable under the CSA" under the categorical approach.[4] Pet. App. 16a, 18a-19a.

The Board disagreed. Under the Board's precedential decision in *In re Aruna*, 24 I. & N. Dec. 452 (2008), the Board concluded that the government is not required to *disprove* the possibility that an offense may have involved a small amount of marijuana distributed for no remuneration. Pet. App. 19a-20a.

In *Aruna*, the Board concluded that the default CSA provision governing possession of marijuana with intent to distribute is 21 U.S.C. 841(b)(1)(D), which is a felony provision carrying a five-year maximum sentence. The exception in 21 U.S.C. 841(b)(4) for a small amount of marijuana distributed for no remuneration creates only "a 'mitigating exception' to the otherwise applicable 5-year statutory maximum." 24 I. & N. Dec. at 457 (quoting *United States* v. *Hamlin*, 319 F.3d 666, 670 (4th Cir. 2003)). The elements of the offense under Section 841(b)(1)(D) do not require the government to prove that the defendant sought remuneration or that the of-

[4] Petitioner did not argue that, as a factual matter, his offense had concerned only a "small amount" of marijuana or had not involved "remuneration." See also note 3, *supra*.

fense involved more than a "small" amount; rather, to benefit from this "mitigating exception," the defendant must prove that the amount was small and that he sought no remuneration. *Ibid.* (quoting *Hamlin*, 319 F.3d at 671). The Board therefore held that the categorical approach does not require the Board to presume that a state offense involved the mitigating characteristics that could allow a defendant to claim entitlement to misdemeanor treatment under the CSA. *Ibid.*[5]

The Board noted in *Aruna*, however, that the alien had "made no effort during his proceedings before the [IJ] to prove that the quantity of marijuana in his offense was 'small' or that his offense involved a conspiracy to distribute marijuana for no remuneration, beyond his mere assertion of such, nor d[id] he request a remand for this purpose." 24 I. & N. Dec. at 458 n.5. The Board thus left open the possibility that, in an appropriate case, an alien could prove in immigration court that his state conviction fell within the "mitigating exception" of 21 U.S.C. 841(b)(4), even if it was not apparent from conviction documents alone that he would have been sentenced under this "mitigating exception" if he had instead been convicted in federal court.

In *Aruna*, the aggravated-felony question was relevant to whether the alien was removable (on which the government bears the burden of proof); in this case, by contrast, petitioner's removability is not in dispute and the aggravated-felony question is relevant only to eligibility for discretionary relief (on which the alien bears

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[5] The Board recognized that the Third Circuit had reached a contrary conclusion, but disagreed with that result and determined not to follow it in cases outside the Third Circuit. 24 I. & N. Dec. at 457 n.4 (citing, inter alia, *Jeune* v. *Attorney Gen. of the U.S.*, 476 F.3d 199, 205 (3d Cir. 2007)).

the burden of proof). The Board thus noted at the outset that petitioner bore the burden of establishing that his offense was not an aggravated felony. Pet. App. 17a (citing 8 C.F.R. 1240.8(d)). Petitioner had not carried that burden. Because petitioner, not the government, would have had to establish the mitigating circumstances set out in 21 U.S.C. 841(b)(4), those circumstances were not relevant to the analysis. The Board thus held that petitioner's Michigan conviction was most analogous to the basic federal offense of possession with intent to distribute, 21 U.S.C. 841(b)(1)(D). That offense is a felony, so petitioner's offense is "a felony punishable under the [CSA]" and, therefore, an aggravated felony. Pet. App. 20a.[6]

5. The court of appeals denied a petition for review. Pet. App. 1a-14a.

Like the Board, the court of appeals concluded that Section 841(b)(1)(D), not Section 841(b)(4), is "the default provision for punishing possession of [marijuana] with the intent to distribute," *i.e.*, the provision that applies when the amount of marijuana is undetermined. Pet. App. 9a. That is because "a federal prosecutor trying to have a defendant punished for a drug offense under [Section] 841(b)(1)(D) does not need to prove the absence of the [Section] 841(b)(4) elements." *Ibid.*

6. Petitioner sought rehearing en banc, which the court denied without any judge calling for a poll. Pet. App. 44a-45a.

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[6] Because it found petitioner ineligible for discretionary relief, the Board did not address petitioner's argument that the IJ had erred in denying such relief in the alternative as a matter of discretion.

ARGUMENT

The court of appeals correctly sustained the Board's decision in this case. Although there is some disagreement in the courts of appeals concerning the question presented, there is not a mature conflict warranting this Court's review. In particular, the courts of appeals have not yet considered the relevance of this Court's recent holding in *Carachuri-Rosendo* v. *Holder*, 130 S. Ct. 2577 (2010), the case on which petitioner principally relies. In any event, this case is not a suitable vehicle, because the IJ expressly held that even if petitioner were eligible for cancellation of removal, the IJ would deny his application on the merits as a matter of discretion.

1. a. The relevant question here is whether petitioner's Michigan offense is a "felony punishable under the [CSA]." 18 U.S.C. 924(c)(2). A state crime is a "felony" for these purposes (whether or not it is classified as a felony under state law) if it is equivalent to an offense under the CSA that is punishable by more than a year of imprisonment. *Carachuri-Rosendo*, 130 S. Ct. at 2582; *Lopez* v. *Gonzales*, 549 U.S. 47, 56 & n.7, 60 (2006).

The Board and this Court have used a "categorical approach" to resolve whether a particular state controlled-substance offense is an aggravated felony. *In re Aruna*, 24 I. & N. Dec. 452, 456 (B.I.A. 2008); *Carachuri-Rosendo*, 130 S. Ct. at 2586-2587 & n.11, 2588. The "categorical approach" refers to the practice of looking only at the elements of the offense of conviction itself, rather than at the particular facts of the crime that led to the conviction. See *Aruna*, 24 I. & N. Dec. at 456; *Carachuri-Rosendo*, 130 S. Ct. at 2586-

2587.[7] In the context of controlled-substance offenses, applying the categorical approach requires the IJ to examine the elements of the state offense and determine whether, if a jury finds all of those elements satisfied, it has necessarily also found that the defendant committed the elements of a felony offense under the CSA (which for these purposes is equivalent to the "generic offense" that is at issue in other contexts in which the categorical approach applies). See *Aruna*, 24 I. & N. Dec. at 456.

Attempted possession of marijuana with intent to distribute is a felony under the CSA because it is punishable by imprisonment for more than one year. See pp. 2-3, *supra*; *Carachuri-Rosendo*, 130 S. Ct. at 2581. The elements of that offense are met if the defendant knowingly attempts to possess marijuana with intent to distribute it.[8] The elements of petitioner's Michigan offense "are an attempt to possess with intent to deliver less than five kilograms of [marijuana]." Pet. App. 7a. Thus, petitioner was convicted of all the elements necessary to convict him of a felony offense under the CSA.

Petitioner contends (Pet. 21-25), however, that the foregoing analysis is incomplete, and that the relevant comparison must also take into account 21 U.S.C. 841(b)(4), which allows a defendant to have his offense treated as a simple-possession misdemeanor if he shows

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[7] Where a conviction does not *categorically* qualify as an aggravated felony, further analysis under the "modified categorical approach" is appropriate to determine (from a limited set of documents) whether the particular defendant was convicted of conduct that qualifies as an aggravated felony. See *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 187 (2007); see also *Nijhawan* v. *Holder*, 129 S. Ct. 2294, 2299 (2009).

[8] Any quantity of marijuana suffices to establish the felony, although quantities greater than 50 kilograms trigger greater penalties. 21 U.S.C. 841(b)(1)(A)(vii) and (B)(vii).

that he distributed only a small amount of marijuana for no remuneration. Petitioner is mistaken. Section 841(b)(4) is not relevant to the question whether, under the categorical approach, a state offense is "punishable under the [CSA]" as a felony.

A criminal offense is defined by its statutory "elements," which consist of the facts that, absent a valid waiver, must be proved to a jury beyond a reasonable doubt to convict a defendant of the offense. See *Schmuck* v. *United States*, 489 U.S. 705, 716 (1989); *In re Winship*, 397 U.S. 358, 364 (1970); see also *Apprendi* v. *New Jersey*, 530 U.S. 466, 477-478, 490 (2000). Cases describing the "categorical approach" to sentencing-enhancement or aggravated-felony classifications emphasize that it generally focuses on the "elements" of offenses. See *James* v. *United States*, 550 U.S. 192, 202, 214 (2007); *Gonzales* v. *Duenas-Alvarez*, 549 U.S. 183, 186-187 (2007); *Shepard* v. *United States*, 544 U.S. 13, 19 (2005); *Taylor* v. *United States*, 495 U.S. 575, 599-602 (1990).[9] This focus minimizes the "practical difficulties and potential unfairness of a factual approach" in which the events underlying a conviction would be relitigated in a subsequent proceeding. See *id.* at 601-602.

Section 841(b)(4) is irrelevant in using a "categorical approach" to identify state convictions that constitute CSA felonies. That paragraph does not define any element of any crime, and the CSA authorizes a felony sentence without regard to that paragraph.[10] Rather, the

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[9] Compare *Nijhawan*, 129 S. Ct. at 2300-2303.

[10] When a recidivism factor is actually present in a state conviction, the federal analogue is the felony offense of recidivist possession rather than the misdemeanor offense of simple possession, even if (as *Apprendi* permits) the fact of a prior conviction is not formally made an element. See *Lopez*, 549 U.S. at 55 n.6 ("Those state possession crimes

CSA felony is possession of marijuana with intent to distribute. See 21 U.S.C. 841(b)(4) (referring to "any person who violates subsection (a) of this section"). And the maximum penalty for violations of Subsection (a) involving an unspecified amount of marijuana is five years, as set forth in 21 U.S.C. 841(b)(1)(D). Section 841(b)(4) is only a "mitigating exception" to those otherwise-applicable sentencing provisions. See *United States* v. *Outen*, 286 F.3d 622, 637 (2d Cir. 2002) (Sotomayor, J.); see also 21 U.S.C. 885(a)(1) (providing that "[i]t shall not be necessary for the United States to negative any exemption or exception set forth in [the CSA]").

For that reason, every court of appeals to have considered the question has held that for *Apprendi* purposes, the statutory maximum penalty for possession of an unspecified amount of marijuana with intent to distribute is five years (under Section 841(b)(1)(D)), not one year (under Section 841(b)(4)). *Outen*, 286 F.3d at 638-639; *United States* v. *Hamlin*, 319 F.3d 666, 670-671 (4th Cir. 2003); *United States* v. *Campbell*, 317 F.3d 597, 603 (6th Cir. 2003); *United States* v. *Walker*, 302 F.3d 322, 324 (5th Cir. 2002) (per curiam), cert. denied, 537 U.S. 1222 (2003); see also *United States* v. *Eddy*, 523 F.3d 1268, 1271 (10th Cir. 2008) (Section 841(b)(4) does not create a lesser included offense of Section

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that correspond to * * * recidivist possession, see 21 U.S.C. § 844(a), clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2)"); *Carachuri-Rosendo*, 130 S. Ct. at 2585 n.10, 2587 n.12; cf. *United States* v. *Rodriquez*, 553 U.S. 377 (2008). *Carachuri-Rosendo* held that when a recidivism enhancement was potentially available in the underlying criminal prosecution, but was not actually applied, the correct analogy is to misdemeanor possession, not recidivist possession. 130 S. Ct. at 2586-2587.

841(b)(1)(D)); *United States* v. *Fazal-Ur-Raheman-Fazal*, 355 F.3d 40, 53 (1st Cir.) (endorsing *Outen*'s analysis in the context of another statute with a mitigating exception), cert. denied, 543 U.S. 856 (2004).

If adopting a provision that *lowered* the otherwise-applicable maximum sentence for a subset of offenses were deemed to require the prosecution to negate that provision's applicability in every case, such a rule "would largely prohibit Congress from establishing facts in mitigation of punishment[;] * * * any attempt to do so would necessarily result in having to submit to the jury the question of the *negating* of these mitigating facts in order to support a punishment greater than that prescribed in the mitigating provision." *Campbell*, 317 F.3d at 603 (quoting *Outen*, 286 F.3d at 638). In short, there is no requirement that the considerations of a "small amount of marihuana" and "no remuneration" to which Section 841(b)(4) refers must be *excluded* by a jury before a defendant can be convicted of marijuana distribution-related offenses under 21 U.S.C. 841(a)(1) and be subject to felony punishment under 21 U.S.C. 841(b)(1)(D). See *Outen*, 286 F.3d at 638. See generally *Apprendi*, 530 U.S. at 491 n.16 (referring to "the defendant * * * showing" facts in mitigation of punishment).

Thus, under the CSA, a jury can convict a defendant of the crime of possession of marijuana with intent to distribute, without needing to find beyond a reasonable doubt that the amount was "not small" or that there was remuneration. Likewise, a court can accept a plea of guilty to possession of marijuana with intent to distribute, without needing to find a factual basis to conclude that the amount was "not small" or that there was remuneration. And the mere absence of evidence on those points does not cap the defendant's sentence at one year.

See *Hamlin*, 319 F.3d at 670-671; *Campbell*, 317 F.3d at 601-603; *United States* v. *Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002), cert. denied, 537 U.S. 1177 (2003); *Walker*, 302 F.3d at 323-324; *Outen*, 286 F.3d at 625-626, 635-636, 639. Rather, to invoke the one-year maximum, the defendant *himself* must establish that the mitigating exception applies.

Under those circumstances, when the record of a state conviction for possession with intent to distribute marijuana is silent as to drug quantity, the proper federal analogue is a conviction subject to the five-year maximum sentence under Section 841(b)(1)(D). That is a "felony punishable under the [CSA]" and, therefore, an aggravated felony.

b. Petitioner asserts (Pet. 19-24) that the court of appeals' decision is contrary to this Court's holding in *Carachuri-Rosendo*. That contention lacks merit.

The Court in *Carachuri-Rosendo* held that when a defendant is convicted of simple possession in state court, but evidence outside the record of conviction could establish that he is a recidivist, his state-law crime nonetheless is analogous to the federal offense of simple possession, not recidivist possession. 130 S. Ct. at 2586-2589. The Court did not announce a rule that, as petitioner would have it, "a federal court must look not only at the elements of an offense, but also at mandatory sentencing factors that affect whether the state offense is punishable as a felony under federal law." Pet. 21-22. In fact, the Court held Carachuri-Rosendo's state-law offense to be analogous to simple possession under the CSA precisely because the state offense contained no "mandatory sentencing factor[]" of recidivism. See 130 S. Ct. at 2587-2589. Although petitioner emphasizes that *Lopez* and *Carachuri-Rosendo* both indicate that

state convictions must concern conduct that would "*necessarily*" amount to a CSA felony, Pet. 4, 20, 23, that does not mean that "mitigating exceptions" to felony sentencing provisions must be taken into account in the elements-based "categorical approach."

The Court's analysis is fully consistent with the holding of the court of appeals. The Court held in *Carachuri-Rosendo* that a defendant is "punishable" as a felon under the CSA only if the prosecutor takes all the requisite steps to trigger a statutory maximum sentence in excess of one year; in the case of recidivist possession, those steps under the CSA include filing a criminal information alleging any prior convictions. 130 S. Ct. at 2587-2588; see 21 U.S.C. 844(a), 851. Here, all the facts necessary to subject petitioner to a five-year sentence were established by his Michigan conviction: he knowingly possessed marijuana with intent to distribute it. See 21 U.S.C. 841(b)(1)(D).[11] No other fact had to be proved; the government was under no obligation to prove either quantity or remuneration. 21 U.S.C. 885(a)(1). If petitioner had been charged in federal court, he could not have invoked the one-year statutory maximum unless *he* showed that his offense involved only a small amount of marijuana and no remuneration—a showing he has never attempted to make. *Carachuri-Rosendo* thus bolsters the point that petitioner was "punishable" as a felon under the CSA. That is particularly true in the context of this case, because petitioner also bears the burden of showing eligibility for the discretionary relief of cancellation of removal, by

[11] Petitioner's insistence that *Carachuri-Rosendo* emphasized "the record of conviction" (Pet. 21) therefore is beside the point here.

establishing that he was not convicted of an aggravated felony. See 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. 1240.8(d).

c. Because petitioner did not attempt to prove that his state offense did, in fact, involve a small amount of marijuana distributed for no remuneration, this case does not present the question whether an alien can defeat an aggravated-felony finding by making such a showing. The Board has stated that he can, and that he may even use evidence outside the record of conviction. See *In re Dudley*, No. A043-092-703, 2011 WL 899580 (B.I.A. Feb. 14, 2011) (unpublished) (citing *Aruna* for the proposition that an alien "may attempt to prove in Immigration Court that he or she is not an aggravated felon * * * because the underlying drug trafficking offense involved possession of a 'small amount of marijuana for no remuneration'");[12] see also *Aruna*, 24 I. & N. Dec. at 458 n.5 (stating that the alien had made "no effort * * * to prove that the quantity of marijuana in his offense was 'small' or that his offense involved a conspiracy to distribute marijuana for no remuneration"). The burden remains on the alien. See *ibid.*; 8 U.S.C. 1229a(c)(4)(A); 8 C.F.R. 1240.8(d).

Petitioner suggests (Pet. 13 n.3) that the court of appeals has foreclosed an alien from making such a showing. But the court of appeals merely stated that petitioner could not prevail even if the court "assume[d]" that the state offense involved only "the minimum criminal conduct necessary to sustain the conviction." Pet. App. 13a. The court of appeals noted that the *actual* amount of marijuana involved in petitioner's offense was "unknown." *Id.* at 8a. Thus, the court did not purport to

[12] The Board's decision in *Dudley* was amended on the government's motion for reconsideration, to make clear that Dudley did not in fact possess only a small quantity of marijuana. See 2011 WL 899580.

decide this issue in any binding way. Accord *Julce* v. *Mukasey*, 530 F.3d 30, 36 (1st Cir. 2008) (leaving this issue open and suggesting that the Board may wish to address it).

In any event, petitioner is poorly positioned to complain that the court of appeals has foreclosed aliens from litigating this issue before the immigration courts, because as noted, petitioner did not attempt to do so.

2. Petitioner overstates the degree of disagreement among the courts of appeals. Although two circuits previously reached a different conclusion, and those courts may reach a different result with the benefit of the decision in this case and the Board's decision in *Aruna*. Furthermore, the only courts that have considered the question with the benefit of the recent decision in *Carachuri-Rosendo*—the court below and the Fifth Circuit—have rejected petitioner's position. As noted above, *Carachuri-Rosendo* provides further support for the decision below, but even if petitioner were correct that it supports his position instead, it would be premature for this Court to grant review of the first precedential decision to address the issue with the benefit of the decision in *Carachuri-Rosendo*.

a. Petitioner acknowledges that the First Circuit has reached the same conclusion as the court below. *Julce*, 530 F.3d at 33-35. The Fourth Circuit has reached the same holding in a criminal context, by holding that possessing an unspecified amount of marijuana with intent to distribute is a "drug trafficking crime" under 18 U.S.C. 924(c)(2) (the same definition that the INA borrows, 8 U.S.C. 1101(a)(43)(B)). *Hamlin*, 319 F.3d at 670-671.

On November 8, 2011, the Fifth Circuit reached the same conclusion in a published opinion, repudiating the

earlier non-precedential decision that petitioner cites (Pet. 14, 16-17). See *Moncrieffe* v. *Holder*, No. 10-60826, 2011 WL 5343694 (rejecting the holding of *Jordan* v. *Gonzales*, 204 Fed. Appx. 425 (2006)). The court began with its precedent in *Walker*, *supra*, in which it held "that the default sentencing range for a marijuana distribution offense is the CSA's felony provision, § 841(b)(1)(D), rather than the misdemeanor provision." *Moncrieffe*, 2011 WL 5343694, at *3 (citing *Walker*, 302 F.3d at 324). The court of appeals "adopt[ed] the same interpretation of § 841 for immigration purposes as for sentencing purposes": because Moncrieffe's conviction for possession of marijuana with intent to distribute was punishable as a felony unless Moncrieffe established both a small quantity and a lack of remuneration, which he did not do, it was a "drug trafficking crime." *Ibid.*

Petitioner cites two decisions reaching the opposite conclusion. The Second Circuit, in *Martinez* v. *Mukasey*, 551 F.3d 113 (2008), recited but misapplied the principle that "the *sole* ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction under a given statute." *Id.* at 121. Here, the "minimum criminal conduct" sufficient to obtain a conviction under Michigan law also suffices to obtain a felony conviction under the CSA; the offense is a felony under the CSA *unless* the defendant affirmatively proves both smallness of quantity and lack of remuneration. The Third Circuit has offered even less reasoning for its conclusion; its cases trace back to an earlier decision in which the state statute itself appeared to incorporate "no remuneration" and "small amount" findings, which does not by its terms address whether the government must negate the *possibility* of such findings. See *Steele*

v. *Blackman*, 236 F.3d 130, 137 (2001). The Third Circuit then cited *Steele* for the proposition that a state statute prohibiting possession of marijuana with intent to distribute does not qualify as a felony CSA offense unless the state statute "contain[s] sale for remuneration as an element." *Wilson* v. *Ashcroft*, 350 F.3d 377, 381 (2003). The Third Circuit applied the same no-element reasoning in *Jeune* v. *Attorney Gen. of the U.S.*, 476 F.3d 199, 205 (2007).[13]

Each of the precedential decisions that petitioner cites predated the decision below; all but *Martinez* predate the Board's decision in *Aruna*; and all, of course, predate *Carachuri-Rosendo*. Those factors counsel against plenary review at this point: if another case arises in the Second or Third Circuit raising this issue, those courts may be persuaded to reconsider. To the government's knowledge, no petition for rehearing en banc raising the issue has been filed in either of these courts since they decided the effect of Section 841(b)(4).

Such petitions could therefore still lead these courts to align themselves with the First, Fifth, and Sixth Circuits as well as the Board. In addition, the Second and Third Circuits have not yet examined their prior decisions regarding the effect of Section 841(b)(4) in light of this Court's recent opinion in *Carachuri-Rosendo*, which may lead them to revise their views on the issue.[14]

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[13] See also *Dias* v. *Holder*, No. 08-73051, 2011 WL 4431099 (9th Cir. Sept. 23, 2011) (non-precedential).

[14] The Third Circuit did refer to *Carachuri-Rosendo* in a recent decision that followed that court's prior case law concerning Section 841(b)(4), but the court upheld the alien's removability and ineligibility for relief under an alternative theory and so had no occasion to reexamine its precedent. See *Catwell* v. *Attorney Gen. of the U.S.*, 623 F.3d 199, 206-209 & n.11 (2010).

Carachuri-Rosendo emphasized the relevance of "prerequisites" (unlike Section 841(b)(4)) in undertaking a "categorical inquiry" regarding the "drug trafficking crime" aggravated felony. 130 S. Ct. at 2588.[15] This Court's reasoning could therefore be relevant to the Second and Third Circuits in reassessing their decisions regarding the effect of the "mitigating exception" of Section 841(b)(4) on aggravated felony determinations.[16]

3. This case is also a poor vehicle for considering the issue petitioner seeks to raise. First, as the IJ noted (Pet. App. 40a), petitioner's argument is undercut by the fact that Michigan has its own provision governing the non-commercial distribution of marijuana. See Mich. Comp. Laws Ann. § 333.7410(7) (West 1992). Petitioner was not prosecuted under this provision, suggesting that the intended distribution for which he was convicted would have been remunerative and outside 21 U.S.C. 841(b)(4).[17]

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[15] Furthermore, *Nijhawan* recognized that at least some "aggravated felony" determinations that do not concern elements of crimes may be subject to consideration of evidence beyond conviction records. 129 S. Ct. at 2297-2298.

[16] The Board adheres to current Second and Third Circuit precedent in cases arising in those jurisdictions, see *In re Taylor*, No. A079-110-293, 2010 WL 2601509 (B.I.A. June 8, 2010) (regarding Second Circuit); *Aruna*, 24 I. & N. Dec. at 457 n.4 (Third Circuit). The issue may arise in those courts in the criminal context, or in cases in which the alien petitions for review based on an alleged misapplication of circuit law.

[17] The Michigan statute, Mich. Comp. Laws Ann. § 333.7410(7) (West Supp. 2011), reads the same now as it did in 1998, except for minor changes in punctuation: "A person who distributes marihuana without remuneration and not to further commercial distribution and who does not violate subsection (1) is guilty of a misdemeanor punishable by imprisonment for not more than 1 year or a fine of not more than $1,000.00, or both, unless the distribution is in accordance with the

Second, even if petitioner succeeded in showing he is eligible for cancellation of removal, he already has had a full hearing on whether he would merit that relief in the exercise of the agency's discretion, A.R. 124-294, and the immigration judge issued an alternative ruling denying cancellation in the exercise of discretion. Pet. App. 32a-33a, 36a, 38a-39a, 41a-43a. Although petitioner contends that he still could challenge that decision before the Board, Pet. 9 n.2, he provides no reason to believe the Board would reach a different result. Furthermore, the agency's discretionary decision denying cancellation would not be subject to judicial review. 8 U.S.C. 1252(a)(2)(B)(i). Because there is no reason to believe that review by this Court would ultimately make any difference to the outcome of petitioner's removal proceedings, the case is not an appropriate vehicle for further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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federal law or the law of this state." *Ibid.* The exception in "subsection (1)" concerns distribution to minors. Cf. 21 U.S.C. 859.