No. 12-2798-AG

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Manuel Pascual,

Petitioner,

v.

Eric H. Holder, Jr.,
Attorney General of the United States

Respondent,

PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING EN BANC

BRIEF OF *AMICI CURIAE*
IMMIGRANT DEFENSE PROJECT, THE BRONX DEFENDERS, BROOKLYN DEFENDER SERVICES, THE LEGAL AID SOCIETY, NEIGHBORHOOD DEFENDER SERVICE HARLEM, NEW YORK COUNTY DEFENDER SERVICES, AND QUEENS LAW ASSOCIATES IN SUPPORT OF THE PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici curiae* hereby certify as follows:

Immigrant Defense Project's parent corporation is the Fund for the City of New York (FCNY), a nonprofit corporation that does not issue stock.

The Bronx Defenders does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

Brooklyn Defender Services does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

The Legal Aid Society does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

Neighborhood Defender Services of Harlem does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

New York County Defender Services does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

Queens Law Associates does not have a parent corporation. It is a nonprofit corporation that does not issue stock.

STATEMENT OF IDENTITY OF AMICI CURIAE, INTEREST IN CASE, AND SOURCE OF AUTHORITY TO FILE

Amici are the six institutional public defender offices that represent indigent criminal defendants in New York City, as well as the Immigrant Defense Project, a New York-based non-profit legal resource and training center dedicated to promoting fundamental fairness for immigrants accused of or convicted of crimes. Collectively, amici represent or advise more than 320,000 criminal defendants each year, of whom a significant percentage are non-citizens. Each of the public defender *amici* employs in-house immigration attorneys who advise non-citizen clients on the immigration consequences of any contemplated plea bargain, and *amicus* IDP provides similar advice to criminal defense counsel and immigrants throughout the states in this Circuit. *Amici* therefore have a keen interest in the proper and predictable classification of state offenses under immigration law. *Amici* submit this brief to explain why, from the immigrant defense community's perspective, this Court's dismissal of Mr. Pascual's Petition for Review is likely to have broad and unwarranted negative implications for numerous other immigrants.

PRELIMINARY STATEMENT

Amici curiae respectfully urge this Court to grant Mr. Pascual's Petition for Rehearing and Suggestion for Rehearing En Banc.[1] Many thousands of defendants across the country are convicted each year of violating drug sale statutes. In many States, including New York, Connecticut, and Vermont, these laws reach beyond exchanges of drugs for money to criminalize mere "offers" to sell. In dismissing Mr. Pascual's Petition for Review, this Court held that an offer to sell meets the definition of a federal drug trafficking aggravating felony. That ruling of law—recently abandoned by the Attorney General of the United States and rejected by the Board of Immigration Appeals—would result in enormous consequences for many immigrants. Non-citizens will be subject to mandatory (as opposed to possible) removal; and citizens and non-citizens alike could be threatened with dramatic sentencing enhancements if later convicted of other federal offenses. The Court should grant rehearing to avoid these harsh and unwarranted consequences.

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[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, nor any person other than amici or their counsel contributed money intended to fund the preparation or submission of this brief.

ARGUMENT

I. The Court's Holding Contradicts Second Circuit Precedent, Recent Rulings by the Board of Immigration Appeals, and the Attorney General's Concession Before this Court that an "Offer to Sell" Drugs Is Not Categorically an Aggravated Felony Under the Immigration and Nationality Act.

The holding in this case conflicts with binding Circuit precedent. In fact, the Board of Immigration Appeals recently relied on that precedent to reject the Attorney General's position that "offers to sell" drugs are categorically aggravated felonies for immigration law purposes. And in a case now pending before this Court, the Attorney General has now conceded that an offer to sell is not categorically an aggravated felony. The Court should straighten out these conflicting positions through rehearing.

Mr. Pascual, a non-citizen, was convicted under N.Y.P.L. § 220.39, which outlaws "sale of a controlled substance in the third degree." This Court dismissed his Petition for Review of a decision to remove him, holding that a conviction under this statute is necessarily an "aggravated felony" for purposes of the Immigration and Nationality Act ("INA"), "even if Pascual did no more than offer . . . to sell cocaine." *Pascual v. Holder*, No. 12-2798 (Feb. 19, 2013) ("Slip op."), at 7. But in a criminal appeal five years ago, this Court held that Connecticut's drug law forbidding, among other things, "a mere offer to sell . . . does not fit within the Guidelines' definition of a controlled substance offense." *United States*

v. Savage, 542 F.3d 959, 965 (2d Cir. 2008) (quoting *United States v. Price*, 516 F.3d 285, 288-89 (5th Cir. 2008)) (internal quotation marks omitted). The definition in the Sentencing Guidelines of a "controlled substance offense" is indistinguishable from the INA's definition (for "aggravated felony" purposes) of "illicit trafficking in a controlled substance." In each instance, state convictions count only if the statute is confined to conduct punishable under the Controlled Substances Act ("CSA").[2] *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006); 8 U.S.C. § 1101(a)(43)(B).

This Court held in *Savage* that an offer does not amount to even an attempt to sell. 542 F.3d at 965 (noting, *e.g.*, that "[a]n offer to sell can be fraudulent" (citation omitted)). New York law, although requiring proof that an offer to sell was bona fide, *see People v. Samuels*, 99 N.Y.2d 20, 24 (N.Y. 2002), likewise is broader than the CSA, which is limited to "manufactur[ing], distribut[ing], or dispens[ing], or possess[ing] with intent to" do the same (including attempts or conspiracies). 21 U.S.C. §§ 841(a)(1), 846.

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[2] Under the INA, "illicit trafficking in a controlled substance" includes a "drug trafficking crime" (as defined in section 924(c) of title 18), 8 U.S.C. § 1101(a)(43)(B), meaning "any felony punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2).

First, a mere offer to sell can occur without "manufactur[ing]," "dispens[ing]," or "distribut[ing]" a drug. *See* 21 U.S.C. § 802(11), (8) ("distribute" means "deliver"; "deliver" means "the actual, constructive, or attempted transfer of a controlled substance"); *People v. Mullen*, 549 N.Y.S.2d 520, 523 (App. Div. 1989) (offer to sell can occur without the "actual" or "constructive" transfer of a controlled substance).

An "offer" can also occur without an "attempt" to sell or transfer. An attempt requires both a specific intent to accomplish the target crime and an overt act that is a "substantial step" toward it. *See United States v. Jackson*, 560 F.2d 112, 120-21 (2d Cir. 1977). The "overt act" must be "adapted to, approximately and which in the ordinary and likely course of things will result in, the commission of the particular crime." *United States v. Manley*, 632 F.2d 978, 988 (2d Cir. 1980).[3] Even an "agreement" to consummate a sale (*i.e.*, offer *and* acceptance) is not itself enough to prove the "overt act" required for an attempt conviction. *See United States v. Delvecchio*, 816 F.2d 859, 862 (2d Cir. 1987) (conviction reversed for attempt to possess with intent to distribute; overt act not established by

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[3] *See also United States v. Pratt*, 351 F.3d 131, 135 (4th Cir. 2003) (attempt charge "punishes conduct that puts in motion events that would . . . result in the commission of a crime but for some intervening circumstance").

agreement on (i) quantity and price of heroin to be sold, (ii) terms of payment, and (iii) date and time of proposed transaction).

Even apart from the legal distinction between an offer to sell and an attempt to distribute (or to possess with such an intent), whether a defendant has taken a "substantial step" for attempt purposes is "so dependent on the particular factual context of each case that . . . there can be no litmus test." *Manley*, 632 F.2d at 988; *see also United States v. Desposito*, 704 F.3d 221, 231 (2d Cir. 2013) ("Whether specific conduct constitutes a substantial step depends on the particular facts of each case viewed in light of the crime charged.") (internal quotations omitted). Thus, it cannot be stated categorically that an "offer to sell" under New York law will always be an attempt under the CSA.[4]

Other courts have agreed with *Savage*, both in the immigration and sentencing contexts. *See, e.g.*, *James v. Holder*, 698 F.3d 24, 27 (1st Cir. 2012) (the INA definition for "illicit trafficking . . . does not appear to encompass offers and gifts," requiring the court to examine the charging documents under a "modified categorical approach"); *Santos v. Attorney General of the U.S.*, 352 F.

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[4] Nor is the New York law co-extensive with the federal "possession with intent to distribute" violation; "if a defendant makes a bona fide offer to sell drugs, conviction may be had *without proof of possession of the contraband*." *People v. Forgione*, 864 N.Y.S.2d 837, 842 (Sup. Ct. 2008) (emphasis added).

App'x 742, 744 (3d Cir. 2009) (same); *Price*, 516 F.3d at 287 (conviction under Texas drug sale statute is not predicate offense for purposes of the Guidelines; remanded for sentence reduction).[5] And the United States Sentencing Commission, as recently as 2008, created a special and broader sub-category of prior drug-related convictions by taking the CSA definition (which applies under U.S.S.G. § 4B1.2) and adding "offers." This special definition—the only one in

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[5] Additional authorities include: *Davila v. Holder,* 381 F. App'x 413, 415 (5th Cir. 2010) (N.Y.P.L. § 220.41 covered an offer to sell, which is not an offense under the CSA and therefore not categorically a drug trafficking crime aggravated felony); *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1132 (9th Cir. 2007) (conviction under California "offer to sell" statute is not necessarily an aggravated felony); *Mendieta-Robles v. Gonzales,* 226 F. App'x 564, 569 (6th Cir. 2007) (Ohio trafficking in cocaine offense is not categorically an aggravated felony where the state statute covers offering to sell); *United States v. Rivera-Sanchez*, 247 F.3d 905, 909 (9th Cir. 2001) (concluding, in sentencing context, that a state offense that includes "offers" to sell marijuana includes solicitation conduct not covered under the CSA and thus was not categorically an aggravated felony) (en banc); *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1999) (state solicitation offense is not punishable under CSA and thus not an aggravated felony); *United States v. Gonzalez*, 484 F.3d 712, 716 (5th Cir. 2007) (Texas offense covering offering to sell a controlled substance does not come within then-existing definition of drug trafficking offense in U.S. Sentencing Guideline § 2L1.2); *United States v. Aguilar-Ortiz*, 450 F.3d 1271, 1275 (11th Cir. 2006) (prior conviction for solicitation under Florida law did not categorically warrant a drug trafficking offense enhancement under § 2L1.2(b)(1)(B)); *Carter v. United States*, 731 F. Supp. 2d 262, 271-72 (D. Conn. 2010) (convictions under Connecticut drug sale statute are not predicate offenses for purposes of the Guidelines; sentence reduced); *United States v. Jacobs*, 3:08-cr-0211 (CSH), 2011 U.S. Dist. LEXIS 126620 (D. Conn. Nov. 2, 2011) (same).

the Guidelines that includes prior "offer" offenses—is called a "drug trafficking offense," and it applies solely to certain prior convictions counted in U.S.S.G. § 2L1.2. *See id.*, n.1(B)(iv).

In the face of this line of precedent, the Board of Immigration Appeals *and* the Attorney General have agreed that convictions under such state statutes cannot be treated categorically as aggravated felonies. *See, e.g.*, Brief of Respondent at 29, *Andrews v. Holder*, No. 11-5449 (2d Cir. Oct. 22, 2012) ("It is undisputed that, as the Board [of Immigration Appeals] assumed here, a conviction under N.Y.P.L. § 220.31 does not qualify categorically as a drug trafficking aggravated felony."); *Matter of Shawn Delroy Gordon*, No. A040-088-544 (BIA Mar. 7, 2011) ("We find the record does not establish that the respondent's conviction under [Connecticut law] for possession of marijuana with the intent to sell is an aggravated felony under section 101(a)(43)(B) of the INA.") (attached as Exhibit A). At the very least, Mr. Pascual should have been allowed to proceed with his Petition on the merits, with Respondent limited to invoking the modified categorical approach, which—when available—requires a case-specific inquiry into the charging documents of the earlier criminal proceeding.[6]

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[6] A short *per curiam* opinion, without the benefit of full briefing or a discussion of *Savage*, creates unnecessary confusion in this important area of both

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II. Treating "Offers" to Sell Drugs as Aggravated Felonies Would Adversely and Unfairly Affect a Large Number of Immigrants in Removal Proceedings.

Each year, thousands of defendants are sentenced under state laws that define the "sale" of drugs in broad terms. Many are not United States citizens. The ruling here would turn a much greater number of them into aggravated felons, making them ineligible to seek discretionary relief from removal. The Court should grant rehearing to avoid that serious and unwarranted consequence.

In 2011, a total of 4,192 defendants were convicted of sale of drugs in the State of New York alone. *See* New York State Felony Processing Final Report Indictment Through Disposition January—December 2011 at 26. That large number is typical. The Final Report for 2010 documents 4,492 convictions; in 2009 there were 4,836. *See* 2010 Final Report at 26; 2009 Final Report at 26.[7] In

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immigration and criminal law. The Court should at least withdraw its opinion pending the outcome in *Andrews*, which has been fully briefed and awaits oral argument. *See* Order, *Andrews v. Holder*, 11-5449-AG (Sept. 21, 2012) (directing that *Andrews* be transferred to the Regular Argument Calendar) (attached as Exhibit B). (Gibson Dunn, co-counsel on this brief, represents Mr. Andrews *pro bono* in that proceeding, which has tentatively been calendared for the week of May 28, 2013.) Alternatively, the Court should depublish the panel's *per curiam* opinion and proceed by summary order.

[7] These numbers include all convictions under N.Y.P.L. §§ 220.31, § 220.34, 220.39, 220.41, 220.43, 220.44, 220.65, 220.77, 221.45, 221.50, and 221.55, which are all classified under New York law as felonies from Class A-I through E. Although equivalent statistics for Connecticut and Vermont are not

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both 2005 and 2006, 27 percent of all suspects arrested nationwide by the Drug Enforcement Agency were non-citizens. *See* Federal Justice Statistics 2006; Federal Justice Statistics 2005. (Circuit-specific statistics are unavailable.) If New York's non-citizen prosecution rate is at least on par with the national average, more than 1,000 non-citizens are convicted under its drug sale statutes each year.

A ruling that automatically classifies these state convictions as aggravated felonies under the INA would erroneously bar many immigrants from discretionary relief from removal. Drug sale statutes in Connecticut, New York, and Vermont all define "sale" or "sell" to include making an "offer" to sell or to transfer. *See* N.Y. Penal Law § 220.00(1) (McKinney's 2013); CONN. GEN. STAT. § 21a-240(50) (2013); VT. STAT. ANN. tit. 18, § 4201(30) (2012). Under the Court's new approach, any alien convicted under one of these state statutes would be statutorily ineligible for most forms of discretionary relief from removal, including asylum and cancellation of removal, and this Court would be deprived of its jurisdiction to

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available, 409 drug felony cases were filed in the state courts of Vermont in the year ending on June 30, 2012. *See* Vermont Superior Court – Criminal Division 2012, *available at*: http://www.vermontjudiciary.org/JC/Shared%20Documents/2012-Criminal.pdf. In the year ending June 30, 2011, the number was 408. *See* Vermont Superior Court – Criminal Division 2011, *available at*: http://www.vermontjudiciary.org/JC/Shared%20Documents/2011-Criminal.pdf.

review such removal orders. *See* 8 U.S.C. §§ 1158(b)(2)(A)(ii), (B)(i); 1228(b)(5); 1229b(a)(3); 1229c(a)(1); 1231(b)(3)(B)(ii); 1252(a)(2)(C).

Such severe consequences would occur outside this Circuit too. At least twenty States have laws that criminalize a mere "offer" to sell drugs.[8] If the Court's new approach is followed elsewhere, thousands of additional immigrants would likely be affected, not to mention the confusion that would ensue from the abrupt change in course.

III. Fearing the New Immigration Consequences of Any Drug Sale Conviction, Immigrant Defendants Would Be Discouraged From Entering Guilty Pleas.

Under the Court's rationale, any conviction under a state law that includes a prohibition on the mere "offer" to sell drugs will be an aggravated felony conviction. The prospect of mandatory deportation for such convictions could pose grave consequences in many states by discouraging plea bargains.

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[8] *See,* ARIZ. REV. STAT. § 13-3405 (2010); CAL. HEALTH & SAFETY CODE § 11352(a) (2011); COLO. REV. STAT. § 18-18-403(1) (2009); FLA. STAT. § 817.563 (2009); HAW. REV. STAT. § 712-1240 (2009); MINN. STAT. 152.01(15a) (2011); MONT. CODE ANN. § 45-9-101 (2013); MO. ANN. STAT. § 195.010 (2011); NEV. REV. STAT. § 372A.070 (2011); N.H. REV. STAT. ANN. § 318-B:1 (2013); N.D. CENT. CODE ANN. § 19-03.1-01 (West 2011); OHIO REV. CODE ANN. § 2925.03 (West 2012); 35 PA. STAT. ANN. § 780-113 (West 2011); R.I. GEN. LAWS ANN. § 21-28-1.02 (West 2012); TEX. HEALTH AND SAFETY CODE § 481.001 (Vernon 2009); UTAH CODE ANN. § 58-37-8 (West); WASH. REV. CODE § 69.50.4012 (2012).

The Court's new approach would greatly raise the stakes for many non-citizens charged with state drug offenses. The Supreme Court recognizes that "[p]reserving the right to remain in the United States may be more important to the [immigrant] than any potential jail sentence." *INS v. St. Cyr*, 533 U.S. 289, 322-23 (2001). And "'preserving the possibility' of discretionary relief from deportation" is "'one of the principal benefits sought by defendants deciding whether to accept a plea offer or instead to proceed to trial.'" *Padilla v. Kentucky*, 130 S. Ct. 1473, 1483 (2010) (quoting *St. Cyr*, 533 U.S. at 323).

Padilla held in particular that where deportation would be "presumptively mandatory," defense counsel's failure to inform the non-citizen defendant of this likely consequence is ineffective assistance of counsel. 130 S. Ct. at 1483 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). *See also* 8 U.S.C. § 1228(c) ("An alien convicted of an aggravated felony shall be conclusively presumed to be deportable from the United States."). Many immigrants prosecuted for drug offenses in twenty States would be well-advised to risk the uncertainties of a trial rather than give in to the alternative of all-but-certain deportation. The potential deleterious effect on the trial courts in those States is difficult to overstate.[9]

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[9] When defense attorneys fail to raise this significant immigration consequence before their non-citizen clients plead guilty, courts will be burdened just the

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The importance of plea bargaining to the efficiency of our criminal justice system is well recognized. *See Santobello v. New York*, 404 U.S. 257, 260 (1971) (noting that plea bargaining is essential because it allows state and federal governments to save resources by avoiding full-scale trials). Guilty pleas account for 95 percent of all criminal convictions in federal court and 90 to 95 percent of all state and federal criminal dispositions. *See Plea Bargaining Research Summary*, Bureau of Justice Assistance, U.S. Department of Justice, *available at* https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf. This Court ought not lightly embark on a course that could impose such substantial additional costs on state criminal judicial systems.

IV. The Court's Reasoning, If Applied To Criminal Sentencing, Would Greatly Increase Penalties for Many Federal Defendants.

If the *Pascual* reasoning were to be extended to the sentencing context, where the relevant statutory and guidelines provisions are largely the same for enhancement purposes, it would create unnecessarily long criminal sentences. The Supreme Court cases establishing the ground rules for whether a state offense can

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same: this time with post-conviction motions to vacate guilty pleas for ineffective assistance of counsel. The Department of Justice recognizes this risk, advising prosecutors to "ensure that defendants enter knowing and intelligent pleas that will not be subject to challenge under *Padilla*." *Immigration Consequences of Criminal Convictions: Padilla v. Kentucky*, Office of Immigration Litigation, U.S. Department of Justice (Nov. 2010).

be categorized as a serious drug or violent crime addressed federal sentence enhancements. *See Taylor v. United States*, 495 U.S. 575, 600-02 (1990); *Shepard v. United States*, 544 U.S. 13, 19-21 (2005). Most directly, bringing "offer" statutes within the definition of aggravated felonies in the INA will lead to substantial statutory sentence enhancements for immigrants later charged with illegal reentry after removal. Indeed, under the INA, a prior "aggravated felony" conviction increases the maximum sentence for illegal reentry by a factor of ten. *See* 8 U.S.C.§ 1326(a), 1326(b)(2) (two year maximum for illegal reentry increases to twenty years for aliens previously convicted of an aggravated felony).

Other federal sentence enhancement provisions rely on similar definitions. For example, a prior "felony drug offense"—which triggers higher statutory minimums and maximums under the federal drug laws—is defined as a "felony punishable under the Controlled Substances Act," meaning a law that "proscribes conduct punishable as a felony under that federal law." *Lopez*, 549 U.S. at 60. Were the Court's ruling to apply here, even one prior conviction for such an offense would double the mandatory minimum sentence. *See* 21 U.S.C. §§ 841(b)(1)(A), (B) & 851 (procedure for sentence enhancement). Where two prior convictions are "felony drug offenses," the mandatory "minimum" can become life imprisonment without release. *See* 21 U.S.C. § 841(b)(1)(A) (raising the minimum from ten years to life for specified drug amounts).

Finally, the Court's reasoning, if applied broadly, would greatly expand the number of career offender sentences under the Sentencing Guidelines. A "career offender" is one who has two or more "prior felony convictions of either a crime of violence or a controlled substance offense" within the meaning of the Guidelines. U.S.S.G. §§ 4B1.1(a), 4B1.2(b). A "controlled substance offense" includes state offenses much like those included in the "aggravated felony" definition. *See* U.S.S.G. § 4B1.2(b) & n.1 (state offense punishable by more than one year, criminalizing manufacture, import, export, distribution, or dispensing of controlled or counterfeit substances; possession of such substances with intent to do the same; and attempts, aiding and abetting, and conspiracy). The career offender label can have serious consequences because high minimum offense levels are triggered by the high statutory maximums under the federal drug statutes. *See* U.S.S.G. § 4B1.1(b). Current law avoids these types of sentences in a large number of cases. *See* Sarah French Russell, *Rethinking Recidivist Enhancements: The Role of Prior Drug Convictions in Federal Sentencing*, 43 U.C. Davis L. Rev. 1135, 1190 n.279 (2010) (2010 survey of cases handled by Connecticut Office of the Federal Defender shows that by opposing categorical use of prior drug convictions that were obtained under laws containing "offer" language, defendants avoided prior drug conviction enhancement under the Armed Career Criminal Act in 100%

of the cases; the career offender provision in 60 percent of the cases; and the 851 enhancement in 87.5 percent of the cases).

CONCLUSION

Amici respectfully request that this Court grant the Petition for Rehearing and Suggestion for Rehearing En Banc, vacate the order of dismissal, and set the case for briefing on the merits.

Dated: April 5, 2013

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

This brief complies with the typeface requirements of Fed. R. App. P. Rule 32(a)(5) and the type style requirements of Fed. R. App. P. Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Times New Roman in 14-point font.

Dated: April 5, 2013

/s David Debold
David Debold

CERTIFICATE OF SERVICE

It is hereby certified that today, I caused to be served electronically a copy of the foregoing Brief for *Amici Curiae* In Support Of the Petition for Rehearing and Suggestion for Rehearing En Banc via the Court's CM/ECF system on the following parties:

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Dated: April 5, 2013

EXHIBIT A

SC

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Name: GORDON, SHAWN DELROY **A040-088-544**

Date of this notice: 3/7/2011

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Cole, Patricia A.
Greer, Anne J.
Pauley, Roger

File: A040 088 544 - Hartford, CT

Date: MAR - 7 2011

In re: SHAWN DELROY GORDON

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael J. Boyle, Esquire

ON BEHALF OF DHS: Amit Patel
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(B))

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (as defined in section 101(a)(43)(F))

Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Controlled substance violation

APPLICATION: Termination of proceedings

The respondent appeals the Immigration Judge's September 9, 2010, decision denying his motion to terminate his proceedings. The appeal will be sustained, and the proceedings will be terminated.

In his decision, the Immigration Judge found that the Department of Homeland Security ("DHS") met its burden in establishing the respondent's removability under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), based on his conviction for an aggravated felony as defined by section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B) (I.J. at 3). The record reflects that the respondent pleaded guilty via an *Alford* plea on July 15, 2003, in the Bridgeport Superior Court, Connecticut, to the offense of possession of marijuana with the intent to sell, in violation of Connecticut General Statutes section 21a-277(b) (Exhs. 4 and 6). The respondent did not file any applications for relief from removal but filed a motion to terminate proceedings arguing that the DHS did not sustain its burden in establishing his removability as charged (I.J. at 2).[1]

[1] The respondent was previously granted cancellation of removal on May 15, 2002.

We find the record does not establish that the respondent's conviction under section 21a-277(b) for possession of marijuana with the intent to sell is an aggravated felony under section 101(a)(43)(B) of the Act (I.J. at 3). *See* 8 C.F.R. § 1003.1(d)(3)(ii) (2010) (*de novo* review).[2] In *United States v. Savage*, 542 F.3d 959 (2d Cir. 2008), the United States Court of Appeals for the Second Circuit, where this case arises, found that the Connecticut definition of "sale," for purposes of the relevant statute, includes an offer to sell, and further held that the government cannot use a plea colloquy to show an actual delivery where an *Alford* plea is entered. *See id.* We agree that this holding is applicable both in the criminal and immigration contexts and that, insofar as the holding with regard to the definition of "sale" is concerned, the decision in *Savage* effectively supersedes the Second Circuit's prior decision in *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003), because that case never considered the issue. *See Abimbola v. Ashcroft*, 378 F.3d 173, 181 n.5 (2d Cir. 2004) (finding *Gousse* non-binding when considering definition of conviction under the Act because the issue was not considered in that case).

Further, because the respondent entered an *Alford* plea, his conviction under Connecticut law does not fit the definition of a controlled substance offense because the Connecticut statutes cover some substances that are not controlled substances as defined in 21 U.S.C. § 802. *See* Respondent Br. at 20-26. Thus, it has not been shown that he is removable under section 237(a)(2)(B)(i) of the Act. *See id.* Finally, the Immigration Judge rejected the DHS's charge alleging that the respondent has been convicted of an aggravated felony as defined by section 101(a)(43)(F) of the Act, a crime of violence (I.J. at 2). Specifically, the Immigration Judge found that the DHS did not respond to the respondent's contention that the applicable assault statute is divisible (I.J. at 2). The DHS has not appealed the Immigration Judge's decision in this regard. As a result, there are no remaining charges of removability.

Accordingly, the appeal will be sustained, and the proceedings will be terminated.

ORDER: The appeal is sustained, and the proceedings are terminated.

FOR THE BOARD

[2] We are unpersuaded by the respondent's assertion that the omission of the parentheses in the Notice to Appear and conviction documents when referencing his conviction under section 21a-277(b) of the Connecticut General Statutes requires that his proceedings be terminated. Contrary to the respondent's assertions, the conviction documents clearly identify the statute of conviction (Exhs. 4 and 6).

EXHIBIT B

BIA
Abrams, IJ
A036 706 672

United States Court of Appeals

FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 21st day of September, two thousand twelve.

Present:

Pierre N. Leval,
Debra Ann Livingston,
Christopher F. Droney,
Circuit Judges.

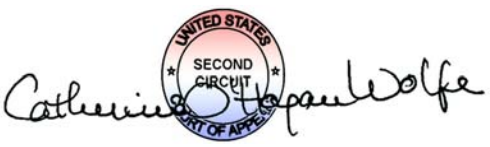
Churchill Leonard Spencer Andrews, AKA Churchill Lenard Andrews,
Petitioner,

v. 11-5449-ag
NAC

Eric H. Holder, Jr., United States Attorney General,
Respondent.

Petitioner moves for leave to proceed *in forma pauperis* and for a stay of removal. Respondent opposes Petitioner's stay motion. Upon due consideration, it is hereby ORDERED that the motion for leave to proceed *in forma pauperis* is GRANTED and the motion for a stay of removal is DENIED. Respondent is directed to file its brief within thirty days of the entry of this order, and Petitioner is directed to file any reply within seven days of the filing of Respondent's brief. The Court further directs that this case be transferred from the Non-Argument Calendar to the Regular Argument Calendar.

FOR THE COURT:
Catherine O'Hagan Wolfe, Clerk



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