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PRACTICE ADVISORY: THE IMPACT OF THE BIA DECISIONS IN *MATTER OF CARACHURI* AND *MATTER OF THOMAS* ON REMOVAL DEFENSE OF IMMIGRANTS WITH MORE THAN ONE DRUG POSSESSION CONVICTION*

December 19, 2007

On December 13, 2007, the Board of Immigration Appeals (BIA) issued two precedent decisions that together mean that, **in cases arising outside the Second, Fifth and Seventh Circuits, a non-citizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist**. *See Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007) (hereinafter *Carachuri*) and *Matter of Thomas*, 24 I&N Dec. 416 (BIA 2007) (hereinafter *Thomas*). The BIA left open the question of when a noncitizen who was convicted by the state as a recidivist could be deemed convicted of an aggravated felony.

In cases arising in the Fifth Circuit, as well as the Second and Seventh Circuits, the BIA indicated that it was constrained by circuit precedent to find that a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. *See Carachuri*, 24 I&N Dec. at 385-88, 392-93. This practice advisory provides arguments for individuals in these circuits to show that the precedents from these circuits cited by the BIA do not preclude a finding that a second or subsequent state possession offense is not an aggravated felony.

This advisory is divided into the following sections:

- What the BIA decided in *Carachuri* and *Thomas*
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What the BIA decided in *Carachuri* and *Thomas*

One year ago, in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), the Supreme Court decided that a state simple possession drug conviction is generally not a "drug trafficking" aggravated felony if the offense would not be a felony under *federal* law. Therefore, since a conviction for a first-time drug possession offense is generally not a felony under federal law, most noncitizens convicted of a single state drug possession offense—although removable—may be eligible to avoid removal by seeking cancellation of removal, asylum, withholding of removal, and/or naturalization because they are not subject to the aggravated felony bars applicable to these waivers or benefits. *See Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales* (April 12, 2007), posted on the web at www.nysda.org/idp/docs/07_PostLopezAdvisoryforRemovalDefense41207.pdf.

Nevertheless, after *Lopez*, the Department of Homeland Security (DHS) has argued that noncitizens with more than one possession conviction could be deemed aggravated felons based on dicta in *Lopez* indicating that state drug possession offenses could "counterintuitively" be deemed "drug trafficking" aggravated felonies if the state offense "corresponds" to the federal "recidivism possession" felony offense at 21 U.S.C. § 844(a) (possession of a controlled substance after a prior drug conviction has become final). *See Lopez*, 127 S.Ct. at 630 n.6. Under federal law, a second or subsequent possession offense *may* be penalized as a recidivist possession felony if notice of the prior conviction has been given and an opportunity to challenge the fact, finality and validity of the prior conviction has been provided in the criminal case. *See* 21 U.S.C. § 851. Up until recently, however, the DHS argued that any second state simple possession drug conviction could be transformed into a "drug trafficking" aggravated felony based on a prior conviction for simple possession. In the DHS' view, it did not matter that the state criminal proceeding did not prove the prior conviction or offer an opportunity equivalent to that under federal law to challenge the fact, finality, and validity of the alleged prior conviction, or even where the prior conviction never came up during the state criminal proceeding.[1]

In *Carachuri*, the BIA rejected the DHS' broad argument and decided that, in the absence of controlling federal court authority finding otherwise, a noncitizen's state conviction for simple possession of a controlled substance "will not be considered an aggravated felony based on recidivism unless the individual's status as a recidivist drug offender was either admitted or determined by a judge or jury *in connection with a prosecution for that simple possession offense*." *Carachuri*, 24 I&N Dec. at 394 (emphasis added). The BIA did not apply this rule in the *Carachuri* case itself—a case that arose under Fifth Circuit

[1] As the BIA noted, the DHS modified its position after oral argument in *Carachuri* to state that "a conviction arising in a State that has *drug-specific* recidivism laws cannot be deemed a State-law counterpart to 'recidivist possession' unless the State actually used those laws to prosecute the respondent." *Carachuri*, 24 I&N Dec. at 391 (emphasis added).

law—because it found that it was bound by the contrary Fifth Circuit criminal sentencing decision in *United States v. Sanchez-Villalobos*, 412 F.3d 572, 577 (5th Cir. 2005), *cert. denied*, 546 U.S. 1137 (2006) (finding alternative basis for applying sentence enhancement based on prior conviction of an aggravated felony because drug possession conviction at issue was preceded by another conviction and thus "could have been punished" under 21 U.S.C. § 844(a) as a felony). *See Carachuri*, 24 I&N Dec. at 386-88. The BIA did apply this rule in *Thomas*—a decision issued the same day as *Carachuri* but in a case that arose under Eleventh Circuit law—because it found that the Eleventh Circuit has not ruled on this issue. *See Thomas*, 24 I&N Dec. at 421-22.

What *Carachuri* means for noncitizens whose cases arise in Circuits other than the 2nd, 5th, and 7th Circuits

A. Conviction not obtained under state recidivist provision

Under *Carachuri* and *Thomas*, Immigration Judges are now bound—at least in cases arising in jurisdictions outside the Second, Fifth, and Seventh Circuits (see following sections addressing case law in these circuits)—to find that a noncitizen's state conviction for **simple possession of a controlled substance is not an aggravated felony based on evidence of a prior drug conviction *where the individual's status as a recidivist drug offender was not admitted or determined by a judge or jury in the state criminal proceedings* relating to the second or subsequent conviction at issue.** The BIA majority in *Carachuri* states:

> [T]he purely "hypothetical" approach embraced by the Second, Fifth, and Seventh Circuits (as well as the concurring Board Members) discounts the importance of the respondent's actual offense . . . in favor of an expansive, and apparently noncategorical, inquiry into his larger criminal history. In essence, the hypothetical approach would authorize Immigration Judges to collect a series of disjunctive facts about the respondent's criminal history, bundle them together for the first time in removal proceedings, and then declare the resulting package to be "an offense" that could have been prosecuted as a Federal felony. . . . Without a showing of recidivism within the confines of the State prosecution, we conclude that the State offense cannot be said to proscribe conduct punishable as a felony under Federal law.

Carachuri, 24 I&N Dec. at 393.

Essentially, this means that, in most jurisdictions, a noncitizen's second or subsequent state possession conviction should not be deemed an aggravated felony if the state did not charge and prosecute the individual as a recidivist.

B. Conviction obtained under state recidivist provision

If an individual was charged and convicted as a recidivist under state law, then, in the majority of jurisdictions, the question is to what extent do the state's recidivist provisions correspond to those under federal law. *See* 21 U.S.C. §§ 844(a) and 851. Under federal law, a second or subsequent possession offense may not be penalized as a "recidivism possession" felony unless the offense was committed after the alleged prior conviction has become final, *see* 21 U.S.C. § 844(a), and the U.S. Attorney before trial, or before entry of a guilty plea, has filed an information with the court stating in writing the previous conviction(s) to be relied upon, and the defendant has had an opportunity to challenge the fact, finality and validity of the prior conviction(s) in a hearing in which the U.S. Attorney has the burden of proof beyond a reasonable doubt on any issue of fact. *See* 21 U.S.C. 851. The BIA indicates that, at a minimum, the state must have provided the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper in order for a particular crime to be considered a "recidivist" offense. *See Carachuri*, 24 I&N Dec. at 391. The BIA, however, goes on to state the following:

> We do not now decide whether State criminal procedures must have afforded the alien an opportunity to challenge the *validity* of the first conviction in a manner consistent with 21 U.S.C. § 851(c). Nor are we now concerned with the timing of notice, or with the burdens and standards of proof applicable to a defendant's challenge to his status as a recidivist. We also reserve the question whether facts about the nature, timing, or finality of prior convictions must be established categorically or otherwise.

Carachuri, 24 I&N Dec. at 394, n.10 (citation omitted).

For cases arising in the First, Third and Ninth Circuits, one should also consider the relevant favorable precedents in those circuits. The First and Third Circuits found, prior to *Carachuri*, that second or subsequent state drug possession convictions should not be deemed to correspond to a federal felony under § 844(a) in the absence of some notice and proof in the state criminal proceedings of the prior drug conviction. *See Berhe v. Gonzales*, 464 F.3d 74, 85–86 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130, 137–38 (3d Cir. 2001). The Ninth Circuit has gone further – at least in the immigration context -- and ruled that no second or subsequent state drug possession conviction should be treated as punishable by more than one year's imprisonment and therefore a "felony" punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement. *See Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004).[2]

[2] As the BIA points out, the rationale for the Ninth Circuit interpretation in *Oliveira-Ferreira* may be affected by the decision in a criminal sentencing case currently pending before the Supreme Court and scheduled to be argued on January 15, 2008. *See Carachuri*, 24 I&N Dec. at 386, n.3

What *Carachuri* means for noncitizens whose cases arise in the 5th Circuit

In *Carachuri*, the BIA holds that it is bound in cases arising in the Fifth Circuit to find that an individual's second or subsequent state possession offense may be deemed an aggravated felony even where the individual was not charged and convicted as a recidivist. *See Carachuri*, 24 I&N Dec. at 386-88 (citing *United States v. Sanchez-Villalobos*, 412 F.3d 572 (5th Cir. 2005)). Nevertheless, noncitizens and their lawyers in the Fifth Circuit should raise any available arguments that second or subsequent possession offenses are not aggravated felonies. (For arguments to raise, see practice materials referenced in Resources section at the end of this advisory). Even if Immigration Judges and the BIA reject these arguments based on *Sanchez-Villalobos*, they should be raised to preserve them for Fifth Circuit review or to benefit from any future Fifth Circuit decision in another case making clear that *Sanchez-Villalobos* is not binding precedent on this issue. In fact, the multiple possession issue is raised in at least three cases currently pending before the Fifth Circuit in the criminal sentencing context,[3] and *Carachuri* itself may be appealed to the Fifth Circuit.

Noncitizens and their lawyers who have cases pending at the Fifth Circuit should argue that *Sanchez-Villalobos* is no longer binding, if it ever was, on resolution of multiple possession issues in the Circuit. First, *Sanchez-Villalobos* was decided pre-*Lopez*, under a standard rejected by the Supreme Court in *Lopez*.[4] Furthermore, to the extent *Sanchez-Villalobos* applied the correct federal felony standard, it applied it in a manner inconsistent with *Lopez*. *See supra Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales*. As the BIA stated, "[i]t is certainly reasonable to believe that the Fifth Circuit may want to reexamine its law in the wake of *Lopez v. Gonzales*. Indeed, . . . we believe *Lopez* points strongly toward a different construction of the statute in 'recidivist possession' cases." *Carachuri*, 24 I&N Dec. at 387. In addition, *Sanchez-Villalobos* was a sentencing decision that reached its determination on the two possession issue in a cursory and conclusory way, unlike the more thorough and complete analysis undertaken by the First and Third Circuits in *Berhe* and *Steele* in the immigration context. *See Carachuri*, 24 I&N Dec. at 392 (noting that the *Sanchez-Villalobos* court did not "address[] or resolve[] the more intricate set of issues raised by the parties here, bearing on how a State drug possession offense may equate to the Federal 'offense' of recidivist possession when the Federal offense itself is compounded

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(citing *United States v. Rodriguez*, 464 F.3d 1072 (9th Cir. 2006), *cert. granted*, 128 S. Ct. 33 (2007) (No. 06-1646)).

[3] *United States v. Rodriguez de Leon*, Docket No. 07-50347 (briefing completed on 9/10/07); *United States v. Gutierrez-Quintanilla*, Docket No. 07-40494 (briefing completed on 11/2/07); and *United States v. Arevalo-Sanchez*, Docket No. 07-40684 (briefing completed on 12/12/07).

[4] *Sanchez-Villalobos* applied a state or federal felony approach to drug aggravated felony determinations, see *Sanchez-Villalobos*, 412 F.3d at 576 (offense must "be a felony under either state *or* federal law"), that *Lopez* rejected when it adopted a federal felony only standard. See *Lopez*, 127 S. Ct. at 629-33.

out of a disparate collection of elements, substantive sentencing facts, and procedural safeguards within the CSA").

Finally, and significantly, it should be pointed out that the Fifth Circuit itself has not treated *Sanchez-Villalobos* as binding precedent on the multiple possession issue. Even before *Lopez*, the Fifth Circuit questioned the significance of its alternative holding in *Sanchez-Villalobos* that a second state possession offense could be an aggravated felony under the federal standard. *Smith v. Gonzales,* 468 F.3d 272, 276 n.3 (5th Cir. 2006) ("The effect of Part B [the alternative basis for affirmance] in Sanchez-Villalobos is uncertain"). In addition, after *Lopez* was decided, the Fifth Circuit rejected a government motion to dismiss that argued that *Lopez* requires that all subsequent possession convictions be treated as aggravated felonies. *See Semedo v. Gonzales*, Dkt. No. 06-61102 (5th Cir. 2007). In fact, despite *Sanchez-Villalobos*, the Fifth Circuit not only rejected this request but it granted the petitioner a stay of removal. Moreover, after the government switched tactics and moved for remand in another Fifth Circuit case involving an unpublished Board decision that had relied on *Sanchez-Villalobos*, the Fifth Circuit ordered remand to the Board for reconsideration in light of *Lopez*. *See Bharti v. Gonzales*, No. 06-60383 (5th Cir. 2007). In this case, the government itself had taken the position that the Fifth Circuit has not addressed the issue at hand in this case. The government's papers to the Fifth Circuit stated:

> [T]he Board should be permitted, in the first instance, to apply its expertise to this case in light of the Supreme Court's analysis. In particular, remand is appropriate for the Board to determine whether in order for Petitioner's second possession offense to qualify as an aggravated felony, he needed to have been charged under a recidivist statute, or the first conviction needed to have been charged or proven during the criminal proceedings for the subsequent offense. *See* 21 U.S.C. § 851; *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006). That question has been raised by Petitioner here in his opening brief (as well as in the brief of amici curiae), but does not appear to have been addressed by either the Board or this Court in the context of immigration proceedings.

Respondents' Opposition To Motion of Amici Curiae For Leave to Submit Amicus Brief, *Bharti v. Gonzales*, attached to Brief of Amicus Curiae New York State Defenders Association for Respondent before the BIA, posted at www.nysda.org/idp/docs/07_MatterofC-A-BIAAmicusBriefFinalRedacted.pdf. In fact, despite *Sanchez-Villalobos*, the Fifth Circuit has also recently remanded even a criminal sentencing case involving two prior possession convictions for reconsideration of an aggravated felony sentence enhancement in light of *Lopez*, *See U.S. v. Arevalo-Sanchez*, 2006 WL 870362 (5th Cir. Mar. 21, 2007) (unpublished) ("In light of Lopez, Arevalo-Sanchez's argument has merit"), and flatly rejected the government's arguments in another criminal sentencing case,

United States v. Galvan-Lozano, No. 06-41297, 2007 U.S. App. LEXIS 21849, *3-4 (5th Cir. 2007) (unpublished) ("The government provides no authority . . . to support its assertion that a court of appeals may affirm [an aggravated felony sentencing enhancement] based on drug convictions, which were not individually aggravated felonies, on the ground that the convictions together are the equivalent of a recidivist possession conviction . . .").

Thus, noncitizens and their lawyers should argue that, given *Lopez*, *Sanchez-Villalobos* is no longer good law in the Fifth Circuit. If an individual was not charged and convicted as a recidivist under state law, he or she should argue for application, in the interest of uniformity, of the rule of *Carachuri* to find that the conviction is not an aggravated felony. If an individual *was* charged and convicted as a recidivist under state law, then the individual should make any available arguments that the state recidivist provisions do not correspond to those under federal law. *See* 21 U.S.C. §§ 844(a) and 851.

What *Carachuri* means for noncitizens whose cases arise in the 2nd Circuit

In *Carachuri*, the BIA appears to imply in dicta that it would be bound also in cases arising in the Second Circuit to find that an individual's second or subsequent state possession offense may be deemed an aggravated felony even where the individual was not charged and convicted as a recidivist. *See Carachuri*, 24 I&N Dec. at 392-393 (citing *United States v. Simpson*, 319 F.3d 81 (2d Cir. 2002)). The decision does not note that the Second Circuit expressly stated in *Simpson* that its holding was not binding beyond the criminal sentencing context in which the issue arose in that case. *See Simpson* at 86, n.7 ("We offer no comment on whether such convictions constitute "aggravated felonies" for any purpose other than the Guidelines"). In any event, even if *Simpson* were binding in the immigration context, noncitizens and their lawyers in cases arising in the Second Circuit should point out that this conclusion in *Carachuri* was dicta and then raise any available arguments that second or subsequent possession offenses are not aggravated felonies. (For arguments to raise, see practice materials listed in Resources section at the end of this advisory). Even if Immigration Judges and the BIA reject these arguments based on *Simpson*, they should be raised to preserve them for Second Circuit review or to benefit from any future Second Circuit decision in another case making clear that *Simpson* is not binding precedent on this issue. In fact, the multiple possession issue is raised in at least one case currently being briefed before the Second Circuit. *Martinez v. Gonzales*, Docket No. 07-3031.

Noncitizens and their lawyers who have cases pending at the Second Circuit (or even those with cases still pending before the agency given that any finding in *Carachuri* with respect to Second Circuit law was dicta) should also argue that *Simpson* was decided pre-*Lopez*, under a standard rejected by the

Supreme Court in *Lopez*.[5] Furthermore, to the extent *Simpson* applied the correct federal felony standard, it applied it in a manner inconsistent with *Lopez*. *See supra Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales*. In addition, *Simpson* was a sentencing decision that reached its determination on the two possession issue in a cursory and conclusory way, unlike the more thorough and complete analysis undertaken by the First and Third Circuits in *Berhe* and *Steele* in the immigration context. *See Carachuri*, 24 I&N Dec. at 392 (noting that the *Simpson* court did not "address[] or resolve[] the more intricate set of issues raised by the parties here, bearing on how a State drug possession offense may equate to the Federal 'offense' of recidivist possession when the Federal offense itself is compounded out of a disparate collection of elements, substantive sentencing facts, and procedural safeguards within the CSA").

Finally, and significantly, the Second Circuit itself has not treated *Simpson* as binding precedent on the multiple possession issue in the immigration context. In fact, in a subsequent immigration case, the Second Circuit explicitly chose not to resolve "this complex issue" in a pro se case lacking full briefing. *See Durant v. INS*, 393 F.3d 113, 115 (2d Cir. 2004), *amended by Durant v. INS*, 2004 U.S. App. LEXIS 27904, at *2 n.1 (2d Cir. December 16, 2004) ("We are reluctant to adjudicate this complex issue without the benefit of full briefing . . . . Accordingly, we do not address [the issue]"). And, in post-*Lopez* cases raising the multiple possession issue, the government itself has sought remand in at least one case in which the Board in an unpublished opinion had relied on *Simpson*. The Second Circuit's remand order, stipulated to by the government, remands the case to the Board for consideration "in light of *Lopez*," and states that the Board should consider the fact that the immigrant "was not charged under a recidivist statute." *See Powell v. Gonzales*, Dkt. No. 06-5315 (2d Cir. Feb. 7, 2007); *see also Martinez v. Ridge*, Dkt. No. 05-3189 (2d Cir. May 8, 2007); *Sorbo v. Ashcroft*, Dkt. No. 04-1215 (2d Cir. Sept. 10, 2007) (remand orders in other multiple conviction cases at the government's request to provide the agency with an opportunity to reconsider decisions in light of *Lopez*).

Thus, noncitizens and their lawyers should argue that *Simpson* is not the law of the Second Circuit in the immigration context and, even if it were, that it is no longer good law after *Lopez*. If an individual was not charged and convicted as a recidivist under state law, he or she should argue for application, in the interest of uniformity, of the rule of *Carachuri* to find that the conviction is not an aggravated felony. If an individual *was* charged and convicted as a recidivist under state law, then the individual should make any available arguments that the state recidivist provisions do not correspond to those under federal law. *See* 21 U.S.C. §§ 844(a) and 851.

[5] *Simpson* applied a state or federal felony approach to drug aggravated felony determinations, see *Simpson*, 319 F.3d at 85 (offense is an "aggravated felony" when it "can be classified as a felony under either state or federal law"), that *Lopez* rejected when it adopted a federal felony only standard. See *Lopez*, 127 S. Ct. at 629-633.

What *Carachuri* means for noncitizens whose cases arise in the 7th Circuit

In *Carachuri*, the BIA indicates in dicta that it would be bound in cases arising in the Seventh Circuit to find that an individual's second or subsequent state possession offense may be deemed an aggravated felony even where the individual was not charged and convicted as a recidivist. *See Carachuri*, 24 I&N Dec. at 392-393 (citing *United States v. Pacheco-Diaz*, 506 F.3d 545 (7th Cir. 2007)). The decision does not note that the Seventh Circuit has not yet issued its mandate in *Pacheco-Diaz*. Fed. R. App. P. 41(a) (mandate issues 21 days after entry of judgment or seven days after denial of petition for rehearing). This is because Mr. Pacheco filed a petition for rehearing on November 6, 2007 pursuant to Fed. R. App. P. 40(a)(1) and the Seventh Circuit has not denied the petition. In fact, the Court has asked the government to respond. *See United States v. Pacheco-Diaz*, Dkt. No. 05-2264.

In any event, even if the petition for rehearing in *Pacheco-Diaz* is denied, noncitizens and their lawyers in cases arising in the Seventh Circuit should point out that the *Carachuri* conclusion regarding the binding effect of *Pacheco-Diaz* was dicta and then raise any available arguments that second or subsequent possession offenses are not aggravated felonies. (For arguments to raise, see practice materials listed in Resources section at the end of this advisory). Even if Immigration Judges and the BIA reject these arguments based on *Pacheco-Diaz*, they should be raised to preserve them for Seventh Circuit review or to benefit from any future Seventh Circuit decision in another case making clear that *Pacheco-Diaz* is not binding precedent on this issue. In fact, the issue of whether individuals convicted of more than one possession offense may automatically be deemed aggravated felons is currently pending before the Seventh Circuit in a set of consolidated cases raising this issue in the immigration context. *See Fernandez et. al. v. Keisler*, 06-3476, *Jimenez-Mateo v. Keisler*, 06-3987, and *Calderon v. Keisler*, 06-3994 (consolidated as "*Jimenez-Mateo*").

Noncitizens and their lawyers who have cases pending at the Seventh Circuit (or even those with cases still pending before the agency given that any finding in *Carachuri* with respect to Seventh Circuit law was dicta) should argue that *Pacheco-Diaz* is not binding on resolution of the question addressed by *Carachuri*. First, the *Pacheco-Diaz* court did not address the situation of an individual whom the State chose not to charge and convict as a recidivist, and consider whether a resulting non-recidivist disposition in such a case truly corresponds to a federal recidivist felony conviction. *See Carachuri*, 24 I&N Dec. at 392 (noting that the *Pacheco-Diaz* court did not "address[] or resolve[] the more intricate set of issues raised by the parties here, bearing on how a State drug possession offense may equate to the Federal 'offense' of recidivist possession when the Federal offense itself is compounded out of a disparate collection of elements, substantive sentencing facts, and procedural safeguards

within the CSA"). In fact, at oral argument in *Jimenez-Mateo*, at least one member of the panel stated repeatedly that the consolidated immigration cases raised a key legal issue that was not presented to the *Pacheco-Diaz* court, namely, whether an immigrant who was not charged and convicted as a recidivist under state law can be labeled a "drug trafficking" aggravated felon. October 30, 2007 Oral Argument in *Jimenez-Mateo*, *available at* www.ca7.uscourts.gov/fdocs/docs.fwx. To the extent that *Pacheco-Diaz* does not address relevant arguments, it does not bind the Seventh Circuit on these points. *See*, *e.g.*, *Petrov v. Gonzales*, 464 F.3d 800, 802 (7th Cir. 2006) ("Because [prior Seventh Circuit decision] did not mention that subject, it does not contain a holding on the issue").

Second, *Pacheco-Diaz* was briefed and argued before *Lopez*, *see Pacheco-Diaz,* 506 F.3d at 545 (argued November 27, 2006, eight days before December 5, 2006 decision in *Lopez*), and, lacking the benefit of post-*Lopez* briefing, its reasoning is fatally flawed in light of the Supreme Court's analysis in *Lopez*. For example, *Pacheco-Diaz*, which was a sentencing case, relied heavily on sentencing case law, such as *United States v. Perkins,* 449 F.3d 794 (7th Cir. 2006) and *United States v. Henton*, 374 F.3d 467 (7th Cir. 2004), which analyzed punishment under state law where there were no prerequisites for recidivist enhancement. The relevant provision in the Armed Career Criminal Act at issue in those cases direct a court to determine the maximum term of imprisonment for the state offense at issue by looking to *state penalties* and their requirements. *See Perkins*, 449 F.3d at 796 (analyzing the maximum term authorized under Illinois law); *Henton*, 374 F.3d at 469 (same). The *Perkins* and *Henton* decisions analyzed the relevant state statutes and, noting that the state recidivist enhancement provision at issue in those cases has no prerequisites, found that the defendants were subject to a recidivist enhancement that qualified them as "serious drug offenses." *See Perkins*, 449 F.3d at 796; *Henton*, 374 F.3d at 469 (distinguishing *United States v. Williams*, 326 F.3d 535, 538 (4th Cir. 2003), which involved a state statute that had prerequisites for recidivist enhancement). This is a different inquiry than the inquiry under *Lopez*—where the focus must be on *federal penalties*, which do incorporate specific recidivist enhancements requirements.[6] Thus, had the *Pacheco-Diaz* panel focused on the "maximum

[6] In *Lopez*, the Supreme Court analyzed the definition of "drug trafficking crime" in 18 U.S.C. § 924(c) and concluded that only those state convictions that "proscribe conduct punishable as a felony under [ ] *federal* law" are "drug trafficking" aggravated felonies. *Lopez*, 127 S. Ct. at 633 (emphasis added). Thus, *unlike* the inquiry in Armed Career Criminal Act "serious drug offense" cases, for example, *Lopez* clarifies that inquiry in "drug trafficking" aggravated felony cases is *not* about the maximum term of incarceration authorized under *state* law, but is instead focused solely on the maximum term authorized under *federal* law. Under federal law, a recidivist drug possession conviction does have prerequisites, requiring a federal prosecutor to charge in an information, and subsequently establish, a final prior conviction. *See* 21 U.S.C. §§ 844(a) and 851. The Supreme Court has held that these requirements must be met in order for the "maximum term authorized" for an offense to be enhanced under the federal recidivist statute. For example, in *LaBonte*, the Supreme Court held that "for defendants who have received the notice under § 851(a)(1), as respondents did here, the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the *unenhanced* maximum

term of imprisonment" authorized by *federal* law rather than state law, it would have followed the Supreme Court's decisions in *LaBonte* and *Price* to conclude that "the unenhanced maximum applies" where an individual was not charged as a recidivist and that conviction therefore was not punishable as a felony. *LaBonte*, 520 U.S. at 758-760; *see also supra* fn. 5.

Third, the *Pacheco-Diaz* panel did not fully consider the implications of its decision in the immigration context, as evident by its failure to even discuss, let alone distinguish, the binding precedents of the First and Third Circuits. *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3d Cir. 2001); *see also Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002); *McNeil v. AG of the United States*, 2007 U.S. App. LEXIS 20582, *15-17 (3d Cir. 2007) (recently applying *Steele* and *Gerbier*). Moreover, the cases that the *Pacheco-Diaz* decision did rely on arise in circuits (the Second and Fifth) that no longer consider that contrary case law binding. *See* discussion in two preceding sections of this advisory. The only other decision of a circuit (the Sixth) cited by *Pacheco-Diaz* in support of its position in fact rejected a government claim that an individual's second possession conviction could categorically be treated as an aggravated felony. *See United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005) (found that appellant's second drug offense occurred prior to his first conviction becoming final, "[a]ccordingly, he could not be charged under the recidivist provision of the federal statute").

Thus, noncitizens and their lawyers should argue that *Pacheco-Diaz*—even if the Seventh Circuit denies rehearing—does not fully resolve questions raised by *Lopez*, at least with respect to questions not addressed in the *Pacheco-Diaz* decision and not yet resolved by the *Jimenez-Mateo* cases. If an individual was not charged and convicted as a recidivist under state law, he or she should argue for application, in the interest of uniformity, of the rule of *Carachuri* to find that the conviction is not an aggravated felony. If an individual *was* charged and convicted as a recidivist under state law, then the individual should make any available arguments that the state recidivist provisions do not correspond to those under federal law. *See* 21 U.S.C. §§ 844(a) and 851.

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applies." *United States v. LaBonte*, 520 U.S. 751, 758-760 (1997) (emphasis added). The Supreme Court later applied this rule in *United States v. Price*, 537 U.S. 1152 (2003), remanding that case back to the Fifth Circuit. In its decision following that remand, the Fifth Circuit acknowledged, "[i]n our prior opinion, we concluded Price's 21 U.S.C. § 844 conviction could have been a felony because of his prior convictions. However, Price did not receive notice that these prior convictions could be used. Thus his 21 U.S.C. § 844 conviction *could not be a felony*." *United States v. Price*, No. 00-51078, 67 Fed. Appx. 243, *2-3 (5th Cir. 2003) (not for publication) (emphasis added). In other words, a simple possession offense is not punishable as a recidivist felony unless the requirements for charging and establishing recidivism under federal law are met. *Lopez* clarifies that these federal requirements are precisely what matters for the inquiry here, and if the state conviction does not correspond to the federal felony, "it does not count" as an aggravated felony. *Lopez*, 127 S. Ct. at 631.

Resources

Those whose cases are not fully resolved by the BIA decisions in *Carachuri* and *Thomas*—e.g., those whose cases arise in the Second, Fifth, and Seventh Circuits, or those whose cases involve convictions under state recidivist provisions that may or may not correspond to those under federal law—may refer to prior Immigrant Defense Project (IDP) resource materials for additional arguments to challenge continuing or future DHS charges that an individual with more than one simple possession drug conviction has been convicted of an aggravated felony. Please note, however, that these resource materials have not yet been updated to include the impact of the BIA decisions in *Carachuri* and *Thomas*. These resources include:

- *Practice Advisory: Removal Defense of Immigrants in Drug Possession Cases—The Impact of Lopez v. Gonzales* (April 12, 2007), posted at www.nysda.org/idp/docs/07_PostLopezAdvisoryforRemovalDefense41207.pdf (see section entitled "What if my client has more than one state drug possession conviction?" on pages 6-9).

- *Pro Se Advisory: Immigrants With Multiple Drug Possession Convictions: Instructions for Challenging Whether You Have Been Convicted of an Aggravated Felony* (Oct. 12, 2007), posted at www.nysda.org/idp/docs/07_PracticeAdvisoryMultipleDrugPossession_NotanAF_Advisory_Final1017.pdf.

For additional litigation support or to learn about later developments on the issues discussed in this advisory, please see the IDP website at www.immigrantdefenseproject.org, or contact IDP's Alina Das at (212) 725-6486 or Manny Vargas at (212) 725-6485.