No. 10-_____

IN THE

Supreme Court of the United States

JORGE ALBERTO GARCIA,

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 SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the Immigration and Nationality Act, a lawful permanent resident convicted of an "aggravated felony" is ineligible for cancellation of removal. 8 U.S.C. § 1229b(a)(3). State drug offenses punishable under the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*, are aggravated felonies. *Lopez v. Gonzales*, 549 U.S. 47, 57 (2006). The CSA prohibits "possess[ion] with intent to … distribute … a controlled substance," which includes marijuana. 21 U.S.C. § 841(a)(1). Most of the offenses proscribed by the CSA are federal felonies. 21 U.S.C. § 841(b)(4), however, establishes an exception for offenses where an individual "distribut[es] a small amount of marijuana for no remuneration," providing that such offense "shall be treated as" the offense of simple possession — a federal misdemeanor under 21 U.S.C. § 844(a).

Petitioner pled no contest to attempted possession of an unspecified amount of marijuana with intent to deliver under a Michigan state statute that encompasses distribution of a small amount of marijuana for no remuneration — an offense squarely within the ambit of 21 U.S.C. § 841(b)(4). The question presented, on which the courts of appeals have divided 3-2, is:

Whether a state conviction for possession of unspecified quantity of marijuana categorically constitutes a felony conviction under federal law (and therefore an "aggravated felony" under federal immigration law), even if the offense could fall within the federal misdemeanor exception for low-level drug offenses?

PARTIES TO THE PROCEEDING

Petitioner is Jose Alberto Garcia, petitioner below.

Respondent is United States Attorney General Eric H. Holder, Jr., respondent below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i
PARTIES TO THE PROCEEDING ii
TABLE OF APPENDICES v
TABLE OF AUTHORITIES vii
OPINIONS AND ORDERS BELOW 1
JURISDICTION 1
STATUTORY PROVISIONS INVOLVED 1
STATEMENT OF THE CASE 1
A. Introduction 1
B. Factual Background 5
C. Federal and State Statutory Schemes 6
D. Proceedings Before the Immigration Court and the BIA 8
E. Proceedings Before the Sixth Circuit 10
REASONS FOR GRANTING THE PETITION 11
A. The Courts of Appeals Are Deeply and Irreconcilably Divided on the Question Presented. 11
B. The Sixth Circuit's Erroneous Ruling Contravenes this Court's Precedent. 19

TABLE OF CONTENTS

Page

C. The Question Presented Is Important and Recurring, and this Case Is a Suitable Vehicle for Resolving this Question. 25

CONCLUSION.. 30

TABLE OF APPENDICES

Page

Appendix A
Opinion of the U.S. Court of Appeals for the Sixth Circuit (Mar. 28, 2011) 1a

Appendix B
Decision of the Board of Immigration Appeals (Oct. 14, 2009) 15a

Appendix C
Order of the Immigration Judge (July 18, 2008)... 22a

Appendix D
Oral Decision and Orders of the Immigration Judge (July 18, 2008)............. 25a

Appendix E
Order of the U.S. Court of Appeals for the Sixth Circuit Denying the Petition for Rehearing *En Banc* (June 1, 2011) 44a

Appendix F
21 U.S.C. § 841 .... 46a

Appendix G
21 U.S.C. § 844 .... 75a

Appendix H
Mich. Comp. Laws § 333.7401 (1998) 78a

Appendix I
Mich. Comp. Laws § 50.92........................... 83a

TABLE OF APPENDICES
(continued)

Page

Appendix J
Motion/Order of Nolle Prosequi,
State of Michigan, 10th Judicial Circuit,
Saginaw County,
People v. Garcia,
Case No. 98-015121-FH-3
(Aug. 28, 1998) 85a

Appendix K
Judgment of Sentence,
State of Michigan, 10th Judicial Circuit,
Saginaw County,
People v. Garcia,
Case No. 98-015121-FH-7
(Aug. 28, 1998) 87a

TABLE OF AUTHORITIES

Page(s)

CASES

Aguirre v. INS,
79 F.3d 315 (2d Cir. 1996) 19

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 22, 23

Apprendi v. New Jersey,
530 U.S. 466 (2000) .... passim

Carachuri-Rosendo v. Holder,
130 S. Ct. 2577 (2010) .... passim

Chen v. Mukasey,
524 F.3d 1028 (9th Cir. 2008) 19

Evanson v. Attorney Gen.,
550 F.3d 284 (3d Cir. 2008) 16, 17, 18

In re Aruna,
24 I. & N. Dec. 452 (B.I.A. 2008) 18, 26

In re C-V-T-,
22 I & N. Dec. 7 (B.I.A. 1998) 27

Jeune v. Attorney Gen.,
476 F.3d 199 (3d Cir. 2007) .... passim

Jordan v. Gonzalez,
No. 05-60539, 204 Fed. App'x. 425, 2006 WL 3153479 (5th Cir. Nov. 2, 2006) 14, 16, 17, 25

TABLE OF AUTHORITIES
(continued)

Page

Julce v. Mukasey,
530 F.3d 30 (1st Cir. 2008) .... passim

Lopez v. Gonzales,
549 U.S. 47 (2006) .... passim

Martinez v. Mukasey,
551 F.3d 113 (2d Cir. 2008) .... passim

Patterson v. New York,
432 U.S. 197 (1977) 24

Rendon v. Mukasey,
520 F.3d 967 (9th Cir. 2008) 20

Steele v. Blackman,
236 F.3d 130 (3d Cir. 2001) 17

Thomas v. Attorney Gen.,
625 F.3d 134 (3d Cir. 2010) 16, 21

United States v. Bartholomew,
310 F.3d 912 (6th Cir. 2002) 10, 11, 23, 24

United States v. Darwich,
337 F.3d 645 (6th Cir. 2003) 6

United States v. Outen,
286 F.3d 622 (2d Cir. 2002) (Sotomayor, J.) ....
.... 15, 24

United States v. Walker,
302 F.3d 322 (5th Cir. 2002) 24

TABLE OF AUTHORITIES
(continued)

Page

Wilson v. Ashcroft,
350 F.3d 377 (3d Cir. 2003)................14, 15, 16, 17

STATUTES

18 Pa. Stat. Ann. § 7508(a)(1)(i)................................15

35 Pa. Stat. Ann. § 780-113(a)(30)....................................15

8 U.S.C. § 1101(a)(43)(B) 6

8 U.S.C. § 1101(f)(8)..26

8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i) 26

8 U.S.C. § 1182(a)(2)(A)(i)(II) 6

8 U.S.C. §§ 1182(a)(2)(A)(i)(II), (C).............................6

8 U.S.C. §§ 1182(a)(9)(A)(ii), 1326(a), (b)(2) 25

8 U.S.C. § 1227(a)(2)(A)(iii)...25

8 U.S.C. § 1228(c) 25

8 U.S.C. § 1229b 6

8 U.S.C. § 1229b(a)...27

8 U.S.C. § 1229b(a)(3)....................................6, 9, 21, 25

8 U.S.C. § 1252...1

8 U.S.C. § 1252(a)(2)(C) 25

TABLE OF AUTHORITIES
(continued)

Page

18 U.S.C. § 924(c)(2) 6

21 U.S.C. § 801 *et seq.* 2

21 U.S.C. § 841 1

21 U.S.C. § 841(a) 7, 8

21 U.S.C. § 841(a)(1) 6

21 U.S.C. § 841(b) 6

21 U.S.C. § 841(b)(1)(D) .... passim

21 U.S.C. § 841(b)(4) .... passim

21 U.S.C. § 844 .... 1, 7, 23

21 U.S.C. § 844(a) 20, 22

28 U.S.C. § 1254(1) 1

Ariz. Rev. Stat. Ann. § 13-3405(A), (B)(4) (2010) 26

KRS § 218A.1421(2) 26

Mass. Gen. Laws. ch. 94C, § 32C(a) 13

Mich. Comp. Laws § 333.7401 .... 1, 7

Mich. Comp. Laws § 333.7401(1), (2)(d)(iii) (1998) 7

Mich. Comp. Laws § 333.7401(2)(d) 8

TABLE OF AUTHORITIES
(continued)

Page

Mich. Comp. Laws § 750.92 1

Mich. Comp. Laws § 750.92(3) 2, 8

N.J. Stat. Ann. § 2C:35-5b(11) 16

N.Y. Penal Law § 221.40 .... 15, 16

S.C. Code 1976 § 44-53-370(d)(4) (2010) 26

T.C.A. § 39-17-418 26

Wis. Stat. § 961.41(1)(h)1 (2011) 26

RULES

8 C.F.R. § 316.10(b)(1)(ii) 26

OTHER AUTHORITIES

Immigration Review, *FY 2010 Statistical Year Book*, at B6 tbl.2A (2011), *available at* www.justice.gov/eoir/statspub/fy10syb.pdf (hereinafter *EOIR 2010 Statistical Year Book*) 18, 26

U.S. Const. art. I, § 8, cl. 4 19

OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 638 F.3d 511 (6th Cir. 2011) and reproduced in the Petition Appendix ("App.") at 1a-14a. The decisions of the Board of Immigration Appeals and the Immigration Judge are unreported, but are reproduced at App. 15a-21a and 25a-43a, respectively.

JURISDICTION

The court of appeals entered its judgment on March 28, 2011, App. 1a, and denied rehearing *en banc* on June 1, 2011, App. 44a. This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals had jurisdiction under 8 U.S.C. § 1252.

STATUTORY PROVISIONS INVOLVED

Sections 841 and 844 of Title 21 of the U.S. Code are reproduced at App. 46a-74a and 75a-77a, respectively. Sections 333.7401 and 750.92 of the Michigan Compiled Laws that were in effect at the time of Petitioner's conviction on August 28, 1998, are reproduced at App. 78a-82a and 83a-84a, respectively.

STATEMENT OF THE CASE

A. Introduction

The Sixth Circuit's decision below squarely raises an issue on which the courts of appeals are deeply and irreconcilably divided: Whether a state conviction for possession of an unspecified quantity of marijuana categorically constitutes a felony conviction under federal law (and therefore an

"aggravated felony" under federal immigration law), even if the offense could fall within the federal misdemeanor exception for low-level drug offenses.

Two courts of appeals (including the Sixth Circuit below) have held that such a conviction amounts to an "aggravated felony." By contrast, three other courts of appeals have reached a contrary conclusion. The Board of Immigration Appeals ("BIA") agrees with the minority position, and applies it in the remaining circuits. The courts on both sides of the split have considered the contrary arguments advanced by the other circuits and have adhered to their expressed views.

The minority circuit approach is flatly contrary to this Court's precedents of *Lopez v. Gonzales*, 549 U.S. 47 (2006), and *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). The issue is important and recurring, because an alien deemed convicted of an "aggravated felony" is barred from obtaining discretionary relief and faces mandatory deportation from the United States.

In this case, Petitioner Jose Alberto Garcia ("Garcia") was ordered removed from the United States after having pleaded no contest to a state conviction under Mich. Comp. Laws § 333.7401(2)(d)(iii) for the attempted possession of an unspecified quantity of marijuana — an offense deemed a misdemeanor under the Michigan state law, Mich. Comp. Laws § 750.92(3). The Michigan statute is broad enough to encompass distribution of a small amount of marijuana for no remuneration — an offense that the federal law, the Controlled Substances Act ("CSA"), 21 U.S.C. § 801 *et seq.*, expressly instructs "shall be treated" as a

misdemeanor. 21 U.S.C. § 841(b)(4). Garcia's record of conviction contains no indication that his offense exceeded what the federal law regards as a misdemeanor.

The Sixth Circuit held, however, that Garcia's conviction must be categorically regarded as analogous to a federal felony conviction, thereby constituting an "aggravated felony" under the Immigration and Nationality Act ("INA") and barring Garcia from obtaining cancellation of removal. The court of appeals reasoned that, under this Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), as interpreted by circuit precedent, 21 U.S.C. § 841(b)(1)(D) constitutes the CSA's baseline provision for punishing possession of an unspecified amount of marijuana that is less than 50 kilograms. The Sixth Circuit then concluded that section 841(b)(1)(D), which is a felony provision, is the proper federal analogue to Garcia's state conviction. The Sixth Circuit rejected Garcia's reliance on section 841(b)(4) — the CSA's misdemeanor provision — on the grounds that section 841(b)(4) is only a sentencing factor, and not a stand-alone misdemeanor offense.

The court of appeals recognized that three other circuit courts had previously considered this precise question, and that two of them have reached the opposite conclusion. (One more circuit has also considered this issue, and has adopted the majority approach.) Although the Sixth Circuit acknowledged that the contrary opinions of its sister circuits "deserve respect," it nevertheless sided with the minority position.

Thus, the Sixth Circuit's decision deepened an already-existing split on an important question of federal law. Under the rule it adopted — which, either by circuit law or through the BIA administrative interpretation, is applied in two-thirds of the immigration proceedings in the United States — an alien whose state conviction could constitute only a misdemeanor under federal law will be labeled as an "aggravated felon" and mandatorily deported from the United States. By contrast, under the majority approach — which is applied in circuits reviewing one-third of the immigration proceedings — an identically situated alien remains eligible for cancellation of removal. This Court should intervene to resolve this entrenched split and restore uniformity to the application of federal immigration law.

The court of appeals' approach is also antithetical to this Court's precedent, which instructs that a state-law conviction constitutes an aggravated felony only if the conviction would *necessarily* have been punishable as a felony under federal law. *Lopez*, 549 U.S. at 55, 59-60. Most critically, the Sixth Circuit ignored this Court's admonition in *Carachuri-Rosendo* that, in determining whether a state conviction categorically amounts to a felony under federal law, a court must consider not only the elements of the offense but also mandatory sentencing factors that affect whether the offense is punishable as a felony under federal law. 130 S. Ct. at 2587. The court of appeals' erroneous rule cannot be reconciled with the precedent of this Court and should be corrected.

B. Factual Background

Garcia, a citizen of Mexico, arrived in the United States on a visitors' visa in 1979 at the age of 14. He became a conditional United States permanent resident in 1992 based on his marriage to a U.S. citizen. App. 28a. The conditions on Garcia's permanent residency were removed in 1995. App. 2a; 28a.

Garcia is currently employed as a foreman with a construction company, where he has worked for the past 15 years. Garcia has five children, all of whom are U.S. citizens and live in the United States. His oldest son is serving in the U.S. Marine Corps. In addition, four of Garcia's siblings currently live in the United States. Two of them are U.S. citizens and two are permanent residents. Garcia continues to support one of his sons, as well as his son's family.

On January 16, 1998, when Garcia was staying overnight at the house of his long-term girlfriend, local police executed a search warrant of her house and found an unspecified amount of marijuana in the basement. App. 30a. As Garcia testified before the immigration court, the marijuana belonged to his girlfriend's sons, and Garcia himself was not aware of it. App. 34a-35a.

Acting on his counsel's advice, Garcia pled no contest to attempted possession of an unspecified amount of marijuana with intent to deliver under Mich. Comp. Laws § 333.7401(2)(d)(iii). App. 2a; 85a-86a; 87a. Garcia received a $500 fine, plus costs. App. 2a; 88a. Garcia's counsel did not inform him of the potential immigration consequences of his guilty plea. App. 13a-14a.

In 2005, upon his return from a trip abroad, the government initiated removal proceedings against Garcia under 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), (C), based on his 1998 drug conviction. App. 2a-3a; 16a. Garcia conceded removability on that basis but sought cancellation of removal under 8 U.S.C. § 1229b. App. 3a.

C. Federal and State Statutory Schemes

An alien subject to removal based on a conviction for a controlled substance offense, 8 U.S.C. § 1182(a)(2)(A)(i)(II), may apply for discretionary cancellation of removal if the alien "has not been convicted of an aggravated felony." 8 U.S.C. § 1229b(a)(3). The INA defines aggravated felony as "illicit trafficking in a controlled substance … , including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B); *see also* App. 6a. Section 924(c) of Title 18, in turn, defines a drug-trafficking crime as "any felony punishable under" the Controlled Substances Act ("CSA"). 18 U.S.C. § 924(c)(2).

The CSA prohibits "possess[ion] with intent to … distribute … a controlled substance," which includes marijuana. 21 U.S.C. § 841(a)(1). Of relevance here, section 841(b) of the CSA contains several penalty provisions, "each [of which] provides for a different criminal offense with separate elements." *United States v. Darwich*, 337 F.3d 645, 655 (6th Cir. 2003). Section 841(b)(1)(D) prescribes the penalty for an offense of possessing "less than 50 kilograms" or fewer than 50 plants of marijuana, authorizing "imprisonment of not more than 5 years." 21 U.S.C. § 841(b)(1)(D).

The CSA, however, also establishes an exception for instances where an individual violates 21 U.S.C. § 841(a) "by distributing a small amount of marijuana for no remuneration." 21 U.S.C. § 841(b)(4); *see also* 21 U.S.C. § 841(b)(1)(D) (specifying that its penalty should apply "except as provided in [section 841(b)(4)]"). In these instances, the offender "shall be treated as provided in section 844," which is the misdemeanor provision of the CSA. 21 U.S.C. § 841(b)(4). This misdemeanor provision criminalizes simple possession of marijuana, and provides that such offense be punishable by not more than one year in prison. 21 U.S.C. § 844; App. 8a.

The Michigan state statute under which Garcia was convicted provides, in pertinent part, that

> a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance … . A person who violates this section as to [m]arihuana or a mixture containing marihuana is guilty of a felony punishable as follows: …
>
> If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than $20,000.00, or both.

Mich. Comp. Laws §§ 333.7401(1), (2)(d)(iii) (1998), *reproduced at* App. 78a, 80a. [1] This provision

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[1] Although section 333.7401 of the Michigan Compiled Laws has been amended, the amendments did not modify subsection (continued...)

represents the smallest amount of marijuana criminalized under the statute. App. 19a n.1.

Michigan's general attempt statute further provides that where the attempted offense

> is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars.

Mich. Comp. Laws § 750.92(3), *reproduced at* App. 83a-84a.

D. Proceedings Before the Immigration Court and the BIA

The immigration judge denied Garcia's request for cancellation of removal on the grounds that his drug conviction would support a federal felony conviction under 21 U.S.C. §§ 841(a), (b)(1)(D). App. 40a. Therefore, the immigration judge concluded that Garcia was ineligible for cancellation of removal

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(...continued)

333.7401(2)(d) — the marijuana-related provision under which Garcia was convicted in 1998.

as an individual "convicted of an[] aggravated felony." 8 U.S.C. § 1229b(a)(3). *See* App. 40a-41a.[2]

The BIA agreed with the immigration judge. App. 4a; 20a. It concluded that the elements of Garcia's conviction corresponded to the elements of 21 U.S.C. § 841(b)(1)(D), and thus Garcia's offense should be considered an aggravated felony under the INA. App. 18a-20a. The BIA rejected Garcia's argument that the appropriate federal analogue to his state conviction is 21 U.S.C. § 841(b)(4), which provides that "distribut[ion of] a small amount of marijuana for no remuneration shall be treated" as a misdemeanor. App. 18a-20a. In the BIA's view, section 841(b)(4) was irrelevant to the categorical approach, because it constituted a "mitigating exception" rather than a discrete offense, and required proof of additional facts beyond those necessary for a conviction under section 841(b)(1)(D). App. 19a-20a.

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[2] The immigration judge opined that Garcia's state conviction would also constitute an aggravated felony because it contained a trafficking element, namely the intent to deliver. App. 39a. As the Sixth Circuit noted, the government and the BIA abandoned this contention as contrary to this Court's instruction that the trafficking element entails "'some sort of commercial dealing,'" which the Michigan statute under which Garcia was convicted lacked. App. 6a (quoting *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006)). The immigration judge also found alternative grounds for denying relief that Garcia challenged before the BIA, but that the BIA did not resolve. App. 36a-37a; 41a-42a. These challenges remain viable on remand.

E. Proceedings Before the Sixth Circuit

The Sixth Circuit affirmed the BIA. App. 12a-13a. The court of appeals acknowledged that "the precise amount of marihuana involved in Garcia's case is unknown." App. 8a. The Sixth Circuit observed, however, that the elements of Garcia's state offense "presumptively correspond" to the elements of a federal felony offense under 21 U.S.C. § 841(b)(1)(D), which criminalizes attempted possession of marijuana with intent to deliver and contains no reference to a minimum drug quantity. App. 8a.

The court of appeals expressly noted that the circuit courts are divided on the question of whether a state conviction for a marijuana distribution offense of unspecified quantity would necessarily sustain a felony conviction under the CSA and therefore constitute an "aggravated felony" under the INA. *Id.* at App. 10a-12a (comparing *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), with *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008), and *Jeune v. Attorney Gen.*, 476 F.3d 199 (3d Cir. 2007)). The Sixth Circuit acknowledged that the opinions of the Second and Third Circuits, which held that such a state conviction is not categorically an aggravated felony, "deserve respect." App. 12a. The court of appeals nevertheless concluded that Garcia's state offense constituted an aggravated felony under the rationale of its prior decision in *United States v. Bartholomew*, 310 F.3d 912 (6th Cir. 2002). App. 12a.

In *Bartholomew*, the Sixth Circuit held that section 841(b)(1)(D), rather than section 841(b)(4), constitutes the baseline punishment for a crime under *Apprendi v. New Jersey*, 530 U.S. 466 (2000),

and therefore the precise amount of marijuana need not be proven to the jury in order to punish under section 841(b)(1)(D). App. 9a; 12a (discussing *Bartholomew*, 310 F.3d at 925). Reasoning that, under *Bartholomew*, "the amount of marihuana is not an element of the relevant federal felony," the Sixth Circuit rejected Garcia's reliance on section 841(b)(4), and held that "Garcia's state conviction is an aggravated felony under the categorical approach." App. 13a.

Petitioner timely sought rehearing *en banc* on the grounds that the court of appeals' decision exacerbated existing circuit conflict and conflicted with this Court's precedents, but the Sixth Circuit denied rehearing. App. 44a-45a.

REASONS FOR GRANTING THE PETITION

A. The Courts of Appeals Are Deeply and Irreconcilably Divided on the Question Presented.

There is a mature and acknowledged conflict among the courts of appeals on whether a state conviction for possession of an unspecified quantity of marijuana categorically constitutes an "aggravated felony" conviction under federal law that bars an alien from cancellation of removal, even if that offense could fall within 21 U.S.C. § 841(b)(4)'s exception for low-level drug offenses. Five circuits have now addressed the issue and have divided 3-2. The courts on both sides of the split have considered the contrary approach adopted by the other circuits but have adhered to their respective views. This Court's intervention is needed to resolve this

entrenched conflict and restore uniformity in this area of immigration law.

1. Two courts of appeals have held that a state conviction for possession of an unspecified quantity of marijuana categorically constitutes a felony under the CSA, and therefore an "aggravated felony" under the federal immigration law. In reaching this conclusion, the Sixth Circuit reasoned that Section 841(b)(1)(D) of the CSA — rather than Section 841(b)(4) — constitutes the default provision for punishing possession of marijuana with the intent to distribute where the amount of marijuana is undetermined. App. 9a; 12a. The Sixth Circuit held that, because the amount of marijuana is "not an element of the relevant federal felony," namely, section 841(b)(1)(D), a state conviction where the marijuana quantity is unspecified "is an aggravated felony under the categorical approach." App. 13a. Indeed, the Sixth Circuit indicated that its holding would stand even if "the conduct underlying [the] state conviction was the minimum criminal conduct necessary to sustain the conviction" — in other words, if the drug quantity were such that the offender could only be prosecuted in federal court under section 841(b)(4). *Id.*

In reaching this conclusion, the Sixth Circuit expressly aligned itself with the First Circuit's earlier decision in *Julce v. Mukasey*, 530 F.3d 30, 35 (1st Cir. 2008). App. 10a. There, the First Circuit held that a state conviction for possession with intent to distribute involving any amount of marijuana within the maximum limit prescribed by Section 841(b)(1)(D) is considered a felony under the CSA. *Julce*, 530 F.3d at 35. *Julce* involved an alien who pled guilty to

possession with intent to distribute under a Massachusetts statute that punished, among other things, possession of marijuana with intent to distribute. *Id.* at 33 (citing Mass. Gen. Laws. ch. 94C, § 32C(a)). The First Circuit rejected the argument that, because the Massachusetts statute encompassed conduct that would be treated as a misdemeanor under Section 841(b)(4), a conviction under that state statute, where the marijuana quantity was undetermined, should not be automatically considered a felony under the CSA. *Julce*, 530 F.3d at 33-34. In the First Circuit's view, this argument was unavailing because Section 841(b)(4) "does not create a stand-alone misdemeanor offense," but is "best understood as a mitigating sentencing provision." *Id.* at 35. Therefore, the First Circuit concluded, because the same elements that underpinned a conviction under the Massachusetts statute could support a federal felony conviction, a conviction under the Massachusetts statute qualified as an "aggravated felony" under the INA. *Id.*[3]

[3] The First Circuit left open the possibility that the BIA may permit an alien to demonstrate, by reliance on his state-court record of conviction, that "his conduct of conviction fell within § 841(b)(4)." *Julce*, 530 F.3d at 35-36. The court of appeals below, however, has foreclosed even this possibility. The Sixth Circuit held that it would consider Garcia's conviction to be an aggravated felony under the INA even if it "were to assume that the conduct underlying his state conviction was the minimum criminal conduct necessary to sustain the conviction." App. 13a. Thus, the Sixth Circuit treats the amount of marijuana involved as entirely irrelevant to the analysis of whether a state conviction constitutes a federal felony, even if such amount would fit squarely within the ambit of 21 U.S.C. § 841(b)(4).

2. By contrast, three circuits have held that a state conviction that may fall within the ambit of section 841(b)(4) is not categorically punishable as a felony under the CSA. *See Martinez v. Mukasey*, 551 F.3d 113, 119-20 (2d Cir. 2008); *Jeune v. Attorney Gen.*, 476 F.3d 199, 205 (3rd Cir. 2007); *Jordan v. Gonzalez*, No. 05-60539, 204 Fed. App'x. 425, 427-28, 2006 WL 3153479, at *2-3 (5th Cir. Nov. 2, 2006) (unpublished).

These circuits look to the "minimum conduct" necessary to sustain a conviction under the state statute and then ask whether that conduct "would necessarily be punishable as a felony" or would qualify for misdemeanor treatment under 21 U.S.C. § 841(b)(4). *See Martinez*, 551 F.3d at 120; *see also Jeune*, 476 F.3d at 204-05; *Jordan*, 204 Fed. App'x at 427, 2006 WL 3153479, at *1-2. If the conduct might fall within the ambit of section 841(b)(4) and qualify as a misdemeanor, these circuits hold that it would not be "punishable as a felony" under federal law. *Martinez*, 551 F.3d at 120; *see also Jeune*, 476 F.3d at 204-05; *Jordan*, 204 Fed. App'x at 427, 2006 WL 3153479, at *2.

The Second and Third Circuits noted that section 841(b)(4) establishes an "exception" from the felony offenses criminalized by the remainder of section 841. *Martinez*, 551 F.3d at 119-20; *Jeune*, 476 F.3d at 205 (quoting *Wilson v. Ashcroft*, 350 F.3d 377, 381 (3d Cir. 2003)) (internal quotation marks omitted); *see also Jordan*, 204 Fed. App'x at 427, 2006 WL 3153479, at *2. As the Second Circuit explained, "the activity covered by 21 U.S.C. § 841(b)(4) is not merely 'one of lesser degree than those covered by (b)(1)(D) but of a different type more akin to simple possession

than to provisions intended to cover traffickers.'" *Martinez*, 551 F.3d at 120 (quoting *United States v. Outen*, 286 F.3d 622, 637 (2d Cir. 2002) (Sotomayor, J.)); *see also Wilson*, 350 F.3d at 380 n.2.

In *Martinez*, the Second Circuit held that a conviction under a New York statute criminalizing the distribution of between two and 25 grams of marijuana did not correspond to a federal felony under 21 U.S.C. § 841(b)(1)(D). 551 F.3d at 119-20 & n.6 (discussing N.Y. Penal Law § 221.40). Focusing on the "minimum conduct of which [the alien] might have been convicted," the Second Circuit explained that this conviction "could have been for precisely the sort of non-remunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4)." *Id.* at 120. Consequently, the Second Circuit held that the alien's state conviction could not be categorically regarded as an aggravated felony under the INA. *Id.* at 121-22.

The Third Circuit has similarly held that a conviction under a state statute that criminalized the possession with intent to deliver less than two pounds of marijuana and did not contain remuneration as an element does not categorically constitute a felony under the CSA. *Jeune*, 476 F.3d at 205 (discussing a conviction under 35 Pa. Stat. Ann. § 780-113(a)(30) and a sentence under 18 Pa. Stat. Ann. § 7508(a)(1)(i)). Because the record was silent as to the quantity of marijuana involved or whether the distribution was for remuneration, the Third Circuit held that the alien's state conviction could not be categorically regarded as a felony conviction under the CSA, and was therefore not an aggravated felony within the meaning of the INA. *Id.*

The Third Circuit expressly reaffirmed its holding in *Jeune*, *see Evanson v. Attorney Gen.*, 550 F.3d 284, 291-92 (3d Cir. 2008), and has applied the same approach to analogous state convictions, *see Thomas v. Attorney Gen.*, 625 F.3d 134, 143, 148 (3d Cir. 2010) (considering a conviction under N.Y. Penal Law § 221.40 — the statute considered by the Second Circuit in *Martinez*); *Wilson*, 350 F.3d at 381-82 (considering a conviction under N.J. Stat. Ann. § 2C:35-5b(11), which criminalized possession of at least one ounce and less than five pounds of marijuana with intent to manufacture, distribute, or dispense).[4]

In an unpublished opinion, the Fifth Circuit adopted the same approach as the Second and Third Circuits. Considering a conviction under the same New York statute that was at issue in *Martinez*, the Fifth Circuit held that such conviction did not categorically constitute an aggravated felony under the INA. *Jordan*, 204 Fed. App'x at 428, 2006 WL

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[4] Notably, the Second and the Third Circuits expressly rejected the government's argument that, in the absence of proof by the alien that his state offense would be punishable under 21 U.S.C. § 841(b)(4), the alien's conviction must be presumed to be a felony under the CSA. *Martinez*, 551 F.3d at 121; *Jeune*, 476 F.3d at 205. As the Second Circuit explained, "[t]he very basis of the categorical approach is that the *sole* ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction under a given statute. This does not require [an alien] to prove how little marihuana he had or the nature of the transfer, so long as his conviction *could have been based* on a nonremunerative transfer of a small amount of marihuana." *Martinez*, 551 F.3d at 121 (second emphasis added) (citation omitted).

3153479, at *2. Because the record did not specify whether the defendant distributed "more than a small amount" of marijuana, the Fifth Circuit concluded that it "does not support a finding that [the alien] engaged in conduct . . . that would raise his violation to the level of a federal felony." *Id.* at *3. The Fifth Circuit therefore refused to hold that such conviction constitutes an aggravated felony under federal immigration law.

3. The 3-2 conflict among the courts of appeals is mature and entrenched, and can be resolved only by this Court. Courts of appeals on both sides of the split have considered the contrary opinions of their sister circuits and have reaffirmed their prior views.

Thus, the First Circuit acknowledged that the Third Circuit had "reached a different conclusion in the context of other state statutes," but rejected that approach on the grounds that the Third Circuit's position did not "take appropriate account of the role that § 841(b)(4) plays as an exception to the sentencing scheme under § 841(b)(1)(D)." *Julce*, 530 F.3d at 35 n.6 (rejecting the approach adopted by the Third Circuit in *Wilson*, 350 F.3d 377, and *Steele v. Blackman*, 236 F.3d 130, 137 (3d Cir. 2001)). In turn, the Third Circuit acknowledged the First Circuit's contrary holding in *Julce*, but reaffirmed its prior position. *Evanson*, 550 F.3d at 289.

The court of appeals below carefully canvassed the arguments advanced on both sides of the split. App. 10a-12a (examining *Julce*, *Martinez*, and *Jeune*). The Sixth Circuit acknowledged that "the Second and Third Circuits have decided this precise issue the other way," and that their approach "deserve[s] respect," App. 10a; 12a. Nevertheless, the court of

appeals rejected this approach, finding the First Circuit's reasoning more persuasive. *Id.* at 12a-13a. Despite its recognition of the circuit conflict, the Sixth Circuit has refused to rehear the issue *en banc*. App. 44a-45a.

4. In addition to the 3-2 conflict among the courts of appeals, the BIA — the agency with expertise in immigration matters — has considered the approach adopted by the majority of courts of appeals and has declined to apply it outside of these circuits. *In re Aruna*, 24 I. & N. Dec. 452, 457 n.4 (B.I.A. 2008) ("[W]e respectfully disagree with the Third Circuit's reasoning as it relates to marijuana distribution offenses, and we therefore decline to apply those precedents in removal proceedings arising outside the Third Circuit."). The BIA continues to adhere to this view. *See* App. 19a-20a (applying *In re Aruna*). The Third Circuit, in turn, has recognized the BIA's disagreement with its approach, but reaffirmed its prior view. *Evanson*, 550 F.3d at 289.

Thus, in three circuits (covering nine states and one federal territory), an alien whose state conviction could constitute only a misdemeanor under federal law remains eligible for cancellation of removal. Each year, these circuits review approximately one-third of the immigration proceedings in the United States. *See* Office of Planning, Analysis, and Technology, U.S. Dep't of Justice, Executive Office for Immigration Review, *FY 2010 Statistical Year Book*, at B6 tbl.2A (2011), *available at* www.justice.gov/eoir/statspub/fy10syb.pdf (hereinafter *EOIR 2010 Statistical Year Book*). By contrast, in every other circuit an identically situated alien is categorically barred from seeking this

discretionary relief, and will instead be deported irrespective of his existing ties to the United States. This starkly disparate treatment impedes the uniform administration of the immigration laws, in contravention of the constitutional requirement of "an uniform Rule of Naturalization." U.S. Const. art. I, § 8, cl. 4. *See also Chen v. Mukasey*, 524 F.3d 1028, 1033 (9th Cir. 2008) ("in the context of immigration law, … national uniformity is paramount") (internal quotation marks and citation omitted); *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (emphasizing the importance of "avoid[ing] disparate treatment of similarly situated aliens under the immigration laws").

Circuit splits on immigration law deserve special attention because they drive aliens to parts of the country where deportation rules are more lenient. The competing opinions of the courts of appeals (and of the BIA) have thoroughly canvassed the arguments on both sides of the split, and these courts have solidified their positions. There is no reason to await further percolation. The conflict is mature, entrenched, and ripe for resolution by this Court.

B. The Sixth Circuit's Erroneous Ruling Contravenes this Court's Precedent.

The Sixth Circuit's decision is contrary to this Court's precedent set forth in *Lopez v. Gonzales*, 549 U.S. 47 (2006), and *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). These decisions explain when a state conviction should be considered an aggravated felony under the INA, and that explanation forecloses the Sixth Circuit's rule.

Lopez held that a state's decision to classify a drug offense as a felony is not determinative of whether the offense should receive felony treatment under the CSA because drug offenses serious enough to be given felony treatment by the states could still amount only to misdemeanors under the CSA. 549 U.S. at 52, 58. Under *Lopez*, a state-law conviction is categorically an aggravated felony only if the conviction would *necessarily* have been punishable as a felony under federal law. *Id.* at 55, 59-60; *see also Martinez*, 551 F.3d at 120; *Rendon v. Mukasey*, 520 F.3d 967, 974 (9th Cir. 2008).

This Court reiterated this instruction in *Carachuri-Rosendo*. There, an alien committed two drug possession offenses, each of which was considered a misdemeanor under both state and federal law. *Carachuri-Rosendo*, 130 S. Ct. at 2581, 2583. Although the state law — like the analogous federal statute, 21 U.S.C. § 844(a) — authorized a sentencing enhancement upon proof that the defendant had been previously convicted of a similar offense, the state did not seek such an enhancement for the second conviction. *Carachuri-Rosendo*, 130 S. Ct. at 2581 & n.4, 2583. Further, the federal law provided that "only *recidivist* simple possession offenses are 'punishable' as a federal 'felony' under the Controlled Substances Act." *Id.* at 2581 & n.4 (emphasis in original).

This Court considered whether an alien's second state conviction could nevertheless be considered an aggravated felony because, "hypothetically speaking, the underlying conduct could have received felony treatment under federal law." *Id.* at 2583, 2586. Pointing out the INA's express requirement that an

alien actually be "'*convicted* of an aggravated felony,'" the Court instructed that a court must "look to the conviction itself as our starting place, not to what might have or could have been charged." *Carachuri-Rosendo*, 130 S. Ct. at 2586 (quoting 8 U.S.C. § 1229b(a)(3)) (emphasis in original); *see also id.* at 2587 n.12. Specifically, the Court rejected the approach of the court of appeals below, which relied on "facts not at issue in the crime of conviction (*i.e.*, the existence of a prior conviction) to determine whether [the alien] *could have* been charged with a federal felony." *Id.* at 2588 (emphasis in original). As the Court admonished, a "hypothetical felony approach" that does not consider the record of conviction "is based on a misreading of … *Lopez* because it "ignores both the conviction (the relevant statutory hook), and the conduct actually punished by the state offense." *Id.*[5] Here, the Sixth Circuit failed to follow this guidance and examine whether Garcia's state conviction for possessing an unspecified amount of marijuana *necessarily* would have constituted a federal felony, or whether it could have been treated instead as a misdemeanor under 21 U.S.C. § 841(b)(4).

Most critically, *Carachuri-Rosendo* holds that a federal court must look not only at the elements of an offense, but also at mandatory sentencing factors that

[5] Indeed, the Third Circuit expressly relied on *Carachuri-Rosendo* in support of its decision to adhere to circuit precedent that a state conviction for marijuana distribution does not constitute an aggravated felony unless the record of conviction permits a federal court to "conclusively determine" that the alien would have been guilty of a felony under the CSA. *Thomas*, 625 F.3d at 145-7.

affect whether the state offense is punishable as a felony under federal law. 130 S. Ct. at 2587. In examining the applicable statutory scheme, the Court in *Carachuri-Rosendo* explained that "a first-time simple possession offense" was generally "a federal misdemeanor" under 21 U.S.C. § 844(a); only "*recidivist* simple possession offenses [we]re 'punishable' as a federal 'felony'" under the CSA. *Id.* at 2581 (emphasis in original); *see also id.* at 2587 ("For federal law purposes, a simple possession offense is not 'punishable' as a felony unless a federal prosecutor first elects to charge a defendant as a recidivist in the criminal information."). As the Court explained, under *Almendarez-Torres v. United States*, 523 U.S. 224, 247 (1998), a recidivist enhancement was not an element of the offense, but a mandatory sentencing factor that could be determined by a judge by a preponderance of the evidence. *Carachuri-Rosendo*, 130 S. Ct. at 2581 n.3; *see also id.* at 2583 (referring to this provision as "a sentencing enhancement"). Nevertheless, for the purposes of determining whether an alien's state conviction constitutes an aggravated felony under the INA, this Court "view[ed] § 844(a)'s felony simple possession provision [resulting from the recidivist enhancement] as *separate and distinct* from the misdemeanor simple possession offense." *Id.* at 2581 n.3 (emphasis added).

The Sixth Circuit's decision is flatly contrary to *Carachuri-Rosendo* and misapplies this Court's *Apprendi* jurisprudence. The court of appeals' central rationale for rejecting Garcia's reliance on the statutory exception in 21 U.S.C. § 841(b)(4) for drug offenses involving only "a small amount of marihuana" was the fact that "the amount of

marihuana is not an element of the relevant federal felony." App. 13a; *see also* 9a. The Sixth Circuit derived this conclusion from its prior holding, in *United States v. Bartholomew*, 310 F.3d 912 (6th Cir. 2002), that section 841(b)(1)(D) and not section 841(b)(4) is the applicable statutory baseline for what the government must prove to the jury under *Apprendi* in a conviction for distribution of an unspecified quantity of marijuana. App. 9a (citing *Bartholomew*, 310 F.3d at 925). Consequently, the Sixth Circuit reasoned, section 841(b)(4) was irrelevant to the categorical analysis because it "'does not create a stand-alone misdemeanor offense,' but is rather 'best understood as a mitigating sentencing provision.'" App. 10a (quoting *Julce*, 530 F.3d at 35).

But, as *Carachuri-Rosendo* instructs, the question of whether section 841(b)(4) sets forth a separate element of the offense or a mandatory sentencing limitation has no bearing on the inquiry of whether a state conviction that could fall within the ambit of section 841(b)(4) must *necessarily* be regarded as a felony conviction under section 841(b)(1)(D). In *Carachuri-Rosendo*, "by reason of *Almendarez-Torres*, the federal misdemeanor offense has been raised to a felony offense *without changing its elements*, solely by increasing its penalty pursuant to a recidivist 'sentencing factor.'" *Carachuri-Rosendo*, 130 S. Ct. at 2590 (Scalia, J., concurring in the judgment) (emphasis added). Similarly here, once the defendant produces mitigating evidence in order to obtain misdemeanor treatment under section 841(b)(4), that provision mandates that he can only be convicted of a federal *misdemeanor* because his offense "shall be treated" as a misdemeanor offense of simple possession under 21 U.S.C. § 844. Thus, regardless of

whether section 841(b)(4) sets forth a separate offense, an affirmative defense, or a mandatory sentencing factor, the alien's offense would not be *punishable* as a felony under federal law. *Cf. Patterson v. New York*, 432 U.S. 197, 206 (1977) (defendant's proof, by preponderance of the evidence, that he acted under extreme emotional disturbance, "would reduce the crime [of murder] to manslaughter" — a separately defined offense).

The Sixth Circuit's rationale is not only antithetical to *Carachuri-Rosendo*, but has also been rejected by other circuits. The Sixth Circuit in *Bartholomew* expressly followed the Second Circuit's decision in *Outen*, which also had concluded that section 841(b)(1)(D) was the proper baseline for the *Apprendi* purposes. *Bartholomew*, 310 F.3d at 925 (discussing *Outen*, 286 F.3d at 638 (Sotomayor, J.)). Yet, the Second Circuit in *Martinez* did not view *Outen* as compelling the same result that the Sixth Circuit had reached here. On the contrary, *Outen* actually *supported* the Second Circuit's conclusion that, where "the minimum conduct of which [an alien] might have been convicted [was] 'more akin to simple possession,'" his state conviction could have been "precisely" analogous to a federal misdemeanor under section 841(b)(4). *Martinez*, 551 F.3d at 120 (quoting *Outen*, 286 F.3d at 637).

Similarly, the Fifth Circuit did not view its prior holding that section 841(b)(1)(D) is the default penalty provision for offenses involving an unspecified amount of marijuana, *United States v. Walker*, 302 F.3d 322, 324 (5th Cir. 2002), as an obstacle to finding a state conviction not to be a federal felony if it could fall within 21 U.S.C.

§ 841(b)(4). *Jordan*, 204 Fed. App'x at 427, 2006 WL 3153479, at *2.

Thus, the circuit courts are deeply divided not only with respect to the applicability of 21 U.S.C. § 841(b)(4) in determining whether a state crime constitutes an aggravated felony under federal immigration law, but also on the proper methods of conducting this analysis in light of this Court's *Apprendi* jurisprudence. The Court should grant certiorari to reaffirm its holding in *Carachuri-Rosendo* and provide much-needed guidance to the courts of appeals.

C. The Question Presented Is Important and Recurring, and This Case Is a Suitable Vehicle for Resolving This Question.

The question of whether an alien is properly deemed convicted of an "aggravated felony" has far-reaching consequences for immigrants and their families. In addition to being ineligible to seek cancellation of removal, 8 U.S.C. § 1229b(a)(3), an alien convicted of an aggravated felony is subject to removal in the first place, 8 U.S.C. § 1227(a)(2)(A)(iii); is presumed removable, 8 U.S.C. § 1228(c); and is ineligible to seek judicial review of a removal order, 8 U.S.C. § 1252(a)(2)(C).

If removed from the United States, an aggravated felon is permanently barred from seeking readmission to the country (absent a waiver), and is subject to increased punishment — 20 years instead of two — in the event of illegal re-entry. 8 U.S.C. §§ 1182(a)(9)(A)(ii), 1326(a), (b)(2). An alien convicted of an aggravated felony on or after November 29, 1990, is categorically unable to

demonstrate the "good moral character" required for naturalization. 8 U.S.C. § 1101(f)(8); 8 C.F.R. § 316.10(b)(1)(ii). Finally, because federal law automatically categorizes any aggravated felony as a "particularly serious crime," an aggravated felon is ineligible to seek asylum. 8 U.S.C. § 1158(b)(2)(A)(ii), (B)(i).

Under the Sixth Circuit's erroneous interpretation of this Court's categorical approach, aliens who committed relatively minor drug offenses — offenses that would be considered misdemeanors in federal court — would be labeled as aggravated felons and exposed to these drastic immigration consequences. Because the BIA shares the Sixth Circuit's view, *see* App. 19a-20a; *In re Aruna*, 24 I. & N. Dec. at 458 n.4 (B.I.A. 2008), this inflexible rule would affect approximately two-thirds of aliens in immigration court proceedings. *See EOIR 2010 Statistical Year Book* at B6 tbl.2A; *supra* at 18.

The impact of this misguided approach would be wide-reaching, because several states do not have statutory provisions analogous to 21 U.S.C. § 841(b)(4), which specifically address possession or distribution of small amounts of marijuana. *See, e.g.*, Ariz. Rev. Stat. Ann. §§ 13-3405(A), (B)(4) (2010) (Arizona: two pounds); S.C. Code 1976 § 44-53-370(d)(4) (2010) (South Carolina: between one ounce and ten pounds); Wis. Stat. § 961.41(1)(h)1 (2011) (Wisconsin: 200 gram sale). Similarly, a number of states that have specific provisions regarding transfer of small quantities of marijuana criminalize such distribution regardless of remuneration. *See, e.g.*, KRS § 218A.1421(2) (Kentucky); T.C.A. § 39-17-418 (Tennessee).

Because an alien may be unaware of the immigration consequences of his criminal conviction, he may have no incentive to produce evidence regarding drug quantity in the state-court proceeding. *See Julce*, 530 F.3d at 36. Here, for instance, Garcia's counsel did not inform him of the potential immigration consequences of his guilty plea. App. 13a-14a; *supra* at 5. Thus, state-court convictions in these states generally would not distinguish between offenses involving "a small amount of marihuana for no remuneration," which would be treated as misdemeanors under federal law, 21 U.S.C. § 841(b)(4), and offenses that would constitute a felony under the CSA.

The relief of cancellation of removal is discretionary. 8 U.S.C. § 1229b(a). In the exercise of this discretion, the immigration courts weigh the seriousness of the alien's offense against countervailing equitable factors, such as "family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the [alien] and his family if deportation occurs, … a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exits, and other evidence attesting to a respondent's good character." *See In re C-V-T-*, 22 I & N. Dec. 7, 11-12 (B.I.A. 1998); *see also* App. 37a-38a. The immigration courts can deny this relief to aliens where the gravity of the criminal offense is not outweighed by the factors counseling in favor of granting discretionary relief. Thus, by restoring uniformity to the administration of the immigration laws with respect to aliens'

eligibility for cancellation of removal, this Court would not be limiting the government's discretion in the enforcement of immigration law. On the contrary, it is the Sixth Circuit's inflexible rule that removes that discretion from the government, categorically barring U.S. permanent residents who are low-level drug offenders (and would not be considered felons under the federal law) and demonstrate both rehabilitation and strong community ties, from obtaining such relief.

Garcia's petition presents a highly suitable vehicle for resolving the question of the proper treatment of an alien convicted of a state drug offense that could be considered misdemeanor under 21 U.S.C. § 841(b)(4). Garcia properly raised and preserved in his immigration proceedings and in the court of appeals his request for cancellation of removal, as well as his objection to the immigration judge's and the BIA's conclusion that his state conviction constitutes a conviction for aggravated felony. App. 2a-3a; 8a-9a; 16a; 29a-30a. The court of appeals' opinion below thoroughly considered the issue and comprehensively canvassed the case-law and arguments presented on both sides of the circuit split.

Garcia's case also presents strong equities for the exercise of discretion, should his ineligibility for cancellation of removal be lifted.[6] Garcia pled no

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[6] Although the immigration judge concluded that he would not exercise his discretion and grant cancellation of removal, *see* App. 37a-42a, Garcia challenged that conclusion before the BIA. The BIA did not resolve this challenge, which remains viable on remand.

contest only to attempted possession of marijuana, and his entire penalty consisted of a $500 fine. App. 2a; 85a-86a; 87a-88a; *supra*, at 5. As Garcia testified before the immigration court, the marijuana at issue belonged to others, and Garcia was not even aware of its presence in the house where he was staying overnight. App. 34a-35a; *supra* at 5. Garcia came to the United States at a young age and has been a lawful permanent resident since 1992. App. 2a; 28a; *supra* at 4-5. All five of Garcia's children are U.S. citizens, and he is supporting one of them financially. *Supra* at 5. Garcia has been employed with the same company for the past 15 years and is a valued employee. The Sixth Circuit's approach would not permit the BIA even to consider these factors, whereas the contrary view adopted by a majority of circuits would enable Garcia to seek relief that would allow him to say in the United States with his family.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 2011

TABLE OF APPENDICES

Page

Appendix A
Opinion of the U.S. Court of Appeals for the Sixth Circuit (Mar. 28, 2011) 1a

Appendix B
Decision of the Board of Immigration Appeals (Oct. 14, 2009) 15a

Appendix C
Order of the Immigration Judge (July 18, 2008)... 22a

Appendix D
Oral Decision and Orders of the Immigration Judge (July 18, 2008)............. 25a

Appendix E
Order of the U.S. Court of Appeals for the Sixth Circuit Denying the Petition for Rehearing *En Banc* (June 1, 2011) 44a

Appendix F
21 U.S.C. § 841 .... 46a

Appendix G
21 U.S.C. § 844 .... 75a

Appendix H
Mich. Comp. Laws § 333.7401 (1998) 78a

Appendix I
Mich. Comp. Laws § 50.92........................... 83a

TABLE OF APPENDICES (continued)

Appendix J
Motion/Order of Nolle Prosequi,
State of Michigan, 10th Judicial Circuit,
People v. Garcia,
Case No. 98-015121-FH-3
(Aug. 28, 1998) 85a

Appendix K
Judgment of Sentence,
State of Michigan, 10th Judicial Circuit,
Saginaw County,
People v. Garcia,
Case No. 98-015121-FH-7
(Aug. 28, 1998) 87a

APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION
PURSUANT TO SIXTH CIRCUIT RULE 206

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

JORGE GARCIA,
Petitioner,

V.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

No. 09-4390

On Petition for Review from the
Board of Immigration Appeals.
No. A071 857 678.

Decided and Filed: March 28, 2011

Before: GILMAN, GIBBONS, and COOK,
Circuit Judges.

COUNSEL

ON BRIEF: Kreuza Lako, HILF & HILF, PLC, Franklin, Michigan, for Petitioner. Anthony P. Nicastro, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

OPINION

RONALD LEE GILMAN, Circuit Judge. Petitioner Jorge Garcia faces removal to Mexico, his home country. Although he applied for cancellation of removal, the Board of Immigration Appeals (BIA) determined that he is ineligible for this relief because his state drug conviction for the attempted possession of marihuana with the intent to deliver the drug constitutes an "aggravated felony" under the Immigration and Nationality Act (INA). The BIA ruled that his state conviction is an aggravated felony because it corresponds to a felony drug crime under federal law. Garcia challenges the BIA's determination, arguing that his state conviction is not an aggravated felony because it corresponds to a misdemeanor drug crime under federal law rather than a felony drug crime. He also argues that he is entitled to a waiver of inadmissibility and relief due to the ineffective assistance of his counsel during the state drug proceeding. For the reasons set forth below, we **DENY** Garcia's petition for review.

I. BACKGROUND

Garcia became a lawful permanent resident of the United States in 1995. In 1998, he pled guilty to the attempted possession of marihuana with the intent to deliver the drug, in violation of Mich. Comp. Laws § 333.7401(2)(d)(iii). He was sentenced to a fine and costs totaling $1,150.

The Department of Homeland Security (DHS) began removal proceedings against him in 2005, alleging that he was removable because, among other things, he was an alien believed to be an illicit

trafficker in a controlled substance and an alien who had been convicted of a controlled-substance offense under 8 U.S.C. §§ 1182(a)(2)(C) and 1182(a)(2)(A)(i)(II), respectively. Garcia admitted the factual allegations and conceded that he was removable as an alien convicted of a controlled-substance offense. But he sought a waiver of inadmissibility for his state drug conviction under 8 U.S.C. § 1182(h) and cancellation of removal under 8 U.S.C. § 1229b.

In July 2008, the immigration judge (IJ) concluded that Garcia should be denied both of these forms of relief. A § 1182(h) waiver for drug offenses is available only for a single offense of simple possession of 30 grams or less of marihuana. 8 U.S.C. § 1182(h). Because Garcia pled guilty to something more than simple possession of marihuana, the IJ reasoned that Garcia was not eligible for a § 1182(h) waiver.

Cancellation of removal, Garcia's other asserted basis for relief, is not available to an alien who, among other things, has been convicted of an offense deemed an aggravated felony under federal law. 8 U.S.C. § 1229b(a)(3). The IJ concluded that Garcia was not eligible for cancellation of removal because Garcia's state conviction constituted an aggravated felony due to the fact that (1) the conviction contained a trafficking element—namely, the intent to deliver—and (2) the elements of the state conviction would support a felony conviction under 21 U.S.C. § 841(a)(1) and punishment under 21 U.S.C. § 841(b)(1)(D). And even if Garcia were eligible for cancellation of removal, the IJ determined

that Garcia had not demonstrated that he was entitled to such discretionary relief.

The BIA agreed. Citing *Lopez v. Gonzales*, 549 U.S. 47, 55 (2006), the BIA reasoned that Garcia's state offense would be an aggravated felony under the "categorical approach" if the elements of his state offense corresponded to the elements of a federal felony offense under the Controlled Substances Act (CSA), 21 U.S.C. § 801 et seq. Because the BIA found that Garcia's state offense corresponded to the federal felony offense of marihuana distribution, which was punishable by up to five years' imprisonment under 21 U. S.C. § 841(b)(1)(D), it concluded that Garcia's offense should be considered an aggravated felony. The BIA rejected Garcia's argument that the federal offense comparable to his state offense was instead the misdemeanor provision of 21 U.S.C. § 841(b)(4). According to the BIA, that provision is not a discrete offense, but rather a mitigating sentencing provision that Garcia had to prove was applicable by showing that his offense involved only a small amount of marihuana without any remunerative exchange.

Because the absence of these mitigating facts—namely, a small amount of marihuana and no remunerative exchange—would not need to be established by the government in order to convict Garcia of the federal felony offense, the BIA reasoned that drug quantity and remuneration are not elements of that offense. This led it to conclude that Garcia's state offense should be deemed an aggravated felony because the elements of that offense corresponded to the elements of the felony drug crime under 21 U.S.C. §§ 841(a)(1), (b)(1)(D), and 846.

Garcia timely appealed the BIA's decision.

II. JURISDICTION

We have jurisdiction under 8 U.S.C. § 1252 because that statute provides for judicial review of removal orders. *See* 8 U.S.C. § 1252(a)(1), (b). But because Garcia is considered a criminal alien under 8 U.S.C. § 1252(a)(2)(C), our jurisdiction is limited to constitutional claims or questions of law raised in Garcia's petition. *Id.* § 1252(a)(2)(C), (D). The primary issue raised in Garcia's petition is whether his state conviction constitutes an aggravated felony under federal law. This is a legal question. *See Patel v. Ashcroft*, 401 F.3d 400, 407 (6th Cir. 2005). We therefore have jurisdiction to review the issue.

III. ANALYSIS

A. The aggravated-felony issue

Because the BIA rendered its own opinion in this case rather than simply adopting the IJ's decision, we concentrate our review on the analysis of the BIA. *See Koulibaly v. Mukasey*, 541 F.3d 613, 619 (6th Cir. 2008). We review de novo the legal question of whether Garcia's state drug conviction amounts to an aggravated felony under the INA. *See Patel*, 401 F.3d at 407. Although we generally defer to reasonable BIA interpretations of immigration statutes, we owe no deference to the BIA on this question because the answer depends on interpreting state and federal criminal statutes. *Id.*

An alien may apply for discretionary cancellation of removal if, among other things, the alien "has not been convicted of any aggravated

felony." 8 U.S.C. § 1229b(a)(3). All of the offenses listed in 8 U.S.C. § 1101(a)(43) are deemed aggravated felonies, one of which is "illicit trafficking in a controlled substance . . . , including a drug trafficking crime" as defined in 18 U.S.C. § 924(c). 8 U.S.C. § 1101(a)(43)(B). Section 924(c) in turn defines a drug-trafficking crime as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)."

A state drug offense is considered an aggravated felony if it falls within the general term "illicit trafficking." *Lopez v. Gonzales*, 549 U.S. 47, 57 (2006). "Illicit trafficking" is not statutorily defined, but the Supreme Court has reasoned that "ordinarily 'trafficking' means some sort of commercial dealing." *Id*. at 53. Neither the BIA nor the government contend, however, that Garcia's state offense counted as an aggravated felony under this route because the statute he violated does not require commercial dealing. *See* Mich. Comp. Laws §§ 333.7401(2)(d)(iii) and 333.7105(1).

The other way that a state drug offense constitutes an aggravated felony under 8 U.S.C. § 1101(a)(43)(B) is where the state offense is considered a drug-trafficking crime, which occurs if the state offense "proscribes conduct punishable as a felony" under the CSA. *Lopez*, 549 U.S. at 60. In other words, "a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony." *Id*. at 57. The CSA defines a felony as a crime "to which it assigns a punishment exceeding one year[s'] imprisonment." *Id*. at 56 n.7. An alien convicted of such an offense is not eligible for cancellation of removal. *Carachuri-Rosendo v.*

Holder, 130 S. Ct. 2577, 2589 (2010) (citing 8 U.S.C. § 1229b(a)(3)). This framework for determining whether a state drug offense is considered a drug-trafficking crime has sometimes been called the "hypothetical federal felony" rule. *Rashid v. Mukasey*, 531 F.3d 438, 442-43 (6th Cir. 2008).

Under this rule, we use the "categorical approach" to determine if a state offense constitutes an aggravated felony. *Id.* at 447. In doing so, we may "look only to the fact of conviction and the statutory definition of the prior offense," *id.* (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)), and may not "look through to the defendant's actual criminal conduct," *id.* (quoting *United States v. Montanez*, 442 F.3d 485, 489 (6th Cir. 2006)). The elements of the crime are the most important factors to consider. *Montanez*, 442 F.3d at 492.

Garcia pled guilty to and was sentenced for attempted possession with intent to deliver marihuana, in violation of Mich. Comp. Laws § 333.7401(2)(d)(iii). The elements of that offense are an attempt to possess with intent to deliver less than five kilograms of the drug. *Id.* § 333.7401(1), (2)(d)(iii). No commercial transaction is required under the Michigan statute because "deliver" is defined as "the actual, constructive, or attempted transfer from 1 person to another of a controlled substance." *Id.* § 333.7105(1).

The CSA similarly prohibits a person from "possess[ing] with intent to . . . distribute . . . a controlled substance." 21 U.S.C. § 841(a)(1). Marihuana is a controlled substance under federal law. 21 U.S.C. §§ 802(6), 812 Schedule I(c)(10). The term "distribute" is defined as "to deliver," and

"deliver" is a noncommercial term that means "the actual, constructive, or attempted transfer of a controlled substance." 21 U.S.C. § 802(8), (11); *accord United States v. Wallace*, 532 F.3d 126, 129 (2d Cir. 2008) (collecting cases—including *United States v. Vincent*, 20 F.3d 229 (6th Cir. 1994)—holding that distribution within the meaning of 21 U.S.C. § 841(a) can occur without a sale). And "attempts . . . to commit any offense defined in [the CSA] shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt." 21 U.S.C. § 846.

Although the precise amount of marihuana involved in Garcia's case is unknown, the attempt to possess with the intent to deliver *any amount* of marihuana less than 50 kilograms is punishable by up to five years in prison. 21 U.S.C. § 841(b)(1)(D). This means that the elements of Garcia's state offense presumptively correspond to the elements of the federal felony offense of attempting to possess with intent to deliver marihuana. His state conviction should therefore be considered an aggravated felony. *See Lopez*, 549 U.S. at 57.

But Garcia contends that his state offense does not correspond to a federal felony because an exception in 21 U.S.C. § 841(b)(4) provides that anyone who violates § 841(a) by "distributing a small amount of marihuana for no remuneration" shall be punished as if he or she engaged in simple possession of the drug, a misdemeanor punishable by not more than one year in prison under § 844. Garcia claims that § 841(b)(4) applies here because his state offense fails to include remuneration as an element. He also notes that his state offense "deals with the smallest

amount of marijuana that is provided for in Michigan law" (under five kilograms), which implies that § 841(b)(4) is applicable because the government failed to show that the amount of marihuana involved was more than small. In essence, Garcia is arguing that the CSA's default provision for punishing possession with intent to distribute an undetermined amount of marihuana is the misdemeanor exception of § 841(b)(4), and that this default applies unless the government disproves § 841(b)(4)'s applicability by showing either that more than a small amount of marihuana was involved or that a remunerative exchange occurred.

The problem with Garcia's argument is that a federal prosecutor trying to have a defendant punished for a drug offense under § 841(b)(1)(D) does not need to prove the absence of the § 841(b)(4) elements. This court has ruled in *United States v. Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002), that the amount of marihuana involved does not need to be proven to the jury in order to convict under § 841(a) and to punish under § 841(b)(1)(D). The amount of marihuana, assuming that it is under 50 kilograms, is therefore not an element of the felony drug offense. Instead, where the amount of marihuana is undetermined—as it is in this case—§ 841(b)(1)(D) is the default provision for punishing possession of the drug with the intent to distribute, not § 841(b)(4). *Id.*; *see also United States v. Hamlin*, 319 F.3d 666, 670-71 (4th Cir. 2003) (holding that § 841(b)(1)(D) is the default provision for possessing an undetermined amount of marihuana with the intent to distribute the drug). So the elements of Garcia's state offense establish a felony offense under 21 U.S.C. § 841.

The First Circuit, reasoning along similar lines, has reached the same conclusion. *See Julce v. Mukasey*, 530 F.3d 30, 34-36 (1st Cir. 2008). In *Julce*, the alien argued that his state conviction for possession with the intent to distribute marihuana should not be punishable as a CSA felony because it would be treated as a misdemeanor under § 841(b)(4). *Id.* at 34. The First Circuit rejected this argument, reasoning that § 841(b)(4) "does not create a stand-alone misdemeanor offense," but is rather "best understood as a mitigating sentencing provision." *Id.* at 35.

To avoid punishment under § 841(b)(1)(D), which the First Circuit found was the default-punishment provision, "the defendant bears the burden of producing mitigating evidence in order to obtain misdemeanor treatment under § 841(b)(4)." *Id.* Julce failed to satisfy that burden. *Id.* at 35-36. Because the elements of Julce's state conviction, "if proven in a federal prosecution under § 841, would establish a felony offense," the court determined that his conviction constituted an aggravated felony. *Id.* at 35.

We acknowledge that the Second and Third Circuits have decided this precise issue the other way, but we are not persuaded by their analysis. *See Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008); *Jeune v. Attorney Gen.*, 476 F.3d 199 (3d Cir. 2007). Martinez involved a New York conviction for the sale of marihuana in the fourth degree. Unlike Garcia's offense that could have encompassed as much as 5 kilograms of marihuana, Martinez's offense likely involved between 2 and 25 grams of marihuana (less than one ounce). The offense also did not require

remunerative exchange as an element of the offense. In applying the categorical approach, *Martinez* relied on another Second Circuit case establishing that "only the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant" to the categorical approach. *Id*. at 118 (quoting *Gertsenshteyn v. United States Dep't of Justice*, 544 F.3d 137, 143 (2d Cir. 2008)). Since the minimum criminal conduct under the New York statute involved only two grams of marihuana, the court concluded its analysis as follows: "[W]e look no further than to the fact that Martinez's conviction could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4)." *Id*. at 120.

As in the present case, the government in *Martinez* argued "that it was Martinez's burden to prove that his state conviction would be punishable under 21 U.S.C. § 841(b)(4)." *Id*. at 121. But the Second Circuit rejected this argument because its interpretation of the categorical approach—a focus on the "minimum criminal conduct necessary to sustain a conviction under a given statute"—meant that Martinez did not have "to prove how little marihuana he had or the nature of the transfer, so long as his conviction could have been based on a nonremunerative transfer of a small amount of marihuana." *Id*. The court also observed that "[p]lacing the burden on Martinez, instead, necessarily requires looking into evidence of Martinez's actual conduct," which runs counter to the policy behind the categorical approach of avoiding mini-trials on whether a specific defendant's conduct

"was less or more culpable than what his actual conviction required." *Id*.

In *Jeune*, the Third Circuit reached the same conclusion using similar reasoning. *Jeune*, 476 F.3d at 205. Jeune pled guilty under a Pennsylvania statute that prohibited the manufacture, delivery, or possession with intent to manufacture or deliver marihuana. *Id*. at 200-201. Based upon the statute and the record of conviction, the court determined that Jeune's offense involved less than two pounds of marihuana, but could not determine that his offense involved remuneration. *Id*. at 204-05. The court also interpreted the categorical approach as requiring the court to "assume that Jeune's conduct was only the minimum necessary to comport with the statute and record." *Id*. at 204 (citations omitted). Because the least culpable conduct in *Jeune* involved a small amount of marihuana and no remunerative exchange, Jeune's state offense was deemed punishable under the misdemeanor provision of 21 U.S.C. § 841(b)(4) and therefore not an aggravated felony. See *id*. at 205.

Although the opinions in *Martinez* and *Jeune* deserve respect, the principles established in *Bartholomew* cut against them, and *Bartholomew* is a controlling Sixth Circuit case. *Bartholomew* concludes that the amount of marihuana need not be proven to convict under § 841(a) or to punish under § 841(b)(1)(D), and further holds that § 841(b)(1)(D) establishes the default punishment for cases where the amount of marihuana is undetermined. *United States v. Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002). Because "a state offense whose elements include the elements of a felony punishable under the

CSA is an aggravated felony," *Lopez*, 549 U.S. at 57, and because the amount of marihuana is not an element of the relevant federal felony, Garcia's state conviction is an aggravated felony under the categorical approach. This would be the case even if we were to assume that the conduct underlying his state conviction was the minimum criminal conduct necessary to sustain the conviction. Moreover, although *Bartholomew* is a criminal-sentencing case rather than an immigration case, this court has declined to interpret a drug-based aggravated felony differently in immigration and criminal-sentencing contexts. *See Rashid v. Mukasey*, 531 F.3d 438, 442 (6th Cir. 2008); *United States v. Palacios-Suarez*, 418 F.3d 692, 697 (6th Cir. 2005). Garcia's conviction therefore constitutes an aggravated felony under the INA.

B. Waiver under 8 U.S.C. § 1182(h)

The next issue is whether Garcia is eligible for a waiver of inadmissability. A § 1182(h) waiver for drug offenses is available only for a single offense of simple possession of 30 grams or less of marihuana. 8 U.S.C. § 1182(h). Because Garcia pled guilty to something more than simple possession of marihuana, he is statutorily ineligible for a § 1182(h) waiver.

C. Ineffective assistance of counsel

Finally, Garcia asserts that his criminal defense attorney failed to inform him of the immigration consequences of pleading guilty to the state drug offense. He contends that this failure by his attorney amounted to constitutionally deficient

representation based upon the Supreme Court holding in *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486-87 (2010), that attorneys must inform their clients whether a guilty plea carries a risk of deportation.

We cannot reach the merits of Garcia's argument, however, because his claim is not a proper one in immigration proceedings. As this court held in *Al-Najar v. Mukasey*, 515 F.3d 708, 714 (6th Cir. 2008), "[a]n alien petitioner may not collaterally attack a criminal conviction that serves as the basis for the DHS's initiation of removal proceedings against the alien, regardless of whether the attack is raised in a habeas petition or, as it is here, on review from a decision of the BIA." We further note that Padilla's ineffective-assistance-of-counsel claim arose in postconviction proceedings rather than in immigration proceedings. *Padilla*, 130 S. Ct. at 1478.

IV. CONCLUSION

For all of the reasons set forth above, we **DENY** Garcia's petition for review.

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A071 857 678 - Detroit, MI

Date: Oct. 14, 2009

In re: JORGE ALBERTO GARCIA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Sufen Hilf, Esquire

ON BEHALF OF DHS: Michael B. Dobson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act
[8 U.S.C. § 1182(a)(2)(A)(i)(II)]-
Controlled substance violation

Sec. 212(a)(2)(C), I&N Act
[8 U.S.C. § 1182(a)(2)(C)] -
Controlled substance trafficker

APPLICATION: Cancellation of removal

The respondent appeals from an Immigration Judge's July 18, 2008, decision sustaining the charges of removability, finding that he is ineligible for the relief of cancellation of removal under section 240A(a) of the Immigration and Nationality Act or a waiver of inadmissibility under section 212(h) of the Act, and ordering him removed from the United States. The appeal will be dismissed.

The respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, was convicted on August 28, 1998, of attempted possession with the intent to distribute a controlled substance, in violation of section 333.7401(2)(d)(iii) of the Michigan Compiled Laws. *See* Exh. 4, Respondent's Answer to Department's Motion to Pretermit Relief (Judgement of Sentence and Statute); *see also* Exh. 2. The Immigration Judge found that the conviction renders the respondent ineligible for cancellation of removal because he is an alien who has been convicted of an aggravated felony under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act (I.J. at15-16). *See* section 240A(a)(3) of the Act, 8 U.S.C. § 1129b(a)(3). The respondent claims that because Michigan law would punish, under the same statute as the one under which he was convicted, the non-remunerative transfer of small amounts of marijuana, his conviction is not categorically an aggravated felony drug trafficking crime, and he should be permitted to apply for cancellation of removal. *See* Respondent's Brief at 7-10. For the following reasons we will affirm the result reached by the Immigration Judge. *Matter of A-S-B-*, 24 I&N Dec. 493 (BIA 2008).

The Michigan statute at issue provides in relevant part: "a person shall not manufacture, create, deliver or possess with intent to manufacture, create, or deliver a controlled substance." MICH. COMP. LAWS § 333.7401(1). There is no dispute that marijuana is the controlled substance at issue here. *See* Exhs. 4, 8. The relevant subpart under which the respondent was convicted provides that "[a] person who violates this subsection . . . as to (d) marihuana . . . is guilty of a felony punishable as follows (iii) [i]f the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than $10,000.00 or both." MICH. COMP. LAWS § 333.7401(2)(d)(iii). "Distribution" under Michigan law is defined as "the actual, constructive, or attempted transfer from one person to another of a controlled substance," MICH. COMP. LAWS § 333.7105(1). The Judgement of Sentence reflects that the respondent received a fine of $500 and was required to pay some $1150 in total fines and costs (Exhs. 2, 4).

The respondent, as an alien seeking relief from removal, bears the burden of establishing his eligibility and fitness for relief. 8 C.F.R. § 1240.8(d). A conviction for an aggravated felony disqualifies a lawful permanent resident like the respondent from the relief of cancellation of removal. *See* section 240A(a)(3) of the Act, 8 U.S.C. § 1129b(a)(3). It is therefore the respondent's burden to prove that he has not been convicted of an aggravated felony as that term is defined in section 101(a)(43) of the Act. Section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), defines the term "aggravated felony" to include a "drug trafficking crime" as defined in 18 U.S.C. § 924(c). The present aggravated felony

determination is subject to the "categorical approach," meaning that the "elements" of the respondent's predicate offense must correspond to the "elements" of an offense that carries a maximum term of imprisonment of more than 1 year under the CSA. *See Lopez v. Gonzales*, 549 U.S. 47, 55, 127 S.Ct. 625, 631 (2006) (the reference to a 'felony punishable under the [CSA]' in § 924(c)(2) is to a crime punishable as a felony under the federal Act). Thus, for a state drug offense to qualify as a "drug trafficking crime" and, by extension, an aggravated felony, it must correspond to an offense that carries a maximum term of imprisonment exceeding 1 year under the CSA. *Id.* at 631 and n.7.

The Department of Homeland Security ("the DHS," formerly the Immigration and Naturalization Service) argues that the respondent's conviction is a state felony that corresponds to the federal felony offense of marijuana distribution. *See* 21 U.S.C. § 841(a)(1). The federal offense is punishable under the CSA by a term of imprisonment of up to 5 years. *See* 21 U.S.C. § 841(b)(1)(D). The respondent contends that his Michigan conviction for distribution of a controlled substance does not correspond to any felony offense under the CSA because the Michigan statute at issue would include within the concept of "distribution" even non-remunerative transfers of drugs. *See* MICH. COMP. LAWS § 333.7105(1) ("distribution" under Michigan law includes "the actual, constructive, or attempted transfer from one person to another of a controlled substance"); *People v. Schulz*, 635 N.W. 2d 491 (Mich. App. 2001) (social sharing, without remuneration, would be included within Michigan's concept of "delivery"). According to the respondent, because the Michigan statute does

not require a showing of remuneration and because the CSA would treat distribution of a "small amount of marijuana for no remuneration" as a misdemeanor under 21 U.S.C. § 841(b)(4), his conviction for a felony punishable under the CSA has not been shown on this record.[1]

We disagree with the respondent's contention that the existence of section 841(b)(4) of the CSA—presenting the opportunity to punish a small category of offenses as misdemeanors—requires that we find that he has not been convicted of an aggravated felony. The provisions of section 841(b)(4) are properly viewed not as a discrete "offense," but as a sentencing provision that describes a "mitigating exception" to the otherwise-applicable 5-year statutory maximum called for by 21 U.S.C. § 841(b)(1)(D).[2] As we noted in *Matter of Aruna*, 24 I&N 452, 455 (BIA 2008), "mitigating facts that decrease the penalty below the statutory maximum need not be proven to a jury or treated as "elements" for any purpose." Thus, we conclude that because the categorical approach is concerned only with the facts that a jury must have decided beyond a reasonable doubt, the respondent's Michigan offense must

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[1] The respondent's conviction under section 333.7401(2)(d)(iii) of the Michigan statute is for the smallest amount of marijuana identified under Michigan law.

[2] *See United States v. Outen*, 286 F.3d 622, 638 (2d Cir. 2002) (federal prosecutor seeking a 5-year sentence against a marijuana distributor not required by *Apprendi v. New Jersey*, 530 U.S. 466 (2000) to prove beyond a reasonable doubt that the amount of marijuana distributed was "large" or that remuneration was present).

correspond not to the federal offense described in this mitigating exception, "but rather to the offense that may be proved to a jury upon the fewest facts." *See Matter of Aruna, supra,* at 456 (citation omitted); *accord U.S. v. Bartholomew*, 310 F.3d 912, 925 (6th Cir. 2002) ("the proper 'baseline' or 'default' federal provision is not the provision with the lowest penalty, but rather the one which states a complete crime upon the fewest facts").

We therefore must reject the respondent's argument that section 841(b)(4) of the CSA is the relevant federal provision for comparing state marijuana violations where the quantity of the drug is undetermined, "because it requires proof of an additional fact—the absence of remuneration." *See Matter of Aruna, supra,* at 456. As to the amount of marijuana and the absence of remuneration—prerequisites for qualifying for the reduction in sentence—the defendant in a criminal case would bear the burden of proof. *Matter of Aruna, supra,* at 457. As we stated in *Matter of Aruna, supra,* "facts that must be proved by the accused in order to support a reduced sentence do not constitute 'elements' of an offense for purposes of categorical analysis." *Id.* We therefore find no error in the Immigration Judge's determination that the respondent has not proven his eligibility for cancellation of removal under section 240A(a)(3) of the Act. Under a categorical analysis, the respondent's conviction for an aggravated felony disqualifies him from relief.

Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/ Roger Pauley

FOR THE BOARD

APPENDIX C

IMMIGRATION COURT
477 MICHIGAN AVENUE, SUITE 440
DETROIT, MI 48226

In the Matter of

Case No.: A71-857-678

GARCIA, JORGE ALBERTO
Respondent

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of the oral decision entered on JULY 18, 2008.

This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[X] The respondent was ordered removed from the United States to Mexico.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to or in the alternative to .

[ ] Respondent's application for voluntary departure was granted until upon posting a bond in the amount of $___ with an alternate order of removal to .

Respondent's application for:

[ ] Asylum was ( ) granted ( ) denied ( ) withdrawn.

[ ] Withholding of removal was ( ) granted ( ) denied ( ) withdrawn.

[X] A Waiver under Section 212(h) was ( ) granted (X) denied ( ) withdrawn.

[X] Cancellation of removal under section 240A(a) was ( ) granted (X) denied ( ) withdrawn.

Respondent's application for:

[ ] Cancellation under section 240A(b)(1) was ( ) granted ( ) denied ( ) withdrawn. If granted, it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Cancellation under 240A(b)(2) was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Adjustment of Status under Section ___ was ( ) granted ( ) denied ( ) withdrawn. If granted it is ordered that the respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's application of ( ) withholding of removal ( ) deferral of removal under Article III of the Convention Against Torture was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's status was rescinded under section 246.

[ ] Respondent is admitted to the United States as a ___ until ___.

[ ] As a condition of admission, respondent is to post a $___ bond.

[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the Immigration Judge's oral decision.

[ ] Proceedings were terminated.

[ ] Other:______________________________________.

Date: Jul 18, 2008

/s/ Robert D. Newberry
ROBERT D. NEWBERRY
Immigration Judge

Appeal: Alien Reserved Appeal Due By: 8-18-2008

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
DETROIT, MICHIGAN

File No.: A 071 857 678 July 18, 2008

In the Matter of

JORGE ALBERTO GARCIA IN REMOVAL PROCEEDINGS

Respondent

CHARGES: Section 212(a)(2)(C) of the Immigration and Nationality Act, as amended, in that a Consular or Immigration Officer knows or has reason to believe that the alien is an alien who is or has been an illicit trafficker in any controlled substance, or is or has been a knowing assister, a better, conspirator, colluder, with others in the illicit trafficking in any such controlled substance;

Section 212(a)(2)(A)(i)(II) of the Immigration and Nationality Act, as amended, an alien who has been convicted of or who

admits having committed or who admits committing acts which constitute the essential elements of (or conspiracy or attempt to violate) any law, regulation of a state, the United States or a foreign country relating to a controlled substance, as defined in Section 102 of the Controlled Substances Act 21 United States Code 802 et. seq.

Section 212(a)(7)(A)(i) of the Immigration and Nationality Act as amended, immigrant at time of application for admission is not in possession of a valid, unexpired immigrant visa, reentry permit, border crossing card or other valid entry document required by the Immigration Act, and an valid, unexpired passport or other suitable travel document or document by identity and nationality, required by the regulations promulgated by the Attorney General, pursuant to Section 211(a)) of the Act.

APPLICATIONS: Cancellation of removal of lawful permanent resident;

and

Waiver of conviction, pursuant
to INA Section 212(h).

ON BEHALF OF RESPONDENT:
Sufen Hilf, Esquire

ON BEHALF OF DHS:
Michael Dobson
Senior Associate Counsel

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Background and Procedural History

The respondent is a male, native and citizen of Mexico, he was born on June 6, 1965. He was placed into these removal proceedings, through the filing with the Court of a Notice to Appear (herein NTA). The NTA has been designated as Exhibit no. 1. The front page of Exhibit no. 1 reflects that it was filed with the Court on January 4, 2006, after being personally served on the respondent on July 7, 2005. This Notice to Appear contains six factual averments and two charges. The two charges are the Section 212(a)(2)(C) charge and the charge, pursuant to Section 212(a)(2)(A)(i)(II). Ultimately, factual averments no. 3 through 6 on Exhibit no. 1 were deleted, through the publication and filing of this Court with an amended charging document, which was ultimately marked as Exhibit no. 1A. The Court notes, however, the respondent conceded the first two factual allegations in the Notice to Appear, specifically, that he is not a citizen or national of the

United States, and he is a native and citizen of Mexico.

The amended charging document, Exhibit 1A, was filed with this Court on January 4, 2006. It contains the third charge, that is the without documents charge, pursuant to Section 212(a)(7)(A)(1)(I) of the Immigration and Nationality Act (hereinafter Act or INA). This amended charging document also adds the factual allegations 3 through 8 and ultimately the respondent conceded the six factual allegations but denied the charge on Exhibit no. 1A. Specifically, the Court notes that the respondent conceded that his status was adjusted to that of a lawful conditional resident at Detroit, in December of 1992, under Section 245 of the Act, but the conditions on his permanent residence were removed in February of 1995, and that he applied for admission as a returning resident on June 9, 2005 at Port Everglades, Florida. He also admitted that on June 9, 2005, his inspection was deferred for approximately one month to afford him the opportunity to present his conviction records relating to a controlled substance offense to the United States Customs and Border Protection of the Detroit Metro Airport.

He also admitted the allegation concerning his conviction, that is, that he was on August 28, 1998, convicted in the Tenth Judicial Circuit Court in Saginaw, Michigan for the crime of attempted possession with intent to deliver marijuana and crime prevention M.C.L. 33.7401(2)(d)(iii) and that he was not in possession of a valid, unexpired immigrant visa, reentry permit, border crossing card or other valid entry document required by the Act. Presumably he

conceded this fact averment because he had not obtained a 212(h) waiver or a cancellation of removal if they were appropriate. Based upon the respondent's concession to the fact averment no. 8, as well as his applications and his testimony in court, the Court finds that the third charge, without document charge, has been sustained by clear, convincing and unequivocal evidence.

The Court also finds that given the respondent conceded that he was removable pursuant to the generic controlled substance charge, pursuant to 212(a)(2)(A)(i)(II) of the Act, his removability, pursuant to that statute has also been demonstrated by clear, convincing and unequivocal evidence.

For the reasons discussed below, the Court will also find, by clear, convincing and unequivocal evidence, that the respondent is removable on the remaining charge that is concerning him being potentially and illicit trafficker in any controlled substance.

In order to sustain the Government's burden, the Government proffered the respondent's conviction record. This was received into evidence as Exhibit no. 2. It reflects that the respondent pled no contest to a lesser included offense of attempted possession with intent to deliver marijuana, after he was originally charged with possession with intent to deliver marijuana and conspiracy to do the same.

To try to avoid being removed, the respondent filed two applications for relief. The cancellation of removal application was denominated at Exhibit no. 3, and that application for the waiver of the conviction, pursuant to Section 212(h) of the Act was denominated at Exhibit no. 3A. However, if the

Court said that the cancellation application was 2, it should be 3.

On May 1, 2007, the Government filed a Motion to Pretermit the respondent's applications for relief, because the respondent was a drug trafficker, pursuant to INA Section 101(a)(43)(U) of the Act, as this relates to INA Section 101(a)(43)(B).

On May 15, 2007, the respondent filed an answer to the Government's Motion to Pretermit Relief. On May 21, 2007, the Court issued an order, stating that the facts are in dispute, hence the Motion to Pretermit is denied, citing 8 C.F.R. 1240(b) and (d).

In anticipation of a merits hearing, the Government filed on May 23, 2008, a proposed Exhibit, which was marked as Exhibit no. 4 for identification. This proposed Exhibit is the January 15, 1998 search warrant with concomitant affidavit in support of a search warrant. This is the search warrant that resulted in the respondent's girlfriend being raided on January of 1998. This led the respondent to ultimately plead no contest to the charge as mentioned above. This document was received into evidence only because the respondent testified during the course of proceeding, that when he was arrested and while he was incarcerated at some point, the respondent was handed a warrant although he did not identify the warrant and he claims that he did not understand exactly what that warrant was for. The contents of the warrant will not be considered in arriving at any decision in the case at bar.

Again, in anticipation of a merits hearing, the respondent submitted a series of documents, Tabbed 1 through 7. They consist *inter alia* of his green card,

tax returns for the years 2001, 2003, 2007, and evidence that the respondent has property, where he is making some mortgage payments, as well as Tab 4, a record of conviction for driving under the influence in St. John's, Michigan, on or about August of 2004. If the Court did not mention it, Exhibit no. 5 was received. The only objection was the relevance, given the fact that the respondent, in the eyes of the Government, was not eligible for cancellation of removal or 212(h) relief. Similarly, the respondent submitted Tabs 8 through 14, these were marked as Exhibit 6 for identification and were received into evidence as 6 with the only objection, the fact that these documents are totally irrelevant, given the fact that the respondent is not eligible for any relief. These documents indicate that the respondent had complied with the biometric instructions. See Tab 13.

There also were other documents, such as a letter, see Tab 11, from the respondent's son, Marcos Garcia, one of the respondent's five children.

During the course of the hearing, the Government submitted several documents to rebut the respondent's claim, that he had only been arrested twice. The first document is Exhibit no. 7, which indicates that the respondent was charged for an incident happening two months after the event that resulted in him pleading no contest and the charges involved in this particular incident from March 25, 1998, for possession with intent to deliver marijuana and maintaining a drug house, both in contravention of Michigan statute.

At Exhibit no. 8, the Government offered a police incident report with respect to the January 1998 incident, and it developed why the house was raided

and found in the house. The Court will note that this was received into evidence after the respondent's attorney claimed that this report did not belong to him. However, the respondent, within the four corners of this report, was quite clearly a suspect or subject, whose name is indicates as having been given his Miranda warnings, based upon what happened at the home after he was aroused from bed.

The Court is not going to rely on the matters contained in Exhibit 8, although they are technically admissible in the Court's view. They are really unnecessary to decide any issue in this case.

During the course of the proceeding, the respondent claimed that he pled no contest, because he did not have money to pay or continue to pay for his retained lawyer and that he never had a public defender. Exhibit no. 9 was received into evidence. This reflects that the respondent actually made an application for a public defender. The respondent confirmed that page three of this Exhibit, that that was his signature, but he claims that he could not read the application for public defender, page two of this document also reflects that the Court ordered two days after he requested the public defender, that Mr. Everett Lee represent the respondent and Exhibit no. 9 is a stipulation saying that Mr. Lee is no longer counsel and Mr. Robert D. Curry, the retained counsel, was going to represent the respondent.

Again, during the course of the hearing, the respondent insisted that he had only been arrested and fingerprinted twice. Exhibit no. 10 was received into evidence, which indicates that the respondent was arrested three times and fingerprinted three

times. The first was on January 16, 1998, see page three of this Exhibit. The second arrest, located on the same page, shows that he was arrested on March 25, 1998 by the same Sheriff's Office in Saginaw, Michigan and the third arrest was for the driving under the influence charge of May 29, 2004.

It was the respondent's position that the respondent was not an aggravated felon, because the offense that he was convicted of did not have a trafficking element, and the corresponding Federal statute was not a felony. In order to rebut this, the Government had the Court take judicial notice of Section 333.7410, particularly sub-paragraph (7). This is of the Compiled Michigan Laws, which reflect that the respondent could have been charged with distribution of marijuana without remuneration and for not commercial distribution, but that this was not the statute that he was prosecuted on.

In order to help the Court understand that the respondent would not be convicted of an offense that had a commercial trafficking involved, the respondent requested that the Court take judicial notice of the definition of delivery, pursuant to the Michigan statute and that statute is quoted at the Exhibit 12. It reads delivery means, "the actual, constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship."

The Court will now embark upon a discussion of the respondent's removability, pursuant to the one charge in dispute. The Court will then address the respondent's eligibility for 212(h) and cancellation of removal, pursuant to Section 240A(a) of the Act, and then the Court will have a succinct discussion about

the respondent being granted cancellation of removal, assuming arguendo that he was eligible for this form of relief, which the Court will find that he is not.

Respondent's Removability Pursuant To Him Being Thought To Be An Illicit Trafficker In Any Controlled Substance

Because the respondent is a lawful permanent resident, the respondent in the Sixth Circuit must be demonstrated to be removable by clear, convincing and unequivocal evidence. With respect to the respondent's removability, pursuant to Section 212(a)(A)(2)(C) of the Act, the Court notes initially that the statute does not require a conviction to establish inadmissibility. The Court notes that the predecessor statute had a long history. For instance, in Matter of R-H-, 79 Int. Dec. 675 (BIA 1958), the Board of Immigration Appeals held that an alien who knowingly and consciously acts as a conduit in the transfer of marijuana between a dealer and a customer, the dealer was excludable under the former section involving illicit trafficker in drugs, even though he derived no personal gain or profit from the transaction.

Simple possession would not render the respondent being removable, pursuant to this Section. There must be at least circumstantial evidence that the respondent was going to traffic the drug. See Matter of Favela, 16 I&N Dec. 753 (BIA 1979); Matter of Rico, 16 I&N Dec. 118 (BIA 1977); Matter of P-, 5 I&N Dec. 190 (BIA 1953); and Matter of McDonald and Brewster, 15 I&N Dec. 203 (BIA 1975).

In the case currently, the respondent claimed that he did not have any idea that there was marijuana

being stored in the basement of a home, in which he was sleeping overnight with his girlfriend and a number of other individuals. This marijuana, he said, was in the basement. He also indicated in his testimony that his wife was present at that time and he knew that his brother had indicated to someone that the marijuana weighing skills were, in fact, the brother's marijuana weighing scales.

Despite the respondent's claims of ignorance of anything involving marijuana or even the fact that he did not know it was in the course, respondent elected to plead guilty but plead no contest, because he indicated that he was unemployed and he could not afford to keep retaining his lawyer and fought the two charges. However, the respondent further testified that as far as he knew, he pled no contest to a misdemeanor and it was the charged offense. He also testified that he was only arrested once and if he was arrested twice, it was for the same incident.

The Court notes, however, that the records of the Court at Exhibit 2, reflect that the respondent pled no contest to a lesser included offense, an attempt of one of the charges alleged against him, and in exchange, the greater charge was nolo prosecuted and the conspiracy charge was nolo prosecuted. But more importantly, while the respondent claimed that he had no pre-trial agreement and pled no contest to a misdemeanor, his own lawyer confessed that he pled guilty to a felony, wherein he could have received a maximum of two years and he had also been charged with an incident on March 25, see Exhibit 7, wherein he was charged with possession with intent to deliver on March 25, as well as maintaining a drug house and that is the same address as he was sleeping in, in

January, when he was arrested from the bed. And these records reflect that because the respondent pled to the lesser included offense for the January offense, the Government nol prossed without prejudice, the possession with intent to deliver marijuana and the maintained drug ops, resulting from the arrest on March 25, 1998.

So the respondent, quite clearly, lied to the Court about how many times he was arrested and the reasons for such arrest. The Court can only conclude that the respondent is lying about these things, because he does not want the Court to be able to know a complete and accurate history of his drug involvement and we know that he lied with respect to why he pled guilty. And while it might have been one of the reasons he pled guilty that he ran out of funds or something equivalent thereof, clearly he had a pre-trial agreement and there was some incentive to plead no contest to dismiss the charges that he claims to have no memory of.

The bottom line is that the Court finds that upon based upon the respondent's no content plea alone and the subservient matters that he now claims that he does not remember, that his removability as an illicit drug trafficker has been established by clear and convincing evidence. Thus, the charge, pursuant to Section 212(a) (2) (C) is sustained.

Respondent's Eligibility For 212(h) Waiver

With respect to 212(h), the only waiver applicable for drug offenses, is if the respondent has been convicted of a single offense of simple possession of 30 grams or less of marijuana. Here, obviously, the respondent was found guilty, pursuant to his pleas of

no contest, to something much greater than a single offense of simple possession of 30 grams of marijuana. Thus, ipso facto, the respondent is ineligible to apply for a 212(h) waiver and, accordingly, the Court denies this form of relief without further comment.

Respondent's Eligibility For Cancellation Of Removal As A Lawful Permanent Resident

Pursuant to Section 240A(a) of the Act, the Court may cancel the removal of an alien who is inadmissible or deportable, if the alien, first, has been lawfully admitted for permanent residence for not less than five years. Now, with respect to this statutory qualification, the Court notes that there is no dispute that he meets this requirement.

Next, he must demonstrate that he has resided in the United States continuously for seven years after having been admitted in any status. Again, there is no debate the respondent meets that qualification.

What is in dispute is first, that the respondent cannot demonstrate that he has not been convicted of an aggravated felony and the Court will show below that the respondent has, in fact, been convicted of an aggravated felony. The Court also notes that even if the respondent were eligible to apply for cancellation of removal, these requirements do not provide an indiscriminate cancellation of removal for those who demonstrate their statutory eligibility. See Matter of C-V-T-, 22 I&N Dec. 7, 10 (BIA 1998). Should the respondent be eligible to apply for cancellation of removal, the Court notes that the Court looks to a number of positive and negative factors. Those factors include the nature of the respondent's Immigration history, the length of time that the

respondent has been in the United States, where family members are, whether they be in the United States or overseas, the Immigration history of those relatives, the respondent's work history, the respondent's criminal history, the hardship that might endure to the respondent or other family members.

With respect to the case at bar, the respondent has five children in the United States. However, all of them are now adults and they can certainly travel to Mexico to visit their father. Additionally, the respondent has some grandchildren that he is close to and he is close to children and grandchildren of his girlfriend, who he has had a longstanding relationship for 13 years, but so far has elected not to tie the knot, although the girlfriend was not here to testify. Of course, the respondent could not keep a straight story about many things, the fact, with respect to why his girlfriend wasn't here, he testified that she had some back problems. Unfortunately for him, the daughter of his girlfriend testified that the mother, because of the stress of the moment, suffers from migraine headaches and has no other physical infirmities.

The Court believes the daughter of the girlfriend and not the respondent, because the respondent's troubled history for telling the truth is very, very dubious. In fact, he told the Court some lies, such as I don't remember being arrested three times. I don't remember being fingerprinted three times and why he entered the no contest plea.

While the respondent certainly has a number of equities, including a long history of employment, although in his application, he said he never obtained

any welfare, such as United States employment compensation. The respondent testified that he frequently gets unemployment compensation because during winter months, he is not able to work on such things as bridge construction. So the respondent had some difficulty telling the truth in his own application as well.

In any event, one of the most important matters, generally speaking for cancellation cases is whether or not the respondent has rehabilitative potential or has been rehabilitated. Given the respondent's lies to the Court, as already elucidated, the Court finds that the respondent has demonstrated not only to be rehabilitated but that he has no rehabilitative potential, and accordingly, if the respondent were eligible to apply for cancellation of removal, given a totality of the circumstances, the Court would deny the respondent's cancellation of removal application. See Matter of C-V-T-, supra, at page 14.

Now, the respondent claims that he has not been convicted of an aggravated felony, because there is no trafficking element in the conviction that he was convicted of. The Court notes that the Court disagrees on his face, it does have a drug trafficking element because the respondent pled no contest to an attempted possession of marijuana with intent to deliver. And intent to deliver is a drug trafficking element per se. Nevertheless, that is not controlling here.

First, we know that based upon the respondent's concessions through counsel, that he was convicted of a State felony, for which he could get two years incarceration. United States v. Polacios-Suarez; 418 F.3d 692, 700 (6th Cir. 2005), the Court of Appeals

noted that “where a State conviction does not involve a trafficking element, the sole inquiry under Section [101(a)(43)(B)] is to determine whether the [state conviction] could be considered a felony (indiscernible) under the CSA [Controlled Substances Act.”

The Court notes again, as mentioned in the background section that the respondent was not convicted, pursuant to the Michigan statute that provided for distribution or delivery of a controlled substance and a non-commercial setting and without remuneration and that while there is a Federal statute that has a counterpart to this Michigan statute, there is also a counterpoint to the statute that he was actually convicted of pursuant to his no contest pleas. That statute is 21 United States Code 841(b)(1)(D), where the maximum permissible punishment for this offense is not more than five years imprisonment. We also know that because the respondent pled guilty to an attempt in Federal Court, would carry the same maximum punishment, five years potential incarceration. See 21 United States Code Section 846. We also note that for the purposes of a Federal definition, because the respondent could have gotten more than one year of incarceration, this would be a felony. See 18 United States Code Section 3559(a)(5). Under Matter of Polacios-Suarez; supra, the respondent stands convicted of a drug trafficking crime, pursuant to Section 101(a)(43)(U), that portion which applies to attempts and conspiracies to commit the aggravated felony found at 101(a)(43)(B). See also Matter of Aruna, 24 I&N Dec. 452 (BIA 2008); and Matter of Carachuri-Rosendo, 24 I&N Dec. 382, 385 (BIA 2007).

In conclusion for cancellation of removal, the respondent just is not eligible for cancellation of removal, because the respondent have told lies to the Court and has not demonstrated his rehabilitative potential, the Court would deny his application for cancellation of removal, as a matter of discretion.

Now, the Court could go forward and list all of the evidence proffered on behalf of the respondent to indicate what the Court was relying on in the balancing of these equities, the negative and positive factors. The Court only knows that because of the respondent is ineligible, the Court is not going to go over with a fine-tooth comb this evidence.

But the Court has considered the length and time in the United States, his Immigration history, the fact that he was in the United States for a lengthy period of time illegally after he had dropped out of school and had no status, that he is close to his children, that he has five children born over a relatively short period of time to his two different spouses, although he has them born in some sort of unique order. First, his son, Marcos, was born in 1987, to his first wife. The second child, Jorge, was born in September 1987 to the respondent's second wife, and that his next son, Jorge, Jr., was born on June 6, 1988 to his first wife. That a daughter was born in December 1989 to his second wife, and then a month later or thereabouts, another daughter was born in January 1990 by his first wife. Now, when he was trying to explain this unique family history, he said he was young and he can prove that he was current on his child support payments. Was he divorced? Well, my wife wanted to live -- this is divorce from wife no. one, she wanted to live in Texas,

and we did not get along. Well, it is no wonder we didn't get along when he is having children out of wedlock.

The Court also considered the testimony of Sophie Jimenez, the daughter of his girlfriend. Of course, the Court has also considered the fact that while she considers him to be the father of her and the grandfather to her baby, and that she believes that the respondent taught her to be responsible and that she would be devastated, these factors do not outweigh the other negative factors, including the fact that she does not know any of the facts and circumstances surrounding the respondent's conviction or her mother's conviction for the same offense or related offense. But she is willing to say that she knows that the respondent is innocent, but she also torpedoed the respondent when she testified that the mother did not show up because of migraines, which is diametrically opposed to the respondent's testimony.

Lastly, we had Jorge, Jr., testify. He is the third to the oldest, he says. He is married, he has two children, a daughter and a son and that he is in bridge construction and his father is his supervisor, although he testified that the respondent in the year 2007 was his supervisor, apparently, and that the respondent's father did not use the family vehicle for work related driving at work sites, which is again, in opposition to the respondent's 2007 income tax return at Exhibit 5, Tab 2, wherein the respondent claimed that he drove 19,600 miles on business.

CONCLUSION

For the reasons stated above, the Court finds that the respondent is removable on each and every of the three distinct charges, that it has been demonstrated by clear, convincing and unequivocal evidence. The Court also finds that the respondent is not eligible for a waiver of his convictions under Section 212(h), that the Court also finds that the respondent, because he has been convicted of a drug trafficking offense is ineligible for cancellation of removal but assuming arguendo that he is, he has not demonstrated that he should be granted this relief as a matter of discretion.

And accordingly, the Court issues the following orders:

ORDER

IT IS HEREBY ORDERED that the respondent's application for cancellation of removal be denied. Respondent's application for 212(h) waiver be denied and that the respondent be removed from the United States to Mexico, on the three charges contained in his Notice to Appear as amended.

____

ROBERT NEWBERRY
Immigration Judge

APPENDIX E

No. 09-4390
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
June 1, 2011

JORGE ALBERTO GARCIA,
Petitioner,

v. **ORDER**

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
Respondent.

BEFORE: GILMAN, GIBBONS, and COOK, Circuit Judges.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case.

Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
Leonard Green, Clerk

APPENDIX F

UNITED STATES CODE
TITLE 21 — Food and Drugs
CHAPTER 13 — Drug Abuse Prevention and Control
SUBCHAPTER I — Control and Enforcement
PART D — Offenses and Penalties

§ 841. Prohibited acts A

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally--

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1) **(A)** In the case of a violation of subsection (a) of this section involving—

(i) 1 kilogram or more of a mixture or substance

containing a detectable amount of heroin;

(ii) 5 kilograms or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 1000 kilograms or more of a mixture or substance

containing a detectable amount of marijuana, or 1,000 or more marijuana plants regardless of weight; or

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $10,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of

imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $20,000,000 if the defendant is an individual or $75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 849, 859, 860, or 861 of this title after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of Title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in

addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of--

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable

amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N-[1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marijuana, or 100 or more marijuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $5,000,000 if the defendant is an individual or $25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $8,000,000 if the defendant is an individual or $50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposed

under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 2000), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20

years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant is an individual or $5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $2,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at

least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is

other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of Title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(E) **(i)** Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more

than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $500,000 if the defendant is an individual or $2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $1,000,000 if the defendant

is an individual or $5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the

provisions of Title 18, or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $100,000 if the defendant is an individual or $250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such persons shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of Title 18, or $200,000 if the defendant is an individual or $500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under

this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of Title 18.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed--

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of Title 18;

(C) $500,000 if the defendant is an individual; or

(D) $1,000,000 if the defendant is other than an individual;

or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or

intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use--

(A) creates a serious hazard to humans, wildlife, or domestic animals,

(B) degrades or harms the environment or natural resources, or

(C) pollutes an aquifer, spring, stream, river, or body of water,

shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.

(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of Title 18 (including rape), against an individual, violates subsection (a) of this section by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with Title 18.

(B) Definitions. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals

Any person who knowingly or intentionally—

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined

(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under Title 18, or both.

(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under Title 18, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires

or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty

In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals

(1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under Title 18 or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined

under Title 18 or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that--

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this subchapter or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means--

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of Title 5, to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this chapter:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the

authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other health professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this chapter.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this chapter.

(h) Offenses involving dispensing of controlled substances by means of the Internet

(1) In general

It shall be unlawful for any person to knowingly or intentionally--

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this subchapter; or

(B) aid or abet (as such terms are used in section 2 of Title 18) any activity described in subparagraph (A) that is not authorized by this subchapter.

(2) Examples

Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally—

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 823(f) of this title (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 829(e) of this title;

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections 823(f) of this title or 829(e) of this title;

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection

(d) or (e), respectively, of section 831 of this title.

(3) Inapplicability

(A) This subsection does not apply to--

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this subchapter;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to--

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location

tool (as those terms are defined in section 231 of Title 47); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of Title 47 shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation

Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).

APPENDIX G

UNITED STATES CODE
TITLE 21 — Food and Drugs
CHAPTER 13 — Drug Abuse Prevention and Control
SUBCHAPTER I — Control and Enforcement
PART D — Offenses and Penalties

§ 844. Penalties for simple possession

(a) Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be

fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

(b) Repealed. Pub.L. 98-473, Title II, § 219(a), Oct. 12, 1984, 98 Stat. 2027

(c) "Drug, narcotic, or chemical offense" defined

As used in this section, the term "drug, narcotic, or chemical offense" means any offense which proscribes the possession, distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited under this subchapter.

APPENDIX H

MICHIGAN COMPILED LAWS (1998)
CHAPTER 333 — Health
Public Health Code
ARTICLE 7 — Controlled Substances
PART 74 — Offenses and Penalties

§ 333.7401. Unlawful manufacture, delivery, or possession with intent to deliver; unlawful dispensing, prescription, or administration; penalties; discharge from probation of individual sentenced to lifetime probation

Sec. 7401. (1) Except as authorized by this article, a person shall not manufacture, create, deliver, or possess with intent to manufacture, create, or deliver a controlled substance, a prescription form, an official prescription form, or a counterfeit prescription form. A practitioner licensed by the administrator under this article shall not dispense, prescribe, or administer a controlled substance for other than legitimate and professionally recognized therapeutic or scientific purposes or outside the scope of practice of the practitioner, licensee, or applicant.

(2) A person who violates this section as to:

(a) A controlled substance classified in schedule 1 or 2 that is a narcotic drug or a drug described in section 7214(a)(*iv*) and:

(*i*) Which is in an amount of 650 grams or more of any mixture containing that substance is guilty of a felony and shall be imprisoned for life except as otherwise provided in this subparagraph. A person convicted of violating this subparagraph may be punished as provided by law by imposing a sentence

of imprisonment for any term of years but not less than 25 years if any of the following apply:

(A) The person is within the jurisdiction of the circuit court or recorder's court of the city of Detroit under section 606 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.606 of the Michigan Compiled Laws, section 4 of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.4 of the Michigan Compiled Laws, or section 10a(1)(c) of Act No. 369 of the Public Acts of 1919, being section 725.10a of the Michigan Compiled Laws.

(B) The person is being sentenced under section 18(1)(n) of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.18 of the Michigan Compiled Laws.

(*ii*) Which is in an amount of 225 grams or more, but less than 650 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 20 years nor more than 30 years.

(*iii*) Which is in an amount of 50 grams or more, but less than 225 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 10 years nor more than 20 years.

(*iv*) Which is in an amount less than 50 grams, of any mixture containing that substance is guilty of a felony and shall be imprisoned for not less than 1 year nor more than 20 years, and may be fined not more than $25,000.00, or placed on probation for life.

(b) Any other controlled substance classified in schedule 1, 2, or 3, except marihuana, is guilty of a

felony punishable by imprisonment for not more than 7 years or a fine of not more than $10,000.00, or both.

(c) A substance classified in schedule 4, is guilty of a felony punishable by imprisonment for not more than 4 years or a fine of not more than $2,000.00, or both.

(d) Marihuana or a mixture containing marihuana, is guilty of a felony punishable as follows:

(*i*) If the amount is 45 kilograms or more, or 200 plants or more, by imprisonment for not more than 15 years or a fine of not more than $10,000,000.00, or both.

(*ii*) If the amount is 5 kilograms or more but less than 45 kilograms, or 20 plants or more but fewer than 200 plants, by imprisonment for not more than 7 years or a fine of not more than $500,000.00, or both.

(*iii*) If the amount is less than 5 kilograms or fewer than 20 plants, by imprisonment for not more than 4 years or a fine of not more than $20,000.00, or both.

(e) A substance classified in schedule 5, is guilty of a felony punishable by imprisonment for not more than 2 years or a fine of not more than $2,000.00, or both.

(f) An official prescription form or a counterfeit official prescription form, is guilty of a felony punishable by imprisonment for not more than 20 years or a fine of not more than $25,000.00, or both.

(g) A prescription form or a counterfeit prescription form other than an official prescription form or a counterfeit official prescription form, is guilty of a felony punishable by imprisonment for not

more than 7 years or a fine of not more than $5,000.00, or both.

(3) A term of imprisonment imposed pursuant to subsection (2)(a) or section 7403(2)(a)(*i*), (*ii*), (*iii*), or (*iv*) shall be imposed to run consecutively with any term of imprisonment imposed for the commission of another felony. An individual subject to a mandatory term of imprisonment under subsection (2)(a) or section 7403(2)(a)(*i*), (*ii*), (*iii*), or (*iv*) shall not be eligible for probation, suspension of that sentence, or parole during that mandatory term, except and only to the extent that those provisions permit probation for life, and shall not receive a reduction in that mandatory term of imprisonment by disciplinary credits or any other type of sentence credit reduction.

(4) The court may depart from the minimum term of imprisonment authorized under subsection (2)(a)(*ii*), (*iii*), or (*iv*) if the court finds on the record that there are substantial and compelling reasons to do so. In addition, if any of the following apply, the court may depart from the minimum term of imprisonment authorized under subsection (2)(a)(*ii*), (*iii*), or (*iv*) if the individual has not previously been convicted of a felony or an assaultive crime and has not been convicted of another felony or assaultive crime arising from the same transaction as the violation of this section:

(a) The person is within the jurisdiction of the circuit court or recorder's court of the city of Detroit under section 606 of the revised judicature act of 1961, Act No. 236 of the Public Acts of 1961, being section 600.606 of the Michigan Compiled Laws, section 4 of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.4 of the Michigan

Compiled Laws, or section 10a(1)(c) of Act No. 369 of the Public Acts of 1919, being section 725.10a of the Michigan Compiled Laws.

(b) The person is being sentenced under section 18(1)(n) of chapter XIIA of Act No. 288 of the Public Acts of 1939, being section 712A.18 of the Michigan Compiled Laws.

(5) As used in this section:

(a) "Assaultive crime" means a violation of chapter XI of the Michigan penal code, Act No. 328 of the Public Acts of 1931, being sections 750.81 to 750.90 of the Michigan Compiled Laws.

(b) "Plant" means a marihuana plant that has produced cotyledons or a cutting of a marihuana plant that has produced cotyledons.

APPENDIX I

MICHIGAN COMPILED LAWS
CHAPTER 750 — Michigan Penal Code
The Michigan Penal Code
CHAPTER XII — Attempts

750.92. Attempt to commit crime

Sec. 92. ATTEMPT TO COMMIT CRIME—Any person who shall attempt to commit an offense prohibited by law, and in such attempt shall do any act towards the commission of such offense, but shall fail in the perpetration, or shall be intercepted or prevented in the execution of the same, when no express provision is made by law for the punishment of such attempt, shall be punished as follows:

1. If the offense attempted to be committed is such as is punishable with death, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 10 years;

2. If the offense so attempted to be committed is punishable by imprisonment in the state prison for life, or for 5 years or more, the person convicted of such attempt shall be guilty of a felony, punishable by imprisonment in the state prison not more than 5 years or in the county jail not more than 1 year;

3. If the offense so attempted to be committed is punishable by imprisonment in the state prison for a term less than 5 years, or imprisonment in the county jail or by fine, the offender convicted of such attempt shall be guilty of a misdemeanor, punishable by imprisonment in the state prison or reformatory not more than 2 years or in any county jail not more than 1 year or by a fine not to exceed 1,000 dollars; but in

no case shall the imprisonment exceed 1/2 of the greatest punishment which might have been inflicted if the offense so attempted had been committed.

APPENDIX J

STATE OF MICHIGAN JUDICIAL DISTRICT 10th JUDICIAL CIRCUIT COUNTY PROBATE	MOTION/ ORDER OF NOLLE PROSEQUI	CASE NO. 98-015121-FH-3
ORI	Court address	Court telephone no. (517)790-5471

ORI **COURT ADDRESS** **Court telephone no.**
(517)790-5471
MI- 1730015J 111 MICHIGAN AVE., SAGNINAW, NI 48602

☒ The State of Michigan THE PEOPLE OF ☐ ______________ ______________	v.	Defendant's/Juvenile's name, address, and telephone no. JORGE ALBERTO GARCIA **CTN** 73 98 000233 01 | **SID** | **DOB** 6/6/65
☐ **Juvenile**	**In the matter of** ______________	

Count	CRIME	CHARGE CODE(S) MCL citation/PACC Code
01	Possession With Intent to Deliver Marijuana	333.74012D111
02	Conspiracy	750.157(a)

MOTION

A. GEORGE BEST, **prosecuting official, moves for a nolle prosequi in this case**
Name (type or print)
for the following reason(s):

Defendant pled and was sentenced on
Count III — Attempted Possession
With Intent to Deliver Marijuana.

28 Aug 98	/s/ A. George Best	
Date	Prosecuting official	Bar No.
	A. GEORGE BEST	

ORDER

IT IS ORDERED:

Motion for nolle prosequi is granted as to the following charge(s) which are dismissed without prejudice:

Cts 1 & 2

8/28/98	/signed/	
Date	Judge	Bar No.

APPENDIX K

STATE OF MICHIGAN 10th JUDICIAL CIRCUIT SAGINAW COUNTY	JUDGMENT OF SENTENCE	CASE NO. 98-015121-FH-7

ORI **COURT ADDRESS** **Court telephone no.**
(517)790-5471
MI- 1730015J 111 MICHIGAN AVE., SAGNINAW, NI 48602

THE PEOPLE OF ☑ The State of Michigan ☐ ______________________	V	Defendant's name, address, and telephone no. GARCIA, JORGE ALBERTO 909 WALSH BLVD FLINT, MI 48502		
		CTN	SID	DOB
		73-98-000233-01		6/06/65

THE COURT FINDS:

1. Defendant was found guilty on 7/08/98 (Date) of the crime(s) as stated below:

Count	CONVICTED BY			CRIME	CHARGE CODE(S) MCL citation/PACC Code
	Plea*	Court	Jury		
3	NC			ATT POSS W/I DEL. MARIJU	333.74012D3 (A)

*Plea: insert "G" for guilty plea; use "NC" for nolo contendere; use "MI" for guilty but mentally ill.

2. Defendant

☒ represented by an attorney:
P31110 CURRIE, ROBERT ALEXAN

☐ advised of right to counsel and appointed counsel and knowingly, intelligently, and voluntarily waived that right.

☐ 3. Conviction reportable to the Secretary of State. Defendant's driver license number is:
☐ 4. Licensing sanction reportable to State Police. ☐Revoked ☐Suspended __ days ☐Restricted __________days
☐ 5. HIV testing was ordered on __________. Confidential test results are on file. Date

IT IS ORDERED:

☐ 6. Defendant is sentenced to jail as follows.
☐ Report at ____.

Count	Date Sentence Begins	Sentenced		Credited		To Be Served	
		Mos.	Days	Mos.	Days	Mos.	Days
	8/28/98						

Release Authorized for the Following Purpose	Release Period	
	From	To
☐ Upon payment of fine and costs. ☐ To work or seek work. . . . . ☐ For attendance at school. . . . . . ☐ For medical treatment. . . . . . ☐ Other:____________________		

7. Defendant shall pays as follows:

Count	Fine	Costs	Restitution	Crime Victim	Other (specify)	Total	Due Date
3				60.00		60.00	09/28/98
	500.	500.			FLF 150.00	1150.	10/28/98

Fines, costs, and fees not paid within 56 days of the due date are subject to a 20% late penalty on the amount owed. If a cash bond/bail was personally deposited by defendant, payment toward the total is to first be collected out of that bond/bail.

☐ 8. Defendant shall be placed on probation for __ months and abide by the terms of probation. (See separate order.)
☐ 9 Complete the following rehabilitative services:
☐ Alcohol Highway Safety Education ☐Treatment (☐ outpatient, ☐ inpatient, ☐ residential, ☐ mental health.)
Specify:
[ ] 10. Other:

AUGUST 28, 1998 — /signed/ P11002
Date — Judge (VISITING JUDGE — BORCHARD) Bar no.