

No. 09-60

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 A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

**BRIEF FOR AMICUS CURIAE
CENTER FOR COURT INNOVATION
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS CURIAE.....	1
SUMMARY OF ARGUMENT	2
BACKGROUND.....	5
REASONS FOR GRANTING THE WRIT	12
I. RESOLUTION OF THE CIRCUIT SPLIT IN THIS CASE IS WARRANTED BECAUSE IT ADDRESSES AN ISSUE THAT IMPACTS THE EFFECTIVENESS OF THE DRUG COURT MODEL FOR NONCITIZENS WHO SEEK DRUG TREATMENT.....	12
A. Resolution Of The Split Will Deter- mine Whether Noncitizens With Prior Drug Possession Convictions Who Have Successfully Completed Drug Treatment Programs Are Barred From Seeking Discretionary Relief From Removal And Applying For Natural- ization	12
B. Resolution Of The Split Will Deter- mine Whether Drug Courts May Re- main Effective As A Tool To Promote Participation In And Completion Of Drug Treatment For Noncitizens With Prior Drug Possession Convictions.....	17

TABLE OF CONTENTS – Continued

	Page
II. RESOLUTION OF THE CIRCUIT SPLIT IN THIS CASE IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE ABILITY OF DRUG COURTS TO ADVISE NONCITIZEN PARTICIPANTS WITH PRIOR DRUG POSSESSION CONVICTIONS OF THE CONSE- QUENCES OF SUCCESSFUL COMPLE- TION OF DRUG TREATMENT PRO- GRAMS.....	23
CONCLUSION	27

TABLE OF AUTHORITIES

Page

CASES

<i>Alsol v. Mukasey</i> , 548 F.3d 207 (2d Cir. 2008).....	3, 25
<i>Berhe v. Gonzales</i> , 464 F.3d 74 (1st Cir. 2006).....	3
<i>Carachuri v. Holder</i> , 570 F.3d 263 (5th Cir. 2009).....	3, 23, 25
<i>Fernandez v. Mukasey</i> , 544 F.3d 862 (7th Cir. 2008).....	3, 23
<i>Lujan-Armendariz v. INS</i> , 222 F.3d 728 (9th Cir. 2000).....	13, 14
<i>Matter of Carachuri-Rosendo</i> , 24 I&N Dec. 382 (BIA 2007) (en banc).....	2, 23
<i>Matter of C-V-T</i> , 22 I&N Dec. 7 (BIA 1998).....	15
<i>Matter of Roldan-Santoyo</i> , 22 I&N Dec. 224 (BIA 1999).....	13
<i>Matter of Salazar-Regino</i> , 23 I&N Dec. 223 (BIA 2002) (en banc).....	14
<i>Matter of West</i> , 22 I&N Dec. 1405 (BIA 2000).....	24
<i>Rashid v. Mukasey</i> , 531 F.3d 438 (6th Cir. 2008).....	3
<i>Steele v. Blackmun</i> , 236 F.3d 130 (3d Cir. 2001).....	3

STATUTES

8 U.S.C. § 1101(a)(43)(B).....	2
8 U.S.C. § 1101(a)(48)(A).....	13
8 U.S.C. § 1101(f).....	16

TABLE OF AUTHORITIES – Continued

	Page
8 U.S.C. § 1158.....	15
8 U.S.C. § 1226(c)	24
8 U.S.C. § 1227(a)(2)(B)(i)	14
8 U.S.C. § 1227(a)(2)(B)(ii)	14
8 U.S.C. § 1229b(a).....	15
8 U.S.C. § 1252(b)(2).....	24
8 U.S.C. § 1427(a).....	16
8 U.S.C. § 1611.....	10
8 U.S.C. § 1621	10
42 U.S.C. § 3797u-1	18
42 U.S.C. § 3797u-2.....	18

OTHER AUTHORITIES

Alina Das, <i>Immigrants and Problem-Solving Courts</i> , 33 CRIMINAL JUSTICE REVIEW 308 (2008).....	11
STEVEN BELENKO & TAMARA DUMANOVSKY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, Pub. No. NCJ-144531 PROGRAM BRIEF: SPECIAL DRUG COURTS (1993).....	18
BUREAU OF JUSTICE ASSISTANCE, U.S. DEP'T OF JUSTICE, DEFINING DRUG COURTS: THE KEY COMPONENTS (2004)	19

TABLE OF AUTHORITIES – Continued

	Page
AMANDA B. CISSNER & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND ‘DO THEY WORK?’ (2005).....	8, 20
DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP’T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS (1998).....	22
John S. Goldkamp, <i>The Origin of the Treatment Drug Court in Miami, in THE EARLY DRUG COURTS 19</i> (W. Clinton Terry, III ed., 1999).....	7
C. WEST HUDDLESTON, III ET AL., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES (2008).....	7, 8, 13, 19
HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES (April 2009).....	11
NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, DEFINING DRUG COURTS: THE KEY COMPONENTS (1997)	17
NATIONAL INSTITUTE OF JUSTICE, U.S. DEP’T OF JUSTICE, DRUG COURTS: THE SECOND DECADE (June 2006).....	6, 13, 19, 20
OFFICE OF NATIONAL DRUG CONTROL POLICY, DRUG COURTS	7
OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: FY2010 BUDGET SUMMARY (May 2009).....	9

TABLE OF AUTHORITIES – Continued

	Page
MICHAEL REMPEL ET AL., CENTER FOR COURT INNOVATION, THE NEW YORK STATE DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS (2003).....	8
NANCY R. RYTINE, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, ESTIMATES OF LEGAL PERMANENT RESIDENT POPULATION IN 2007 (2007)	11
THE PARTNERSHIP FOR A DRUG-FREE AMERICA, PRESIDENTIAL CANDIDATES WEIGH IN: RESPONSE OF SENATOR BARACK OBAMA (Dec. 13, 2007)	9
U.S. ATTORNEY GENERAL ERIC HOLDER, JR., REMARKS AS PREPARED FOR DELIVERY BY ATTORNEY GENERAL ERIC HOLDER AT THE VERA INSTITUTE OF JUSTICE'S THIRD ANNUAL JUSTICE ADDRESS (July 9, 2009).....	10
U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEP'T OF HOMELAND SECURITY, N-400 APPLICATION FOR NATURALIZATION (2009)	16
U.S. DEP'T OF HOMELAND SECURITY, RESPONSE TO FOIA CASE No. 09-FOIA-1243 (Feb. 6, 2009)	25
U.S. GOV'T ACCOUNTABILITY OFFICE, PUBL'N No. 05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES (2005)	7, 9, 18, 19

INTEREST OF AMICUS CURIAE¹

The split among the courts of appeals over the proper application of the “aggravated felony” label to individuals with more than one simple drug possession offense has broad significance for noncitizens, their families and communities, and the courts that focus on breaking the cycle of drug addiction and crime. Increasingly the criminal justice system has turned to drug courts and other court-involved drug treatment programs as a problem-solving solution to drug addiction and crime. Individuals charged with drug offenses now have the opportunity to participate in drug treatment and, if successful, earn a reduction or dismissal of the charges against them. The question and uncertainty over whether noncitizens with a prior drug possession conviction who successfully complete drug treatment are nonetheless subject to mandatory deportation as “aggravated felons” has created a host of difficulties for the administration of these court programs in communities with immigrant populations. Amicus submits this brief to urge the Court to resolve this issue.

¹ Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amicus states that no counsel for a party authored any part of the brief, and no person or entity other than amicus and their counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

Amicus the **Center for Court Innovation** is a non-profit, non-partisan organization dedicated to helping courts and criminal justice agencies reduce crime and improve public confidence in the justice system. Through demonstration projects, expert research, training, and technical assistance, the Center works with jurisdictions throughout the United States to implement problem-solving initiatives. Since the Center’s founding, it has been actively engaged in studying and promoting the development of drug courts across the country.



SUMMARY OF ARGUMENT

The circuit split in this case raises the question of whether a person who has more than one simple drug possession offense should be automatically labeled as having an “aggravated felony” conviction under 8 U.S.C. § 1101(a)(43)(B). The Board of Immigration Appeals (BIA) has taken the position that such an individual should not be labeled as an aggravated felon unless the person was convicted as a recidivist – and therefore the equivalent of a federal felon – in the actual criminal proceeding.² Four circuits have reached the same conclusion, but two circuits – the Fifth and the Seventh – hold that anyone with more than one simple drug possession offense, regardless of

² *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (en banc).

whether he or she was treated as a recidivist in the criminal case, is an aggravated felon and thus barred from seeking discretionary relief from deportation from an immigration judge or becoming a citizen.³

Amicus urges the Court to resolve the circuit split on this issue for two reasons. First, this issue has a profound impact on courts' work with noncitizens with a prior drug possession conviction who seek to or have overcome drug addiction through drug court programs. The standard drug court procedure requires participants to plead guilty or admit facts sufficient for a conviction but offers participants who successfully complete drug treatment a reduction or dismissal of the charges against them. Noncitizens who successfully participate in drug treatment court programs are generally still

³ Compare *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (holding that, in order to be deemed to have been convicted of an aggravated felony based on having more than one drug possession conviction, a noncitizen must have been convicted of a *recidivist* drug offense in his or her criminal proceeding), and *Rashid v. Mukasey*, 531 F.3d 438 (6th Cir. 2008) (same), and *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006) (same), and *Steele v. Blackmun*, 236 F.3d 130 (3d Cir. 2001) (same), with *Carachuri v. Holder*, 570 F.3d 263 (5th Cir. 2009) (holding that a noncitizen who is convicted of a drug possession offense following any prior final drug possession conviction will automatically be deemed to have been convicted of an aggravated felony even when he or she was not convicted of a recidivist drug offense in his or her criminal proceeding), and *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008) (same), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009).

deemed to be deportable as having a controlled substance “conviction” under immigration law, but would be able to seek discretionary relief from deportation. Normally, evidence of successful rehabilitation would be a positive factor for an immigration benefit or relief from deportation. However, being labeled an aggravated felon changes the calculus because it prevents a noncitizen with a prior drug possession conviction from even being considered for discretionary relief from deportation and subjects him or her to numerous other consequences, including a permanent bar to naturalization. This paradoxical result puts the criminal court system in the difficult position of trying to encourage noncitizens to participate in and complete drug court programs despite the fact that even successful participation may result in their mandatory deportation. It fundamentally changes the incentive structure that makes drug courts effective in breaking the cycle of drug addiction and crime, a goal important to the participants, their families and communities, and local, state, and federal government.

Second, the uncertainty resulting from the circuit split over this issue has made it difficult, if not impossible, for courts to advise noncitizen participants of the consequences of their participation in drug court programs. Noncitizens with virtually any type of drug possession conviction may be detained and placed in removal proceedings anywhere in the country. If they end up in removal proceedings within

the Fifth or Seventh Circuits, successful drug court participants who have any prior drug possession conviction face mandatory deportation with no consideration given to their rehabilitation. If they end up outside the Fifth or Seventh Circuits, successful drug court participants will be able to provide evidence of their rehabilitation to an immigration judge, who will in turn be able to make a decision about whether to grant discretionary relief from removal. The stark differences between the potential outcomes for successful participants in drug court programs makes the uncertainty over this issue particularly difficult for courts who seek to utilize these innovative programs.

Given the importance of this issue to the effectiveness of criminal courts' drug treatment initiatives and the uncertainty that the circuit split engenders for courts' work with noncitizens, amicus urges this Court to grant certiorari in this case.



BACKGROUND

The issue in this case affects people who have faced or will face simple drug possession charges after any prior such conviction. The criminal justice system has long struggled with how to break the cycle of drug crimes. The resolution of this case is likely to affect the implementation and accessibility of one rapidly expanding and effective solution – drug courts – for noncitizens.

Over the last two decades, drug courts have developed as an innovative response to the failure of traditional criminal justice solutions to curb the incidence of drug crime.⁴ In order to improve public safety, federal and state governments have increasingly recognized the need for programs that confront the addiction underlying many drug possession offenses. The drug courts that have emerged are the result of the coordinated efforts of the judiciary, prosecution, defense bar, probation, law enforcement, treatment, mental health, and social services to intervene and break the cycle of drug abuse, addiction, and crime.⁵

Under the standard drug court model, defendants are offered an opportunity for regimented drug treatment in lieu of the typical punitive sanctions and incarceration associated with drug offenses. Courts closely monitor defendants' progress in treatment and use a series of legal incentives to compel successful completion of the program. If the defendant successfully completes treatment, the drug court may vacate any plea and reduce or dismiss the charges against him or her.⁶ Such a result is a win-win for the parties in the criminal case and the community as a whole.

⁴ See NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, DRUG COURTS: THE SECOND DECADE 1 (June 2006).

⁵ See *id.*

⁶ See *id.* at 2.

The first drug court was established in Dade County, Florida in 1989.⁷ Since then, drug courts have spread across the country. Currently, there are a total of 2,140 drug courts in the United States and another 284 in the planning stages.⁸ This represents a thirty-two percent increase since 2004.⁹ Drug courts operate or are being planned in each of the fifty states, the District of Columbia, Puerto Rico, Guam, Northern Mariana Islands, two Federal Districts, and more than seventy tribal locations across the United States.¹⁰

The rapid expansion of the drug court model has been fueled by studies confirming the effectiveness of the program. In 2005, the U.S. Government Accountability Office conducted a comprehensive survey of the effectiveness of drug courts and found evidence of consistent reductions in the incidence of new arrests and convictions for drug court participants.¹¹ A series

⁷ John S. Goldkamp, *The Origin of the Treatment Drug Court in Miami*, in *THE EARLY DRUG COURTS* 19, 22 (W. Clinton Terry, III ed., 1999).

⁸ OFFICE OF NATIONAL DRUG CONTROL POLICY, *DRUG COURTS*, <http://www.whitehousedrugpolicy.gov/enforce/DrugCourt.html> (last visited Aug. 10, 2009).

⁹ C. WEST HUDDLESTON, III ET AL., *PAINTING THE CURRENT PICTURE: A NATIONAL REPORT CARD ON DRUG COURTS AND OTHER PROBLEM SOLVING COURT PROGRAMS IN THE UNITED STATES* 1 (2008).

¹⁰ OFFICE OF NATIONAL DRUG CONTROL POLICY, *supra* note 8.

¹¹ U.S. GOV'T ACCOUNTABILITY OFFICE, *PUBL'N No. 05-219, ADULT DRUG COURTS: EVIDENCE INDICATES RECIDIVISM REDUCTIONS AND MIXED RESULTS FOR OTHER OUTCOMES* (2005).

of recent evaluations have reached the same conclusions.¹² For example, a multi-site study by the Center for Court Innovation found that drug courts in New York State generated significant offense reduction for participants over a three-year post-arrest period compared with similar non-participating defendants.¹³ Offense reduction was most pronounced for graduates of drug court programs.¹⁴ Other research has also indicated that drug courts may be particularly effective for participants with prior possession convictions – a circumstance not uncommon for people who suffer from addiction and would most benefit from treatment.¹⁵ Moreover, studies confirm that drug

¹² See HUDDLESTON, *supra* note 9, at 6, 8 (summarizing studies of the effectiveness of drug courts in various jurisdictions).

¹³ MICHEL REMPEL ET AL., CENTER FOR COURT INNOVATION, THE NEW YORK STATE DRUG COURT EVALUATION: POLICIES, PARTICIPANTS AND IMPACTS x (2003) (reporting a twenty-nine percent recidivism reduction over a three-year post-arrest period and an average thirty-two percent reduction over a one-year post-program period when compared with cases processed in conventional courts).

¹⁴ REMPEL ET AL., *supra* note 13, at xi.

¹⁵ AMANDA B. CISSNER & MICHAEL REMPEL, CENTER FOR COURT INNOVATION, THE STATE OF DRUG COURT RESEARCH: MOVING BEYOND ‘DO THEY WORK?’ 14 (2005) (noting research indicates that drug courts may be more effective in reducing the likelihood of re-offending for participants with a prior criminal record than for those who have committed first-time offenses).

courts produce these positive results with significant cost-savings for local, state, and federal government.¹⁶

For these reasons, the federal government has strongly endorsed the drug court model. The Obama Administration has requested \$58.9 million in federal funding for drug courts for fiscal year 2010, a \$35 million increase from the previous fiscal year.¹⁷ This comports with President Obama's stated commitment to "ensure that states have the resources to support existing drug courts, which have been proven successful in dealing with non-violent offenders" and to "replicate these efforts within the federal criminal justice system."¹⁸ The U.S. Department of Justice has championed the drug court model. Noting the impact of drug courts in New York State, U.S. Attorney General Eric Holder, Jr. recently proclaimed the importance of promoting drug courts as effective drug policy:

One promising, viable solution to the devastating effect of drugs on the criminal

¹⁶ See U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 11, at 7 (noting that benefits exceeded costs by a range of \$1,000-\$15,000 per participant in the drug courts studied).

¹⁷ OFFICE OF NATIONAL DRUG CONTROL POLICY, NATIONAL DRUG CONTROL STRATEGY: FY2010 BUDGET SUMMARY 4 (May 2009).

¹⁸ THE PARTNERSHIP FOR A DRUG-FREE AMERICA, PRESIDENTIAL CANDIDATES WEIGH IN: RESPONSE OF SENATOR BARACK OBAMA (Dec. 13, 2007), http://www.drugfree.org/Portal/DrugIssue/Features/Presidential_Candidates_Weigh_In (last visited Aug. 10, 2009).

justice system and on American communities is the implementation of more drug treatment courts. Drug court programs provide an alternative to incarceration for non-violent offenders by focusing on treatment of their underlying addiction. Program participants are placed in treatment and routinely tested for drug use – with the imposition of immediate sanctions for positive tests balanced with suitable incentives to encourage abstinence from drug use. These programs give no one a free pass. They are strict and can be extraordinarily difficult to get through. But for those who succeed, there is the real prospect of a productive future.¹⁹

This goal of having a “real prospect of a productive future” is one shared by participants in drug court programs in communities across the country – including communities with high immigrant populations. Drug courts are open to both citizens and noncitizens with legal status.²⁰ As of 2007, there were 12.8 million lawful permanent

¹⁹ U.S. ATTORNEY GENERAL ERIC HOLDER, JR., REMARKS AS PREPARED FOR DELIVERY BY ATTORNEY GENERAL ERIC HOLDER AT THE VERA INSTITUTE OF JUSTICE’S THIRD ANNUAL JUSTICE ADDRESS (July 9, 2009), <http://www.usdoj.gov/ag/speeches/2009/ag-speech-090709.html> (last visited Aug. 10, 2009).

²⁰ Some drug court programs may require direct proof of status to establish participants’ ability to arrange for payment for treatment, which typically involves Medicaid coverage. Medicaid coverage is limited to “qualified aliens” with legal status. *See* 8 U.S.C. §§ 1611, 1621.

residents living in the United States.²¹ While there are no statistics of the number of permanent residents enrolled in drug court programs, a significant number of noncitizens face deportation for drug offenses.²² Many drug courts have worked with noncitizens who seek treatment, particularly in states with high noncitizen populations.²³

The drug court model, with its proven results, is changing the way that traditional court systems are handling drug possession crimes. Its effectiveness and accessibility for noncitizens is an issue of significant importance to amicus and the courts with which it works throughout the United States.



²¹ NANCY R. RYTINE, OFFICE OF IMMIGRATION STATISTICS, U.S. DEP'T OF HOMELAND SECURITY, ESTIMATES OF LEGAL PERMANENT RESIDENT POPULATION IN 2007 1 (2007).

²² See HUMAN RIGHTS WATCH, FORCED APART (BY THE NUMBERS): NON-CITIZENS DEPORTED MOSTLY FOR NONVIOLENT OFFENSES 32 (April 2009) (reporting that the United States has deported at least 122,180 noncitizens based on nonviolent drug offenses between 1997 and 2007).

²³ See Alina Das, *Immigrants and Problem-Solving Courts*, 33 CRIMINAL JUSTICE REVIEW 308, 309 (2008) (noting that the immigration consequences of participation in problem-solving court programs may pose a significant issue for courts in states with high noncitizen populations).

REASONS FOR GRANTING THE WRIT

I. RESOLUTION OF THE CIRCUIT SPLIT IN THIS CASE IS WARRANTED BECAUSE IT ADDRESSES AN ISSUE THAT IMPACTS THE EFFECTIVENESS OF THE DRUG COURT MODEL FOR NONCITIZENS WHO SEEK DRUG TREATMENT.

The resolution of the question of whether a successful drug court participant with a prior simple drug possession conviction must automatically be labeled an “aggravated felon” will fundamentally affect drug courts’ ability to serve as an effective and cost-efficient means to address drug use by non-citizens and to positively impact immigrant families and communities. An interpretation that results in the mandatory deportation of successful graduates of drug court programs who have prior simple possession dispositions undermines the incentive for noncitizens to participate in these programs.

A. Resolution Of The Split Will Determine Whether Noncitizens With Prior Drug Possession Convictions Who Have Successfully Completed Drug Treatment Programs Are Barred From Seeking Discretionary Relief From Removal And Applying For Naturalization.

Virtually all noncitizens who participate successfully in drug court programs are deportable. The critical issue is whether the aggravated felony

definition is read so broadly as to deny all noncitizen drug court participants with prior simple drug possession convictions any possibility of discretionary relief from deportation or naturalization.

The drug court model typically requires a defendant to plead guilty to the initial charges.²⁴ Upon successful completion of treatment, the drug court may reduce or dismiss the charges against the defendant.²⁵ The Board of Immigration Appeals typically considers such a provisional plea, even if vacated after successful treatment, to constitute a “conviction” for purposes of immigration law.²⁶ Thus a

²⁴ While some drug courts permit participants to enter treatment without a guilty plea, the majority of drug courts currently require a guilty plea upfront. *See HUDDLESTON, supra* note 9, at 4-5.

²⁵ *See NATIONAL INSTITUTE OF JUSTICE, supra* note 4, at 2.

²⁶ *See* 8 U.S.C. § 1101(a)(48)(A) (defining a “conviction” as “a formal judgment of guilt of the alien entered by a court” or, “if adjudication of guilt has been withheld, where: (i) a judge or jury has found the alien guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and (ii) the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed”); *Matter of Roldan-Santoyo*, 22 I&N Dec. 224 (BIA 1999) (holding that a noncitizen who pleads guilty to a drug offense but later receives an expungement pursuant to a deferred adjudication program will be deemed to have a “conviction” under 8 U.S.C. § 1101(a)(48)(A)). *But see Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000) (holding that a noncitizen who receives an expungement of his first-time simple drug possession offense pursuant to a state rehabilitative statute does not have a “conviction” because his or her offense would have qualified for treatment under the Federal First Offender Act). The Board

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participant in drug court is likely to be considered deportable and face other immigration consequences associated with having drug possession offenses.²⁷ Moreover, virtually any individual with a prior simple drug possession conviction is, of course, already deportable for that offense.²⁸ The question presented in this case is whether noncitizens with more than one such simple drug possession offense are also subject to being classified as having an “aggravated felony” conviction – barring immigration judges from exercising judicial discretion.

Congress has created a graduated scheme of immigration consequences for drug offenses, allowing immigration judges to decide whether to grant certain noncitizens with drug convictions forms of relief such as cancellation of removal, asylum, or other waivers if they can prove sufficient positive

of Immigration Appeals does not follow *Lujan-Armendariz* outside the Ninth Circuit. *Matter of Salazar-Regino*, 23 I&N Dec. 223 (BIA 2002) (en banc).

²⁷ 8 U.S.C. § 1227(a)(2)(B)(i) (“Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one’s own use of 30 grams or less of marijuana, is deportable.”); *see also* 8 U.S.C. § 1227(a)(2)(B)(ii) (“Any alien who is, or at any time after admission has been, a drug abuser or addict is deportable.”).

²⁸ 8 U.S.C. § 1227(a)(2)(B)(i).

equities or threat of persecution upon deportation.²⁹ The existence of these forms of relief provides noncitizens charged with drug offenses a strong incentive to complete drug treatment. Noncitizens' successful completion of rehabilitation programs leaves open the possibility of obtaining discretionary relief by showing an immigration judge that they have overcome addiction and deserve to remain in the United States with their families.³⁰ The question of whether a noncitizen with a prior drug possession conviction will be deemed mandatorily deportable after successfully completing drug treatment is therefore a critical issue for drug courts.

Similarly, the case implicates the issue of whether noncitizens with prior simple drug possession convictions who have already successfully completed drug court programs are eligible for naturalization. In addition to state criminal conviction information, the application for naturalization requires applicants to state whether they have ever been "placed in an alternative sentencing or rehabilitative program (for example: diversion,

²⁹ See, e.g., 8 U.S.C. § 1229b(a) (listing requirements for cancellation of removal for lawful permanent residents); 8 U.S.C. § 1158 (listing requirements for asylum).

³⁰ See *Matter of C-V-T*, 22 I&N Dec. 7, 12 (BIA 1998) (explaining that, in addition to other evidence of positive equities meriting cancellation of removal, "a respondent who has a criminal record will ordinarily be required to present evidence of rehabilitation before relief is granted as a matter of discretion").

deferred prosecution, withheld adjudication, deferred adjudication).”³¹ This question elicits information about dispositions such as those provided by drug courts. In circuits that interpret the aggravated felony label to apply to anyone with more than one simple possession disposition, even longtime legal permanent residents who have successfully completed drug treatment will face not only automatic denial of their citizenship application but will also be subject to referral for mandatory deportation.³²

The aggravated felony label is the most severe of the graduated sanctions Congress created for drug offenses, and one that would harshly affect successful participants in drug court. Successful drug court participants are already deportable because of their simple possession offenses – this case is about whether the law further requires the elimination of all judicial discretion in those deportation proceedings. Such an interpretation would bind the hands of immigration judges, mandating that noncitizens who have overcome their addictions as a result of drug treatment courts be deported despite their rehabilitation.

³¹ U.S. CITIZENSHIP AND IMMIGRATION SERVICES, U.S. DEP’T OF HOMELAND SECURITY, N-400 APPLICATION FOR NATURALIZATION (2009), <http://www.uscis.gov/files/form/N-400.pdf> (last visited Aug. 10, 2009).

³² 8 U.S.C. §§ 1101(f) (stating that a person who has been convicted of an aggravated felony is permanently barred from establishing “good moral character”), 1427(a) (requiring “good moral character” as a requirement for naturalization).

B. Resolution Of The Split Will Determine Whether Drug Courts May Remain Effective As A Tool To Promote Participation In And Completion Of Drug Treatment For Noncitizens With Prior Drug Possession Convictions.

Given the severe consequences that attach to an “aggravated felony” conviction, the resolution of this case will determine whether drug courts are able to effectively serve noncitizens with prior simple possession convictions who seek treatment. Drug courts operate on an incentive model, using the coercive leverage of the criminal justice system to encourage individuals to participate in and complete drug treatment programs. An interpretation that labels any noncitizen with more than one prior possession disposition who successfully completes drug treatment an aggravated felon, therefore mandating their deportation without consideration of positive equities, eviscerates the incentives necessary for the drug court model to work effectively.

Though the scope and nature of drug courts vary from jurisdiction to jurisdiction, all share certain common elements and reflect recognition that the coercive leverage of the criminal justice system is a powerful tool to promote participation in and compliance with treatment.³³ Under the standard

³³ See NATIONAL ASSOCIATION OF DRUG COURT PROFESSIONALS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (1997) (describing common elements of the drug court model).

drug court model, defendants are first screened for eligibility based on their criminal history, eligibility for drug treatment, and current case information.³⁴ Most drug court programs are reserved for defendants charged with drug possession or other nonviolent offenses.³⁵ Most drug court programs are not accessible to defendants charged with drug trafficking crimes.³⁶

Eligible defendants must decide whether to participate in drug court, thereby foregoing the traditional criminal court process of adversarial plea bargaining or trial. In the traditional criminal court system, defendants focus on seeking a favorable plea bargain with the prosecutor or taking their case to trial in an adversarial context. In drug courts, the prosecutor and defense counsel are encouraged to “shed their traditional adversarial courtroom relationship and work as a team,” such that “the team’s focus is on the participant’s recovery and

³⁴ See U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 11, at 37-38.

³⁵ Any drug court program that allows participation by either current or past violent offenders cannot receive federal grants administered under Title II of the 21st Century Department of Justice Appropriations Authorization Act. 42 U.S.C. § 3797u-1. See 42 U.S.C. § 3797u-2 (defining “violent offender”).

³⁶ See STEVEN BELENKO & TAMARA DUMANOVSKY, BUREAU OF JUSTICE ASSISTANCE, U.S. DEP’T OF JUSTICE, Pub. No. NCJ-144531 PROGRAM BRIEF: SPECIAL DRUG COURTS 5 (1993) (noting that many drug courts handle only drug possession cases).

law-abiding behavior – not on the merits of the pending case.”³⁷ Rather than challenge guilt or seek a lesser plea bargain, defendants in drug court are typically required to plead guilty to the charges at the outset.³⁸ Instead of incarceration, the defendant then enters into treatment, which typically lasts at least twelve months, and may be inpatient or outpatient, while the drug court closely monitors his or her progress.³⁹ If the defendant fails to complete treatment, the drug court may impose sanctions or sentence him or her according to the initial plea. If the defendant successfully completes treatment, however, the drug court may vacate the plea and reduce or dismiss the charges against him or her.⁴⁰

Participation in drug courts thus involves the potential for high reward to the defendant. A successful defendant has the opportunity to reintegrate back into society with evidence of rehabilitation and avoids receiving an additional conviction on his or her criminal record. An unsuccessful defendant, however, may receive a higher sentence on his or her initial plea in drug court than he or she might if he or she opted for trial or plea-bargaining. Indeed, drug courts use the “carrot” of the reduction or dismissal of charges, with the “stick” of incarceration and other

³⁷ BUREAU OF JUSTICE ASSISTANCE, U.S. DEPT OF JUSTICE, *DEFINING DRUG COURTS: THE KEY COMPONENTS* 3 (2004).

³⁸ HUDDLESTON, *supra* note 9, at 4-5.

³⁹ *See* U.S. GOV'T ACCOUNTABILITY, *supra* note 11, at 3.

⁴⁰ *See* NATIONAL INSTITUTE OF JUSTICE, *supra* note 4, at 2.

sanctions, to motivate the completion of treatment. The coercive power of the court contributes to the success of the drug court model.⁴¹ The model does not work without both the carrot and the stick.

An interpretation that labels any noncitizen with a prior simple drug possession conviction who successful completes drug treatment as an “aggravated felon” removes the “carrot” of eligibility for discretionary relief from deportation, leaving only the “stick” of punishment. For noncitizens who have only one prior simple drug possession conviction, participation in drug treatment court – due to the provisional plea – may be precisely what deems them to be an aggravated felon. There is no incentive for them to participate, and every incentive to opt for trial or a plea to a nondrug offense. For noncitizens who already have more than one prior simple drug possession conviction, participation in drug treatment court will not make them any more or less of an aggravated felon, but the benefits of drug treatment – proof of rehabilitation – are undermined because an

⁴¹ See, e.g., *id.* at 1 (“By providing a structure that links supervision and treatment, drug courts exert legal pressure on defendants to enter and remain in treatment long enough to realize benefits. More than two-thirds of participants who begin treatment through a drug court complete it in a year or more – a six-fold increase in retention compared with programs outside the justice system.”); CISSNER & REMPEL, *supra* note 15, at 4-5 (2005) (noting that retention rates of drug court programs are believed to be higher than treatment programs outside the court system due to courts’ use of incentives and legal pressure to coerce compliance by defendants).

immigration judge cannot consider any such positive equities. This counterintuitive result – that an immigration judge cannot consider rehabilitation, the very equity that would otherwise be of paramount importance to the exercise of judicial discretion in a deportation case – undermines the incentive structure of the drug court model as well as the fairness of the deportation system.

An interpretation that reaches the opposite result – in line with the reasoned opinion of the Board of Immigration Appeals and the First, Second, Third, and Sixth Circuits – keeps the incentive structure of the drug court model in place and maintains fairness in the deportation system. Successful noncitizen drug court participants emerge from the programs rehabilitated, have avoided jail time and an additional conviction on their state criminal records, and are able to remain with their families and build positive equities to demonstrate in their deportation case. Provided that over five years have passed since the offense, noncitizens who successfully complete drug court programs may be granted U.S. citizenship. The benefits to the individual are significant – because judicial discretion is preserved and mandatory deportation is not the inevitable result.

These benefits also extend beyond the individual to the families and communities of noncitizens. By promoting sobriety and law-abiding behavior, drug courts have the potential to strengthen families and make a profound impact on the health of our society as a whole. Nearly two-thirds of drug court

participants are parents.⁴² Many noncitizen drug offenders have U.S. citizen children and/or spouses whose lives are immeasurably changed for the better when their noncitizen family member completes drug treatment and overcomes his or her substance abuse problem. Drug courts provide a strong incentive for noncitizens with substance abuse issues to complete a rigorous rehabilitation program, and therefore serve the interests of U.S. citizen children and other family members.

Expansion of the “aggravated felony” term to include anyone with more than one simple possession offense will therefore eliminate many of the positive benefits of drug courts by dramatically curtailing the ability of state criminal justice systems to channel noncitizens into treatment programs and unfairly punishing noncitizens who have successfully completed drug treatment and now lead healthy, stable lives. Amicus respectfully requests that the Court grant certiorari in this case to resolve this important issue for the courts.

⁴² DRUG COURT CLEARINGHOUSE AND TECHNICAL ASSISTANCE PROJECT, U.S. DEP’T OF JUSTICE, LOOKING AT A DECADE OF DRUG COURTS 8 (1998).

II. RESOLUTION OF THE CIRCUIT SPLIT IN THIS CASE IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE ABILITY OF DRUG COURTS TO ADVISE NON-CITIZEN PARTICIPANTS WITH PRIOR DRUG POSSESSION CONVICTIONS OF THE CONSEQUENCES OF SUCCESSFUL COMPLETION OF DRUG TREATMENT PROGRAMS.

The resolution of the circuit split is also necessary because the uncertainty over the interpretation at issue renders drug courts unable to advise noncitizen participants with prior drug possession convictions of the consequences of their successful participation. The Board of Immigration Appeals has adopted a rule that does not automatically treat a second simple drug possession offense as an aggravated felony.⁴³ This rule applies unless there is contrary, binding circuit law.⁴⁴ Currently, only the Fifth and Seventh Circuits have contrary law.⁴⁵ Unfortunately, many individuals are detained in those circuits and a drug court will have no way of determining whether one of its participants will be subject to favorable or unfavorable law due to the

⁴³ *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (en banc).

⁴⁴ *Id.* at 394.

⁴⁵ *Carachuri v. Holder*, 570 F.3d 263 (5th Cir. 2009); *Fernandez v. Mukasey*, 544 F.3d 862 (7th Cir. 2008), *reh'g and reh'g en banc denied*, unpublished order, Nos. 06-3476, 06-3987, 06-3994 (Apr. 16, 2009).

Government's method of detention and transfers of immigrants in removal proceedings. This uncertainty prevents drug courts from assessing the effectiveness of their programming for noncitizens and advising potential participants about the consequences of their participation.

Most noncitizens in removal proceedings may be detained, and virtually any noncitizen with a controlled substance conviction who has spent any time in jail, including an arrest, after October 8, 1998 will be considered to be subject to mandatory, no-bond detention for the duration of his or her proceedings.⁴⁶ The Government may detain a noncitizen in an immigration detention facility anywhere in the country, where the noncitizen will be required to appear before an immigration judge. The immigration judge must follow the law of the circuit that binds the immigration court, and not the law that applies where the noncitizen lives or where he or she received his or her dispositions.⁴⁷

The split in the circuits on whether a person with more than one simple possession offense is an aggravated felon thus makes it difficult, if not impossible, for a drug court to advise a potential

⁴⁶ 8 U.S.C. § 1226(c) (listing grounds for mandatory detention); *Matter of West*, 22 I&N Dec. 1405 (BIA 2000) (interpreting the scope of the mandatory detention statute).

⁴⁷ 8 U.S.C. § 1252(b)(2) (providing for circuit review based on “the judicial circuit in which the immigration judge completed the proceedings”).

noncitizen participant of the consequences of his or her participation. A lawful permanent resident who lives in New York, received a drug possession conviction in New York, and then has the opportunity to pursue drug treatment through a New York drug court, may be picked up and detained in a facility within the jurisdiction of the Second Circuit – such as Varick Street Detention Facility in New York or the Bergen County Jail in New Jersey, both under the jurisdiction of the Varick Immigration Court. If that happens, he will be subject to Second Circuit law, which will not deem his drug possession offenses to be aggravated felonies.⁴⁸ He may file for cancellation of removal or asylum, and may later apply for naturalization. If he is transferred to a facility in Texas, such as Port Isabel Detention Center, he will be subject to Fifth Circuit law, which will deem his drug possession offenses to be aggravated felonies.⁴⁹ He will be barred from seeking any relief. This latter, harsher result is not unlikely – a recent response to an Associated Press Freedom of Information Act request revealed that twenty-nine percent of immigrant detainees from around the country are held in detention facilities within the Fifth Circuit.⁵⁰

This creates a significant dilemma for drug courts as they cannot properly advise noncitizen

⁴⁸ *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008).

⁴⁹ *Carachuri v. Holder*, 570 F.3d 263 (5th Cir. 2009).

⁵⁰ U.S. DEP'T OF HOMELAND SECURITY, RESPONSE TO FOIA CASE NO. 09-FOIA-1243 (Feb. 6, 2009) (on file with counsel).

participants on the consequences of their participation in drug treatment. For noncitizens whose removal cases occur outside the Fifth and Seventh Circuits, participation in drug treatment will be a strong benefit to their immigration case because it will permit them to establish rehabilitation and positive equities necessary for relief from removal or an application for naturalization. By contrast, for noncitizens whose removal cases occur in the Fifth and Seventh Circuits, participation in drug treatment may make them worse off. Noncitizens who have only one prior simple drug possession conviction will need to be advised that participation in drug treatment – due to the provisional plea – will be enough to deem them an aggravated felon if they are transferred to the Fifth or Seventh Circuits. Those who already have more than one prior simple drug possession disposition will need to be advised that their successful participation in drug treatment cannot change the outcome of a removal proceeding if they are transferred to one of those circuits because an immigration judge will be unable to consider any equities in their case. These complex consequences and the uncertainty of the applicable law make it difficult, if not impossible, for drug courts to advise noncitizen participants of the consequences of their participation in and completion of drug treatment.



CONCLUSION

For the foregoing reasons, amicus respectfully submits that the petition for the writ of certiorari should be granted.

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