

No. 05-484

IN THE
Supreme Court of the United States

ALBERTO SANCHEZ-VILLALOBOS,
A/K/A ALBERTO VILLALOBOS SANCHEZ,
A/K/A FRANCISCO SANCHEZ SAENZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

**BRIEF FOR AMICI CURIAE
IMMIGRANT DEFENSE PROJECT OF THE
NEW YORK STATE DEFENDERS ASSOCIATION,
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS, AND
IMMIGRANT LEGAL RESOURCE CENTER**

IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

	Page
INTERESTS OF AMICI CURIAE.....	1
SUMMARY OF ARGUMENT.....	3
REASONS FOR GRANTING THE WRIT.....	5
I. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE GOVERNMENT MAY DETAIN ANY NON-CITIZEN IN ANY CIRCUIT, LEADING TO THE ARBITRARY APPLICATION OF THE AGGRAVATED FELONY LABEL.....	5
II. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE IT CONCERNS THE APPLICATION OF IMMIGRATION LAW'S MOST SEVERE PENALTIES.....	8
A. An Aggravated Felony Conviction Bars An Immigration Judge From Exercising Discretionary Authority To Permit A Non-Citizen To Remain In The United States	10
B. An Aggravated Felony Conviction Bars An Immigration Judge From Granting Asylum To A Non-Citizen Who Has Suffered Or Will Suffer Persecution In Her Country Of Origin	11
C. An Aggravated Felony Conviction May Bar An Otherwise Eligible Non-Citizen From Naturalization.....	12

TABLE OF CONTENTS—CONTINUED

III. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE AGGRAVATED FELONY LABEL IN SOME CIRCUITS APPLIES TO LOW-LEVEL MISDEMEANOR CONVICTIONS, MANY OF WHICH WERE ADJUDICATED IN A SUMMARY FASHION WITHOUT ANY CONTEMPLATION THAT SERIOUS CONSEQUENCES WOULD ATTACH TO THE DISPOSITION 13

IV. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE RULE OF LAW BY INTERFERING WITH THE ABILITY OF IMMIGRANTS TO MAKE DECISIONS CONCERNING THE RESOLUTION OF MINOR CRIMINAL CHARGES THAT MAY HAVE PROFOUND IMMIGRATION CONSEQUENCES 18

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

	Page(s)
<i>In re Adeniji</i> , 22 I. & N. Dec. 1102 (BIA 1999)	7
<i>In re Yanez-Garcia</i> , 23 I. & N. Dec 390 (BIA 2002)	1, 6
<i>United States v. Hernandez-Avalos</i> , 251 F.3d 505 (5th Cir. 2001)	1
<i>United States v. Sanchez-Villalobos</i> , 412 F.3d 572 (5th Cir. 2005)	<i>passim</i>

STATUTES

8 U.S.C. § 1101(a)(43)(B)	3
8 U.S.C. § 1101(f)(8)	12
8 U.S.C. § 1158(b)(2)(A)(ii)	12
8 U.S.C. § 1158(b)(2)(B)(i)	12
8 U.S.C. § 1158(c)(2)(B)	12
8 U.S.C. § 1182(h)	11
8 U.S.C. § 1227(a)(2)(B)	8
8 U.S.C. § 1229b(a)	10
8 U.S.C. § 1229b(a)(3)	11

TABLE OF AUTHORITIES—CONTINUED

STATUTES—CONTINUED

8 U.S.C. § 1229c(b)(1)(C)	11
8 U.S.C. § 1427(a)	12
N.Y. PENAL LAW § 220.03 (2005).....	14

OTHER AUTHORITIES

CRIMINAL COURTS COMM. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y., SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK (1983)	17
ICE OFFICE OF DETENTION AND REMOVAL (DRO), http://www.ice.gov/graphics/dro/ (last visited Nov. 9, 2005).....	8
HON. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2004 (2004), http://www.courts.state.ny.us/ ctapps/soj04.pdf	14, 16
NAACP LEGAL DEF. AND EDUC. FUND, THE STATUS OF INDIGENT DEFENSE IN SCHUYLER COUNTY (2003).....	16
NEW YORK JUDICIAL SELECTION, http://www.ajs.org/ js/NY_methods.htm (last visited Nov. 9, 2005).....	15
N.Y. STATE BAR ASS’N, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES (2001)	15

TABLE OF AUTHORITIES—CONTINUED

OTHER AUTHORITIES—CONTINUED

NEW YORK STATE DEFENDERS ASSOC., ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), http://www.nysda.org/ NYSDA_Resources/Immigrant_Defense_ Project/05_Analysis_NY_misdemeanor_drug_ offense_data_10_05.pdf	14
N.Y. STATE DIV. OF CRIMINAL JUSTICE SERVS., ADULT ARRESTS: N.Y. STATE BY COUNTY AND REGION 1994, http://criminaljustice.state.ny.us/ crimnet/ojsa/arrests/year1994.htm (last modified July 21, 2005).....	14
OFFICE OF NAT’L DRUG CONTROL POLICY, STATE OF NEW YORK PROFILE OF DRUG INDICATORS (April 2003).....	14
MARTHA RAYNER, <i>NEW YORK CITY’S CRIMINAL JUSTICE COURTS: ARE WE ACHIEVING JUSTICE?</i> , 31 FORDHAM URB. L.J. 1023 (2004).....	14,16
ALISON SISKIN, CONGRESSIONAL RESEARCH SERVICES, IMMIGRATION RELATED DETENTION: CURRENT LEGISLATIVE ISSUES (2004), <i>available at</i> http://www.fas.org/irp/crs/RL32369.pdf	8

TABLE OF AUTHORITIES—CONTINUED

OTHER AUTHORITIES—CONTINUED

FREDA F. SOLOMON, N.Y. CRIM. JUST. AGENCY, INC.,
THE IMPACT OF QUALITY OF LIFE POLICING: HOW
THE NYPD’S NEW POLICING STRATEGY OF THE
1990S AFFECTED ARRESTS, DEFENDANTS AND THE
CRIMINAL COURTS (2003).....15

DANIEL WISE, *CASELOADS SKYROCKET IN BROOKLYN
COURTS: UPSWING LINKED TO NYPD NARCOTICS
INVESTIGATION*, N.Y. L.J., May 22, 200015

STEVEN ZEIDMAN, *POLICING THE POLICE: THE ROLE OF
THE COURTS AND THE PROSECUTION*, 32 FORDHAM
URB. L.J. 315 (2005).....17

INTERESTS OF AMICI CURIAE¹

The deep and growing split among the circuit courts concerning the proper application of the “aggravated felony” label to state drug offenses has broad significance for non-citizens and their advocates. Although the issues presented in this case arise in the illegal re-entry context, their resolution has profound implications for a wide array of immigration matters, including eligibility for asylum, citizenship, and basic forms of relief from removal.² The current circuit split regarding the application of the aggravated felony label makes it challenging, if not virtually impossible, for amici to advise immigrants effectively and to train advocates about the potential immigration consequences of misdemeanor drug possession convictions. As organizations concerned with the intersection of immigration and criminal law, amici urge the Court to resolve the important issues raised in this case.

The **New York State Defenders Association** (NYSDA) is a not-for-profit membership association of more than 1400 public defenders, legal aid attorneys, assigned counsel, and others dedicated to developing and supporting high quality legal defense

¹ Letters of consent have been filed with the Clerk. Pursuant to Rule 37.6, amici state that no counsel for a party authored any part of the brief, and no person or entity other than amici and their counsel made a monetary contribution to the preparation or submission of this brief.

² Immigration judges apply the rule of the circuit in which they sit, whether that rule was announced in an illegal re-entry or an immigration case. *In re Yanez-Garcia*, 23 I. & N. Dec. 390, 394–396 (BIA 2002). Furthermore, some circuits, including the Fifth Circuit, apply the same interpretation of the aggravated felony label in illegal re-entry and immigration cases. *See, e.g., United States v. Hernandez-Avalos*, 251 F.3d 505, 509–10 (5th Cir. 2001).

services for all people, regardless of income. Among other initiatives, NYSDA operates the **Immigrant Defense Project (IDP)**, which provides defense attorneys, immigration attorneys, and immigrants with expert legal advice, publications, and training on issues involving the interplay between criminal and immigration law.

The **National Association of Criminal Defense Lawyers (NACDL)** is a non-profit corporation with more than 13,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. NACDL was founded in 1958 to promote criminal law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal defense counsel. NACDL is particularly dedicated to advancing the proper and efficient administration of justice, including issues involving the role and duties of lawyers representing parties in administrative, regulatory, and criminal investigations.

The **Immigrant Legal Resource Center (ILRC)** is a national clearinghouse that provides technical assistance, training, and publications to low-income immigrants and their advocates. Among its other areas of expertise, the ILRC is known nationally as a leading authority on the intersection between immigration and criminal law. The ILRC provides daily assistance to criminal and immigration defense counsel on issues relating to citizenship, immigration status and the immigration consequences of criminal convictions.

SUMMARY OF ARGUMENT

The circuit courts currently apply the aggravated felony label in sharply divergent ways. In treating petitioner's misdemeanor codeine possession conviction, with its sixty day jail sentence, as a crime within the meaning of 8 U.S.C. § 1101(a)(43)(B) ("illicit trafficking in a controlled substance"), the Fifth Circuit adopted one of the broadest and most far-reaching interpretations of the term "aggravated felony" that courts have thus far employed.³

The discord among the circuits affects individual immigrants nationwide. In accordance with long-standing practices, the Department of Homeland Security (DHS) often detains a non-citizen with a misdemeanor drug possession conviction in a jurisdiction outside the federal circuit in which the conviction occurred, and often transfers the non-citizen several times from one detention facility to another. Non-citizens convicted in New York, for example, are regularly transferred to detention facilities dispersed across the country, including the facility in Oakdale, Louisiana. Because immigration judges apply the law of the circuit in which they sit, and because DHS routinely transfers detainees from one location to another, the split among the circuits has a dramatic impact on individual immigrants.

Virtually all non-citizens, including lawful permanent residents, are deportable if they have been convicted of a drug-related offense. When that drug offense is labeled an "aggravated felony," immigration judges are barred from granting asylum and several basic forms of relief from removal, no matter how harmful removal may be for the non-citizen or his family. This is true even for lawful permanent residents who have spent most of their lives

³ *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005).

in the United States, asylum seekers who have experienced or reasonably fear persecution in their home countries, members of the U.S. Armed Forces, and immigrants with U.S. citizen spouses and children.

In New York, as in other states, misdemeanor cases are handled in a summary fashion, without significant procedural safeguards. The relatively perfunctory processing of misdemeanor cases is rooted in the understanding that misdemeanor defendants face less serious direct and collateral consequences as a result of conviction. Courts that would apply the aggravated felony label even to misdemeanor drug possession offenses would nonetheless bar immigrants with such convictions from discretionary relief or defenses to removal that would otherwise be available to them. Though they were convicted of the most minor drug possession offenses that exist within state penal codes, many non-citizens now find themselves subject to one of U.S. immigration law's most severe classifications.

Given the severity of the penalties that follow the application of the aggravated felony label, the uncertainty that has resulted from the circuit courts' multitude of different interpretations of the term should now be resolved. The proliferation of conflicting interpretations of the term undermines the rule of law. It is virtually impossible for an advocate to advise her client effectively about the possible future consequences of a conviction when that conviction can lead to vastly different consequences depending on where in the country that client is haled into immigration court.

Amici request that the Supreme Court grant certiorari to resolve the clear and growing circuit division about the appropriate application of the aggravated felony label.

REASONS FOR GRANTING THE WRIT

I. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE GOVERNMENT MAY DETAIN ANY NON-CITIZEN IN ANY CIRCUIT, LEADING TO THE ARBITRARY APPLICATION OF THE AGGRAVATED FELONY LABEL

There is a clear and growing split among the circuit courts concerning how to determine whether a state-law drug possession offense fits the aggravated felony definition of “illicit trafficking in a controlled substance.”⁴ The circuits are divided over whether a state-law offense should be considered an aggravated felony if it is a felony under state law, punishable as a felony under federal law, or, in the most extreme position (taken by the Fifth Circuit in this case), either a felony under state law *or* punishable as a felony under federal law. The circuits are also divided over the relevance of recidivist enhancements in determining whether a state-law offense should be classified as a federal felony. Finally, the circuits are divided over whether the potential punishment under state law or the classification applied by the state (i.e., misdemeanor or felony) should govern whether a state-law drug possession offense is an aggravated felony.

The split results in far more than the obvious effect of subjecting individuals with similar convictions to different law in different parts of the country. The Board of Immigration Appeals (BIA) has held that in determining whether a drug conviction constitutes an aggravated felony, immigration judges must defer to

⁴ For a complete summary of the circuit splits, see Petition of Petitioner-Appellant for a Writ of Certiorari, *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005), *petition for cert. filed*, No. 05-484 (Oct. 14, 2005).

the interpretation given to the phrase “illicit trafficking in a controlled substance” by the circuit in which they sit.⁵ DHS may detain a non-citizen in any detention facility in the country; that non-citizen will be forced to appear before an immigration judge while in detention. Given the current splits among the circuits, DHS’ practice of detaining non-citizens in facilities throughout the country, without regard to the state in which they reside or the state in which the conviction occurred, means that any circuit’s rule may apply to any one individual.

Non-citizens placed in detention in New York, for example, are commonly transferred to Passaic, New Jersey (with hearings before immigration judges in New York City, in the Second Circuit), York, Pennsylvania (Third Circuit), or Oakdale, Louisiana (Fifth Circuit). Each of these jurisdictions applies a different rule regarding whether and under what circumstances a state misdemeanor drug possession conviction may constitute an aggravated felony. As a result, a New York resident will face wildly different immigration consequences depending solely upon where the government chooses to detain her. A long-time lawful permanent resident with U.S. citizen children who has a New York misdemeanor possession conviction, if detained in Louisiana, may be deemed to have been convicted of an aggravated felony and denied any possibility of relief from removal. The same person convicted of the same misdemeanor offense, if detained in Pennsylvania, will be eligible for cancellation of removal, permitting her to remain in the United States to care for her children.

Furthermore, individuals are commonly detained in several different circuits during the course of the removal process. A

⁵ *Yanez-Garcia*, 23 I. & N. Dec. at 396.

typical scenario involves a New York resident, convicted in New York and arrested by immigration officials at the probation office, transferred to a county jail in New Jersey, where he may or may not see an immigration judge for a bond hearing, and finally transferred to Oakdale. Family members in New York are likely to contact New York attorneys and advocates on his behalf, while the non-citizen himself may speak with an attorney in New Jersey before proceedings finally commence in Louisiana. Due to the split among the circuits, any legal advice he or his family receives becomes useless as soon as he is transferred to a facility in another circuit.

DHS detains many non-citizens whose lives are affected by the application of the aggravated felony label to drug possession misdemeanor convictions. DHS detains these non-citizens for a number of different reasons. DHS takes the position that any non-citizen who has spent one day or more in jail since 1998 on a drug conviction is subject to mandatory detention.⁶ Furthermore, DHS may detain a non-citizen U.S. resident who travels outside the country upon her attempted return to the United States if she is found inadmissible as a result of a prior conviction. A non-citizen may also be detained due to a prior conviction if he or she comes to the attention of DHS through an application for a new immigration status, such as naturalization. Lastly, non-citizens seeking asylum in the United States may be subject to detention while their asylum applications are processed.

As detention plays a growing role in immigration enforcement, the lack of predictability within the law becomes increasingly troubling. The numbers of non-citizens detained through these different routes has risen steadily in the past ten years. From 1996

⁶ *In re Adeniji*, 22 I. & N. Dec. 1102, 1107–11 (BIA 1999).

to 2004, the size of the daily population in DHS detention facilities increased by more than 150%, from 9,011 in 1996 to 22,812 in 2004.⁷ Over the course of a given year, hundreds of thousands of non-citizens will be detained. In 2002, DHS detained approximately 202,000 non-citizens. Of this number, DHS asserts approximately 103,000 had criminal records.⁸ As a result of the split among the circuits, each of these non-citizens is unable to predict the devastating immigration consequences that could follow from a misdemeanor conviction, because those consequences depend entirely on where the non-citizen is detained.

II. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE IT CONCERNS THE APPLICATION OF IMMIGRATION LAW'S MOST SEVERE PENALTIES

Virtually every non-citizen convicted of a drug offense is deportable.⁹ Congress has chosen to lessen the dramatic impact of

⁷ ALISON SISKIN, CONGRESSIONAL RESEARCH SERVICES, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES 12 (2004), *available at* <http://www.fas.org/irp/crs/RL32369.pdf>. DHS' Bureau of Immigration and Customs Enforcement (ICE) operates eight detention facilities around the country, and augments the capacity of its own detention facilities with an additional seven contract detention facilities. ICE also uses state and local jails on a reimbursable basis, joint federal facilities with the Bureau of Prisons, the Federal Detention Center in Oakdale, Louisiana, and a contractor owned and operated facility in Eloy, Arizona, U.S. ICE Office of Detention and Removal (DRO), <http://www.ice.gov/graphics/dro/> (last visited Nov. 9, 2005).

⁸ SISKIN, *supra* note 7, at 12.

⁹ 8 U.S.C. § 1227(a)(2)(B) ("Any alien who at any time after admission has been convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance . . . other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.").

this law by allowing immigration judges to find that certain non-citizens are eligible for cancellation of removal, asylum, or a family hardship waiver if they can prove sufficient positive equities or threat of persecution upon removal. The aggravated felony determination acts as a per se bar to these forms of relief, preventing immigration judges from granting relief even for those non-citizens whose continued presence here would benefit the United States. As a function of the circuit split, the profoundly life-altering consequences of the aggravated felony label are applied inconsistently throughout the country.

A non-citizen convicted of a crime deemed an aggravated felony may find herself unable to obtain any relief from removal, no matter how compelling her circumstances. As a result of the current split among the circuits, two non-citizens convicted of the same crime in the same state may face dramatically different immigration consequences. The application of the aggravated felony label to immigrants with misdemeanor drug possession convictions means that non-citizens who served in the Armed Forces, and have U.S. citizen family members, will be exiled from the United States without regard for the hardship caused to themselves or their families. Furthermore, non-citizens who could otherwise naturalize may be permanently barred from U.S. citizenship as a result of misdemeanor drug possession convictions. Other non-citizens, even those convicted of the same misdemeanor offense in the same state, will be eligible for relief from removal, asylum, or citizenship solely because they happen to be detained or are required to make their application in another circuit.

A. An Aggravated Felony Conviction Bars An Immigration Judge From Exercising Discretionary Authority To Permit A Non-Citizen To Remain In The United States

Because Congress has long recognized that removal has dramatic and devastating consequences for non-citizens and their families, the Immigration and Nationality Act contains several provisions that empower judges to grant discretionary relief from removal to otherwise deportable or inadmissible non-citizens based on their individual circumstances. Non-citizens with misdemeanor drug possession convictions, including lawful permanent residents who have lived in the United States for many years, will be ineligible for almost all of these forms of relief if they appear before an immigration judge in a jurisdiction where their offense is considered an aggravated felony.

Lawful permanent residents who are deportable are eligible for cancellation of removal if they have been lawfully admitted as permanent residents for at least five years and have spent seven continuous years in the United States. 8 U.S.C. § 1229b(a). Receipt of cancellation of removal depends upon the non-citizen's ability to show compelling reasons why she should be permitted to remain in the United States. Cancellation of removal has traditionally been an important form of relief for lawful permanent residents who have lived in the United States for most of their lives and lack meaningful ties to their home country, who have served in the U.S. Armed Forces, whose families would suffer if they were deported, or who can show proof of rehabilitation and good character.

Family hardship waivers are an important form of relief for lawful permanent residents who are otherwise inadmissible. In order to qualify for relief under this provision, a lawful permanent resident must show seven years of continuous residence in the

United States and that denial of admission would result in extreme hardship to a spouse, parent or child who is a U.S. citizen or lawful permanent resident. 8 U.S.C. § 1182(h).

Lawful permanent residents are statutorily barred from obtaining cancellation of removal or a family hardship waiver if they have been convicted of an aggravated felony. *See* 8 U.S.C. § 1229b(a)(3); 8 U.S.C. § 1182(h). Application of the aggravated felony label to a misdemeanor drug possession offense therefore prohibits an immigration judge from considering even the most compelling individual circumstances and requires the removal of individuals who would otherwise qualify for the relief that Congress has made available.¹⁰

B. An Aggravated Felony Conviction Bars An Immigration Judge From Granting Asylum To A Non-Citizen Who Has Suffered Or Will Suffer Persecution In Her Country Of Origin

Individuals who have suffered past persecution or who face a well-founded fear of future persecution in their home countries are eligible for asylum in the United States. For immigrants who cannot return to their countries of origin, asylum is a route to permanent residency and eventually U.S. citizenship. Immigrants who have been convicted of a “particularly serious crime,”

¹⁰ A non-citizen with an aggravated felony conviction is also ineligible for voluntary departure in lieu of an order of removal. *See* 8 U.S.C. § 1229c(b)(1)(C). This form of discretionary relief allows a non-citizen to avoid the stigma and harassment of removal proceedings, and permits her to leave within a designated period of time, giving her an opportunity to tie up her affairs in the United States before departure. Voluntary departure also allows a non-citizen to choose to return to a country other than her country of origin in order to avoid persecution.

however, are statutorily barred from eligibility for asylum, and such forms of relief may even be revoked based on their convictions. 8 U.S.C. § 1158(b)(2)(A)(ii) & (c)(2)(B). An individual convicted of an “aggravated felony” is automatically deemed to have been convicted of a “particularly serious crime,” and therefore is statutorily barred from obtaining asylum. 8 U.S.C. § 1158(b)(2)(B)(i). An immigration judge presiding over such a case lacks any discretion whatsoever to grant asylum, regardless of how great the danger of persecution the non-citizen would face if returned to her home country.

C. An Aggravated Felony Conviction May Bar An Otherwise Eligible Non-Citizen From Naturalization

In order to naturalize and become a U.S. citizen, a non-citizen ordinarily must establish, among other things, that she has been a person of “good moral character” within the past five years before applying to naturalize, and that she has continued to exhibit good moral character while the naturalization application is pending. 8 U.S.C. § 1427(a). In contrast, a non-citizen convicted of an aggravated felony after 1990 is permanently barred from naturalization because the Immigration and Nationality Act precludes any such individual from establishing good moral character. 8 U.S.C. § 1101(f)(8).

III. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE AGGRAVATED FELONY LABEL IN SOME CIRCUITS APPLIES TO LOW-LEVEL MISDEMEANOR CONVICTIONS, MANY OF WHICH WERE ADJUDICATED IN A SUMMARY FASHION WITHOUT ANY CONTEMPLATION THAT SERIOUS CONSEQUENCES WOULD ATTACH TO THE DISPOSITION

The Fifth Circuit's *Sanchez-Villalobos* decision, which states that even a misdemeanor drug possession offense could be deemed an aggravated felony, illustrates the broad sweep of the "either state or federal felony" offense approach to the aggravated felony label. This broad application leads to far harsher consequences than those contemplated by misdemeanor defendants and their representatives at the time of conviction.

The New York criminal justice system demonstrates how the rule endorsed by the Fifth Circuit in this case threatens non-citizen defendants with consequences far greater than can possibly be justified by the procedural protections they received in the criminal justice system. The New York example is particularly relevant because non-citizens with New York misdemeanor convictions are regularly detained and placed in removal proceedings in other jurisdictions, including the Fifth Circuit. These New Yorkers face dramatic immigration consequences despite New York State's minimal procedural protections for misdemeanor defendants.

In New York State, defendants facing misdemeanor convictions are processed at a rate that reflects the minimal consequences the state expects to follow such convictions. A New York State misdemeanor drug possession conviction rarely results in incarceration. For example, there were 258,655 convictions for Criminal Possession of a Controlled Substance in the Seventh Degree, a misdemeanor under New York law, between 1995 and 2004. Of this number, almost sixty percent resulted in

sentences of time served, probation only, conditional discharge, or fines. Of the remainder, the median length of sentence imposed was between nineteen and twenty days.¹¹

New York's quality of life policing campaign has had a tremendous impact on the number of misdemeanor drug cases heard in its criminal courts.¹² In 1994, for example, there were 56,256 misdemeanor drug arrests in New York State.¹³ By 2001, the number of misdemeanor drug arrests had reached 363,269, as compared to 169,944 felony drug arrests.¹⁴ In New York City, quality of life policing led to a sixty percent increase in misdemeanor arraignments in the City's Criminal Courts between 1992 and 2002.¹⁵ The sheer number of misdemeanors processed in

¹¹ NEW YORK STATE DEFENDERS ASSOC., ANALYSIS OF NEW YORK STATE DIVISION OF CRIMINAL JUSTICE SERVICES MISDEMEANOR DRUG OFFENSE STATISTICS FOR THE YEARS 1995 THROUGH 2004 (2005), http://www.nysda.org/NYSDA_Resources/Immigrant_Defense_Project/05_Analysis_NY_misde-meanor_drug_offense_data_10_05.pdf. A person is guilty of criminal possession of a controlled substance in the seventh degree when he knowingly and unlawfully possesses a controlled substance. N.Y. Penal Law § 220.03 (2005).

¹² See HON. JUDITH S. KAYE, THE STATE OF THE JUDICIARY 2004, at 7 (2004), <http://www.courts.state.ny.us/ctapps/soj04.pdf>.

¹³ New York State Div. of Criminal Justice Servs., Adult Arrests: N.Y. State by County and Region 1994, <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year1994.htm> (last modified July 21, 2005).

¹⁴ OFFICE OF NATIONAL DRUG CONTROL POLICY, STATE OF NEW YORK PROFILE OF DRUG INDICATORS 5 (April 2003).

¹⁵ Martha Rayner, *New York City's Criminal Courts: Are We Achieving Justice?*, 31 FORDHAM URB. L.J. 1023, 1026 (2004).

New York State criminal courts requires attorneys and judges to prioritize speed and efficiency.

Most misdemeanor offenses are processed extremely quickly and without substantial procedural protections, with the understanding that serious direct and collateral consequences will not follow from a conviction. Outside of New York City, misdemeanor cases may be heard by Town or Village justices or police court judges, many of whom are not lawyers.¹⁶ In New York City, misdemeanors are prosecuted in Criminal Court, where defendants may find themselves arraigned before Civil Court judges, who are unfamiliar with criminal law and procedure.

Defendants facing misdemeanor charges can and often do plead guilty at arraignment, and many have their cases arraigned, pled, and sentenced on the same day.¹⁷ In New York City in 1998, seventy-three percent of non-felony Criminal Court arraignments resulted in a determinative outcome.¹⁸ Because every judge in New York Criminal Court handles, on average, more than 5,000 cases per year, judges can often spend only minutes per case.¹⁹ Likewise, neither the defense nor the prosecution has the time to investigate the merits of each case. In New York City, indigent

¹⁶ New York Judicial Selection, http://www.ajs.org/js/NY_methods.htm (last visited Nov. 9, 2005).

¹⁷ See N.Y. STATE BAR ASS'N, *THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES* 17–18 (2001).

¹⁸ FREDA F. SOLOMON, N.Y. CRIM. JUST. AGENCY, INC., *THE IMPACT OF QUALITY OF LIFE POLICING: HOW THE NYPD'S NEW POLICING STRATEGY OF THE 1990S AFFECTED ARRESTS, DEFENDANTS AND THE CRIMINAL COURTS* 5 (2003). A determinative outcome includes dismissal of charges.

¹⁹ Daniel Wise, *Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation*, N.Y. L.J., May 22, 2000, at 1.

defendants may speak to a defense attorney for the first time only minutes before arraignment. This situation is not limited to New York City, however. A 2003 survey by the NAACP Legal Defense and Education Fund found that many misdemeanor defendants in Schuyler County, New York, accept guilty pleas without ever speaking to a lawyer.²⁰

As is true throughout the country, the New York State court system has come to rely heavily on plea bargaining to decrease the administrative burden of trying an ever-increasing number of defendants. Given the enormous volume of misdemeanor cases heard in Criminal Court, prosecutors, defense attorneys, judges and defendants alike are under enormous pressure to reach a plea agreement at arraignment. If no plea agreement is reached, misdemeanor cases join a massive backlog of similar cases. The Honorable Judith S. Kaye, Chief Judge of the State of New York, noted in her 2004 State of the Judiciary report that “tens of thousands of misdemeanor cases remain pending for months, even years, while felony filings decline.”²¹ Low-income defendants feel intense pressure to plead guilty at arraignment because proceeding with their cases means their cases will drag on for significant periods of time, forcing them to attend numerous court appearances which interfere with work and family obligations.²²

²⁰ NAACP LEGAL DEF. AND EDUC. FUND, THE STATUS OF INDIGENT DEFENSE IN SCHUYLER COUNTY 10–11 (2003).

²¹ KAYE, *supra* at 7.

²² Rayner, *supra* note 15, at 1055 (“[T]he duty of many court appearances results in pressure on defendants to plead guilty to end the court appearances.”).

The pervasiveness of plea bargaining was noted over twenty years ago by the Association of the Bar of the City of New York, which stated, “If you tell people that several months went by recently in Brooklyn Criminal Court without a single person being tried for anything they will tell you, quite correctly, that you are talking about something which is not a court.”²³ At that time, only one-half of one percent of misdemeanor cases went to trial.²⁴ The situation has only gotten worse: in 2003, the New York City misdemeanor trial rate was less than one third of one percent.²⁵

New York State is not alone in processing misdemeanor drug possession offenses rapidly, primarily through plea bargains, and without substantial procedural protections. As a result of the current confusion among the circuits as to the appropriate application of the aggravated felony label, non-citizens with state-level misdemeanor drug possession convictions will face consequences far more serious than are merited by the perfunctory treatment their cases receive.

²³ CRIMINAL COURTS COMM. OF THE ASS’N OF THE BAR OF THE CITY OF N.Y., *SAVING THE CRIMINAL COURT: A REPORT ON THE CASELOAD CRISIS AND ABSENCE OF TRIAL CAPACITY IN THE CRIMINAL COURT OF THE CITY OF NEW YORK* 19 (1983).

²⁴ *Id.* at 3.

²⁵ Steven Zeidman, *Policing the Police: The Role of the Courts and the Prosecution*, 32 *FORDHAM URB. L.J.* 315, 321 n.35 (2005) (citing statistics from the New York State Division of Criminal Justice Services, Bureau of Justice Research and Innovation).

IV. RESOLUTION OF THE SPLIT AMONG THE CIRCUITS IS WARRANTED BECAUSE THE SPLIT UNDERMINES THE RULE OF LAW BY INTERFERING WITH THE ABILITY OF IMMIGRANTS TO MAKE DECISIONS CONCERNING THE RESOLUTION OF MINOR CRIMINAL CHARGES THAT MAY HAVE PROFOUND IMMIGRATION CONSEQUENCES

The circuit split, coupled with DHS detention transfer policies, makes it extremely difficult to predict what consequences will follow from a guilty plea or a decision to go to trial. As a result of the split, a non-citizen convicted of a misdemeanor drug possession offense may be subject to drastically different consequences depending solely upon where she is detained. Without uniformity in the interpretation of the term “aggravated felony,” stability and predictability within the legal system become elusive concepts to non-citizens and advocates struggling to make informed choices at the intersection of immigration and criminal law.

Amici are organizations that serve defense attorneys whose clients could face removal and other severe immigration consequences as a result of a criminal disposition by guilty plea or trial conviction. In order to properly counsel immigrant clients about the relative advantages and disadvantages of taking a plea, criminal defense attorneys must be fully informed about the implications that a conviction may have for the non-citizen’s immigration status. Part of amici’s mission is to train attorneys to give sound legal advice to their clients, including non-citizen clients. The split among the circuits makes it very difficult for amici to carry out this task because there is no guarantee that non-citizens will face removal proceedings in the same jurisdiction where they reside or are convicted of a crime.

Attorneys serving indigent defendants, the prosecutors who try their cases, and the judges who hear them all carry massive caseloads. The over-burdened criminal court system usually

depends on all but a handful of cases being disposed of through plea bargains. Advocates may have only minutes to talk to their clients before a hearing at which a plea can be taken; it is essential for attorneys to have clear rules to govern the advice they provide, especially when the potential immigration consequences far outweigh the penal consequences.

The specific experience of amicus IDP further illustrates how the current split in the circuits interferes with efforts to provide sound legal advice to immigrants in the criminal justice system. Part of IDP's mission is to provide information to immigrant defendants and their attorneys in order to assist them in making decisions that may have drastic immigration consequences. IDP runs a hotline that receives more than 1,000 calls per year from immigrants and advocates. Many of these calls involve questions about the potential consequences of a guilty plea in misdemeanor cases. This decision presents a minefield of potential problems for those immigrants if their convictions are considered "aggravated felonies." Given the current split among the circuits in interpreting the term, however, IDP struggles to advise such callers, because it cannot predict what law might apply to their case.

Amici serve non-citizens with past convictions as well as non-citizen defendants facing pending criminal charges. These individuals seek advice regarding a host of immigration-related decisions. For example, they often seek advice about whether or not to file for naturalization, whether or not to leave the country in order to visit family elsewhere, and whether or not to apply for a replacement green card. A lawful permanent resident with U.S. citizen children and a U.S. citizen spouse may call seeking advice about whether or not she should leave the country in order to visit a dying parent. If she has a past misdemeanor drug possession conviction, she could be deemed inadmissible upon her return. If placed in detention upon her attempted return to the United States, she might be transferred to any detention facility in the country,

and it is impossible to know whether her drug possession conviction will render her ineligible for the discretionary relief from removal that her compelling circumstances might otherwise afford her. A stable and uniform definition of the term “aggravated felony” is necessary for defense attorneys and immigrant advocates to advise immigrants who are making decisions that could have life-altering consequences for themselves and their families.

CONCLUSION

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

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