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## Carachuri-Rosendo v. Holder: To Be Deemed Convicted of an Aggravated Felony, an Actual Conviction Is Required

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***CARACHURI-ROSENDO V. HOLDER:***  
**TO BE DEEMED CONVICTED OF AN**  
**AGGRAVATED FELONY, AN ACTUAL**  
**CONVICTION IS REQUIRED**

*Inna Zazulevskaya\**

I. INTRODUCTION

As the immigration debate heats up around the country and the number of formal removals<sup>1</sup> continues to consistently increase, the U.S. Supreme Court ruled against the U.S. government and rendered an important decision regarding immigration law in *Carachuri-Rosendo v. Holder*.<sup>2</sup> The Court held that a noncitizen, or alien, convicted of a simple drug-possession offense—an offense that has not been enhanced based on the history of a prior conviction—has not been convicted of an aggravated felony for immigration purposes.<sup>3</sup> Thus the noncitizen will not be subject to mandatory deportation and may seek a discretionary form of relief from the removal order.<sup>4</sup>

Starting in the late 1980s, the American public became increasingly concerned about and fearful of noncitizen criminals.<sup>5</sup> Ironically, studies indicate that the public's concern is misguided given that immigrants have lower crime rates and lower incarceration rates than native-born U.S. citizens.<sup>6</sup> Nonetheless, the number of

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1. When a noncitizen is “removed” it means he is deported from the country. This Comment uses the terms “removal” and “deportation” interchangeably.

2. 130 S. Ct. 2577 (2010).

3. *Id.* at 2589.

4. See *infra* note 25 and accompanying text; *infra* Part IV.

5. STEPHEN H. LEGOMSKY & CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY 550 (5th ed. 2009).

6. Natalie Liem, *Mean What You Say, Say What You Mean: Defining the Aggravated-Felony Deportation Grounds to Target More Than Aggravated Felons*, 59 FLA. L. REV. 1071,

formal removals has been on the rise: over 392,000 noncitizens—the highest number in U.S. history in a given year—were removed in 2010.<sup>7</sup> More than 195,000 of the noncitizens removed in 2010 were removed on criminal grounds.<sup>8</sup>

The high number of noncitizens removed on criminal grounds is not surprising given that noncitizens may be deported for convictions of even minor criminal offenses. For example, like the appellant in *Carachuri-Rosendo*, a noncitizen may be deported for possessing one pill of Xanax<sup>9</sup> without a prescription.<sup>10</sup> Although the appellant was deported based on this simple-possession offense, he did not challenge the ease with which noncitizens lawfully present in the country may be removed. Instead, the appellant challenged the Fifth Circuit's holding that noncitizen's subsequent simple-possession conviction was an aggravated felony, solely because it could have been prosecuted as an aggravated felony under federal law—even though it was not actually prosecuted as such.<sup>11</sup> The U.S. Supreme Court ruled in favor of the noncitizen appellant and held that a subsequent conviction for simple possession is not a conviction for an aggravated felony.<sup>12</sup> This is significant because noncitizens may apply for a form of relief from removal if they meet the eligibility criteria<sup>13</sup> and while convictions of minor criminal offenses do not serve as a mandatory bar to applying for relief, convictions of aggravated felonies always do.<sup>14</sup> The Court's holding means that noncitizens who are convicted of two or more simple-possession

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1092 (2007).

7. News Release, U.S. Immigration & Customs Enforcement, DHS/ICE Reveal Highest Immigration Enforcement on Record in Fiscal Year 2010, (Oct. 8, 2010), <http://www.ice.gov/news/releases/1010/101008washingtondc.htm>.

8. *Id.*

9. Xanax is a prescription drug used to treat anxiety and panic disorders. However, these days it is becoming widely available and is being commonly prescribed for use on an occasional basis to help people deal with the anxiety of flying or cope with death. Alex William, *You Are Cleared for Takeoff*, N.Y. TIMES (Sept. 17, 2006), <http://www.nytimes.com/2006/09/17/fashion/17flying.html?pagewanted=1>; see Tara Parker-Pope, *For Some Bereaved, Pain Pills Without End*, N.Y. TIMES (Oct. 10, 2007), <http://well.blogs.nytimes.com/2007/10/10/for-some-bereaved-pain-pills-without-end/>.

10. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2583 (2010).

11. *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265 (5th Cir. 2009), *rev'd*, 130 S. Ct. 2577 (2010).

12. *Carachuri-Rosendo*, 130 S. Ct. at 2590 (Scalia, J., concurring).

13. Immigration and Naturalization Act § 240(A)(a), 8 U.S.C. § 1229b(a).

14. *Carachuri-Rosendo*, 130 S. Ct. at 2581.

offenses will not be automatically barred from applying for relief from removal and thus have a chance of being allowed to remain in the country.

This Comment examines the Court's rationale in *Carachuri-Rosendo* and discusses what might be an unintended and unfortunate consequence of that decision. Part II summarizes the case's facts and procedural history. Part III explains the Court's reasoning, while Part IV discusses the historical framework of the case. Part V examines the case's impact and the significant questions left unanswered by the Court. Part V also analyzes how this decision may lead to further nonuniformity in the application of the drug-trafficking-aggravated-felony provision and suggests how to avoid this nonuniformity. Finally, Part VI concludes that, although the *Carachuri-Rosendo* decision has its shortcomings, its importance should not be overlooked.

## II. STATEMENT OF THE CASE

Jose Angel Carachuri-Rosendo ("Carachuri-Rosendo") was born in Mexico in 1978.<sup>15</sup> When he was five years old, he moved with his parents to the United States and has been a lawful permanent resident since then.<sup>16</sup> In 2004, Carachuri-Rosendo pleaded guilty in a Texas court to possessing less than two ounces of marijuana, a misdemeanor offense, and received a twenty-day jail sentence.<sup>17</sup> In 2005, he pleaded no contest to possessing one tablet of Xanax without a prescription, also a misdemeanor, and was sentenced to ten days in jail.<sup>18</sup> Texas state law, like federal law, allows a sentencing enhancement if the prosecutor proves to the court that the defendant has been previously convicted of an offense of a similar class.<sup>19</sup> However, the prosecutor did not seek such an enhancement in Carachuri-Rosendo's Xanax-possession case<sup>20</sup> and did not prosecute him as a recidivist.<sup>21</sup>

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15. *Id.* at 2583.

16. *Id.*

17. *Id.*

18. *Id.* at 2580, 2583.

19. *Id.* at 2583.

20. *Id.*

21. *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 264 (5th Cir. 2009), *rev'd*, 130 S. Ct. 2577 (2010).

In 2006, the federal government initiated removal proceedings on the basis of Carachuri-Rosendo's second conviction for Xanax possession.<sup>22</sup> Appearing in front of the Immigration Judge (IJ), Carachuri-Rosendo conceded that his conviction for possession of Xanax made him removable under the Immigration and Naturalization Act (INA).<sup>23</sup> But he still applied for a discretionary cancellation of removal pursuant to INA section 240(A)(a), 8 U.S.C. § 1229b(a).<sup>24</sup> This section provides the attorney general with discretion to cancel an order removing a noncitizen if the noncitizen, among other things, has not been convicted of an aggravated felony.<sup>25</sup> The IJ denied Carachuri-Rosendo's petition and declared him ineligible for cancellation of removal because he had committed a drug-trafficking crime,<sup>26</sup> which is an aggravated felony for the purposes of the INA.<sup>27</sup> The IJ explained that a second misdemeanor possession offense committed after a prior conviction for a misdemeanor becomes final may be prosecuted as a felony under the federal Controlled Substances Act (CSA).<sup>28</sup> Hence, according to the IJ, since Carachuri-Rosendo's second simple-possession conviction could have been punished as an aggravated felony under federal law, he was ineligible for cancellation of removal.<sup>29</sup>

Carachuri-Rosendo appealed the decision to the Board of Immigration Appeals (BIA).<sup>30</sup> The BIA disagreed with the IJ's reasoning but upheld the ruling<sup>31</sup> because it was bound by the Fifth

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22. *Carachuri-Rosendo*, 130 S. Ct. at 2583.

23. *Id.* The INA states that “[a]ny alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State [or], the United States . . . relating to a controlled substance” is removable. Immigration and Naturalization Act § 237, 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

24. *Carachuri-Rosendo*, 130 S. Ct. at 2583.

25. Immigration and Naturalization Act § 240A, 8 U.S.C. § 1229b(a)(3). “Aggravated felonies” are state, federal, or foreign convictions that fit into the categories outlined in section 101(a)(43) of the INA. 8 U.S.C. § 1101(a)(43). Some examples include: murder, rape, a crime of violence for which the term of imprisonment was at least one year, and a theft offense for which the term of imprisonment was at least one year. *Id.*; see also Nelson A. Vargas-Padilla, *The Immigration Consequences of Criminal Conduct*, 3 CRIM. L. BRIEF 24, 27–31 (2007) (discussing some of the statutorily designated aggravated felonies and how the courts have dealt with them).

26. *Carachuri-Rosendo*, 570 F.3d at 265. “Drug trafficking crime” is defined as a felony punishable under the Controlled Substances Act (CSA). *Id.*

27. *Id.* at 264–65.

28. *Id.* at 265.

29. *Id.*; *Carachuri-Rosendo*, 130 S. Ct. at 2583.

30. *Carachuri-Rosendo*, 570 F.3d at 265.

31. *Id.*

Circuit's decision in *United States v. Sanchez-Villalobos*.<sup>32</sup> The BIA stated that, had it not been bound by the Fifth Circuit's decision, it would have required that a second simple-possession offense be prosecuted "under a state recidivism law that corresponds to the federal recidivism law"<sup>33</sup> before that second possession offense could qualify as an aggravated felony. This is so because, according to the BIA, "immigration judges should not go outside the record of the second conviction to determine what, hypothetically, might have been prosecuted."<sup>34</sup>

On review, the Fifth Circuit affirmed the BIA's decision.<sup>35</sup> The court reasoned that since Carachuri-Rosendo's second offense could have been punished as a felony under the CSA if he had been prosecuted in federal court,<sup>36</sup> he was ineligible for cancellation of removal because he had committed a drug-trafficking crime, which qualifies as an aggravated felony.<sup>37</sup> After the Fifth Circuit rendered its decision, Carachuri-Rosendo was removed and petitioned the U.S. Supreme Court for certiorari.<sup>38</sup>

The U.S. Supreme Court granted certiorari because the circuit courts disagreed as to whether a conviction for a subsequent simple-possession offense qualifies as an aggravated felony if the noncitizen's conviction has not been enhanced based on prior conviction in state court (in other words, if the noncitizen has not been convicted as a recidivist).<sup>39</sup>

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32. 412 F.3d 572, 576–77 (5th Cir. 2005) (holding that a second state misdemeanor possession offense qualifies as an aggravated felony for immigration law purposes since it could have been prosecuted as a felony under federal law).

33. *Carachuri-Rosendo*, 570 F.3d at 265.

34. *Id.*

35. *Id.* at 264.

36. *Id.* at 265.

37. *See id.* at 267–68.

38. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2584 & n.8 (2010). According to the Court, the fact that the noncitizen was already removed did not, however, make the case moot because the noncitizen may still seek cancellation of removal even if he has already been deported from the country. *Id.*

39. *Id.* at 2584. The Seventh Circuit is in agreement with the Fifth Circuit that the hypothetical approach applies when noncitizens have state possession convictions. *Carachuri-Rosendo*, 570 F.3d at 267 n.5 (citing to various Seventh Circuit cases). In contrast, the First, Second, Third, and Sixth Circuits have adopted the view advocated by the BIA. *Id.* (citing to various cases from the First, Second, Third, and Sixth Circuits). The BIA argued that the INA's aggravated-felony provision should be interpreted to require a noncitizen's "status as a recidivist drug possessor [to] have been admitted or determined by a court or jury within the prosecution for the second drug crime" for the second simple-possession offense to be an aggravated felony. *See*

## III. REASONING OF THE COURT

The Court unanimously reversed the Fifth Circuit's ruling.<sup>40</sup> The Court held that if a noncitizen has been convicted of a subsequent simple-possession offense that has not been enhanced due to a prior conviction, then he has not been convicted of a felony punishable under the CSA.<sup>41</sup> If an alien has not been convicted of a felony punishable under the CSA, then he has not been convicted of an aggravated felony as defined by the INA.<sup>42</sup> To understand the Court's reasoning behind this decision, one first has to grasp the meaning of "aggravated felony" as applied in this case. The INA states that a lawful permanent alien resident may apply for a discretionary cancellation of removal so long as he "has not been convicted of any aggravated felony."<sup>43</sup> The INA defines "aggravated felony" by listing various offenses,<sup>44</sup> one of which is "illicit trafficking in a controlled substance . . . including a drug-trafficking crime (as defined in section 924(c) of Title 18)."<sup>45</sup> "Drug-trafficking crime" is defined as "any felony punishable under the Controlled Substances Act [CSA]."<sup>46</sup> Hence, a felony punishable under the CSA is an aggravated felony.

The Court stated that for the purposes of CSA, "a felony is a crime for which the 'maximum term of imprisonment authorized' is 'more than one year.'"<sup>47</sup> With the exception of possession of more than five grams of cocaine base or possession of flunitrazepam,<sup>48</sup> the CSA punishes drug-possession crimes as misdemeanors and drug-trafficking offenses as felonies.<sup>49</sup> But a subsequent simple-possession conviction may be punished as a felony as well.<sup>50</sup>

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*id.* (citing *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 391 (B.I.A. 2007)).

40. See *Carachuri-Rosendo*, 130 S. Ct. 2577 (2010).

41. *Id.* at 2589.

42. See *id.* at 2581 (referring to section 1101(a)(43)(B) of the INA).

43. Immigration and Naturalization Act § 240A, 8 U.S.C. § 1229b(a)(3) (2006).

44. *Id.* § 101, 8 U.S.C. § 1101(a)(43).

45. 8 U.S.C. § 1101(a)(43)(B).

46. 18 U.S.C. § 924(c)(2) (2006).

47. *Carachuri-Rosendo*, 130 S. Ct. at 2581 (citing 18 U.S.C. § 3559(a)).

48. Flunitrazepam is a powerful sleep-inducing drug, which is commonly known as a "roofie" or a "date-rape" drug. JERROLD S. MEYER & LINDA F. QUENZER, PSYCHOPHARMACOLOGY: DRUGS, THE BRAIN, AND BEHAVIOR 371 (2005).

49. *Lopez v. Gonzales*, 549 U.S. 47, 54 n.4 (2006).

50. *Carachuri-Rosendo*, 130 S. Ct. at 2581 (referring to this offense as "recidivist simple possession").

The government argued that since Carachuri-Rosendo already had a state simple-possession conviction on his record, if he had been prosecuted in federal court for his second possession offense, then his conduct could have been punished as a federal felony under the CSA.<sup>51</sup> Therefore, he would have been convicted of an aggravated felony.<sup>52</sup> The Court rejected the government's line of reasoning for the following reasons: (1) the government's argument ignored the INA's text; (2) the government's argument, if accepted, would interfere with independent judgment afforded to state prosecutors to execute their states' laws; and (3) the government's and the Fifth Circuit's positions were based on a misreading of the Court's decision in *Lopez v. Gonzales*.<sup>53</sup> Additionally, (4) the government's argument was inconsistent with the common sentencing practices found in federal courts because it is unlikely that Carachuri-Rosendo's subsequent possession would have been punished as a felony in federal court.<sup>54</sup> Finally, (5) "ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor."<sup>55</sup>

First, according to the Court, the most important reason for its ruling against the government was that the government's argument ignored the INA's text.<sup>56</sup> The INA states that the noncitizen is precluded from applying for a discretionary cancellation of removal if he has been *convicted* of an aggravated felony.<sup>57</sup> In this case, aggravated felony is a drug-trafficking crime, which is defined as a felony *punishable* under the CSA. Hence, what punishment the noncitizen could have received or what he could have been charged with is not pertinent; instead, what is pertinent is the offense for which the noncitizen was actually convicted.

As Justice Scalia pointed out in his concurrence, "conviction" means a "formal judgment of guilt of the alien entered by the court."<sup>58</sup> Texas law authorized the prosecutor to charge Carachuri-

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51. *Id.* at 2582–83.

52. *Id.*

53. *Id.* at 2586–88 (citing *Lopez v. Gonzales*, 549 U.S. 47 (2006)).

54. *Id.* at 2589.

55. *Id.* (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004)).

56. *Id.* at 2586.

57. Immigration and Naturalization Act § 240A, 8 U.S.C. § 1229b(a)(3) (2006) (emphasis added).

58. *Carachuri-Rosendo*, 130 S. Ct. at 2590 (Scalia, J., concurring) (quoting 8 U.S.C.



Rosendo as a recidivist—recidivist simple possession is punishable as a felony under the CSA.<sup>59</sup> The state prosecutor chose not to charge Carachuri-Rosendo as a recidivist, however, and as a result, Carachuri-Rosendo was convicted only of the crime of knowingly possessing a controlled substance without a valid prescription.<sup>60</sup>

Whether Carachuri-Rosendo was eligible to apply for relief from removal depended on whether his state conviction amounted to an aggravated felony for immigration law purposes. In *Lopez*, the Court held that in order for a state offense to qualify as an aggravated felony, the offense must include elements of a crime punishable as a felony under the CSA.<sup>61</sup> As previously mentioned, the CSA punishes simple possession of a controlled substance as a misdemeanor with two exceptions that are punished as felonies:<sup>62</sup> (1) the defendant was convicted of simple possession of cocaine base or flunitrazepam<sup>63</sup> and (2) the defendant was convicted as a recidivist, which requires a finding of prior drug conviction by a judge. Carachuri-Rosendo was convicted of an offense that did not involve possession of cocaine base or flunitrazepam and his conviction did not include a finding of prior drug conviction; hence, the offense he was convicted of did not correspond to a felony punishable under the CSA. Therefore, Carachuri-Rosendo had not been convicted of an aggravated felony according to the Court.<sup>64</sup>

The Court briefly discussed its other reasons for rejecting the government's argument. The second reason was that federal law, and many state criminal codes including Texas's, allows prosecutors to exercise discretion when deciding whether to pursue a sentence enhancement based on the existence of a prior conviction.<sup>65</sup> In this case, the Texas prosecutor did not seek such an enhancement.<sup>66</sup> If the Court were to side with the government, it would be essentially permitting an IJ to apply a recidivist enhancement after a prosecutor

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§ 1101(a)(48)(A)).

59. *Id.* at 2581, 2583 (majority opinion).

60. *Id.* at 2591 (Scalia, J., concurring).

61. *Lopez v. Gonzales*, 549 U.S. 47, 57 (2006).

62. *Carachuri-Rosendo*, 130 S. Ct. at 2581.

63. *Id.*

64. *Id.* at 2586–87.

65. *Id.* at 2588.

66. *Id.*

specifically decided not to, thereby allowing an IJ to overrule a prosecutor's independent judgment.<sup>67</sup> Given that a judge cannot order a prosecutor to charge a defendant with a specific crime,<sup>68</sup> an IJ should also not be allowed to apply his own recidivist enhancement post-conviction after a prosecutor has chosen not to.<sup>69</sup>

The third reason for overturning the Fifth Circuit's decision and rejecting the government's argument was that both were based on a misreading of the holding in *Lopez*. The *Lopez* decision requires the government and the courts to look at the conduct that was actually punished by state law—not at the conduct that could have been but nevertheless did not serve as the basis for the state conviction—in order to determine if the conduct is punishable as a felony under federal law.<sup>70</sup> According to the Court, this misreading of the case added too much uncertainty and speculation to a “more focused, categorical inquiry” prescribed by the *Lopez* because it allowed an IJ to look at facts that were not at issue in the crime of conviction to determine whether the noncitizen *could have* been charged with a federal felony.<sup>71</sup>

The fourth reason the Court gave was that, contrary to what the government had argued, had Carachuri-Rosendo been prosecuted in federal court, it was highly unlikely that his conduct would have been punished as a felony given that the controlled substance at issue was a single Xanax pill.<sup>72</sup> The U.S. Sentencing Commission found that in 2000, only 6.9 percent of offenders with prior *felony* drug convictions were tried as recidivists.<sup>73</sup> Logically, the number of offenders with prior *misdemeanor* convictions prosecuted as

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67. *Id.*

68. See *Inmates of Attica v. Rockefeller*, 477 F.2d 375, 379–83 (2d Cir. 1973) (holding that federal courts do not have the power to interfere with the discretionary decisions of prosecuting authorities regarding whether to prosecute a person).

69. This is so given that the *United States Attorney's Manual* considers the decision to seek recidivism enhancement on par with filing the initial criminal charge against the defendant. *Carachuri-Rosendo*, 130 S. Ct. at 2588 (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-27.300(B) (1997), available at [http://www.justice.gov/usao/eousa/foia\\_reading\\_room/usam/title9/27mcrm.htm#9-27.300](http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm#9-27.300) (“Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 . . . as equivalent to the filing of charges.”)).

70. *Id.*

71. *Id.*

72. *Id.* at 2589.

73. Brief of the National Association of Criminal Defense Lawyers and the National Legal Aid and Defender Association et al. as Amici Curiae Supporting Petitioner at 9, *Carachuri-Rosendo*, 130 S. Ct. 2577 (No. 09-60) [hereinafter Amicus Brief].

recidivists in federal court must be even lower. Hence, the government's position that Carachuri-Rosendo would have been prosecuted as a recidivist and convicted of a federal felony—had he been tried in federal court—was unsound.<sup>74</sup>

Finally, the Court stated that “ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor.”<sup>75</sup> In this case, according to the Court, the critical language indeed appears in a criminal statute, 18 U.S.C. § 924(c)(2),<sup>76</sup> which states that a drug-trafficking crime includes any felony punishable by the CSA.<sup>77</sup> Therefore, any ambiguity in the statute needs to be construed in the appellant's favor.

#### IV. HISTORICAL FRAMEWORK

Before the 1980s, the government's use of criminal convictions as a means of deporting noncitizens was fairly limited.<sup>78</sup> But beginning in the late 1980s, a concern over noncitizen criminals spread like wildfire among the American public resulting in hyperactive congressional activity on the matter.<sup>79</sup> In 1988, Congress added a new INA provision, which provided that an aggravated-felony conviction is an additional ground for deportation.<sup>80</sup> Initially, the aggravated-felony provision included only three types of crimes: murder, drug trafficking, and firearms trafficking.<sup>81</sup> But, the list of crimes encompassed by the provision has grown continuously with each major immigration law Congress has enacted since 1988.<sup>82</sup>

In criminal law, “aggravated felony” refers to a serious offense, punished as a felony, that some appalling or serious circumstances makes worse—usually in the way the offense was committed.<sup>83</sup>

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74. According to the Supreme Court, the government did not provide any data that showed that even one Assistant U.S. Attorney has ever attempted to prosecute an analogous federal defendant as a felon. *Carachuri-Rosendo*, 130 S. Ct. at 2589.

75. *Id.*

76. *Id.*

77. 18 U.S.C. § 924(c)(2) (2006).

78. Teresa A. Miller, *Citizenship and Severity: Recent Immigration Reforms and the New Penology*, 17 GEO. IMMIGR. L.J. 611, 622–23 (2003).

79. LEGOMSKY & RODRIGUEZ, *supra* note 5, at 550.

80. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, §§ 7342–44, 102 Stat. 4181, 4469–71; Liem, *supra* note 6, at 1076.

81. Miller, *supra* note 78, at 633.

82. *Id.* at 633–34.

83. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2585 (2010) (quoting *Black's Law*

When it comes to immigration law, however, “aggravated felony” is a term of art and can refer to an offense that is neither “aggravated” nor even a “felony.”<sup>84</sup> Even so, the consequences of an aggravated-felony conviction for immigration-law purposes are quite severe for the noncitizen. Without limitation, the consequences include a noncitizen being unable to seek most forms of discretionary relief, losing certain procedural safeguards, being subjected to mandatory detention from the time the removal proceeding begins until the actual removal occurs, and being permanently barred from returning to the United States unless he first obtains permission from the secretary of Homeland Security.<sup>85</sup>

In defining offenses that qualify as aggravated felonies, Congress uses language that is often broad and ambiguous.<sup>86</sup> This has led to confusion and nonuniformity among the lower courts regarding how to interpret and apply the aggravated-felony provisions.<sup>87</sup> In 2006 the U.S. Supreme Court first addressed the aggravated-felony provision at issue in *Carachuri-Rosendo* in *Lopez*. As previously mentioned, that particular provision of the INA states that a drug-trafficking crime is an aggravated felony and defines “drug trafficking” as a “felony punishable under the Controlled Substance Act.”<sup>88</sup> The issue in *Lopez* was whether conduct punished as a felony under state law but punished as a misdemeanor under the CSA qualified as an aggravated felony for INA purposes.<sup>89</sup> The

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*Dictionary’s* definition of “aggravated” as a crime “made worse or more serious by circumstances such as violence, the presence of a deadly weapon, or the intent to commit another crime”).

84. LEGOMSKY & RODRIGUEZ, *supra* note 5, at 575; Vargas-Padilla, *supra* note 25, at 27. For example, Immigration and Naturalization Act § 101(a)(43)(A) states that sexual abuse of a minor is an aggravated-felony. This aggravated-felony provision encompasses convictions for statutory rape. Vargas-Padilla, *supra* note 25, at 28. In California, one form of statutory rape is punished as a misdemeanor. CAL. PENAL CODE § 261.5(a)–(b) (West 2008). If an offense is punished as a misdemeanor in California it means the maximum term of imprisonment is six months. CAL. PENAL CODE § 19 (West 2008). Hence, a noncitizen convicted of statutory rape in California, for which the maximum term of imprisonment is six months, can be deemed convicted of an aggravated-felony even though federal law defines a felony as a crime for which the maximum term of imprisonment is more than one year. See *Carachuri-Rosendo*, 130 S. Ct. at 2581. An offense can therefore be an aggravated felony for immigration law purposes even if that offense is not technically a felony. See also *United States v. Pacheco*, 225 F.3d 148, 153–54 (2d Cir. 2000) (holding that certain misdemeanors can qualify as aggravated felonies).

85. LEGOMSKY & RODRIGUEZ, *supra* note 5, at 575.

86. Liem, *supra* note 6, at 1081–82.

87. *Id.* at 1081–84.

88. See *supra* notes 41–46 and accompanying text.

89. *Lopez v. Gonzales*, 549 U.S. 47, 50 (2006).

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government argued that the definition of “drug-trafficking crime” requires that the offense be punishable under the CSA and not that it be punishable as a federal felony.<sup>90</sup> Furthermore, a prior conviction in state court satisfies the felony element because the state treats possession as a felony.<sup>91</sup> Thus, according to the government’s argument, if a person is convicted in state court for marijuana possession and that particular state punishes marijuana possession as a felony, then the person has been convicted of an aggravated felony, even though the CSA punishes that same offense as a misdemeanor.

The Court rejected the government’s argument and held that for a state offense to constitute both an aggravated-felony and a felony punishable under the CSA, the state offense must proscribe conduct that is punishable as a felony under federal law.<sup>92</sup> In other words, only if the elements of the state offense include the elements of a felony offense punishable under the CSA is the state offense an aggravated felony.<sup>93</sup>

The rationale behind the decision was that, if the government’s argument prevailed, the law regarding the removal of noncitizens would depend on varying state criminal classifications that may be contrary to congressional intent.<sup>94</sup> For example, simple possession of marijuana is a misdemeanor under the CSA;<sup>95</sup> Congress did not intend, however, for the simple possession of marijuana to constitute a removable offense. This is evidenced by the INA’s text, which provides that possession of thirty grams or less of marijuana does not constitute grounds for removal.<sup>96</sup> But if the Court accepted the government’s argument and “if a state classifies possession of less than thirty grams of marijuana as a felony”—as four states do—then a person convicted of such a crime would be subject to mandatory removal under the INA’s aggravated-felony provision.<sup>97</sup> This not only impedes Congress’s intent but also treats noncitizens unequally:

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90. *Id.* at 53.

91. *Id.*

92. *Id.* at 60.

93. *Id.* at 57.

94. *Id.* at 58.

95. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2581 (2010).

96. *Lopez*, 549 U.S. at 59.

97. Emily Musser, *Developments in the Judicial Branch: The Recent Decision: Lopez v. Gonzales*, 21 GEO. IMMIGR. L.J. 329, 331 (2007).

noncitizens convicted in a state that classifies marijuana possession as a felony would be subject to harsher immigration penalties than those convicted in states lacking similar penalties.<sup>98</sup> This result would be unfair because being deemed an aggravated felon for immigration-law purposes results not only in the person being banned from the state in which he was convicted but also in the person's permanent banishment from the entire country.<sup>99</sup> The criteria and the process for admission for permanent residence to the United States do not vary depending on the state in which the immigrant is planning to live.<sup>100</sup> Likewise a noncitizen's permanent removal from the country should not depend arbitrarily on the state's classification of a crime for which the noncitizen was convicted.

Instead of clarifying the aggravated-felony provision relating to drug-trafficking crimes, the Court's decision in *Lopez* led to further confusion and inconsistent results among the circuits.<sup>101</sup> The Court attempted to address this issue in *Carachuri-Rosendo*.

#### V. ANALYSIS

In *Carachuri-Rosendo*, the Court held that a noncitizen who has been convicted of a simple-possession offense that has not been enhanced based on a prior conviction has not been convicted of a felony punishable under the CSA.<sup>102</sup> In turn, this means that the noncitizen has not been convicted of a drug-trafficking aggravated felony under the INA.<sup>103</sup> The Court's decision, however, implied that had the noncitizen been convicted as a recidivist in state court, then the conviction might constitute an aggravated felony, barring the noncitizen from seeking any discretionary forms of relief.<sup>104</sup> While the decision did resolve the circuit split, the Court left important questions unanswered.

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98. *See id.*

99. *See* LEGOMSKY & RODRIGUEZ, *supra* note 5, at 575.

100. *See generally id.* at chs. 3, 6 (outlining the various admission categories and the admission process for immigrants seeking permanent residence).

101. *See supra* note 39 and accompanying text (highlighting disparity between First, Second, Third, and Sixth Circuits).

102. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010).

103. *See id.* at 2581.

104. *See id.*

*A. Questions Left Unanswered by the Court's Decision*

The first question that the Court left unanswered was whether a finding of recidivism in the noncitizen's conviction record is sufficient in and of itself to deem the noncitizen convicted of a felony punishable under the CSA. As previously mentioned, under the CSA a recidivist simple-possession offense may be punished as a federal felony; before that can occur, however, a prosecutor must allege the existence of a prior simple-possession conviction before the beginning of trial or before a guilty plea is entered.<sup>105</sup> Furthermore, the defendant must be afforded notice and an opportunity to challenge the validity of the prior conviction that was used as the basis for the recidivist finding.<sup>106</sup>

The Court held that Carachuri-Rosendo had not been convicted as a recidivist because his conviction record did not include a finding of a prior drug conviction.<sup>107</sup> Carachuri-Rosendo argued that even if his record of conviction contained a finding of a prior drug conviction, this alone would not be sufficient for him to be deemed convicted of a felony punishable under the CSA; what is also required is a charge of recidivism and an opportunity to defend against such a charge.<sup>108</sup>

The BIA's decision reflected a similar sentiment, stating that the CSA procedures are safeguards meant to protect the rights of the accused and that these safeguards are necessary to the recidivist offense.<sup>109</sup> The Court acknowledged that these procedural requirements "have great practical significance with respect to the conviction itself and are integral to the structure and design of our drug laws."<sup>110</sup> Yet, the Court declined to further address this because it was not necessary to resolve the issue of the case since Carachuri-Rosendo had not been convicted as a recidivist.<sup>111</sup>

Hence, an unanswered question is whether a finding of recidivism in the noncitizen's conviction record is sufficient in and of itself to deem the noncitizen convicted of a felony punishable

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105. *Id.* at 2581–82.

106. *Id.* at 2582.

107. *Id.* at 2586–87.

108. *Id.* at 2586.

109. *Id.* at 2583–84.

110. *Id.* at 2588.

111. *Id.* at 2586.

under the CSA or if additional procedures are also necessary. Another lingering question is if additional procedures are necessary, do the procedures granted by the state have to be the same as (or substantially similar to) the ones mandated by federal law, or will any procedures deemed to protect the accused's rights suffice? If the lower courts disagree on how to answer these lingering questions, this will likely lead to another circuit split and nonuniformity in the application of this particular provision of immigration law throughout the country.

### *B. Other Uniformity Issues*

Another factor that may add to the lack of uniformity in the application of this provision is the differences between the states' recidivist possession laws. At least forty-five states have statutes that provide for separate offenses for simple possession and recidivist possession,<sup>112</sup> and most of these state recidivist statutes vary greatly. For example, Texas authorizes a state prosecutor to seek an enhanced sentence if the prosecutor can show at trial that the defendant has a prior felony or a certain misdemeanor conviction.<sup>113</sup> On the other hand, New York's recidivism statute applies only to a defendant convicted of a second felony drug offense and not to a defendant convicted of a second misdemeanor drug offense.<sup>114</sup> Hence, a noncitizen who committed two simple drug-possession crimes in Texas may be punished as a recidivist, treated as an aggravated felon in immigration court, and as a result, be subject to mandatory removal. On the other hand, in New York a noncitizen who committed similar possession offenses will not be convicted as a recidivist, will not be treated as an aggravated felon in immigration court, and as a result, will be free to apply for discretionary removal relief.

The law in California presents another example of potential nonuniformity that may arise. Before January 1, 2011, California treated possession of 28.5 grams or less of marijuana as a misdemeanor,<sup>115</sup> and the law allowed a sentencing enhancement for a

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112. Amicus Brief, *supra* note 73, at 12.

113. *Id.* at 13.

114. *See* N.Y. PENAL LAW § 70.70(3) (McKinney 2010). New York treats simple possession of a controlled substance as a misdemeanor. *Id.* § 220.03.

115. CAL. HEALTH & SAFETY CODE § 11357(b) (West 2010).



defendant who had “two separate convictions for nonviolent drug possession offenses.”<sup>116</sup> Therefore, a defendant who committed a subsequent offense of possessing 28.5 grams or less of marijuana could have been convicted as a recidivist. However, on January 1, 2011, a bill decriminalizing possession of one ounce (28.35 grams) or less of marijuana went into effect.<sup>117</sup> Simple marijuana possession is no longer a misdemeanor but an infraction—on par with receiving a traffic ticket.<sup>118</sup> It is not yet clear how subsequent possession of marijuana will be treated or if California’s sentencing-enhancement statute will even apply to such infractions. However, if all subsequent possession violations are also treated as infractions and if the sentencing-enhancement statute does not apply to these infractions, this will result in more nonuniformity in the application of the drug-trafficking-crime aggravated-felony provision.

Numerous other states, such as Georgia, Indiana, Louisiana, and Massachusetts, authorize or mandate sentence enhancement for a defendant convicted of subsequent simple marijuana possession.<sup>119</sup> Hence, in California if subsequent possession of marijuana is treated as another infraction and not subject to any sentence enhancement, a noncitizen found guilty of subsequent possession of an ounce or less of marijuana will not be convicted of an aggravated felony for the purposes of immigration law. On the other hand, a noncitizen in numerous other states can be charged and convicted as a recidivist and thus be convicted of an aggravated felony. These types of situations raise the same concerns Justice Ginsburg expressed at oral argument in *Lopez*, when she noted the “disuniformity” of precluding one person from ever coming back while not precluding another simply “because of the happenstance of the State in which they were convicted.”<sup>120</sup>

### C. *The Case’s Impact*

Although technically Carachuri-Rosendo won, the holding’s

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116. CAL. PENAL CODE § 1210.1(b)(5) (West 2010).

117. Patrick McGreevy, *Schwarzenegger Signs Bill Reducing Offense for Marijuana Possession*, L.A. TIMES (Oct. 1, 2010, 10:31 AM), <http://latimesblogs.latimes.com/california-politics/2010/10/schwarzenegger-signs-bill-reducing-offense-for-marijuana-possession.html>.

118. *Id.*

119. GA. CODE ANN. § 16-13-30(d) (2010); IND. CODE § 35-48-4-11 (2010); LA. REV. STAT. ANN. § 40:966(E)(2)(a) (2010); MASS. GEN. LAWS ch. 94(C), § 32C(a)–(b) (2010).

120. Musser, *supra* note 97, at 331.

impact is fairly limited. This holding does not necessarily mean that Carachuri-Rosendo will get to return to the United States; what it does mean is that he and others similarly situated will get to apply for discretionary cancellations of removal.<sup>121</sup> The decision as to whether the removal should be cancelled rests entirely on the attorney general's discretion.<sup>122</sup> Hence, it is unlikely that *Carachuri-Rosendo* will significantly impact the number of noncitizens deported each year. Even so, besides precluding the noncitizen from applying for a discretionary form of relief from a removal order, a finding that the noncitizen committed an aggravated felony subjects the noncitizen to various other harsh consequences. As mentioned, the noncitizen who is deemed an aggravated felon cannot apply for asylum and is subject to mandatory detention from the time the proceedings have begun until the noncitizen is removed.<sup>123</sup> Hence, it is not only logical but also just to require that a legal permanent resident be actually convicted of an aggravated felony before subjecting him to the harsh consequences that the aggravated-felony provision imposes.

Treating a subsequent simple possession as an aggravated-felony for immigration law purposes is fundamentally unfair. The unfairness stems from the fact that it will be incredibly difficult to have a uniform application of this drug-trafficking aggravated-felony provision across all states since recidivist statutes vary from state to state.<sup>124</sup> The only way to uniformly apply this provision is to no longer consider the recidivist simple-possession offense as an aggravated felony.

Eliminating the recidivist simple possession from the scope of the drug-trafficking aggravated-felony provision will not have a significant impact on the government's ability to remove noncitizens convicted of drug-possession offenses. The INA authorizes the removal of a noncitizen who has been convicted of violating any law relating to a controlled substance unless the noncitizen was convicted of a single offense of possessing thirty grams or less of marijuana.<sup>125</sup> Hence, most noncitizens can be removed before they even get a

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121. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2589 (2010).

122. *Id.*

123. Liem, *supra* note 6, at 1079.

124. *See supra* Part V.B.

125. Immigration and Naturalization Act § 237, 8 U.S.C. § 1227(a)(2)(B)(i) (2006).

chance to be convicted of a subsequent simple possession.

If recidivist simple possession is no longer considered an aggravated felony then a noncitizen convicted as a recidivist could apply for discretionary cancellation of removal.<sup>126</sup> However, just because a noncitizen is eligible to apply for cancellation of removal does not mean the attorney general will grant cancellation.<sup>127</sup> Besides having to meet all of the statutory requirements, the noncitizen has to show that he deserves favorable exercise of discretion.<sup>128</sup> One of the adverse factors the attorney general considers in deciding whether to exercise discretion is whether the noncitizen has a criminal record and, if so, “its nature, recency, and seriousness.”<sup>129</sup> Therefore, although a noncitizen convicted as a recidivist could apply for cancellation of removal, there is a good chance that cancellation will not be granted, other than in the most compelling of cases. Given all this, eliminating recidivist simple possession from the scope of the drug-trafficking aggravated-felony provision would ensure a more uniform application of this provision without impeding the government’s ability to deport those convicted of drug-related criminal offenses.

## VI. CONCLUSION

The Court’s decision in *Carachuri-Rosendo* will not likely affect the number of legal permanent residents deported on criminal grounds each year. Furthermore, even though this decision resolved the circuit split, it failed to address important questions. This will likely result in continued nonuniform application of the drug-trafficking aggravated-felony provision. However, even with all of its shortcomings, the decision is significant because it prevents the federal government from imposing the aggravated-felony provision’s harsh consequences on legal permanent residents convicted of only simple drug-possession offenses.

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126. *Id.* § 240(A), 8 U.S.C. § 1229b(a)(3).

127. *See Carachuri-Rosendo*, 130 S. Ct. at 2589 (“*Carachuri-Rosendo*, and others in his position, may now seek cancellation of removal . . . [b]ut he will not avoid the fact that his conviction makes him, in the first instance, removable. Any relief he may obtain depends upon the discretion of the Attorney General.”).

128. LEGOMSKY & RODRIGUEZ, *supra* note 5, at 600.

129. *In re C.V.T.*, 22 I. & N. Dec. 7, 11 (B.I.A. 1998).