No. 09-60

AUG 17 2009

IN THE

Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,

Petitioner,

—v.—

ERIC H. HOLDER, JR., U.S. ATTORNEY GENERAL,

Respondent.

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

BRIEF FOR THE CENTER ON THE ADMINISTRATION OF CRIMINAL LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Of Counsel:

ANTHONY S. BARKOW
DAVID B. EDWARDS
CENTER ON THE ADMINISTRATION OF CRIMINAL LAW
110 West Third Street, Suite 214
New York, New York 10012
(212) 998-6612

CATHERINE M. AMIRFAR
Counsel of Record
HELEN V. CANTWELL
MARGARET D. SPILLANE
JILL VAN BERG
YOUNG K. LEE
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, New York 10022
(212) 909-6000

Counsel for Amicus Curiae

Blank Page

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

FEDERAL CASES

FEDERAL CONSTITUTIONAL PROVISIONS

FEDERAL STATUTES AND REGULATIONS

STATE STATUTES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

Amicus curiae the Center on the Administration of Criminal Law ("the Center"), respectfully submits this brief in support of Petitioner Jose Angel Carachuri-Rosendo.[1] The Center, based at New York University School of Law, is dedicated to defining and promoting good government practices in the criminal justice system through academic research, litigation, and participation in the formulation of public policy, and particularly focuses on prosecutorial power and discretion. In general, the Center's litigation practice concentrates on cases in which exercises of prosecutorial discretion raise significant substantive legal issues. A primary guiding principle in selecting cases to litigate is to identify cases in which prosecutors exercised discretion to engage in overaggressive or unwarranted interpretations of the Constitution, statutes, regulations, or policies in a way that diverges from standard practices, raises fundamental questions of defendants' rights, or is a misuse of government resources in light of law enforcement priorities. The Center also defends exercises of prosecutorial discretion where the discretionary decisions comport with applicable law

---

[1] The parties have consented to the filing of this brief, and letters of consent have been lodged with the Clerk of the Court, in accordance with Supreme Court Rule 37.2(a). Pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than the Center or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

and standard practices and are consistent with law enforcement priorities.

The Center's appearance as *amicus curiae* here is prompted by its concern that allowing immigration courts to supplant prosecutorial discretion exercised in a measured and consistent manner will undermine the fair and efficient administration of the criminal justice system. Thus, this case is an important one to the Center's mission.

SUMMARY OF ARGUMENT

This Court should grant the petition for *certiorari* to resolve the circuit split on an important question of law that goes to the heart of the fair and efficient administration of the criminal justice system: whether an individual can be found to be an aggravated felon for purposes of the immigration laws in the absence of being actually convicted as a recidivist in the underlying state criminal proceeding.[2] The decisions of the Fifth and Seventh Circuits, unlike those of the First, Second, Third, and Sixth Circuits and the Board of Immigration Appeals, permit immigration courts to treat a second or subsequent possession misdemeanor offense as a recidivist felony despite a state prosecutor's choice to decline such a charge.[3] In so holding, the Fifth and

---

[2] The same issue is raised in *Escobar v. Holder*, No. 09-__ (petition for *certiorari* filed August 17, 2009).

[3] *Compare Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008), *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008), *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), *and In re Carachuri-Rosendo*,

Seventh Circuits' decisions contravene the considered charging decisions of state prosecutors acting consistently with the broad discretion afforded them under the law. *Amicus* urges this Court to grant the writ for three principal reasons.

First, this Court should grant *certiorari* because the Fifth Circuit's disregard for the exercise of prosecutorial discretion ignores this Court's recognition that "the decision to prosecute is particularly ill-suited to judicial review," because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985). Such judicial disregard of the proper exercise of prosecutorial discretion violates basic policy imperatives. Because prosecutorial discretion plays a crucial role in the interplay between prosecutors, courts, and legislatures to ensure fair and equitable application of the criminal laws, interfering with such discretion prevents the appropriate actors in the criminal justice system from ensuring that charges and sentences are tailored to the circumstances of the particular individual. Indeed, state and federal legislatures often design punishment schemes to account for the

---

24 I. & N. Dec. 382, 393 (BIA 2007), *with Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) *and Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008).

exercise of prosecutorial discretion, recognizing that such exercise will mitigate what otherwise could be unduly harsh punishments. Further, encroaching upon prosecutorial discretion creates uncertainty about the consequences of convictions, undermining prosecutors' ability to secure plea dispositions. Countermanding prosecutorial discretion also compromises prosecutors' ability to secure cooperation of offenders necessary for the disposal of cases, thereby impeding the proper punishment of the most culpable offenders.

Second, this Court should grant *certiorari* in order to address not only the basic disrespect afforded the states' administration of their criminal justice systems inherent in the decision of the Fifth Circuit, but also the unwarranted disparity created between defendants convicted in state versus federal courts. When a federal immigration court interferes with the administration of state criminal justice systems in this fashion, it upsets the appropriate balance between state and federal interests. Because states play a primary role in defining and enforcing their criminal laws, and state prosecutors bring the vast majority of criminal prosecutions in the United States, encroaching upon state prosecutors' charging decisions while leaving similar decisions of federal prosecutors undisturbed not only demonstrates disrespect for state actors, but has far reaching implications for the criminal justice system. Indeed, in practice, federal prosecutors virtually always exercise their discretion to decline a recidivist drug charge under 21 U.S.C. § 851—in 2007, only 3 defendants were convicted under this provision. Allowing an immigration court to

disregard completely a state prosecutor's decision similarly to decline a recidivist charge would create a vast and very real disparity in the treatment of state and federal offenders.

Finally, this Court should grant *certiorari* because the scheme set forth by the Fifth Circuit creates the risk that a defendant's Sixth Amendment right to a jury trial may be violated depending upon where removal proceedings are initiated.

Given the importance of these issues to the fairness and equity of the criminal justice system and the uncertainty that the circuit split engenders for that system, *amicus* urges this Court to grant *certiorari* in this case.

REASONS FOR GRANTING THE WRIT

I. This Court Should Grant *Certiorari* Because the Fifth Circuit's Decision Improperly Interferes with the Basic Exercise of Prosecutorial Discretion with Respect to Charging Decisions.

As this Court has recognized, prosecutorial discretion "is an integral feature of the criminal justice system," *United States v. LaBonte*, 520 U.S. 751, 762 (1997), and "[i]n our system, so long as the prosecutor has probable cause to believe that the accused committed an offense defined by statute, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion," *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978). "This broad discretion rests largely on the recognition that the

decision to prosecute is particularly ill-suited to judicial review," because "[s]uch factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake." *Wayte v. United States*, 470 U.S. 598, 607 (1985); *see also Heckler v. Chaney*, 470 U.S. 821, 832 (1985) ("[T]he decision of a prosecutor in the Executive Branch not to indict ... [is] a decision which has long been regarded as the special province of the Executive Branch ....").

The Fifth Circuit's decision fundamentally contravenes this integral feature of the criminal justice system by allowing immigration courts to supplant, without any reasoned basis, the considered charging decisions of prosecutors acting within the proper discretion afforded them under the law. If left standing, the decision not only would undermine the vital role prosecutorial discretion plays in ensuring the fair and efficient administration of the criminal justice system, but also would result in a system that ignores the explicit role that discretion plays in the specific statutory scheme at issue.

A. The Prosecutor's Exercise of Discretion Is a Critical Tool Used To Achieve Important Policy Goals and Should Not Be Undermined.

The decision of the Court of Appeals would allow immigration judges—who lack the requisite knowledge of the facts and circumstances that

inform the decisions of the prosecutor, plea allocution judge, and sentencing judge—to interpose their judgment in contravention of the considered collective judgment of the myriad players in the criminal justice system. As the Board of Immigration Appeals ("BIA") itself cautioned in Petitioner's proceedings, "the hypothetical approach would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be 'an offense' that could have been prosecuted as a Federal felony." *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (BIA 2007). Such interference disturbs the efficient and fair administration of the criminal justice system: *first*, by contravening prosecutors' proper role in ensuring the equitable enforcement of the criminal laws through the exercise of their charging discretion, which is particularly important in the context of recidivism cases; *second*, by creating uncertainty about the consequences of convictions and thus undermining prosecutors' critical ability to secure plea dispositions; and *finally*, by compromising prosecutors' ability to secure cooperation of witnesses to ensure the proper punishment of the most culpable offenders.

First, the exercise of prosecutorial discretion is a key mechanism by which punishment is calibrated to fit the characteristics of the specific offense and offender. This Court has recognized that legislatures face "practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently

specific to provide fair warning that certain kinds of conduct are prohibited." *Colten v. Kentucky*, 407 U.S. 104, 110 (1972). As a result, many criminal offenses are enumerated in "statutes that are ill-defined, overbroad, or insufficiently concerned with culpability," while other offenses are found within "[s]tatutes prohibiting appallingly destructive conduct [that] are jumbled together with others prohibiting relatively minor violations of social mores." Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2137 (1998). Given this reality, prosecutorial discretion, particularly in favor of leniency, "is widely seen as necessary, and frequently as a good thing: It permits mercy, and it avoids flooding the system with low-level crimes." William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1892 (2000). Indeed, because "[c]riminal statutes now commonly permit (or purport to require) draconian punishments that no one expects to be imposed in the typical case," "'leniency' has therefore become not merely common but a systemic imperative." SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 1006 (8th ed. 2007).

For example, the U.S. Attorney's Manual requires prosecutors to charge "the most serious offense that is consistent with the nature of the defendant's conduct, and that is likely to result in a sustainable conviction," with the significant caveat that "the attorney for the government consider, *inter alia*, such factors as the Sentencing Guideline range yielded by the charge, [and] whether the penalty yielded ... is proportional to the seriousness of the defendant's conduct ...." U.S. Attorney's Manual,

PRINCIPLES OF FEDERAL PROSECUTION § 9-27.300 (1997), *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/27mcrm.htm (hereinafter "U.S. Attorney's Manual"). The ABA has similarly observed that

> [d]ifferences in the circumstances under which a crime took place, the motives behind or pressures upon the defendant, mitigating factors in the situation, the defendant's age, prior record, general background, and role in the offense, and a host of other particular factors require that the prosecutor view the whole range of possible charges as a set of tools from which to carefully select the proper instrument to bring the charges warranted by the evidence.

ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION AND DEFENSE FUNCTION § 3-3.9(b) cmt. (3d ed. 1993) (hereinafter "ABA STANDARDS").

Many state statutory schemes expressly contemplate the use of prosecutorial discretion related to charging decisions. For example, under Colorado law, prosecutors are provided broad discretion to pursue appropriate dispositions through plea agreements, including to "seek or not to oppose the dismissal of an offense charged if the defendant enters a plea of guilty or *nolo contendere* ... to another offense reasonably related to the defendant's conduct," COLO. REV. STAT. § 16-7-301(2)(b), or to "consent to deferred prosecution," *id.* § 16-7-301(2)(d); *see also* WASH. REV. CODE §

9A.20.030(1) (directing prosecutors to investigate and recommend it to the court when "the alternative of restitution ... is appropriate and feasible.").

Such exercise of prosecutorial discretion *ex ante* complements the courts' authority to adjust sentences as appropriate and is an essential element of the dialogue between courts and prosecutors as to what constitutes appropriate punishment. The U.S. Sentencing Commission has recognized the sometimes imprecise alignment between the statutory definition of an offense and the actual conduct of an offender, and thus has provided mechanisms throughout the Sentencing Guidelines that allow sentencing courts to calibrate sentences to each individual. *See, e.g.*, U.S.S.G. § 4A1.3(b) (authorizing downward departures where "information indicates that the defendant's criminal history category substantially over-represents the seriousness of the defendant's criminal history"); *id.* § 5K2.0(a)(3) (departure from guideline range warranted if circumstances present are "substantially in excess of, or substantially below, that which ordinarily is involved in that kind of offense"). And now that the Federal Sentencing Guidelines are no longer mandatory, *United States v. Booker*, 543 U.S. 220, 245 (2005), federal courts have even greater discretion to individualize sentences such that they reflect, *inter alia*, "the nature and circumstances of the offense and the history and characteristics of the defendant," 18 U.S.C. § 3553(a)(1).

The exercise of a prosecutor's discretion, including to charge a lesser offense (or to decline to

charge at all), is particularly important in recidivism cases, as these laws tend to have graver sentencing implications than anyone—including legislatures—expects, should prosecutors attempt to enforce them in all cases covered by their terms. KADISH, *supra*, at 1006. The U.S. Attorney's Manual specifically provides that the decision to seek a recidivism enhancement pursuant to section 851 should be treated with the same diligence and attention to the particular facts of a case as the pursuit of any other charge under the U.S. Code. *See* U.S. Attorney's Manual § 9-27.300 cmt. ("Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 ... as equivalent to the filing of charges."). Thus, a prosecutor's decision not to seek a recidivist charge should be no more ignored by an immigration court than any other decision made by a prosecutor to charge one particular offense or another. And the implications for a recidivist determination can be stark—for example, depending on the circumstances, it can increase the statutory maximum sentence for simple possession from one year up to as many as five years, *see* 21 U.S.C. § 844.

As another example, the implications of California's recidivist sentencing scheme are so grave that the statute affirmatively provides prosecutors with broad discretion in determining which prior convictions will trigger increased sentences under the law. Under California's "three strikes" law, if a defendant has one prior "serious" or "violent" felony conviction, he must be sentenced to "twice the term otherwise provided as punishment for the current felony conviction," CAL. PENAL CODE § 667(e)(1), and two or more such priors require a

sentence of an indeterminate term of life imprisonment, with a minimum term of at least 25 years before eligibility for parole. *Id.* § 667(e)(2)(A). This third felony need not be "serious" or "violent"—"any felony can constitute the third strike." *Lockyer v. Andrade*, 538 U.S. 63, 67 (2003). However, the "three strikes" statutory scheme expressly provides for the exercise of prosecutorial discretion as a check against harsh results: "[t]he prosecuting attorney may move to dismiss or strike a prior felony conviction allegation in the furtherance of justice ... or if there is insufficient evidence to prove the prior conviction." CAL. PENAL CODE § 667(f)(1). Further, for certain offenses "known as 'wobblers,'" prosecutors may "exercise their discretion to charge a 'wobbler' as either a felony or a misdemeanor." *Ewing v. California*, 538 U.S. 11, 16-17 (2003).

In fact, the exercise of prosecutorial discretion has been the primary mitigation of the impact of this sentencing regime. According to the California District Attorneys Association, "[d]ata from California's most populous counties reveal that prosecutorial discretion to request the court to dismiss felony strikes is used in 21-40% of all Three Strikes cases." CAL. DISTRICT ATTORNEYS ASS'N, PROSECUTORS' PERSPECTIVE ON CALIFORNIA'S THREE STRIKES LAW: A 10-YEAR RETROSPECTIVE 11 (2004), *available at* http://www.threestrikes.org/cdaa/Three Strikes_0.pdf; *see also id.* at i ("As District Attorney for San Mateo County since 1983, I ... signed the ballot argument in opposition to the Three Strikes initiative. In reality, the actual implementation of the law has been appropriate.... The fact that both the court and the prosecutor can cause priors to be

stricken establishes a balance in the law that was missing when Three Strikes was first enacted.").

Lawmakers rely upon such discretion by prosecutors when enacting harsh laws, guided by knowledge of the reality that, because most cases end in guilty pleas, prosecutors use such laws as bargaining tools and exercise their discretion not to charge such laws to the fullest extent possible. *See* William J. Stuntz, Bordenkircher v. Hayes: *Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351, 377-78 (Carol S. Steiker ed., 2006) (making this argument with respect to Congress and state legislatures).

Second, when a court interferes with prosecutors' discretion in the direction of mercy while deferring to their discretion in favor of harshness, as the Fifth Circuit's decision would allow, it creates uncertainty about the consequences of convictions and thus undermines prosecutors' ability to secure dispositions via plea agreement. This Court has observed that "[w]hatever might be the situation in an ideal world, the fact is that the guilty plea and the often concomitant plea bargain are important components of this country's criminal justice system." *Blackledge v. Allison*, 431 U.S. 63, 71 (1977). Because the vast majority of cases are resolved by pleas—97% of convictions in the nation's 75 most populous counties[4]—this reduction in

---

[4] Tracey Kyckelhahn & Thomas H. Cohen, *Felony Defendants in Large Urban Counties, 2004*, Bureau of Justice Statistics Bulletin (U.S. Dep't of Justice Office of Justice Programs, Wash. D.C.), Apr. 2008, at 3, *available at* http://ojp.usdoj.gov/bjs/pub/pdf/fdluc04.pdf.

defendants' willingness to plea bargain will hinder prosecutors' ability to manage and efficiently dispose of their cases, further exacerbating the "[e]xtreme docket pressure [that] characterizes DAs' offices, particularly in the large cities where crime rates tend to be highest," Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 601 (2005).

Uncertainty about the immigration consequences of convictions has had a significant impact upon the criminal justice system. It is already the case that "federal consequences of state crimes will vary according to state severity classifications when Congress describes an aggravated felony in generic terms, without express reference to the definition of a crime in a federal statute," *Lopez v. Gonzales*, 549 U.S. 47, 58 (2006), thus creating uncertainty as to how a conviction under a particular state's law will be treated for purposes of immigration law. The Fifth Circuit's decision further compounds this problem by creating uncertainty based solely upon the happenstance of where the government initiates removal proceedings. This affects prosecutors' ability to secure agreements by significantly increasing the possibility that even a plea to a minor offense will have immigration consequences. *See, e.g.*, Brittany Schoepp, *Panel Hears Deportation Fears of Hispanics*, WIS. STATE J., Feb. 26, 2008, at D1 (defense attorney stating that "many of his clients, who would normally accept plea bargains for minor crimes, are now too afraid that even a short jail sentence will mean deportation, so they take their case to trial").

Finally, other important law enforcement goals can be served when a prosecutor decides to exercise discretion to bring a lesser charge, such as in securing cooperation agreements. As the ABA has noted, "[p]rosecutors frequently and properly choose to pursue a lenient course with one participant in a criminal activity in order to bring other, more serious, offenders to justice." ABA STANDARDS § 3-3.9(b) cmt. In cases that rely heavily upon evidence provided by confidential informants, the ability to induce a plea to a lesser charge avoids a public trial in which the informant's identity would be revealed, thus reducing the "likelihood that the informant's usefulness in other investigations will be seriously diminished or destroyed," U.S. Attorney's Manual § 9-27.420 cmt. 7. And obtaining a plea in one case can free up prosecutorial resources that may be better used to dispose of other cases. *See id.* cmt. 11 ("A plea disposition in one case may facilitate the prompt disposition of other cases, including cases in which prosecution might otherwise be declined.").

In sum, the exercise of discretion in making charging decisions reflects an assessment of the facts, circumstances, and available resources by the prosecutor, the actor in the criminal justice system with the highest competence to exercise that discretion in a full and considered manner. Granting *certiorari* in this case provides the best vehicle for this Court to ensure that the crucial role that such discretion plays in the fair and efficient administration of criminal justice is respected by the lower courts.

B. The Fifth Circuit Failed to Account for the Important Role of Prosecutorial Discretion in the Statutory Scheme.

Given the necessary role that prosecutorial discretion plays in bringing a recidivist felony charge under 21 U.S.C. §§ 844 & 851, the failure of the Fifth Circuit to meaningfully acknowledge such a role in its analysis is a fatal flaw.

Congress specifically enacted 21 U.S.C. § 851 as part of the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 513, 84 Stat. 1236 (1970) in order to give prosecutors discretion not to seek recidivist treatment. "Whereas the prior version of the statute made enhancements for prior offenses mandatory, the new statutory scheme gave prosecutors discretion whether to seek enhancements based on prior convictions." *United States v. Dodson*, 288 F.3d 153, 159 (5th Cir. 2002); *see also* Report of House Committee on Interstate and Foreign Commerce, H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4566, 4576 ("[S]evere penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain.... [M]aking the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties....").

Nevertheless, in the decision below, the Fifth Circuit did not consider the import of the statutory scheme set forth in section 851, nor did it even mention the requirements a prosecutor must satisfy

to charge a recidivist felony under section 844. *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009). The Court of Appeals simply deemed "correct" the immigration judge's holding that "[b]ecause Carachuri's second state conviction could have been punished as a felony under the CSA, had he been prosecuted in federal court, he committed a 'drug trafficking crime,' making him ineligible for cancellation of removal." *Id.* at 264, 265. Missing from this analysis is the critical fact that such conviction could be punished as a felony *only if* a prosecutor chose to prosecute it as such pursuant to the requirements of section 851.

Similarly, while the Seventh Circuit noted that compliance with section 851's requirements was mandatory to charge a recidivist felony under section 844, *Fernandez v. Mukasey*, 544 F.3d 862, 866 (7th Cir. 2008), it nevertheless also ignored the import of that provision in its analysis. Absent from its discussion was the fact that petitioners would have been considered recidivists under federal law *only if* they had been charged as repeat offenders under 21 U.S.C. § 851. *Id.* at 877 (Rovner, J., dissenting); *see id.* ("And that is a big 'if.' After all, they were not charged as repeat offenders in state court. This is the 'one too many levels of hypothetical' with which we were concerned in [a previous case].").

It is telling that unlike these courts, the executive agency charged with the execution of this nation's immigration laws and the agency with the greatest expertise in the enforcement of such laws, gave due weight to the legislative scheme. In Petitioner's proceedings before the BIA, the

Department of Homeland Security ("DHS") changed its position with respect to this issue, "conced[ing] that a conviction arising in a State that has drug-specific recidivism laws cannot be deemed a State-law counterpart to 'recidivist possession' unless the State actually used those laws to prosecute [Petitioner]." *In re Carachuri-Rosendo*, 24 I. & N. Dec. at 390-91. The BIA observed that

> it seems that the DHS is troubled by the fact that a purely hypothetical approach, carried to its logical conclusion, could result in a Federal *misdemeanor* conviction under 21 U.S.C. § 844(a) being treated as a hypothetical Federal *felony* on the ground that the defendant had prior convictions that *could have been used* as the basis for a recidivist enhancement.

Id. at 391. It further noted that "it would ... be anomalous to treat a second State conviction for simple possession as the hypothetical equivalent of a Federal 'recidivist possession' conviction when the State affirmatively elected not to proceed under its own available recidivism laws." *Id.*

The Second Circuit embraced the BIA's reasoning in its decision addressing the treatment of multiple state possession offenses, and specifically noted how the alternate approach advanced by the Fifth and Seventh Circuits would encroach upon the administration of the criminal justice system. Deeming state possession convictions federal felonies, "even when the State explicitly elected not to pursue a recidivist conviction," "would intrude on

prosecutorial discretion to make charging decisions, specifically undermining the State's ability to negotiate plea agreements with defendants who would admit guilty to drug possession with the understanding that their criminal records would reflect misdemeanor and not felony convictions." *Alsol v. Mukasey*, 548 F.3d 207, 217 (2d Cir. 2008).

In light of the clear policy imperatives of both the Congress that enacted section 851 and the federal agency charged with executing its mandate, this Court should grant *certiorari* to resolve the circuit split in favor of the approach set forth by the BIA and the First, Second, Third and Sixth Circuits.

II. This Court Should Grant *Certiorari* Because the Fifth Circuit's Decision Fundamentally Undermines State Interests in the Proper and Equitable Administration of Criminal Justice and Results in Disparate Treatment of Criminal Defendants Facing Convictions in State Versus Federal Courts.

The decision of the Fifth Circuit interferes with the administration of state criminal justice systems and upsets the appropriate balance between state and federal interests in this nation's system of dual sovereigns. This Court has counseled federal courts to defer to appropriate exercises of state power as a matter of "proper respect for state functions, [as] a recognition of the fact that the entire country is made up of a Union of separate state governments." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Such deference is motivated by the "belief that the National Government will fare best if the

States and their institutions are left free to perform their separate functions in their separate ways." *Id.* The resulting balance between state and federal interests "is a system ... in which the National Government, anxious though it may be to vindicate ... federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the States." *Id.* Such deference is particularly important with respect to states' exercise of their competence in the field of criminal justice, since "[s]tates possess primary authority for defining and enforcing the criminal law." *Engle v. Isaac*, 456 U.S. 107, 128 (1982).

The Department of Justice has a strong policy of deferring to state determinations regarding the seriousness and method of prosecuting crimes. The Department "refus[es] to bring a federal prosecution following a state prosecution except when necessary to advance compelling interests of federal law enforcement." *Rinaldi v. United States*, 434 U.S. 22, 28 (1977); *see also* U.S. Attorney's Manual § 9-2-031 ("preclud[ing] the initiation or continuation of a federal prosecution, following a prior state ... prosecution based on substantially the same act(s) or transaction(s)," unless various substantive and procedural prerequisites are met).[5] One of these requirements prohibits federal prosecution following a state trial unless there remain "substantial federal interest[s]" "demonstrably unvindicated" by the state

---

[5] This federal policy is called the "Petite policy," based on *Petite v. United States*, 361 U.S. 529 (1960).

proceedings. *See* U.S. Attorney's Manual § 9-2-031. That requirement cannot be met here.

Rather, Petitioner's circumstance presents a stark example of the severe consequences of inadequate respect for and deference to state determinations. Carachuri-Rosendo was a lawful permanent resident who has since been removed from the country and separated from his fiancée and four children, all of whom are U.S. citizens, based on a misdemeanor conviction for possession of a single tablet of Xanax, an anti-anxiety drug, without a prescription. This simple possession conviction was deemed a recidivist felony by the immigration court because of a prior misdemeanor conviction for possession of zero to two ounces of marijuana, despite the state prosecutor's decision not to charge Petitioner as a recidivist.

When a federal court countermands a state prosecutor's considered decision in this fashion, it causes disparate treatment among state and federal defendants based solely on which government brought the prosecution. Had a federal prosecutor made the same charging decision with respect to Petitioner's second offense, her decision and Petitioner's immigration status would have remained undisturbed. Without addressing the point, the Fifth Circuit nonetheless held that despite the considered decision of the state prosecutor not to pursue a felony charge, a federal immigration court may second-guess that exercise of discretion and penalize Petitioner as if he had been charged and convicted as a recidivist.

Indeed, given that nearly all criminal prosecutions proceed in state rather than federal court, the Court of Appeals' approach risks a pervasive problem. As noted above, the U.S. Attorney's Manual contemplates treating the decision to file an information under section 851 for a recidivist enhancement as equivalent to the decision to file a charge and notes that there are legitimate policy reasons why a prosecutor might decline to charge a defendant as a recidivist. U.S. Attorney's Manual § 9-27.300 cmt. "Such a reason might include, for example, that the United States Attorney's office is particularly overburdened, the case would be time-consuming to try, and proceeding to trial would significantly reduce the total number of cases disposed of by the office." *Id.*

In practice, federal prosecutors readily exercise their discretion to decline a recidivist charge. According to figures compiled by the Bureau of Justice Statistics, 1,376 defendants were charged under 21 U.S.C. § 844 in 2007. In that same year, only 3 defendants were convicted of a recidivist drug felony pursuant to 21 U.S.C. § 851. *See* Bureau of Justice Statistics, Federal Justice Statistics Resource Center, http://fjsrc.urban.org/. By contrast, based on the most recent data available, almost 160,000 defendants were convicted of drug possession felonies in state courts in 2004. *See Drugs and Crime Facts: Drug Law Violations—Pretrial, Prosecution, and Adjudication*, http://www.ojp.usdoj.gov/bjs/dcf/ptrpa.htm#prosecut.[6] Thus,

---

[6] Only data on felony (not misdemeanor) offenses are available on the Bureau of Justice Statistics website.

while a miniscule portion of federal defendants in drug cases have actually been convicted of recidivist felonies, many thousands of state defendants convicted of drug possession misdemeanors could be treated as recidivist felons under federal law under the Fifth Circuit's approach. If federal prosecutors properly consider whether they are overburdened or whether resources merit prosecution in deciding whether to charge a defendant as a recidivist, certainly state prosecutors—with their far more crushing caseloads—are entitled to take those same factors into account and receive the same deference as to their judgment.

III. This Court Should Grant *Certiorari* Because the Scheme Set Forth By the Fifth Circuit Can Lead to a Violation of a Defendant's Right to Trial by Jury Under the Sixth Amendment.

Should the Fifth Circuit's decision stand, defendants convicted of a misdemeanor offense to which a jury trial right does not attach could nevertheless have that conviction treated as an aggravated felony—an offense to which the right *does* attach. To treat a defendant as a convicted felon while depriving her of a trial by jury for that offense violates her rights under the Sixth Amendment.

Under the Sixth Amendment, "a defendant is entitled to a jury trial whenever the offense for which he is charged carries a maximum authorized prison term of greater than six months." *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 542 (1989); *see also* U.S. CONST. amend. VI. There is, however,

"a category of petty crimes or offenses which is not subject to the Sixth Amendment jury trial provision." *Duncan v. Louisiana*, 391 U.S. 145, 159 (1968). While this Court has declined to categorically classify offenses carrying a maximum term of six months or less as "petty" offenses, it has held that it is "appropriate to presume for purposes of the Sixth Amendment that society views such an offense as 'petty.'" *Blanton*, 489 U.S. at 543-44. In light of this presumption, "[a] defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Id.* at 544.

Some jurisdictions have limited the jury trial right to extend only to charges for offenses with an authorized term of greater than six months. *See, e.g.*, N.Y. CRIM. PROC. LAW § 340.40(2). Other jurisdictions have authorized maximum penalties for several drug possession offenses of less than six months. *See, e.g.*, COLO. REV. STAT. § 18-18-406(3) (possession and open display or consumption of not more than one ounce of marijuana is punishable at maximum by a fine and 15 days in county jail). Thus, in jurisdictions with limitations upon the jury trial right, there are drug possession offenses to which that right does not attach, but which, for a defendant convicted multiple times, could under the Court of Appeals' approach be treated as aggravated felonies. For example, under New York law, criminal possession of marijuana in the fifth degree is a Class B misdemeanor, N.Y. PENAL LAW § 221.10,

punishable by a term of imprisonment that "shall not exceed three months," N.Y. PENAL LAW § 70.15(2). A defendant in New York City charged with a misdemeanor with an authorized term of less than six months is eligible only for a bench trial, *see* N.Y. CRIM. PROC. LAW § 340.40(2). Thus, a defendant twice-convicted in New York City of possession of marijuana in violation of § 221.10 facing removal proceedings in the Fifth Circuit could be treated as a felon, despite being unable to secure a trial by jury for the second offense in violation of her Sixth Amendment right to trial by jury.

This Court should grant *certiorari* in this case to ensure that such violations under the scheme set forth by the Fifth Circuit decision—which would depend in large part upon the arbitrary factor of where removal proceeds are initiated—do not occur.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

CATHERINE M. AMIRFAR
Counsel of Record
HELEN V. CANTWELL
MARGARET D. SPILLANE
JILL VAN BERG
YOUNG K. LEE
DEBEVOISE & PLIMPTON LLP
919 Third Avenue
New York, NY 10022
(212) 909-6000

Of Counsel:
ANTHONY S. BARKOW
DAVID B. EDWARDS
CENTER ON THE ADMINISTRATION
OF CRIMINAL LAW
110 West Third Street
Suite 214
New York, NY 10012
(212) 998-6612

August 17, 2009