No. 11-702

In the Supreme Court of the United States

ADRIAN MONCRIEFFE, PETITIONER

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
W. MANNING EVANS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

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. 21 U.S.C. 841(b)(1)(D) (Supp. IV 2010). 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)(4), 844, 885(a)(1).

The question presented is whether, when a defendant is convicted in state court of possession of marijuana with intent to distribute and the record of conviction does not disclose the quantity of marijuana or the amount of remuneration (if any), the defendant 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 opinion of the court of appeals (Pet. App. 1a-9a) is reported at 662 F.3d 387. The decisions of the Board of Immigration Appeals (Pet. App. 10a-13a) and the immigration judge (Pet. App. 14a-18a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 8, 2011. The petition for a writ of certiorari was filed on December 7, 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.*, aliens who have been admitted to the United States are removable if they have been convicted of, among other offenses, one defined to be an

"aggravated felony." 8 U.S.C. 1227(a)(2)(A)(iii). Certain removable aliens may seek the discretionary relief of cancellation of removal, 8 U.S.C. 1229b(a), but an alien convicted of an "aggravated felony" is ineligible for that relief, 8 U.S.C. 1229b(a)(3).

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)(1)-(5); see 21 U.S.C. 802(13).

One provision of the CSA, 21 U.S.C. 841(a)(1), prohibits possession of a controlled substance with intent to distribute. Penalties for violating this CSA provision 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. IV 2010). 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) (Supp. IV 2010). 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) (Supp. IV 2010), 851.

2. Petitioner is a native and citizen of Jamaica. In 1984, he was admitted to the United States as a lawful permanent resident. Pet. App. 2a, 11a.

In 2008, petitioner pleaded guilty in Georgia state court to one count of possession of marijuana with intent to distribute. Pet. App. 2a-3a, 11a; Administrative Record (A.R.) 83-84; Ga. Code. Ann. § 16-13-30(j) (2011). He was sentenced to five years of probation. Pet. App. 2a.[1]

In 2010, based on that conviction, the Department of Homeland Security (DHS) charged petitioner as an alien removable on two grounds: having been convicted of (1) an aggravated felony, 8 U.S.C. 1227(a)(2)(A)(iii), and (2) a controlled substance offense, 8 U.S.C. 1227(a)(2)(B)(i). Pet. App. 2a, 15a. Petitioner admitted DHS's factual allegations but disputed whether they made him removable as charged. *Id.* at 16a.

After DHS produced certain conviction documents, the Immigration Judge (IJ) ruled that petitioner was removable as charged. Pet. App. 2a-3a, 18a. In particu-

[1] Petitioner's sentence was imposed under Ga. Code Ann. § 42-8-60 *et seq.*, which concerns certain first offenders. A.R. 84. Dispositions under that procedure remain convictions for purposes of federal immigration law, however, under a provision added to the INA in 1996. A judgment is a "conviction" even where "adjudication of guilt has been withheld," if (as relevant here) "the alien has entered a plea of guilty" and "the judge has ordered some form of punishment * * * to be imposed." 8 U.S.C. 1101(a)(48)(A). Thus, "the mere fact that [an alien] was sentenced pursuant to Georgia's First Offender Act does not mean that he lacks a 'conviction' for purposes of the INA." *Ali* v. *United States Att'y Gen.*, 443 F.3d 804, 809-810 (11th Cir. 2006).

lar, the IJ cited *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008), in holding that petitioner's conviction was an aggravated felony. Pet. App. 18a. During proceedings to determine whether petitioner was removable, petitioner did not argue that his Georgia offense had in fact involved a small amount of marijuana for no remuneration; during the earlier, distinct proceeding concerning bond, petitioner apparently submitted a document purporting to establish drug quantity, but not the absence of remuneration.[2]

3. Petitioner appealed. He challenged the "aggravated felony" ground of removability, contending that he had established, during the bond proceedings before the IJ, that his Georgia conviction involved a small amount of marijuana; he did not address remuneration. See A.R. 24-25.

4. The Board of Immigration Appeals dismissed petitioner's appeal. Pet. App. 10a-13a.

The Board explained that "[a] state offense constitutes a felony punishable under the [CSA]," and therefore an aggravated felony, "if it proscribes conduct punishable as a federal felony" under the CSA. Pet. App. 11a-12a (citing *Lopez* v. *Gonzales*, 549 U.S. 47 (2006)). In this case, the Board held, petitioner's Georgia offense of possession with intent to distribute marijuana was "analogous to the federal offense of possession of marihuana with intent to distribute," a felony. *Id.* at 12a.

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[2] The IJ's bond decision did not mention the document. See A.R. 66. Petitioner did not offer or cite the document in the proceedings to determine his removability until he filed it with the Board of Immigration Appeals. A.R. 37. The amount of marijuana involved in petitioner's Georgia conviction was never established during the proceedings before the IJ.

The Board rejected petitioner's argument that his Georgia offense should not be considered an "aggravated felony" because the elements of the offense encompassed some conduct that, in federal court, might have been punished under the misdemeanor sentencing provision of 21 U.S.C. 841(b)(4). Pet. App. 12a-13a. The Board had already considered and rejected that argument in its controlling decision in *In re Aruna*, *supra*. Pet. App. 13a.[3]

5. The court of appeals denied a petition for review. Pet. App. 1a-9a.

At the outset of its analysis, the court of appeals stated that it "uses a categorical approach to determine whether a state conviction qualifies as a felony under the CSA" and, specifically, "whether the elements of the state statute are analogous to a federal felony." Pet. App. 5a. Possession of a controlled substance with intent to distribute is a felony under the CSA, *id.* at 6a, and the court of appeals concluded that the analysis does not change in marijuana cases based on the mitigating exception in 21 U.S.C. 841(b)(4). The court of appeals noted that under its precedent in sentencing cases, when the controlled substance is marijuana but there is no evidence of drug quantity, the offense is a felony with a maximum term of five years of imprisonment, not a misdemeanor with a maximum term of one year. Pet. App. 7a-8a (citing 21 U.S.C. 841(b)(1)(D) (Supp. IV 2010)). Only when the *defendant* carries the burden of demonstrating that he possessed only a small amount of marijuana for no remuneration does the mitigating exception

[3] The Board stated that the precedential decision in *Aruna* eliminated any possible obligation to follow the court of appeals' previous *non*-precedential decision on this subject. Pet. App. 12a-13a (declining to follow *Jordan* v. *Gonzales*, 204 Fed. Appx. 425 (5th Cir. 2006)).

apply, the court of appeals concluded. *Id.* at 8a. Because petitioner did not carry that burden here, *id.* at 9a & n.4, the court of appeals sustained the finding that he was removable as an aggravated felon. *Id.* at 9a. The court thus joined the majority of other circuits in concluding that, in marijuana cases, evidence of drug quantity is not necessary for a state conviction for possession with intent to distribute to be treated as a "felony punishable under the [CSA]." See *id.* at 6a-7a.

ARGUMENT

The court of appeals correctly sustained the decision of the Board of Immigration Appeals 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, recent decisions of both this Court and the Board may prompt the two courts of appeals that have applied a different rule to re-examine their approach. This case does not warrant further review.

1. a. The relevant question here is whether petitioner's Georgia 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* v. *Holder*, 130 S. Ct. 2577, 2582 (2010); *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; see also Pet. 8-9. 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; *Kawashima* v. *Holder*, No. 10-577 (Feb. 21, 2012), slip op. 4; *Carachuri-Rosendo*, 130 S. Ct. at 2586-2587.[4] 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 trier of fact found all of those elements satisfied, it 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.

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 possesses marijuana with intent to distribute it.[5] The elements of petitioner's Georgia offense correspond to the federal offense. Pet. App. 12a-13a, 18a; see also *Hardeman* v. *State*, 453 S.E.2d 775, 775-776 (Ga. Ct. App.

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[4] 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).

[5] 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).

1995) (referring to elements of state offense as possession and specific intent to distribute). Thus, petitioner was convicted of all the elements necessary to establish a felony offense under the CSA.

Petitioner contends (Pet. 10-14), 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 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 that apply the "categorical approach" to sentencing-enhancement or aggravated-felony classifications emphasize that it generally focuses on the "elements" of offenses. See *Kawashima*, slip op. 4; *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).[6] This focus minimizes the "practical difficulties and potential unfairness of a factual approach" in which the events underlying a

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

conviction would be relitigated in a subsequent proceeding. *Taylor*, 495 U.S. 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. Rather, the 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. *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)). *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); *Outen*, 286 F.3d at 638-639; 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 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 trier of fact rule out the considerations of a "small amount of marihuana" and "no remuneration," to which Section 841(b)(4) refers, 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 affirmatively establish that the mitigating exception applies.

Under these 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. 12-13) 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* considered a state offense whose elements were punishable in *two* ways under the CSA, one a misdemeanor (simple possession) and one a felony (recidivist possession). The elements of simple and recidivist possession are identical because recidivism is not an element found by the jury beyond a reasonable doubt, see 130 S. Ct. at 2581 n.3, and the question in *Carachuri-Rosendo* was how to determine whether a state defendant would have been "punishable" as a recidivist, and thus a felon, under the CSA. The Court 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. *Id.* at 2586-2589. The Court did not announce a rule that, as petitioner would have it, "in the immigration context[] the question under the categorical approach is not whether the elements of a state offense

match the elements of a federal offense, but rather whether the conduct underlying the state law conviction, as revealed in the record of conviction, is necessarily punishable as a felony." Pet. 13. Nothing in *Carachuri-Rosendo* heralded such a dramatic change in focus, from the elements of an offense to the non-element "underlying" "conduct" of an offense. Indeed, this Court has confirmed since *Carachuri-Rosendo* that the focus in an ordinary categorical-approach case is on the elements of the offense. *Kawashima*, slip op. 4.

Rather, recidivism is unique in that it can change the maximum punishment for an offense *without* being either an element, see 130 S. Ct. at 2581 n.3, or even (as petitioner would have it) "conduct underlying the state law conviction." Pet. 13. Recidivism factors therefore demanded a further refinement of the analysis. When a state conviction actually invokes a recidivism factor, 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 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. Thus, the Court focused in *Carachuri-Rosendo* on the state prosecutor's charging decision, not (as petitioner

suggests) on the underlying facts; it was uncontested that Carachuri-Rosendo did, in fact, have a prior drug-possession conviction. *Id.* at 2580.

The holding of the court of appeals is fully consistent with the Court's analysis. 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) (Supp. IV 2010), 851. Here, all the facts necessary to subject petitioner to a five-year sentence were established by his Georgia conviction: he knowingly possessed marijuana with intent to distribute it. See 21 U.S.C. 841(b)(1)(D) (Supp. IV 2010).[7] 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 carried the burden of showing that his offense involved only a small amount of marijuana and no remuneration; he has never attempted in these immigration proceedings to show the latter, as he admits, and his attempt to show the former was untimely. Pet. 6 n.1; Pet. App. 9a n.4; see note 2, *supra*. *Carachuri-Rosendo* thus bolsters the point that petitioner was "punishable" as a felon under the CSA.

2. Since the filing of the petition for a writ of certiorari, the Board has made clear that an alien can defeat an aggravated-felony finding if he carries his burden to

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[7] Petitioner's insistence that *Carachuri-Rosendo* emphasized "the record of conviction" (Pet. 12-13) therefore is beside the point here.

prove in immigration court that his prior conviction involved only a small amount of marijuana for no remuneration. That decision definitively eliminates one of the conflicts petitioner asserts (which was illusory in any event) and refutes petitioner's notion that the decision below would lead to absurd results.

In *In re Castro-Rodriguez*, 25 I. & N. Dec. 698 (B.I.A. 2012), the alien had previously been convicted of an offense whose elements included possessing less than half an ounce of marijuana. The alien testified in immigration court that he had bought the marijuana at a party. The IJ therefore found that the alien had possessed only a small amount of marijuana for no remuneration. *Id.* at 699. The Board agreed that the alien could defeat the aggravated-felony finding by making such a showing, and that he could do so "by any probative evidence," including his own testimony. *Id.* at 702. The Board remanded for further factfinding on the circumstances of the particular case, *i.e.*, whether the alien had in fact intended to distribute the marijuana for remuneration. *Id.* at 704.[8]

The Board's decision in *Castro-Rodriguez* refutes petitioner's assertion (Pet. 17-19) that the courts of appeals are in conflict over whether an alien can ever seek to prove that his offense involved only a small amount of

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[8] Accord *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'"); *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")

marijuana for no remuneration. The Board has now squarely held that he can. And the only decision that petitioner cites to the contrary, *Garcia* v. *Holder*, 638 F.3d 511 (6th Cir. 2011), petition for cert. pending, No. 11-79 (filed July 18, 2011), does not in fact hold that an alien cannot. In *Garcia*, the alien did not seek to establish either that his offense had involved a small amount of marijuana or that he had not intended to seek remuneration. See Gov't Br. in Opp. at 5-6 nn.3-4, *Garcia*, *supra* (No. 11-79). The Sixth Circuit merely stated that the actual amount of marijuana involved in Garcia's offense was "unknown," and that Garcia could not defeat aggravated-felon status through the mere "assum[ption] that the conduct underlying his state conviction was the minimum criminal conduct necessary to sustain the conviction." 638 F.3d at 516, 518. Thus, the Sixth Circuit did not purport to decide in any binding way what would happen if an alien *did* prove that his offense involved only a small amount of marijuana for no remuneration, or how he could prove it. 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). Especially in light of the Board's subsequent decision making clear that aliens with prior convictions like petitioner's and Garcia's have an open pathway to prove quantity and absence of remuneration, there is no reason to read the Sixth Circuit as having prematurely blocked that path.[9]

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[9] Petitioner is poorly situated in any event to litigate the question whether an alien may establish entitlement to relief under Section 841(b)(4) if he carries his burden, because petitioner never attempted to show that he possessed marijuana for no remuneration and did not timely attempt to prove the quantity involved in his offense. For that

The Board's decision in *Castro-Rodriguez* also refutes petitioner's assertion (Pet. 13-14, 18) that the position of the Board and the court of appeals would unfairly insist on treating an alien as an aggravated felon even if he could definitively prove that, as a factual matter, he possessed only a small amount of marijuana for no remuneration. The Board has now made clear that no such consequence will result. Rather, it is petitioner's position that would lead to that sort of perplexing result. Even if the government could prove that an alien sold substantial quantities of marijuana for profit, under petitioner's position that alien would still escape aggravated-felon treatment, unless (on petitioner's apparent view, Pet. 9, 11 n.2) the government could prove quantity or remuneration using portions of the record of conviction that are permissible under the modified categorical approach. See note 4, *supra*.

3. On the question whether petitioner's offense is properly regarded as a "felony punishable under the [CSA]," petitioner overstates the degree of disagreement among the courts of appeals. Pet. 14-19. Although two circuits previously reached a different conclusion, those courts may reach a different result with the benefit of the court of appeals' decision in this case, the Sixth Circuit's *Garcia* decision, and the Board's decisions in *Aruna* and *Castro-Rodriguez*. Furthermore, the only courts that have considered the question in precedential decisions with the benefit of the recent decision in *Carachuri-Rosendo*—the court below and the Sixth Circuit—have rejected petitioner's position. As noted above, *Carachuri-Rosendo* provides further support for

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reason, the court of appeals expressly declined to address that question in this case. Pet. App. 9a n.4.

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 only the second precedential decision to address the issue with the benefit of the decision in *Carachuri-Rosendo*.

Petitioner acknowledges that the First and Sixth Circuits have reached the same conclusion as the court below. *Julce*, 530 F.3d at 33-35; *Garcia*, 638 F.3d at 515-518. The Fourth Circuit has made the same determination in a criminal context, by holding that notwithstanding Section 841(b)(4)'s mitigating exception, possession of an unspecified amount of marijuana with intent to distribute is a "drug trafficking crime" under 18 U.S.C. 924(c)(2) (the same statutory definition that the INA borrows in its definition of "aggravated felony," 8 U.S.C. 1101(a)(43)(B)). *Hamlin*, 319 F.3d at 670-671.

Petitioner cites two precedential 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 Georgia law also suffices to obtain a felony conviction under the CSA; the offense is punished as 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 possi-

bility 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 has applied the same no-element reasoning, *Jeune* v. *Attorney Gen. of the U.S.*, 476 F.3d 199, 205 (2007), although it has since acknowledged that a conviction constitutes an aggravated felony if the record of conviction includes evidence that the drug quantity exceeded a small amount. See *Catwell* v. *Attorney Gen. of the U.S.*, 623 F.3d 199, 207 (3d Cir. 2010).[10]

Contrary to petitioner's submission (Pet. 15), the issue can recur in those two circuits in ways that would allow those circuits to re-examine this issue in light of subsequent developments. For instance, the Board decided *Catwell* well after the Third Circuit's decision in *Jeune*, see 623 F.3d at 205; the issue was presented there because there was an antecedent question about whether a particular amount was small enough. See also *Thomas* v. *Attorney Gen. of the U.S.*, 625 F.3d 134, 148 (3d Cir. 2010) (antecedent question about sufficiency of alien's admission that he sold marijuana). The issue also recurs in direct criminal appeals. See, *e.g.*, *Outen*, 286

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[10] In addition to discussing Second and Third Circuit cases, petitioner also cites (Pet. 16) an unpublished Ninth Circuit decision, *Dias* v. *Holder*, No. 08-73051, 2011 WL 4431099 (Sept. 23, 2011). The *Dias* decision, however, conflicts with the Ninth Circuit's general rule that affirmative defenses are not relevant to the categorical approach. See *Gil* v. *Holder*, 651 F.3d 1000, 1005-1006 (2011). It would be premature to treat that non-precedential disposition as relevant to whether there is a circuit conflict warranting this Court's review. Cf. Pet. App. 8a.

F.3d at 637. Thus, the government has ongoing opportunities to brief the question in the Second and Third Circuits.

There is reason to think those circuits may take up the opportunity to reconsider their mistaken divergence from the categorical approach. The original circuit precedents predate the Board's decisions in *Aruna* and *Castro-Rodriguez*, which set out the proper procedure for applying the "small amount" mitigating exception when deciding whether a state crime is a "felony punishable under the [CSA]." And to the government's knowledge, no petition for rehearing en banc raising the issue has been filed in either the Second or Third Circuit. Indeed, the Third Circuit noted in one post-*Aruna* case that the government had not requested that the court revisit its pre-*Aruna* precedent in light of the Board's decision. *Evanson* v. *Attorney Gen. of the U.S.*, 550 F.3d 284, 289 (2008). The government will now have the opportunity to do so.

Furthermore, this Court's reasoning in *Carachuri-Rosendo* lends additional support to the decision below. *Carachuri-Rosendo* emphasized the relevance of the procedural "prerequisites" to felony punishment for recidivist possessors under 21 U.S.C. 851 when determining under a "categorical inquiry" whether a possession conviction constituted a "drug trafficking" aggravated felony. 130 S. Ct. at 2588; see also *id.* at 2582. By contrast, Section 841(b)(4) imposes no such "prerequisites" on the government before the government can seek felony punishment of marijuana distributors. (Section 855(a)(1) eliminates any possible ambiguity on that point.)

Reconsideration at the circuit level would thus be in order given the combination of supportive reasoning

from this Court, recent on-point decisions from the Board and from two other circuits (in this case and in *Garcia*), and support in circuit law for the proposition that a defendant can be convicted of felony possession with intent to distribute marijuana without any proof of drug quantity or remuneration. *E.g.*, *Outen*, 286 F.3d at 638. Review by this Court would accordingly be premature at this point.[11]

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[11] Petitioner was charged with being removable based on both an aggravated felony and a controlled substance offense. See p. 3, *supra*. Although the IJ did not discuss the latter in his written decision, see Pet. App. 18a, petitioner has never disputed that his conviction for possession of marijuana with intent to distribute is for "a violation of * * * any law or regulation of a State * * * relating to a controlled substance." 8 U.S.C. 1227(a)(2)(B)(i); see A.R. 68, 72-76. Because petitioner's offense contained the element of intent to distribute, the offense does not qualify for the exception for "a single offense involving possession for one's own use of 30 grams or less of marijuana." 8 U.S.C. 1227(a)(2)(B)(i); see A.R. 81. Thus, petitioner remains removable regardless of whether his Georgia conviction is an "aggravated felony." Accordingly, even if petitioner's conviction were found not to be an aggravated felony, his only basis for avoiding removal would be to seek and obtain cancellation of removal under 8 U.S.C. 1229b(a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
ALISON R. DRUCKER
W. MANNING EVANS
Attorneys

MARCH 2012