No. 09-539

In the Supreme Court of the United States

VICTOR HUGO CARDONA-LOPEZ, 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

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
W. MANNING EVANS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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. 2a-3a), the Board of Immigration Appeals (Pet. App. 4a-10a), and the immigration judge (Pet. App. 11a-14a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 4, 2009. The petition for a writ of certiorari was filed on October 31, 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 longer 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 1999. Pet. App. 5a-6a. In June 2007, petitioner was convicted in Texas state court of possession of less than one ounce of cocaine, a state jail felony, and was sentenced to 30 days in jail. *Id.* at 6a; Administrative Record (A.R.) 109-110.[2] In September 2008, petitioner was again convicted in Texas state court of a drug possession offense. Pet. App. 6a; A.R. 101-102. Petitioner pleaded guilty to possession of less than one ounce of cocaine, and the trial court entered an order deferring adjudication of his guilt and placing him on probation for two years. *Ibid.*[3] Although Texas has re-

[2] See Tex. Health & Safety Code § 481.115(a) and (b) (Vernon 2003) (possession of less than one gram of a Penalty Group 1 substance is a state jail felony); *id.* § 481.102(3)(D) (listing cocaine in Penalty Group 1); see also Tex. Penal Code § 12.35 (Vernon 2003 & Supp. 2009) (state jail felony generally punishable by 180 days to two years of imprisonment); *id.* § 12.44(a) (state jail felony may be punished as a misdemeanor if, "after considering the gravity and circumstances of the felony committed and the history, character, and rehabilitative needs of the defendant, the court finds that such punishment would best serve the ends of justice").

[3] Deferred adjudication under Texas state law is a "conviction" for purposes of 8 U.S.C. 1227(a)(2)(B)(i) and 1229b(a)(3). See, *e.g.*,

cidivist enhancement statutes applicable to some subsequent state jail felony convictions, no enhancement was available for petitioner's second conviction. See Tex. Penal Code §§ 12.35(c)(2), 12.42(a) (Vernon 2003 & Supp. 2009).

b. In October 2008, petitioner was charged with being removable under 8 U.S.C. 1227(a)(2)(B)(i), for having been convicted of an offense relating to a controlled substance, and 8 U.S.C. 1227(a)(2)(A)(iii), for having been convicted of an aggravated felony. Pet. App. 11a-12a. The charging document cited both of his cocaine possession convictions. A.R. 135.

At a hearing before an immigration judge (IJ), petitioner conceded that he was removable because he had been convicted of a controlled substance offense, but denied that he was removable on the ground that his second conviction was an aggravated felony. Pet. App. 12a-13a. Petitioner sought cancellation of removal under 8 U.S.C. 1229b(a). Pet. App. 13a; A.R. 85. The IJ found petitioner removable as charged and also found him ineligible for cancellation of removal because he had been convicted of an aggravated felony based on his two state drug possession offenses. Pet. App. 13a-14a.

The Board of Immigration Appeals (Board) dismissed petitioner's administrative appeal. Pet. App. 4a-10a. The Board agreed with the IJ that a state possession conviction, occurring after a similar prior conviction

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Madriz-Alvarado v. *Ashcroft*, 383 F.3d 321, 330 (5th Cir. 2004); see also 8 U.S.C. 1101(a)(48)(A) (defining "conviction" to include the situation in which "adjudication of guilt has been withheld," if "a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt," and "the judge has ordered some form of punishment, penalty, or restraint on the alien's liberty to be imposed").

had become final, qualifies as an "aggravated felony" under 8 U.S.C. 1101(a)(43)(B) because it is punishable as a felony under the CSA, 21 U.S.C. 844(a). Pet. App. 6a-9a.[4]

3. Petitioner then sought judicial review. The government filed a motion for summary affirmance, arguing that the Fifth Circuit's prior decision in *Carachuri-Rosendo* v. *Holder*, 570 F.3d 263 (2009), cert. granted, No. 09-60 (Dec. 14, 2009), controlled this case. Mot. for Summ. Affirmance 6-9. In a per curiam order, the court of appeals granted the government's unopposed motion and summarily affirmed the Board's decision. Pet. App. 2a-3a.

DISCUSSION

Petitioner seeks review (Pet. 5-39) of the court of appeals' determination that his second conviction under Texas law for drug possession qualifies as an "aggravated felony" for purposes of 8 U.S.C. 1101(a)(43)(B). On December 14, 2009, this Court granted certiorari in *Carachuri-Rosendo* v. *Holder*, No. 09-60, which presents the same question. Accordingly, this Court should hold the petition for a writ of certiorari in this case pending its decision in *Carachuri-Rosendo*, and then dispose of this case accordingly.[5]

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[4] The Board also held that petitioner's first conviction was final at the time he committed his second offense. Pet. App. 7a-9a. Petitioner does not renew any challenge to the finality of his convictions before this Court.

[5] Petitioner suggests in passing (Pet. 7-8, 10-12, 14-17, 19-22, 23-25, 35-36, 37-38) that treating a second or successive drug possession conviction as an aggravated felony would violate various provisions of the Constitution. But petitioner did not present any such arguments to the court of appeals, and the court of appeals did not pass on those arguments. (In his petition for review to the court of appeals, petitioner

CONCLUSION

The Court should hold the petition for a writ of certiorari in this case pending its decision in *Carachuri-Rosendo* v. *Holder*, cert. granted, No. 09-60 (Dec. 14, 2009), and then dispose of this case accordingly.

Respectfully submitted.

ELENA KAGAN
Solicitor General

TONY WEST
Assistant Attorney General

DONALD E. KEENER
W. MANNING EVANS
Attorneys

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referred to several constitutional provisions, stating that constitutional arguments "will need to be developed further under an appropriate brief," Pet. for Review and Mot. for Stay of Removal 1, but he never developed those arguments.) Under these circumstances, petitioner has waived any constitutional challenge to the treatment of his second possession offense as an aggravated felony. In any event, petitioner's suggestion that the Constitution prohibits treating his second possession offense as an aggravated felony is without merit.