



**PRACTICE ADVISORY:  
MULTIPLE DRUG POSSESSION CASES  
AFTER *CARACHURI-ROSENDO V. HOLDER*\***  
June 21, 2010

In *Carachuri-Rosendo v. Holder*, No. 09-60, 560 U.S. \_\_\_ (June 14, 2010) (hereinafter *Carachuri*), **the Supreme Court unanimously rejected the government position that any second or subsequent simple possession drug offense can automatically be deemed a drug trafficking aggravated felony.** Specifically, the Court held that a second or subsequent state possession offense is not an aggravated felony as a “felony punishable” under federal law when the state conviction was not based on the fact of a prior conviction, as would be required for a federal felony recidivist possession conviction. *Id.*, slip op. at 2.

**The Supreme Court’s decision reversed the contrary decision of the Fifth Circuit in *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) (relying on prior Fifth Circuit precedent in the criminal sentencing context to find that any second state possession offense is an aggravated felony because it could “hypothetically” have been punished as a recidivist felony under federal law). It also overruled the similar contrary decision of the Seventh Circuit in *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008).**

**Significantly, the Supreme Court’s decision should now give nationwide effect to the analysis and rulings of the Board of Immigration Appeals (BIA) in its precedent decision in the same case in *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007). In that decision, the BIA had stated that, but for the contrary Fifth Circuit case law, it would have found that a second or subsequent state possession offense does not correspond to the federal recidivist felony unless the prior drug conviction had actually been established in the criminal case in a process that, at a minimum, provided the defendant with notice and an opportunity to be heard on whether recidivist punishment was proper. *Id.* at 390-94.**

This advisory is divided into the following sections:

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## Background

In *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), the Supreme Court decided that a state simple possession drug conviction is not a “drug trafficking crime” aggravated felony unless the offense would be a felony under *federal* law. Since a first-time drug possession offense is generally not a felony under federal law,<sup>1</sup> this meant that many noncitizens convicted of a single state drug possession offense—although removable—would be eligible to avoid removal by seeking cancellation of removal, asylum, withholding of removal, and/or naturalization because they would not be subject to the aggravated felony bars applicable to these waivers or benefits.

After *Lopez*, however, the Department of Homeland Security (DHS) argued that noncitizens with more than one possession conviction could be deemed aggravated felons based on dicta in *Lopez* indicating that state drug possession offenses could “counterintuitively” be deemed “drug trafficking” aggravated felonies if the state offense “corresponds” to the federal “recidivism possession” felony offense at 21 U.S.C. § 844(a) (possession of a controlled substance after a prior drug conviction has become final). *See Lopez*, 127 S. Ct. at 630 n.6. Under federal law, a second or subsequent possession offense *may* be penalized as a recidivist possession felony if notice of the prior conviction has been given and an opportunity to challenge the fact, finality and validity of the prior conviction has been provided in the criminal case. *See* 21 U.S.C. § 851. Nevertheless, DHS initially took the position that *any* second state simple possession drug conviction could be transformed into a “drug trafficking” aggravated felony based on the premise that the prior conviction could have hypothetically been the basis for a federal recidivist felony prosecution.

In *Matter of Carachuri-Rosendo*, the BIA rejected such a broad interpretation and decided that, in the absence of controlling federal court authority finding otherwise, a noncitizen’s state conviction for simple possession of a controlled substance “will not be considered an aggravated felony based on recidivism unless the individual’s status as a recidivist drug offender was either admitted or determined by a judge or jury *in connection with a prosecution for that simple possession offense.*” 24 I&N Dec. at 394 (emphasis added). The BIA did not apply this rule in the *Carachuri* case itself—a case that arose under Fifth Circuit law—because it found that it was bound by a contrary Fifth Circuit criminal sentencing decision. *Id.* at 386-88 (citing *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5<sup>th</sup> Cir. 2005), *cert. denied*, 546 U.S. 1137(2006)).

In reviewing the BIA’s decision, the Fifth Circuit reaffirmed its prior sentencing precedents and found that any second state possession offense is an aggravated felony because it could “hypothetically” have been punished as a recidivist felony under federal law. *See Carachuri-Rosendo v. Holder*, 570 F.3d 263, 265-268 (5<sup>th</sup> Cir. 2009) (“Under this court’s approach for successive state possession convictions, a court or an immigration official characterizes the conduct proscribed in the latest conviction, by referring back to the conduct proscribed by a prior conviction as well.”). The Fifth Circuit stated that the Supreme Court’s decision in *Lopez* required such a “hypothetical approach” permitting the adjudicator to look

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<sup>1</sup> The only exceptions are a conviction for possession of more than 5 grams of crack cocaine or any amount of flunitrazepam. *See* 21 U.S.C. § 844(a).

beyond the record of conviction at issue to determine if the state offense corresponds to a federal felony. *See id.* at 266-67.

### **What the Supreme Court decided in *Carachuri***

The Supreme Court reversed the Fifth Circuit decision below and rejected the Government's defense of that decision. The Court first observed that the "commonsense conception" of the "aggravated felony" and "drug trafficking" terms would not ordinarily be applied to a simple possession drug offense, and stated that "in this case the Government argues for a result that 'the English language tells us not to expect,' so we must be 'very wary of the Government's position.'" *Carachuri*, slip op. at 10 (quoting *Lopez*, 549 U.S. at 54)).

The Supreme Court then flatly rejected the "hypothetical approach" followed by the Fifth Circuit and promoted by the Government's lawyers before the Court. The Court provided five reasons for rejecting the Government's position:

- First, the Court pointed out that the Government's position ignores the text of the immigration statute, which requires that the noncitizen have been "convicted" of an aggravated felony, and thus "indicates that we are to look to the conviction itself as our starting place, not to what might have or could have been charged." *Id.* at 11-14.
- Second, the Court found that the Government's position fails to give effect to the mandatory notice and process requirements for a recidivist conviction contained in 21 U.S.C. § 851. *Id.* at 14-15.
- Third, the Court stated that the Fifth Circuit's hypothetical felony approach is based on a misreading of the Court's decision in *Lopez*, which the Court said involved a "categorical," not hypothetical, inquiry focused on the conduct actually punished by the state offense rather than "focused on facts that could have *but did not* serve as the basis for the state conviction and punishment." *Id.* at 15-16.
- Fourth, the Court observed that the Government's argument is inconsistent with common practice in the federal courts in that it is very unlikely, if not unprecedented, that a low-level simple possession offense such as Mr. Carachuri's would be prosecuted as a felony in the federal courts. *Id.* at 16-17.
- Finally, the Court referenced the rule of lenity, which provides that ambiguities in criminal statutes, including those referenced in immigration laws, should be construed in the noncitizen's favor. *Id.* at 17 (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004)).

The Supreme Court thus concluded that the text and structure of the relevant statutory provisions demonstrate that the noncitizen must have been "actually convicted" of a crime that is itself punishable as a felony under federal law. The Court thus held that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a

prior conviction, he has not been convicted of a federal felony, and therefore has not been convicted of an aggravated felony for immigration law purposes. *Id.* at 17-18.

**What *Carachuri* means for noncitizens with a second or subsequent state possession conviction where the record of conviction contains no finding of a prior conviction**

The Supreme Court decision in *Carachuri* clearly establishes that any second or subsequent possession offense where the record of conviction contains *no* finding of the fact of the prior conviction may not be deemed an aggravated felony. *Id.* at 12. The Court rejected the Government’s position that it is enough to show that such a finding *could have* been made in order for the offense to be deemed a felony punishable under federal law. As the Court stated, “[t]he mere possibility that the defendant’s conduct, coupled with facts outside of the record of conviction, could have authorized a felony conviction under federal law is insufficient to satisfy the statutory command that a noncitizen be “convicted of a[n] aggravated felony.” *Id.* at 17-8. In short, if recidivism was not established in the record of conviction for the second or subsequent offense at issue, the offense cannot be deemed to correspond to a recidivist felony conviction under federal law.

The Supreme Court’s holding affirms the similar analysis of the BIA. In the BIA’s decision in the same case, the BIA similarly stated: “Without a showing of recidivism within the confines of the State prosecution, we conclude that the State offense cannot be said to proscribe conduct punishable as a felony under Federal law.” *Matter of Carachuri-Rosendo*, 24 I&N at 393.

Essentially, this means that, while an individual convicted of a second or subsequent offense of possession of a controlled substance proscribed under the federal drug schedules remains deportable or inadmissible,<sup>2</sup> such an individual may no longer be deemed an aggravated felon where the record of conviction does not establish the fact of a prior conviction, and is therefore not barred from relief from removal such as cancellation of removal for certain lawful permanent residents,<sup>3</sup> asylum,<sup>4</sup> withholding of removal<sup>5</sup> and termination of removal proceedings in order to pursue naturalization.<sup>6</sup>

**What *Carachuri* means for noncitizens with a second or subsequent state possession conviction where the record of conviction does contain some finding of a prior conviction**

Even where the record of conviction does contain some finding of a prior conviction, the Supreme Court decision in *Carachuri* indicates that a second or subsequent state possession conviction may still not be an aggravated felony if the state conviction does not strictly correspond to a federal recidivist possession felony. For example, under federal law, a second or subsequent possession offense may not be penalized as a “recidivist possession” felony unless

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<sup>2</sup> See INA 237(a)(2)(B)(i) (controlled substance offense deportability), 212(a)(2)(A)(i)(II) (controlled substance offense inadmissibility).

<sup>3</sup> Barred by aggravated felony—see INA 240A(a)(3)).

<sup>4</sup> Barred by aggravated felony—see INA 208(b)(2)(B)(i)).

<sup>5</sup> Barred by aggravated felony or felonies for which the person has been sentenced to an aggregate term of imprisonment of at least 5 years—see INA 241(b)(3)(B)).

<sup>6</sup> Barred by post-November 29, 1990 aggravated felony—see INA 101(f)(8).

the offense was committed after the alleged prior conviction has become final. *See* 21 U.S.C. § 844(a); *see also Smith v. Gonzales*, 468 F.3d 272 (5<sup>th</sup> Cir. 2006) (finding a state drug possession offense preceded by a prior drug conviction not to be an offense that would be a felony under federal law because later offense was committed while the individual was still within the time to seek leave to appeal the prior conviction). The Supreme Court’s decision makes clear that, when analyzing a state conviction, such required components of a “drug trafficking” aggravated felony must be shown “categorically,” i.e., by reference to the range of conduct covered under the state statute and not alleged facts outside the statute and record of conviction. *See Carachuri*, slip op. at 16 (“[T]he ‘hypothetical approach’ employed by the Court of Appeals introduces a level of conjecture at the outset of this inquiry that has no basis in *Lopez*. It ignores both the conviction (the relevant statutory hook), and the conduct actually punished by the state offense ... [and] is far removed from the more focused, categorical inquiry employed in *Lopez*.”); *see also Nijhawan v. Holder*, 129 S. Ct. 2294, 2300 (2009) (listing “illicit trafficking in a controlled substance” as an example of a generic crime aggravated felony category to which the categorical approach applies).

Federal court case law in those circuits not overruled by *Carachuri* also supports applying a categorical approach to determining whether a state offense meets the required components of a “drug trafficking” aggravated felony. *See, e.g., Alsol v. Mukasey*, 548 F.3d 207, 217 (2d Cir. 2009) (“[W]hatever petitioner was convicted of under state law must correspond with the crime of recidivist possession under the CSA ... .”); *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2009) (“Provided that an individual has been *convicted* under a state’s recidivism statute and that the elements of that statute include a prior drug-possession conviction that has become final at the time of the commission of the second offense, then that individual, under the categorical approach, has committed an aggravated felony . . . .”).

In addition, federal law requires that the U.S. Attorney before trial, or before entry of a guilty plea, has filed an information with the court stating in writing the previous conviction(s) to be relied upon, and that the defendant has had an opportunity to challenge the fact, finality and validity of the prior conviction(s) in a hearing in which the U.S. Attorney has the burden of proof beyond a reasonable doubt on any issue of fact except those pertaining to the conviction’s constitutionality. *See* 21 U.S.C. § 851. In response to Mr. Carachuri’s argument that such a prosecutorial charge of recidivism and an opportunity to defend against that charge would also be required in his state conviction before he could be deemed “convicted” of a felony punishable under federal law, the Court stated that it need not reach the issue: “In the absence of any finding of recidivism, we need not, and do not, decide whether these additional procedures would be necessary.” *Carachuri* at 12.

Even though the Supreme Court in *Carachuri* did not resolve whether these notice and process requirements contained in 21 U.S.C. § 851 also must have been met in the criminal case for a second or subsequent state possession conviction to be deemed the equivalent of a federal felony, the Court did point out that these requirements are mandatory under federal law, and observed 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.” *Id.* at 14.

As the Supreme Court left open the question of whether the notice and process requirements under federal law must be met for a second or subsequent state possession conviction to be deemed an aggravated felony, the analysis and rulings of the BIA and federal courts—those not overruled by *Carachuri*—that have already addressed this question should now govern. In the *Carachuri* case itself, the BIA already determined that, at a minimum, the state must have provided the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper in order for a particular crime to be considered a “recidivist” offense. See *Matter of Carachuri-Rosendo*, 24 I&N Dec. at 391.

Moreover, even where the noncitizen was provided by the state with notice and an opportunity to be heard regarding the prior conviction, the BIA indicates that there is still a question as to whether the process afforded sufficiently corresponds to the process required under federal law. The BIA did so by raising but leaving this question open:

We do not now decide whether State criminal procedures must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with 21 U.S.C. § 851(c). Nor are we now concerned with the timing of notice, or with the burdens and standards of proof applicable to a defendant’s challenge to his status as a recidivist.

*Id.* at 394, n.10 (citation omitted).

Federal court case law also provides support for process requirements akin to those required under federal law before a second or subsequent possession conviction may be deemed to correspond to a federal recidivist possession felony. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297, 317 (3d Cir. 2002) (“[W]e must be satisfied that the state adjudication possessed procedural safeguards equivalent to the procedural safeguards that would have accompanied the enhancement in federal court.”).

Thus, an individual who has been convicted of a second or subsequent state possession conviction where the record of conviction does contain some finding of a prior conviction should compare the components of the state offense, the process afforded in his or her state criminal case and the state record of conviction to the components of the federal offense and the process required under federal law in order to determine what points can be raised to show that his or her particular state disposition does not correspond to a federal recidivist felony conviction. Some potential points of difference to look for when reviewing the state law, process and record of conviction include the following:

- State offense does not require prior conviction to have been for a drug, narcotic or chemical offense. See 21 U.S.C. § 844(a) and (c).
- State offense does not require prior conviction to have been final before commission of the second or subsequent offense. See 21 U.S.C. § 844(a).
- State criminal process does not require the prosecutor to provide notice of the previous convictions to be relied upon before trial or before entry of a plea of guilty. See 21 U.S.C. § 851(a).

- State criminal process does not afford the defendant an opportunity to deny the fact, finality and validity of an alleged prior drug conviction. *See* 21 U.S.C. § 851(c)(1).
- State criminal process does not require the prosecution to prove beyond a reasonable doubt any issue of fact (other than an issue of fact relating to a claim that a predicate conviction was obtained in violation of the Constitution). *See* 21 U.S.C. § 851(c)(1).
- Record of conviction does not show that the convicting state court actually enhanced punishment based on the prior drug conviction. *See Carachuri*, slip op. at 18 (“We hold that when a defendant has been convicted of a simple possession offense that has not been enhanced based on the fact of a prior conviction, he has not been ‘convicted’ [] of a ‘felony punishable’ as such ‘under the Controlled Substances Act’ ...”) (citation omitted).

### Resources

Individuals who have second or subsequent drug possession convictions, and who have already been ordered removed without a relief hearing based on unfavorable pre-*Carachuri* case law, may find guidance on how now to seek relief under *Carachuri*, including sample legal motions to file with an Immigration Judge, the BIA, or a federal court depending on where the removal case is pending or was last pending, in the following practice advisory:

- National Immigration Project, *Practice Advisory: Sample Carachuri-Rosendo Motions* (June 21, 2010), posted at: <http://www.nationalimmigrationproject.org/legalresources.htm>.

For guidance prepared prior to *Carachuri* on developing legal arguments to challenge drug aggravated felony charges generally, see the following practice advisory:

- Immigrant Defense Project, *Practice Advisory: Using Lopez v. Gonzales to Challenge Aggravated Felony Drug Trafficking Charges or Bars on Relief* (May 19, 2008), posted at: <http://www.immigrantdefenseproject.org/webPages/LvGPressroom.htm>.

For additional litigation support or to learn about later developments on the issues discussed in this advisory, please see the IDP website at [www.immigrantdefenseproject.org](http://www.immigrantdefenseproject.org), or contact the IDP at (212) 725-6422.