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CARACHURI-ROSENDO v. HOLDER130 S. Ct. 2577 (2010)

Phoebe J. Stroede

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I. INTRODUCTION

In *Carachuri-Rosendo v. Holder*,[1] the Supreme Court of the United States considered whether the possibility of a felony conviction in federal court supports the determination that a second state drug possession misdemeanor is an aggravated felony for purposes of the Immigration and Nationality Act when the noncitizen misdemeanant was not charged as a recidivist.[2] The Supreme Court overruled the immigration judge, the Board of Immigration Appeals, and the Fifth Circuit Court of Appeals, and held that a second simple possession offense does not constitute an aggravated felony when the state conviction is not based on the fact of a prior conviction.[3]

II. STATEMENT OF FACTS

A. Factual Background

Petitioner Jose Angel Carachuri-Rosendo lawfully immigrated to the United States in 1983 when he was five years old.[4] He lived in Texas with his common-law wife and four children for twenty-one years.[5] In 2004, Carachuri-Rosendo pled guilty to a Class B misdemeanor for possessing less than two ounces of marijuana and was sentenced to twenty days in jail.[6] In 2005, he was arrested for possession of one anti-anxiety tablet without a prescription, a Class A misdemeanor.[7] He pled no contest and was sentenced to ten days in jail.[8] As a result of Carachuri-Rosendo's second possession conviction, the Federal Government began removal proceedings against him in 2006.[9] Though Carachuri-Rosendo agreed that he was eligible for removal, he petitioned the Attorney General for cancellation of the removal order.[10]

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1. 130 S. Ct. 2577 (2010).
2. *Id.* at 2583.
3. *Id.* at 2580.
4. *Id.* at 2580, 2583.
5. *Id.* at 2583.
6. *Carachuri-Rosendo*, 130 S. Ct. at 2583.
7. *Id.*
8. *Id.* at 2580, 2583.
9. *Id.* at 2583.
10. *Id.*

Under the Immigration and Nationality Act, the Attorney General has the authority to cancel a removal order, provided that the petitioner "has not been convicted of any aggravated felony."[11] In the case at hand, the applicable aggravated felony was illicit trafficking, specifically drug trafficking.[12] A "drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act."[13] The Controlled Substances Act generally punishes simple possession offenses as misdemeanors, with two exceptions.[14] Recidivist possession is one such exception, and it is the only felony punishable under the Controlled Substances Act of which Carachuri-Rosendo might hypothetically have been convicted.[15]

B. Procedural History

The immigration judge found that Carachuri-Rosendo's second possession offense qualified as an aggravated felony for Immigration and Nationality Act purposes because his second state conviction was the equivalent of recidivist possession—a federal felony punishable under the Controlled Substances Act—when the first state conviction was taken into account.[16] As a result, the immigration judge determined Carachuri-Rosendo was ineligible for discretionary cancellation of removal.[17] The Board of Immigration Appeals (BIA) dismissed Carachuri-Rosendo's appeal, though it noted a conflict between seven circuits regarding recidivist possession offenses in an immigration context.[18] With one exception, the conflicting circuit decisions predated *Lopez v. Gonzales*,[19] the controlling Supreme Court authority on the statutes in dispute. In *Lopez*, the Supreme Court considered whether conduct punished as a felony under state law but a misdemeanor under the Controlled Substances Act met the requirement of a "'felony punishable under the Controlled Substances Act'" and therefore could be characterized as an aggravated felony.[20] The Supreme Court determined that "a state offense constitutes a 'felony punishable under the

11. Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(a)(3) (2011).
12. *Carachuri-Rosendo*, 130 S. Ct. at 2585.
13. 18 U.S.C. § 924(c)(2) (2011).
14. Controlled Substances Act § 404, 21 U.S.C. § 844(a) (2011).
15. *Carachuri-Rosendo*, 130 S. Ct. at 2581.
16. In re Carachuri-Rosendo, 24 I. & N. Dec. 382, 383 (2007).
17. *Id.*
18. *Id.* at 385, 394.
19. 549 U.S. 47 (2006).
20. *Id.* at 50 (quoting 18 U.S.C. § 924(c)(2)).

Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."[21]

Based on *Lopez*, the BIA ruled that in the absence of a controlling circuit precedent, a state must successfully impose a recidivist sentencing enhancement in order for the state offense to be considered the equivalent of the aggravated felony of recidivist possession.[22] However, the BIA, sitting in the Fifth Circuit's jurisdiction, was in fact limited by controlling precedent.[23] In *United States v. Sanchez-Villalobos*,[24] the Fifth Circuit held that a single state possession offense may be considered an aggravated felony if the state offense is punishable under the Controlled Substances Act and state law punishes the offense as a felony, or, in the alternative, if the drug possession offense is punishable as a felony in federal court.[25] This latter approach is known as the "hypothetical approach."[26] *Lopez* abrogated the first holding, but the BIA found the alternative holding to be unaffected.[27] While acknowledging that the Fifth Circuit's approach to recidivist possession may need modification to fully align with *Lopez*, the BIA ultimately found that because Carachuri-Rosendo's second drug possession offense was punishable as a felony under the Controlled Substances Act due to a prior conviction, he had committed an aggravated felony and was therefore ineligible for cancellation of removal.[28]

The Fifth Circuit Court of Appeals reaffirmed the hypothetical approach and upheld the BIA's decision.[29] Carachuri-Rosendo argued that the hypothetical approach was inconsistent with circuit precedent and instead advocated the categorical approach, which looks at "'the text of the statute violated, not the underlying factual circumstances.'"[30] The Court of Appeals declined to limit itself to the categorical approach and read *Lopez* as requiring courts to go "beyond the state statute's elements to look at the hypothetical conduct a state statute proscribes."[31] Carachuri-Rosendo appealed the decision and the Supreme Court granted certiorari.[32]

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21. *Id.* at 60 (quoting 18 U.S.C.§ 924(c)(2)).
22. *In re Carachuri-Rosendo*, 24 I. & N. Dec. at 391.
23. *Id.* at 386.
24. 412 F.3d 572 (5th Cir. 2005).
25. *Id.* at 576.
26. Carachuri-Rosendo v. Holder, 570 F.3d 263, 266-67 (5th Cir. 2009), *rev'd*, 130 S. Ct. 2577 (2010) (quoting U.S. v. Cepeda-Rios, 530 F.3d 333, 335 (5th Cir. 2008)).
27. *In re Carachuri-Rosendo*, 24 I. & N. Dec. at 387.
28. *Id.* at 388, 394.
29. *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 264 (5th Cir. 2009).
30. *Id.* at 267 (quoting Lopez-Elias v. Reno, 209 F.3d 788, 791 (5th Cir. 2000)).
31. *Id.* at 266 n.2.
32. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2584 (2010).

III. DECISION AND RATIONALE

A. Majority Opinion

The Supreme Court granted certiorari to

> determine whether the mere possibility, no matter how remote, that a 2-year sentence might have been imposed in a federal trial is a sufficient basis for concluding that a state misdemeanant who was not charged as a recidivist has been "convicted" of an 'aggravated felony' within the meaning of [8 U.S.C.] § 1229b(a)(3).[33]

The Supreme Court reversed the lower courts' decisions and held that the noncitizen must be "*actually convicted* of a crime that is itself punishable as a felony under federal law" in order to be ineligible for cancellation of removal.[34]

The opinion, written by Justice Stevens, began by examining the "'commonsense conception'" of the terms in the provisions, similar to the analysis in *Lopez*.[35] After noting that § 1229b(a)(3) only limits the Attorney General's cancellation powers when the noncitizen has actually been convicted of an aggravated felony, the Court then turned to the hypothetical aggravated felony—recidivist possession, a type of illicit trafficking—to determine if it described Carachuri-Rosendo's actual conviction.[36]

In *Lopez*, the Supreme Court determined that "illicit "trafficking" is generally understood to include a commercial element.[37] Possession of one prescription pill, Carachuri-Rosendo's second offense, is not ordinarily associated with commercial dealing, and commerce was not an element of the state possession offense.[38] Consequently, the Court found the government's characterization of the second simple possession offense as "trafficking" unusual.[39] Additionally, the ten-day sentence Carachuri-Rosendo received for his second simple possession offense is not a punishment one typically associates with aggravated felonies.[40] The government's counterintuitive readings of the conduct and the sentence did

33. *Id*. at 2583.
34. *Id*. at 2589.
35. *Id*. at 2585 (quoting *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006)).
36. *Id*. (citing Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(a)(3) (2011)).
37. *Lopez*, 549 U.S. at 53.
38. *Carachuri-Rosendo*, 130 S. Ct. at 2585.
39. *Id*.
40. *Id*.

not automatically negate their position, but it did heighten the Court's wariness of the government's argument.[41]

After analyzing the disputed terms themselves, the Court turned its attention to the "hypothetical approach" used by the Court of Appeals.[42] The hypothetical approach "treat[s] all 'conduct punishable as a felony' as the equivalent of a 'conviction' of a felony whenever, hypothetically speaking, the underlying conduct could have received felony treatment under federal law."[43] The Court rejected the hypothetical approach for five reasons.[44]

First, the statutes in dispute indicate the determination of eligibility for cancellation of removal begins with the conviction itself.[45] The Immigration and Nationality Act limits the Attorney General's removal cancellation power only when the defendant "has . . . been convicted of any aggravated felony."[46] It is therefore the conviction, not a hypothetical federal charge, that affects the cancellation power.[47] The conviction must be an aggravated felony under the Controlled Substances Act, defined as a sentence exceeding one year's imprisonment.[48] A simple possession offense does not generally qualify as an aggravated felony unless the defendant has been charged as a recidivist, and in those few cases the defendant must receive notice of the charge and an opportunity to challenge the fact of a prior conviction.[49]

Carachuri-Rosendo's prior simple possession conviction was not contained in the record of his subsequent conviction.[50] Without deciding whether a recidivist finding can be made without the fact of a prior offense in record, the Court stated that a federal immigration court cannot use facts not at issue in the state conviction to inflate an offense.[51] Carachuri-Rosendo was never convicted as a recidivist, "and no subsequent development can undo that history."[52] In response, the government argued that if Carachuri-Rosendo had been prosecuted in federal court for the same conduct, the conduct would have been considered an aggravated felony, and

41. *Id*.
42. *Id*. at 2586.
43. *Carachuri-Rosendo*, 130 S. Ct. at 2586.
44. *Id*. at 2586-89.
45. *Id*. at 2586.
46. *Id*. (quoting Immigration and Nationality Act § 240A, 8 U.S.C. § 1229b(a)(3) (2011)).
47. *Id*.
48. *Carachuri-Rosendo*, 130 S. Ct. at 2586 (citing 18 U.S.C. § 3559(a)(5) (2011)).
49. *Id*. at 2586 (citing Controlled Substances Act § 411, 21 U.S.C. § 851 (2011)).
50. *Id*.
51. *Id*.
52. *Id*. at 2586-87.

that potential felony conviction satisfied the requirements of § 924(c)(2).[53] Under the government's interpretation, the word "punishable" in § 924(c)(2*)* meant only any conduct hypothetically punishable as a felony under the Controlled Substances Act, whether or not such a punishment was actually imposed.[54] The Court found this reasoning unpersuasive and at odds with the straightforward text of § 1229b(a)(3), which limits cancellation powers only when aggravated felony conviction actually occurs, not when it might have occurred.[55]

Second, the Court rejected the hypothetical approach because it did not conform to the notice and process requirements found in § 851 of the Controlled Substances Act.[56] Under that Act, a simple possession offense is generally only punishable as a felony if the prosecutor chooses to charge the defendant as a recidivist.[57] In order to impose a recidivist sentencing enhancement the defendant must receive notice and an opportunity to challenge the fact of a prior conviction.[58] Far from being incidental, these requirements are designed to reflect the importance of a prosecutor's decision to seek a recidivist enhancement.[59] In the instant case, the state prosecutor chose not to seek a recidivist enhancement.[60] This independent election would be rendered moot if a federal immigration judge was allowed to subsequently apply a recidivist enhancement based on facts not at issue in the second conviction.[61]

Third, the hypothetical approach used by the government and accepted by the Fifth Circuit involved too high a level of abstraction.[62] Instead of using "the 'proscribed conduct' of a state offense to determine whether [that conduct] is 'punishable as a felony under that federal law,'" the Fifth Circuit looked at the facts the state prosecutor chose not to use as justification for conviction and punishment.[63] Carachuri-Rosendo *might* have been prosecuted with a recidivist enhancement at the state level, and therefore *might* have been sentenced as a felon under federal law.[64] This abstract

53. *Carachuri-Rosendo*, 130 S. Ct. at 2587.
54. *Id.* (quoting 18 U.S.C. § 924 (c)(2) (2006)).
55. *Id*.
56. *Id*.
57. *Id*.; *see* 18 U.S.C. § 851.
58. *Carachuri-Rosendo*, 130 S. Ct. at 2587; *see* 18 U.S.C. § 851(b)-(c).
59. *Carachuri-Rosendo*, 130 S. Ct. at 2588.
60. *Id*.
61. *Id*
62. *Id*.
63. *Id.* (quoting *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006)).
64. *Carachuri-Rosendo*, 130 S. Ct. at 2584.

approach is in conflict with *Lopez*, which calls for a focused categorical analysis of the state and federal offenses.[65]

Fourth, Carachuri-Rosendo's conduct is unlikely to have qualified him as a federal felon had he been prosecuted in federal court.[66] Based on the United States Sentencing Guidelines, his conduct would have earned him a sentence of less than one year and probably less than six months.[67] There is no evidence to show that any federal attorney has ever attempted to characterize similar conduct as a felony.[68] Therefore, even if the government's hypothetical approach was appropriate, it is unlikely that a parallel situation in federal court would have resulted in a felony conviction.[69]

Finally, as the Court previously noted in *Leocal v. Ashcroft*,[70] "ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor."[71] The practical effects of this favorable construction do not affect the safety of the United States' borders; Carachuri-Rosendo was still removable and in fact the government initiated the removal proceedings prior to the present proceedings.[72] His removal may only be reversed if the Attorney General chooses to exercise his cancellation powers.[73]

B. Concurring Opinion of Justice Scalia

In his concurring opinion, Justice Scalia advocated a more streamlined rationale for finding Carachuri-Rosendo eligible for discretionary cancellation of removal.[74] Specifically, he distinguished between conviction, which is defined by elements, and punishment, which is defined by sentencing factors.[75] In the case at hand, the conviction was for a second possession misdemeanor and the punishment could have been extended beyond one year due to the sentencing factor of recidivism.[76] However, a conviction does not consist of "sentencing factors, but only of the elements of the crime charged in the indictment."[77] Recidivism is a sentencing factor

65. *Id.* at 2588.
66. *Id*. at 2589.
67. *Id*. (citing U.S. SENTENCING GUIDELINES MANUAL § 2D2.1(a)(3) (2009)).
68. *Id.*
69. *Carachuri-Rosendo*, 130 S. Ct. at 2589.
70. 543 U.S. 1 (2004).
71. *Carachuri-Rosendo*, 130 S. Ct. at 2589 (citing *Leocal*, 543 U.S. at 11 n.8).
72. *Id*. at 2580, 2589.
73. *Id*. at 2589.
74. *Id.* at 2590 (Scalia, J., concurring).
75. *Id.*
76. *Carachuri-Rosendo*, 130 S. Ct. at 2590 (Scalia, J., concurring).
77. *Id*. at 2591.

that may sufficiently increase the punishment to satisfy an element of an aggravated felony, but a felony-length punishment does not affect the underlying conviction.[78] A misdemeanor conviction with a sentence exceeding one year due to recidivism does not transform that conviction into a felony.[79]

C. Concurring Opinion of Justice Thomas

Justice Thomas chose not to join the "jurisprudential gymnastics" he believed the majority had to undertake to preserve *Lopez*, but agreed that the statutory text was properly interpreted and concurred in the judgment.[80] Reiterating his dissenting opinion in *Lopez*, Justice Thomas listed two requirements for a state offense to render a noncitizen ineligible for discretionary cancellation of removal: "[f]irst, the offense must be a felony; second, the offense must be capable of punishment under the Controlled Substances Act."[81] In the present case, though Carachuri-Rosendo's second possession offense was punishable under the Controlled Substances Act, he was only convicted of a misdemeanor and therefore did not satisfy the first requirement.[82] As a result, Justice Thomas agreed with the majority that Carachuri-Rosendo was eligible for discretionary cancellation of removal.[83]

IV. ANALYSIS

A. Introduction

In *Lopez*, the Supreme Court held that a state possession felony cannot be considered an aggravated felony if it is not punished as a felony under the Controlled Substances Act.[84] Though *Lopez* was itself a tardy resolution of a circuit split, the circuit courts split once again in their application of *Lopez* to recidivist possession.[85] Some circuit courts found that under *Lopez*, and specifically footnote six, a state possession misdemeanor could be construed as an aggravated felony and support deportation on the basis of

78. *Id*.
79. *Id*.
80. *Id*. (Thomas, J., concurring).
81. *Carachuri-Rosendo*, 130 S. Ct. at 2591 (Thomas, J., concurring) (quoting *Lopez v. Gonzales*, 549 U.S. 47, 61 (2006) (Thomas, J., dissenting)).
82. *Id*.
83. *Id*.
84. *Lopez*, 549 U.S. at 60 (2006).
85. Brent E. Newton, *Lopez v. Gonzales: a Window on the Shortcomings of the Federal Appellate Process*, 9 J. APP. PRAC. & PROCESS, 143, 174 (2007).

that hypothetical conviction.[86] Such a bizarre construction is possible due in part to the ambiguous definitions used by the Immigration and Nationality Act. When combined with *Lopez*'s vague and isolated reference to recidivist possession,[87] clarification on recidivist possession in an immigration context became sorely necessary. *Carachuri-Rosendo* was poised to resolve these difficulties and promote uniformity in interpretation and application of immigration law, but the extent to which it succeeded is unclear.[88]

B. Recidivist Possession and other Vague Terms

Recidivist possession—though that phrase is never used—is defined in the Controlled Substances Act, which states in relevant part: "Any person who violates this subsection . . . after. . . a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final . . . shall be sentenced to a term of imprisonment for . . . not more than two years[.]"[89] The length of the sentence, two years, makes recidivist possession a felony.[90] Recidivist possession is listed as a drug trafficking crime, defined in 18 U.S.C. § 924(c)(2) as "any felony punishable under the Controlled Substances Act."[91] The Immigration and Nationality Act lists drug trafficking as a type of illicit trafficking, which is considered an aggravated felony.[92] This labyrinth of definitions contributes to recidivist possession's conceptual difficulties, and the ensuing ambiguity appears to infect nearly every significant definition. For example, the natural reading of "aggravated felony" contradicts its actual definition, which "describes neither an offense which is aggravated nor a felony."[93] The specific aggravated felony at issue in *Carachuri-Rosendo* and *Lopez*, illicit trafficking, requires the incorporation of many sections to determine its true meaning, multiplying the chances of misinterpretation.[94]

If recidivist possession and other core terms are difficult to define, they are even more difficult to apply. Because "drug trafficking crime" refers to a generic crime, a categorical approach is required.[95] The categorical

86. United States v. Pacheco-Diaz, 513 F.3d 776, 778 (7th Cir. 2008) (per curiam) (citing *Lopez*, 549 U.S. at 55 n.6).

87. *Lopez*, 549 U.S. 47 at 55, n.6.

88. *Carachuri-Rosendo*, 130 S.Ct. 2577.

89. Controlled Substances Act § 404, 21 U.S.C. § 844(a) (2006).

90. *See* 18 U.S.C. § 3559(a)(5) (2006).

91. 18 U.S.C. § 924(c)(2).

92. Immigration and Nationality Act § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) (2006).

93. Audra J. Ferguson-Allen, *The Development of the Hypothetical Federal Felony: a Solution to Nonuniformity in Immigration*, 10 SCHOLAR 137, 143 (2008).

94. *Id*. at 145.

95. *See, e.g.*, Sandoval-Lua v. Gonzales, 499 F.3d 1121, 1127-28 (9th Cir. 2007); Gradiz v. Gonzales, 490 F.3d 1206, 1210-11 (10th Cir. 2007).

approach corresponds with state and federal offenses by examining the elements of the conviction, not the label of the offense.[96] However, application of the categorical approach to the specific type of drug trafficking crime, recidivist possession, poses problems. Recidivist possession is not easily parsed; rather, it is "an amalgam of elements, substantive sentencing factors, and procedural safeguards."[97] Such an amorphous concept is difficult to meaningfully correlate to state offenses with the specificity required by the categorical approach. This practical problem has severe consequences in an immigration context in which the deportation of thousands of noncitizens depends on the result.[98]

C. The Confused Precedent of Lopez v. Gonzales

Lopez, which concerned the same statutes at issue in *Carachuri-Rosendo*, was the most on-point case comparing state and federal offenses in an immigration context, but its application to recidivist possession was interpreted in conflicting ways. At the heart of *Lopez* was the definition of "'drug trafficking crime'" as "'any felony punishable under the Controlled Substances Act.'"[99] The government interpreted that definition to mean "any felony punishable under the CSA whether or not as a felony."[100] The Supreme Court rejected this interpretation and held that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."[101]

The holding of *Lopez* was straightforward enough when applied to single convictions, but its effect on successive convictions (i.e. recidivist possession) was unclear. The only place *Lopez* explicitly addressed recidivist possession was in footnote six.[102] After the body of the text stated that the ordinary meaning of a simple possession offense does not include trafficking, and if such a meaning were intended the statute would need to explicitly say so, footnote six acknowledged that three possession offenses, including recidivist possession, "counterintuitively" but "clearly" fall within the illicit trafficking offense: "[t]hose state possession crimes that correspond to felony violations . . . such as . . . recidivist possession . . . clearly fall within the definitions used by Congress . . . regardless of

96. *See* Taylor v. United States, 495 U.S. 575, 599-600 (1990).

97. *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 389 (2007).

98. Ferguson-Allen, *supra* note 93, at 141 (citing Mary Dougherty et. al., Immigration Enforcement Actions: 2004, 1 (2005), available at http://www.dhs.gove/xlibrary/assets/statistics/publications/AnnualReportEnforcement2004. pdf).

99. *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (quoting 18 U.S.C. § 924(c)(2) (2006)).

100. *Lopez*, 549 U.S. at 55-56 (2006).

101. *Id*. at 60.

102. *Id*. at 55, n.6.

whether these federal possession felonies or their state counterparts constitute 'illicit trafficking' or 'drug trafficking' as those terms are used in ordinary speech."[103] Many circuit courts read this note as condoning an analysis beyond categorical and used it to justify a hypothetical-federal-felony approach.[104] The footnote six admission, though technically dictum, set the Supreme Court on a path to clarify the issue in *Carachuri-Rosendo.*

Justice Thomas predicted the import of footnote six, though not explicitly, in his *Lopez* dissent. Describing the fact pattern that was to arise in *Carachuri-Rosendo*, he stated that "the Court admits that its reading will subject an alien defendant convicted of a state misdemeanor to deportation if his conduct was punishable as a felony under the CSA." [105] But the statutes at issue do not inexorably dictate the discrepancy posed by the majority's analysis. In fact, footnote six itself would seem to indicate the opposite: the Controlled Substances Act does not use, and therefore there is no need to resort to, the ordinary meaning of "illicit trafficking" because possession offenses like recidivist possession are explicitly encompassed by that definition.[106] As Justice Thomas demonstrates, "[i]f the Court recognizes, in light of § 924(c)(2), some mere possession offenses under the umbrella of 'illicit trafficking,' it cannot reject Lopez's conviction out of hand" simply because the state conviction does not contain a trafficking element.[107]

Justice Thomas did not have to wait long to see his fear of discrepancy realized. Two years after *Lopez*, the Seventh Circuit applied the holding to recidivist possession in *United States v. Pacheco-Diaz*[108] and concluded that even if never convicted of a felony, a noncitizen could be considered to have committed an aggravated felony for purposes of the Immigration and Nationality Act.[109] Five months after *Pacheco-Diaz*, the Sixth Circuit derived the opposite conclusion from *Lopez* and ruled that the state conviction had to be a felony before an aggravated felony could be found.[110]

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103. *Id*. at 55, n.6 (citations omitted).

104. *E.g.*, *United States v. Pachenco-Diaz*, 513 F.3d 776, 778 (7th Cir. 2008) (per curiam) ("the point of *Lopez* is that, when state and federal crimes are differently defined, the federal court must determine whether the conduct is a *federal* felony, not which statute the state cited in the indictment"); *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2009) ("We are not confined to the categorical approach in cases like Carachuri's because the Supreme Court in *Lopez* goes beyond the categorical approach").

105. *Lopez*, 549 U.S. at 67 (Thomas, J., dissenting).

106. Controlled Substances Act § 404, 21 U.S.C. 844(a) (2006).; *see Lopez*, 549 U.S. at 55 n.6.

107. *Lopez*, 549 U.S. at 64 (Thomas, J., dissenting).

108. 513 F.3d 776, 778-79 (7th Cir. 2008) (per curiam).

109. *Id*. at 779.

110. Rashid v. Mukasey, 531 F.3d 438, 447 (6th Cir. 2008).

The cause of the split was the differing weight given to problematic footnote six.[111]

D. The Circuit Split

Pacheco-Diaz concerned a deported noncitizen who faced a higher punishment for reentering the United States after he had been removed for an "aggravated felony."[112] The Seventh Circuit interpreted *Lopez* as requiring a hypothetical-federal-felony analysis, which meant courts had to look at the convicting conduct and consider whether that conduct was punishable as a felony under the Controlled Substances Act.[113] Under the hypothetical-federal-felony approach, the court determined "it does not matter whether the defendant was charged in state court as a recidivist; indeed, it does not matter whether the state has a recidivist statute in the first place."[114] It only matters that the underlying conduct satisfies the elements of a felony punishable under the Controlled Substances Act.[115] The Seventh Circuit based its application of *Lopez* to recidivist possession specifically on footnote six of the Supreme Court's *Lopez* opinion,[116] and read it as an indication that the Supreme Court realized and accepted that *Lopez* would result in some mere possession offenses (misdemeanors) at the state level being treated as drug trafficking offenses (felonies) at the federal level.[117] However, the crucial issue was whether the conduct would hypothetically support an aggravated felony conviction, regardless of the state conviction.[118]

Judge Rovner, the lone dissenter in *Pachenco-Diaz*, argued that footnote six needed to be applied in the context of the categorical approach rather than merely looking at the conduct.[119] He emphasized that the note spoke of "correspondence" between state and federal offenses, which alluded to the categorical approach and its requirement of correspondence between the elements of the offenses before they can be considered equivalents.[120] By applying footnote six outside of its categorical context,

111. *Id*. at 444-45.
112. *Pachenco-Diaz*, 513 F.3d at 778 (7th Cir. 2008) (per curiam).
113. *Id*. at 779.
114. *Id*.
115. *Id*.
116. *Id*.
117. *Pachenco-Diaz*, 513 F.3d at 780 (Rovner, J., dissenting) (citing *Lopez v. Gonzales*, 549 U.S. 47, 55 n.6 (2006)).
118. *Id*. at 779.
119. *Id*. at 780 (Rovner, J., dissenting).
120. *Id*. (citing *Lopez*, 549 U.S. at 55 n.6).

the majority's interpretation of *Lopez* entailed "one too many levels of hypothetical application."[121]

Shortly after *Pachenco-Diaz*, the Sixth Circuit illustrated their contrary interpretation of recidivist possession in *Rashid v. Mukasey*.[122] The majority noted that the Seventh Circuit's reliance on footnote six resulted in too many hypotheticals: first, whether the defendant could have been charged as a recidivist, and second, whether the recidivist conduct qualified as a federal felony.[123] Instead, the Sixth Circuit interpreted footnote six in the context of *Lopez*'s purpose: harmony between state and federal offenses.[124] The only hypothetical validated by *Lopez* "is whether the crime that an individual *was actually convicted of* would be a felony under federal law."[125] In contrast, the Seventh Circuit's interpretation improperly considered facts (prior convictions) not at issue in trial and used that knowledge to postulate a hypothetical prosecution on the basis of those facts.[126]

With *Lopez*'s goal of uniformity in mind, the Sixth Circuit characterized footnote six in the same manner as the Board of Immigration Appeals in *Carachuri-Rosendo*: the footnote simply meant "that 21 U.S.C. § 844(a) defines 'recidivist possession' as 'an offense,' constituting a 'felony violation' of the Federal drug laws, that 'corresponds' to some 'state possession crimes.'"[127] This interpretation allowed the required categorical approach to be properly applied: in order for a state misdemeanant to be found to have committed an aggravated federal felony, the subsequent state possession conviction must contain a finding of a prior possession conviction that has become final.[128] By focusing on the "heart" of *Lopez*—harmony between offenses—instead of dictum, the Sixth Circuit was able to reconcile *Lopez* and recidivist possession in a practical and consistent manner.[129]

E. The Role of Carachuri-Rosendo

Carachuri-Rosendo had the potential to reconcile the divisive effects of *Lopez*'s footnote six. However, the majority again began their analysis with

121. *Id*. at 781.
122. 531 F.3d 438, 440 (6th Cir. 2008).
123. *Id*. at 445.
124. *Id*.
125. *Id*.
126. *Id*.
127. *Rashid*, 531 F.3d at 446 (quoting *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 290 (2007)).
128. *Id*. at 448.
129. *Id*. at 445.

the common-sense conception of "illicit trafficking," even though footnote six in *Lopez* explicitly acknowledged that the Controlled Substances Act's definition of recidivist possession—the very offense at issue in *Carachuri-Rosendo*—is not a natural interpretation of that phrase.[130] The *Carachuri-Rosendo* opinion went on to state that application of "an 'aggravated' or 'trafficking' label to *any* simple possession offense is, to say the least, counterintuitive and 'unorthodox,'" despite the fact that the Controlled Substances Act does precisely that.[131] The majority attempted to distinguish *Lopez* on grounds other than recidivist possession: "[w]hat we had no occasion to decide in *Lopez*, and what we now address, is what it means to be *convicted* of an aggravated felony."[132] But their rationale left more justices unsatisfied than *Lopez* had.

The result is not entirely unworkable, however. In *Lopez*, the majority read the text of § 924(c) to imply the felony must be punishable *as a felony* under the Controlled Substances Act.[133] *Carachuri-Rosendo* supplements that inference by interpreting "felony" to mean the crime for which the noncitizen was actually convicted, not a hypothetical felony.[134] Though the "as a felony" implication supplied by *Lopez* necessarily entails a hypothetical-federal-felony approach,[135] the word "felony" in the statute must be an actual conviction.[136] In view of the *Lopez* and *Carachuri-Rosendo* holdings, then, the text of § 924(c) is properly read to define "drug trafficking crime" as "any felony [of which the noncitizen was actually convicted] punishable [as a felony] under the Controlled Substances Act."[137] To determine whether a noncitizen is eligible for discretionary cancellation of a removal order, one must look to the conviction itself and correspond that conviction to a felony under the Controlled Substances Act using the categorical approach.[138]

F. Conclusion

Deciphering the Immigration and Nationality Act's treatment of aggravated felonies is difficult due to the ambiguous offenses it incorporates

130. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2585 (2010); *see Lopez v. Gonzales*, 549 U.S. 47, 55 n.6 (2006).

131. *Id.* (quoting *Lopez*, 549 U.S. at 48); Controlled Substances Act § 404, 21 U.S.C. § 844(a) (2006).

132. *Carachuri-Rosendo*, 130 S. Ct. at 2585.

133. *Lopez*, 549 U.S.at 56 n.7.

134. *Carachuri-Rosendo*, 130 S.Ct. at 2589.

135. *Lopez*, 549 U.S. at 55.

136. *Carachuri-Rosendo*, 130 S. Ct. at 2589.

137. 18 U.S.C. § 924(c)(2).

138. *Carachuri-Rosendo*, 130 S.Ct. at 2578.

and the myriad of sections required to define those offenses. Such difficulties are compounded in application, where the ability to correspond state and federal offenses is dependant upon the clarity of the offense. In *Lopez*, the Supreme Court attempted to inject a degree of consistency into aggravated felony immigration proceedings by ruling that a state conviction must be punishable as a felony under the Controlled Substances Act rather than merely punishable whatsoever.[139] Unfortunately, the holding left open the possibility that a noncitizen could be deported without ever being convicted of a felony at all, setting the issue on an inevitable path to be readdressed by the Supreme Court in *Carachuri-Rosendo*.[140] Though *Carachuri-Rosendo* resolved a split in the Second Circuit by explaining that the Immigration and Nationality Act requires an actual felony conviction, the Court's attempts to preserve the *Lopez* analysis may have served to create more confusion.[141] Whether the "jurisprudential gymnastics" the majority undertook to avoid overruling *Lopez* was sufficient to avoid a third consecutive circuit split remains to be seen.[142]

PHOEBE J. STROEDE

139. *See Lopez*, 549 U.S. at 60.
140. 130 S.Ct. 2577.
141. *Id.* at 2589.
142. *Id.* at 2591 (Thomas, J., dissenting).