No. 09-60

IN THE
Supreme Court of the United States

JOSE ANGEL CARACHURI-ROSENDO,
Petitioner,

v.

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

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

This case concerns whether petitioner and other longtime permanent resident aliens are categorically ineligible to seek discretionary cancellation of removal, no matter how deep their connections to the country, whenever they are convicted of a second minor drug possession offense. The INA renders ineligible for discretionary cancellation of removal a permanent resident alien who "*has . . . been convicted* of an[] aggravated felony," including a "drug trafficking crime," defined as a "*felony* punishable under the [CSA]." 8 U.S.C. §§ 1229b(a)(3), 1101(a)(43)(B); 18 U.S.C. § 924(c)(2) (emphases added). It is thus undisputed that, to lose eligibility to seek cancellation of removal, a permanent resident alien must have been "convicted" of a "felony" as defined by the CSA. *See Lopez v. Gonzales*, 549 U.S. 47, 56-57 (2006) (construing "felony punishable under" the CSA to mean "felony as defined by" the CSA). Conversely, a permanent resident alien convicted of a misdemeanor as defined by the CSA retains eligibility to seek cancellation of removal.

Petitioner was convicted of a misdemeanor as defined by the CSA, not a felony. He was convicted under state law of a minor drug possession offense—possession of a controlled substance (Xanax) without a prescription—which is a misdemeanor under the CSA. There was no finding or charge in petitioner's state proceeding that he had a prior drug conviction. In the absence of such a finding, petitioner's maximum sentence under the CSA for his drug possession conviction would have been one year of imprisonment, *viz.*, a misdemeanor sentence. 21 U.S.C. § 844(a). Indeed, the Government acknowledges that "[a] finding of a final prior conviction is required

for felony punishment" under the CSA. Gov't Br. 28. It follows necessarily that, in the absence of any such finding of a prior conviction, a person has been convicted of a misdemeanor as defined by the CSA, not a felony as defined by the CSA.

The Government nonetheless argues that any alien convicted of a minor drug possession offense has been convicted of a felony—indeed, an "aggravated felony"—as long as he has a prior drug possession conviction, regardless of whether the court made any finding of (or was even aware of) the prior conviction. That counterintuitive understanding defies the statutory text. The INA requires that an alien "have been convicted" of a "felony," not that he *could have been convicted* of a felony had additional findings or charges been made. Because prosecutors seek a recidivism enhancement for a minor drug possession offense under the CSA only exceedingly rarely, the Government's approach would have the effect of transforming *every* minor drug possession conviction into a felony in the event of a prior conviction, even though a felony sentence in fact is virtually *never* made available in that situation.

The Government's understanding is particularly anomalous when considered in light of Congress's overarching objective to establish drug "trafficking" as an aggravated felony. 8 U.S.C. § 1101(a)(43)(B). As this Court recognized in *Lopez*, drug possession could be deemed drug "trafficking" only if the INA coerces that conclusion. There is no statutory compulsion to consider a person convicted of a minor drug possession offense to be a drug "trafficker" whenever he has a prior conviction for possession, even in the absence of any judicial finding of recidivism and any prosecutorial decision to bring a re-

cidivism charge. Any such reading would be particularly unwarranted in view of the lenity principles applicable here. In the Government's view, a person who agrees to plead guilty to simple drug possession if the prosecutor forgoes any charge of recidivism, and who thereby avoids any possibility of a felony sentence, *unambiguously* would have been "convicted" of a drug "felony" notwithstanding the impossibility of his receiving a felony sentence for his conviction. That conclusion is untenable.

In the end, there is no adequate indication in the statute—unambiguous or otherwise—that Congress sought to foreclose entirely the grant of discretionary cancellation of removal to longtime permanent resident aliens with deep ties to the country whenever they are convicted of a second minor drug possession offense. The Government of course would retain full discretion to deny such an alien relief because of his convictions and to order his removal. But the issue here is whether a longtime permanent resident alien is categorically barred from even *applying* for a favorable exercise of discretion in the circumstances of this case. The Government identifies no sound interest served by foreclosing any opportunity even to apply for a favorable exercise of discretion, and no sound support for that understanding in the statutory terms or purposes.

I. PETITIONER WAS CONVICTED OF MISDEMEANOR SIMPLE POSSESSION, NOT FELONY RECIDIVIST POSSESSION

A. A Person Has Been Convicted Of The Felony Of Recidivist Possession Only If The Convicting Court Made A Finding Of Recidivism

1. The language of the INA controls the question whether a longtime permanent resident alien convicted a second time for minor drug possession is subject to mandatory deportation without any opportunity to seek discretionary relief based on his individual equities. As relevant here, the INA subjects to mandatory removal an alien who has been "convicted" of "a felony punishable under the [CSA]." 18 U.S.C. § 924(c)(2). The INA defines the key term "conviction" as "a formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A); *see* Fed. R. Crim. P. 32(k)(1) (defining "judgment of conviction"). Mandatory removal therefore is triggered when a court enters a formal judgment of guilt of the facts necessary to make an offense "a felony punishable under the [CSA]."

Under the CSA, possession of a controlled substance is generally a *misdemeanor* subject to a sentence of not more than one year. *See* 21 U.S.C. § 844(a); *Lopez*, 549 U.S. at 53-54 & n.4. But possession of a controlled substance after a prior drug conviction has become final—*viz.*, "recidivist possession," *id.* at 55 n.6—is a *felony* subject to a term of imprisonment of not more than two years. 21 U.S.C. § 844(a). Thus, a person formally judged guilty of possession is convicted of a misdemeanor punishable

under the CSA, while a person formally judged guilty of recidivist possession is convicted of a felony punishable under the CSA. *See* App., *infra*, 1a-14a (formal judgment of guilt specifying that defendant was convicted of recidivist possession under 21 U.S.C. §§ 844(a) and 851).

Petitioner was formally judged guilty of possession of a controlled substance. He was not formally judged guilty of recidivist possession. Accordingly, petitioner was "convicted" of the misdemeanor of simple drug possession, not the "felony" of recidivist possession.

2. The Government argues that petitioner was subject to mandatory deportation because he *committed* a second possession offense, and recidivist possession is punishable as a felony under the CSA. Gov't Br. 20-21 & n.9; *id.* at 44 (Congress "decided that *all* aliens who *commit* offenses serious enough to qualify as aggravated felonies—including repeat drug offenders—should be excluded from the United States." (second emphasis added)). The INA, however, does not subject to mandatory deportation an alien found to have "committed" a "felony" punishable under the CSA. It instead subjects to mandatory deportation only an alien who has been "convicted" of a "felony" punishable under the CSA.

The fallacy of the Government's approach is best illustrated by considering its implications if petitioner had been prosecuted and convicted in the federal system. The Government acknowledges—as it must, *see* Pet. Br. 22-24—that its understanding would equally apply in that situation, and that there is no relevant distinction between the two scenarios. *See* Gov't Br. 36. If petitioner had pleaded guilty to

drug possession under Section 844(a), and there were no judicial finding of recidivism, petitioner would have been convicted of a misdemeanor: in that event, he *could not have been sentenced* to more than one year of imprisonment for his conviction. *See* 21 U.S.C. § 844(a). As the Government itself concedes, "[a] finding of a final prior conviction is required for felony punishment" under the CSA. Gov't Br. 28.

Yet under the Government's interpretation, petitioner nonetheless would be deemed to have been "convicted" of a "felony" because, as a result of his prior conviction for possession, he in theory *could have been* convicted of felony recidivist possession, even though he was not. The Government characterizes that outcome as "hardly anomalous," Gov't Br. 36, but its attempted explanation is hardly comprehensible. Simply put, a person who could receive only a misdemeanor sentence for his conviction cannot sensibly be considered to have been "convicted" of a "felony." The Government's interpretation defies not only the statutory text, but also the reality in practice that prosecutors virtually *never* elect to seek a felony recidivism enhancement in a prosecution for drug possession under Section 844(a). *See* NAFD Br. 16; CACL Br. 24-25. While essentially *no* drug possessor with a prior conviction thus faces a felony sentence under the CSA as a matter of practice, the Government would treat *every* such person as having been convicted of a felony.

The Government stresses that a "felony penalty would have been available in federal court" because of petitioner's prior conviction. Gov't Br. 22. But regardless of whether a felony sentence would have been "available" in the abstract, the statute directs attention to whether a person has been "convicted" of

a "felony" in fact. The relevant point at which to assess the availability of a felony sentence therefore is the time of the "conviction"—*i.e.*, the "formal judgment of guilt . . . entered by [the] court." 8 U.S.C. § 1101(a)(48)(A). And it is well-established that the entry of the formal "judgment of conviction includes both the adjudication of guilt and the sentence." *Deal v. United States*, 508 U.S. 129, 132 (1993); *see* Fed. R. Crim. P. 32(k)(1) ("In the judgment of conviction, the court must set forth the plea, the jury verdict or the court's findings, the adjudication, and the sentence."); J.A. 31a-34a. When a court enters a formal judgment of guilt of drug possession and sets forth the sentence, there could be no felony sentence under the CSA unless there has been a finding of recidivism. Without such a finding, therefore, a person convicted of drug possession cannot have been "convicted" of a "felony" as defined by the CSA.[1]

3. The incompatibility of the Government's theory with the text of the INA comes into sharp relief when considering the implications for other statutes that similarly turn on whether the defendant is "convicted" of a "felony" or of a "misdemeanor." Under the Federal Magistrates Act, for instance, a magis-

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[1] The Government erroneously states that a "conviction" or "formal judgment of guilt" occurs when the "elements of the crime have been established beyond a reasonable doubt." Gov't Br. 23. Insofar as the Government means to suggest that the requisite formal judgment of guilt occurs when a jury renders a verdict of guilt, any such suggestion is contradicted by the terms of the statutory definition, which define a "conviction" as a "formal judgment of guilt . . . entered by *a court*." 8 U.S.C. § 1101(a)(48)(A) (emphasis added); *see Deal*, 508 U.S. at 131 ("the word 'conviction' can mean either the finding of guilt or the entry of a final judgment on that finding," and which meaning governs "must be drawn from the [statutory] context").

trate judge's authority is confined "to try[ing] persons accused of, and sentenc[ing] persons *convicted* of . . . *misdemeanors*." 18 U.S.C. § 3401(a) (emphases added). A magistrate has no authority to try persons accused of, or to sentence persons convicted of, felonies. 28 U.S.C. § 636(a)(3). The Government presumably would not argue that magistrate judges lack authority to try and to sentence any defendant for misdemeanor drug possession in the event the defendant has a prior drug conviction. Yet under the Government's theory, if petitioner had been convicted of drug possession by a magistrate judge, he would have been "convicted" of a "felony" because he has a prior drug possession conviction, even if the prior conviction made no appearance whatsoever in the proceedings giving rise to his conviction.

The felon-in-possession statute similarly underscores the fundamental flaws in the Government's approach. That statute makes possession of a firearm "unlawful for any person . . . who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 U.S.C. § 922(g)(1). Under the plain language of that provision, a person with a prior drug possession offense who negotiates a plea to simple possession rather than recidivist possession would avoid the firearms ban because his conviction was not "punishable by imprisonment for a term exceeding one year." Under the Government's interpretation, however, his conviction for that misdemeanor offense nonetheless would make it illegal for him to possess a firearm because he could have been convicted of felony recidivist possession, even though he was not.

4. Congress's election to impose a "conviction" requirement was not inadvertent. While Congress

refused to impose a conviction requirement in other statutes, it made the contrary choice here.

In the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 1961(1), for instance, Congress defined "racketeering activity" to include "any [listed] *act or threat* . . . which is *chargeable* under State law and *punishable* by imprisonment for more than one year," "any *act* which is *indictable* under" certain provisions of federal law, and "any *offense*" involving a drug felony. *Id.* (emphases added); *see also id.* §§ 1952(b), 1956(c)(7)(A). In *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985), this Court rejected the view that this language requires a conviction for racketeering activity. The Court explained that, "[a]s defined in the statute, racketeering activity consists not of acts for which the defendant *has been convicted*, but of acts *for which he could be*." *Id.* at 488 (emphases added). The Court added that, "[w]hen Congress intended that the defendant have been previously convicted, it said so." *Id.* at 489 n.7 (citing statutes). Congress has also dispensed with the requirement of a conviction in other statutes. *See, e.g.*, 18 U.S.C. §§ 924(c)(1)(A), 1028A.

In the INA, by contrast, Congress expressly required a conviction. An alien therefore is subject to mandatory removal only for acts "for which he has been convicted," not for acts "for which he could be." *Sedima*, 473 U.S. at 488. The Government's position effectively obliterates that distinction, subjecting an alien to mandatory deportation not because he has been convicted of recidivist possession, but because he could have been.

5. In defense of its position, the Government re-

lies heavily on the word "punishable" in the statutory phrase, "punishable under the [CSA]." According to the Government, petitioner's interpretation strips that word of any meaning. Gov't Br. 24-25. The Government is mistaken.

As this Court held in *Lopez*, the phrase "felony punishable under the [CSA]" means "felony as defined by the Act." 549 U.S. at 56 (quotation marks omitted). The phrase "punishable under the [CSA]" therefore serves two important purposes: (i) it makes clear that the conviction must be defined as a felony under federal law (the CSA), rather than under state law; and (ii) it makes clear that a state conviction can qualify as a felony that triggers mandatory deportation and that the alien need not have been convicted under the CSA, something that might not have been clear if the statute encompassed a person convicted of a felony "punish*ed* under the CSA" rather than one "punish*able* under the CSA." The Government thus simply errs in suggesting that petitioner's interpretation turns "on how an offender *actually was punished* in state court." Gov't Br. 25.

Petitioner's interpretation follows from—and is fully consistent with—*Lopez*'s interpretation of the phrase "punishable under the [CSA]." Petitioner makes no argument that he was convicted of a misdemeanor rather than a felony because *state law* defines simple possession as a misdemeanor. Nor does petitioner suggest that only a federal conviction could qualify. Instead, petitioner contends that his state law conviction is a misdemeanor rather than a felony because *federal law* defines possession without a finding of recidivism as a misdemeanor. Of course, federal law defines recidivist possession as a felony. But petitioner was not convicted of recidivist

possession; he was convicted of possession alone, without any finding that he was a recidivist. He therefore was convicted of a misdemeanor as defined by the CSA, not a felony.

The Government, while allowing that a "finding of a final prior conviction is required for felony punishment," asserts that no such finding is required "for conviction of a drug possession offense under Section 844." Gov't Br. 28. But as this Court made clear in *Lopez*, the offense that renders a state conviction an aggravated felony is not mere "drug possession," as the Government would have it, but is "recidivist possession." 549 U.S. at 55 n.6. Because petitioner was convicted of drug possession rather than recidivist possession, he was not convicted of the offense identified in *Lopez* as the offense that would render him categorically ineligible for discretionary cancellation of removal.

B. The INA's Treatment Of Other Felony Drug Possession Offenses Confirms That Petitioner Was Not Convicted Of Recidivist Possession

1. Under the CSA, possession of a controlled substance can constitute a felony not only when the defendant has a prior drug conviction, but also when the defendant has an intent to distribute, or when he possesses more than five grams of cocaine base. 21 U.S.C. §§ 841, 844(a). The INA's treatment of those felony offenses confirms that petitioner was not convicted of felony recidivist possession.

In particular, if an alien were convicted of drug possession, he would not be subject to mandatory deportation simply because an immigration judge (IJ) subsequently determined that, given the large

quantity of drugs possessed, the alien necessarily had an intent to distribute. The INA's requirement that an alien be "convicted" of a "felony" would require a formal judgment by the convicting court of an intent to distribute. The Court established precisely that point in *Lopez*, explaining that "an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation" due to the absence "of a federal felony defined as possessing a substantial amount." 549 U.S. at 60.

To the same effect, an alien convicted of possessing cocaine base would not be subject to mandatory removal simply because an IJ subsequently found that he possessed more than five grams of the substance. The requirement that the alien have been "convicted" of a "felony" would require a formal determination by the convicting court that the defendant possessed more than five grams of cocaine base.

Recidivist possession operates in the same fashion. A person convicted of drug possession is not subject to mandatory removal simply because an IJ subsequently concludes that the person had a prior conviction for drug possession. Rather, the requirement that a person have been "convicted" of a "felony" requires that a finding of recidivism have been made by the convicting court.

2. The Government does not argue that an IJ could transform a misdemeanor conviction for drug possession into a felony conviction by finding that the alien had an intent to distribute. Nor does the Government suggest that an IJ could convert a misdemeanor conviction for possession of cocaine base into a felony conviction by finding that the alien possessed more than five grams. But the Government

argues that recidivism operates differently because it is a sentencing factor rather than an element of the offense, and *Almendarez-Torres v. United States*, 523 U.S. 224, 244 (1998), allows that particular factor to be determined by the court rather than a jury. The Government's argument is unpersuasive.

To be sure, *Almendarez-Torres* establishes that, unlike any other fact that increases the statutory maximum sentence, recidivism may be found by a court rather than a jury. 523 U.S. at 244. But that *constitutional* rule sheds no light on the question of *statutory* interpretation at issue here.

That statutory question instead is answered by the statutory requirement that the alien have been "convicted" of a "felony." From the perspective of that statutory requirement, there is no relevant distinction between recidivism, intent to distribute, and possession of more than five grams of cocaine base. With respect to each of those three facts, a finding of the relevant fact elevates what would otherwise constitute a conviction for misdemeanor drug possession into a conviction of a felony. In all three cases, unless that essential fact is found by the convicting court, an alien has not been "convicted" of a "felony." He instead has been convicted of misdemeanor drug possession. Nothing in *Almendarez-Torres* suggests otherwise.

C. The Three-Or-More-Misdemeanors Provision Shows That Congress Did Not Equate Multiple Drug Misdemeanor Convictions With An Aggravated Felony

The Government's position that a conviction of two misdemeanor possession offenses amounts to a conviction of a felony also cannot be reconciled with the illegal-reentry statute. Under that statute, Congress established a *20-year* statutory maximum for reentry after conviction for an *aggravated felony*, a *ten-year* maximum for reentry following conviction of "*three or more misdemeanors involving drugs, crimes against the person, or both*," and a *two-year* maximum for reentry following convictions *for other lesser offenses*. 8 U.S.C. § 1326 (emphases added). Yet, under the Government's reading, a person convicted of two misdemeanor drug possession offenses, and a person convicted of three or more misdemeanor drug possession offenses, would both be subject to a 20-year maximum because they could have been convicted of recidivist possession, even though they were not.

According to the Government, allowing a conviction for three or more misdemeanor possession offenses to subject an alien to 20 years of imprisonment would not deprive the three-or-more-misdemeanors provision of effect because it would continue to apply to (i) three or more misdemeanor convictions for crimes against the person; (ii) two misdemeanor convictions for crimes against the person and one misdemeanor conviction for possession; and (iii) other similar combinations. Gov't Br. 35-36. Petitioner, however, does not contend that the provision would be deprived of all effect under the Gov-

ernment's interpretation.

Petitioner's argument instead is that the three-or-more-misdemeanors provision facially applies to three or more misdemeanor drug possession offenses, just as it facially applies to the other combinations of offenses specified by the Government. And the Government's interpretation doubles the sentence facially applicable to that substantial subset of cases. Indeed, although a person convicted of *two* misdemeanor offenses is facially subject to a *two-year* maximum, the Government's interpretation would subject him to a *20-year* maximum if the two misdemeanors are minor drug possession offenses. It "is impossible to believe that Congress intended that [18-year] quantum leap in punishment" without saying so with greater specificity. *Abuelhawa v. United States*, 129 S. Ct. 2102, 2107 (2009).

D. There Is No Clear Statutory Command To Treat Petitioner's Conviction As "Illicit Trafficking"

1. The aggravated felony category at issue is "illicit trafficking," including "any felony punishable under the [CSA]." 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). As this Court emphasized in *Lopez*, the ordinary meaning of "illicit trafficking" is "commercial dealing." 549 U.S. at 54. Because simple drug possession does not involve "commercial dealing," it does not fall within the ordinary meaning of "illicit trafficking." *Id*.

That does not mean that a conviction for recidivist possession falls outside the category of illicit trafficking. Because recidivist possession is "a felony punishable under the [CSA]," it qualifies as illicit trafficking. But as the Court explained in *Lopez*,

possession offenses should be viewed as "illicit trafficking" only when there is a "clear statutory command to override ordinary meaning." 549 U.S. at 55 n.6. And while there is a clear statutory command overriding ordinary meaning with respect to convictions for recidivist possession, there is no such clear statutory command with respect to convictions for mere possession without any finding of recidivism by the convicting court. Under the interpretive principles established in *Lopez*, accordingly, a conviction for simple possession without any finding of recidivism fails to compel an alien's mandatory removal.

2. The Government argues that petitioner's interpretation stands at odds with Congress's purposes because Congress "decided that *all* aliens who commit offenses serious enough to qualify as aggravated felonies—including repeat drug offenders—should be excluded from the United States." Gov't Br. 44. But Congress made no such determination. While Congress's definition of "illicit trafficking" sweeps within it any felony punishable under the CSA, including recidivist possession, Congress made no decision that all permanent resident aliens found to have "committed" a drug felony should be removed from the United States without any opportunity to seek discretionary relief. Congress instead required that an alien have been "convicted" of a drug felony.

The Government's argument also fails to take into account the limited consequences of accepting petitioner's interpretation. Under that interpretation, aliens convicted of drug possession, and who have a prior drug conviction, would gain no automatic entitlement to remain in this country. Rather, an alien convicted of possession (other than one-time possession of a small amount of marijuana) remains

subject to removal. 8 U.S.C. § 1227(a)(2)(B)(i). The consequence of accepting petitioner's position instead would be that certain longtime permanent resident aliens convicted of simple possession would retain an opportunity to persuade the Attorney General to grant *discretionary* relief permitting them to remain in the country notwithstanding a prior drug conviction. *Id.* § 1229b(a). In considering an application for discretionary relief, the Attorney General would remain free to take into account all of the alien's circumstances, including any prior convictions. The Government identifies no discernible harm to its interests if the Attorney General were merely *allowed* to exercise discretion in favor of a permanent resident alien whom the Attorney General finds to have made a compelling case to remain in the country despite a prior drug conviction.

E. This Court's Decisions Support Petitioner's Interpretation, Not The Government's

The Government contends that the Court's decision in *Nijhawan v. Holder*, 129 S. Ct. 2294 (2009), *United States v. Hayes*, 129 S. Ct. 1079 (2009), and *United States v. Rodriquez*, 128 S. Ct. 1783 (2008), support its interpretation of the statute. Gov't Br. 26-31. Those decisions in fact support petitioner's understanding, not the Government's.

1. a. In *Nijhawan*, the Court held that an alien convicted of an "offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000," 8 U.S.C. § 1101(a)(43)(M)(i), is subject to mandatory deportation, even when the IJ, rather than the convicting court, finds that the loss to the victim exceeded $10,000. The Government reads

that holding to establish that a person convicted of drug possession without any finding of recidivism has been convicted of a felony if the IJ subsequently finds the existence of a prior drug conviction. The Government's reliance on *Nijhawan* is misplaced.

That case involved the question whether the term "convicted" applies only to the most immediate factor—"offense that . . . involves fraud or deceit"—or whether the term travels further to reach the secondary factor, loss to the victim exceeding $10,000. For two reasons, the Court concluded that the term "convicted" did not travel to the loss to the victim. First, the Court reasoned that the phrase, "in which the loss . . . exceeds $10,000," is most naturally read to refer to the underlying circumstances of the conviction rather than the conduct found by the convicting court. And second, the Court determined that a contrary interpretation would leave an entire aggravated felony category "with little, if any, meaningful application," because there is "no widely applicable federal statute that contains a relevant [*i.e.*, $10,000] monetary loss threshold." *Nijhawan*, 129 S. Ct. at 2301. Neither consideration is present here.

Because the statutory text at issue here requires a person to have been "convicted" of a "felony," the question is not whether the term "convicted" travels beyond an immediate object to reach any secondary statutory factor. Instead, the question is whether the term "convicted" applies to its only possible object—a "felony." The answer to that question has to be yes, or else the term "convicted" would be deprived of any meaning. And because the term "convicted" applies to the requirement that there be a "felony," and because the fact that renders drug possession a felony is recidivism, the term "convicted"

calls for a finding of recidivism by the convicting court.

Nor does that interpretation leave the aggravated-felony category at issue without any meaningful application. The relevant category at issue is "illicit trafficking," including any "felony punishable under the [CSA]." If the term "convicted" applies to the facts that make an offense a "felony," that category would plainly have meaningful application. It reaches convictions for a broad range of federal and state *trafficking* offenses, including convictions for drug manufacturing, distribution, possession with intent to distribute, and conspiracy to commit each of those. *See, e.g.*, 21 U.S.C. § 841. Even if the drug trafficking category were narrowed so as to consider only the offense of recidivist possession, the category would still encompass federal convictions for recidivist possession under Section 844(a). It would also encompass convictions under counterpart state laws, *see Lopez*, 549 U.S. at 59-60, and at least 45 States have a counterpart crime of recidivist possession. *See* NACDL Br. 12-13 & n.15 (citing state laws).

b. To be sure, state law recidivist possession offenses do not necessarily match the contours of federal recidivist possession in all their particulars. Gov't Br. 47-49. But there is substantial overlap, and state recidivist possession convictions therefore would frequently qualify as felonies punishable under the CSA. The variation on the particularities of state laws would have been unsurprising to Congress, and affords no basis to conclude that a person has been convicted of felony recidivist possession even absent any finding of recidivism by the convicting court. *See Lopez*, 549 U.S. at 60 ("Congress knows that any resort to state law will implicate

some disuniformity in state misdemeanor-felony classifications."). After all, states do not necessarily criminalize distribution of the same controlled substances; states do not necessarily proscribe possession with intent to distribute; and states do not necessarily have a separate offense prohibiting possession of more than five grams of cocaine base.

As these examples illustrate, Congress has not compelled states to enact counterpart offenses to federal drug felonies. It has instead provided that, when states *do* elect to establish an analogous offense, a conviction of that analogous offense subjects an alien to mandatory deportation. And of pivotal significance, as explained above, the absence of a precise match between state recidivist possession offenses and the scope of recidivist possession under Section 844(a) in no way denies the aggravated-felony category at issue meaningful application.

c. The Government argues that *Nijhawan* rejects petitioner's supposed view that "all facts relevant to whether an offense counts as an aggravated felony must be established in the state proceeding." Gov't Br. 26. That argument attacks a straw man. Petitioner's position is that, when "convicted" is naturally read to apply to a particular fact and that natural reading would give the aggravated-felony category meaningful application, "convicted" should be read to apply to that fact. Nothing in *Nijhawan* casts the slightest doubt on that position. For the same reason, the Government's assertion that petitioner's position would create "uncertainties and anomalies" with respect to other aggravated felonies (Gov't Br. 36-38) is baseless. Petitioner's interpretation would have *no* effect on the provisions identified by the Government because they each parallel the

provision at issue in *Nijhawan*, not the distinct provision at issue here.

2. The Government's reliance on *Hayes* is similarly misplaced. There, the Court considered the meaning of a prohibition against possession of a firearm by a person who has been "convicted" of "a misdemeanor crime of domestic violence," which is defined as an offense that "has, as an element, the use or attempted use of physical force . . . committed by" a person who has a specified domestic relationship with the victim. 18 U.S.C. §§ 921(a)(33)(A), 922(g)(9). The Court held that the statute describing the predicate offense of conviction must include as an element the use of force, but that the domestic relationship need not have been established in the prior conviction. The Court reasoned that Congress's use of the singular term "element" indicated Congress's intent to treat only the use of force as an element required to be determined in the earlier proceeding. *Hayes*, 129 S. Ct. at 1084. And the Court concluded that a contrary interpretation would have defeated Congress's intent because no federal offense treated the domestic relationship as an element, and only one-third of states had offenses treating the relationship as an element. *Id.* at 1085-88.

That analysis parallels the analysis in *Nijhawan*, *see* 129 S. Ct. at 2302 (relying on *Hayes*), and fails to support the Government's position here for the same reasons. As in *Nijhawan*, there was a specific textual indicator that the term "convicted" extends only to the first statutory factor and does not travel to the second. And that reading was necessary to give meaningful effect to the statute. Neither consideration applies here.

3. The Government equally errs in relying on *Rodriquez*. The statute considered in *Rodriquez* renders a state trafficking conviction a serious drug offense for purposes of the Armed Career Criminal Act if "a maximum term of imprisonment of ten years or more is prescribed by law" for the "offense." 18 U.S.C. § 924(e)(2)(A)(ii). The Court held that the "maximum term of imprisonment prescribed by law" for an "offense" takes into account a state's recidivism laws insofar as the defendant "faced the possibility of a recidivist enhancement." *Rodriquez*, 128 S. Ct. at 1788-89, 1791.

The statutory question in *Rodriquez* differs substantially from the one here. Instead of a requirement that the defendant be "convicted" of a "felony," the statute in *Rodriquez* required a "conviction" for an "offense." And instead of a requirement that the conviction constitute a felony under federal law, the statute in *Rodriquez* required a conviction of an offense as to which the defendant faced the possibility of a recidivist enhancement under state law.

To the extent it is relevant, however, *Rodriquez* supports petitioner. In explaining how to determine whether a defendant "faced the possibility of a recidivist enhancement" resulting in a sentence of 10 or more years of imprisonment, the Court pointed to four sources: (1) the defendant's actual sentence; (2) a judgment of conviction listing the maximum sentence; (3) a charging document containing the maximum sentence; and (4) a plea colloquy in which the judge states the maximum sentence. *Rodriquez*, 128 S. Ct. at 1791. Each of those sources involves documents in the proceeding giving rise to the relevant conviction. Conspicuously, the Court did not include the record of the defendant's *prior* conviction, the

document on which the Government seeks to rely here.

The Court's failure to list the record of a prior conviction cannot have been an oversight. Instead, it reflects the Court's determination that the fact of a defendant's prior conviction fails to show that he "faced the possibility of a recidivist enhancement," and that only the proceedings giving rise to the second conviction could establish that possibility. If the fact of a prior conviction fails to show that a defendant "faced the possibility of a recidivist enhancement," it necessarily fails to show that he was "convicted" of the "felony" of recidivist possession. Thus, far from supporting the Government's position, *Rodriquez* contradicts it.

II. A STATE POSSESSION CONVICTION CONSTITUTES FELONY RECIDIVIST POSSESSION UNDER THE CSA ONLY IF THERE WAS A PROSECUTORIAL CHARGE OF RECIDIVISM

The absence of a finding of recidivism by the convicting court itself suffices to establish that petitioner was not convicted of a felony punishable under the CSA. But petitioner's drug possession conviction fails to qualify as a conviction of a felony punishable under the CSA for the additional reason that there was no prosecutorial charge of recidivism.

A. The Statutory Terms Establish The Need For A Prosecutorial Charge Of Recidivism

1. The terms of 21 U.S.C. § 851 prescribe that "[n]o person who stands convicted of an offense under this part shall be sentenced to increased pun-

ishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court . . . stating in writing the previous convictions to be relied upon." *Id.* § 851(a)(1). Under the plain language of that provision, in the absence of a prosecutorial charge of recidivism, a person convicted of possession shall not be sentenced to more than one year of imprisonment. *Id.* § 844(a). Such a conviction therefore is not "punishable" as a "felony" under the CSA. The Government has previously recognized as much, stating that "[a] drug possession offense is *punishable* as a felony under the Controlled Substances Act by virtue of the defendant's recidivism *only if* the government has filed a notice under 21 U.S.C. 851(a)." Brief for the United States in Opposition at 12, *Price v. United States*, 537 U.S. 1152 (2003) (No. 01-10940) (emphases added). The Government offers no reason to depart from that textual understanding here.

2. This Court's decision in *United States v. LaBonte*, 520 U.S. 751 (1996), confirms that a prosecutorial charge of recidivism is necessary to show that a person with a prior drug conviction has been convicted of felony recidivist possession. In that case, the Court explained that an "enhanced penalty is not automatic," and "may not be imposed unless the Government files an information" under Section 851. *Id.* at 754 & n.1; *see* Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9-27.300(B) cmt. (2002) ("Every prosecutor should regard the filing of an information under 21 U.S.C. § 851 . . . as equivalent to the filing of charges."). The Court thus held that the presence or absence of a prosecutorial charge of recidivism de-

termines whether the "maximum term authorized" includes a recidivist enhancement. The Court explained that "for defendants who have received the notice under § 851(a)(1), . . . the 'maximum term authorized' is the enhanced term," but that "[f]or defendants who did not receive the notice, the unenhanced maximum applies." *LaBonte*, 520 U.S. at 759-60.

Under the Court's analysis in *LaBonte*, the maximum term authorized for a person convicted of drug possession in the absence a prosecutorial charge of recidivism is one year of imprisonment, while the maximum term authorized if the prosecutor charges a prior conviction is two years of imprisonment. *See* 21 U.S.C. § 844(a). *LaBonte* confirms that a person who commits drug possession and has a prior conviction for possession is punishable as a felon under the CSA only in the event the prosecutor elects to bring a charge of recidivism.

The Government attempts to distinguish *LaBonte* on the ground that the statute at issue in that case does not use the word "punishable." Gov't Br. 32 n.13. The Government, however, fails to explain why that should matter. If the "maximum term authorized" for an offense is one year of imprisonment, the offense is punishable as a misdemeanor, not a felony.

B. There Is No Merit To The Government's Arguments Against Requiring A Prosecutorial Charge

In arguing against conditioning the treatment of a state possession conviction as a felony on a prosecutorial charge of recidivism, the Government principally contends that Section 851's requirement of a

prosecutorial charge is "procedural." Gov't Br. 31. According to the Government, if a prosecutorial charge of recidivism is necessary for a state conviction to qualify as a felony punishable under the CSA, so too is every procedural requirement in Section 851. The Government's argument lacks merit.

As a matter of statutory text, Congress singled out a prosecutorial charge of recidivism by establishing that, absent fulfillment of that condition, "[n]o person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions." 21 U.S.C. § 851(a)(1). Congress declined to attach that language to the fulfillment of any other requirement in Section 851. Accordingly, *LaBonte* specified a prosecutorial charge of recidivism as determinative of a defendant's maximum authorized term of imprisonment. *LaBonte* gave no other requirement in Section 851 the same status.

As the statutory text and the decision in *LaBonte* confirm, the requirement of a prosecutorial charge of recidivism serves a unique function. Unlike the other requirements in Section 851, the requirement of a prosecutorial charge embodies Congress's substantive judgment to refrain from exposing to felony punishment every convicted drug possessor with a prior conviction. Congress instead entrusted prosecutors with responsibility to exercise their judgment based on the circumstances of each case. The requirement of a prosecutorial charge therefore serves the purpose of separating recidivists who warrant felony treatment from those who do not. It would subvert the purpose of that requirement to treat every person convicted of drug possession and found by an IJ to have a prior conviction as having been

convicted of a felony punishable under the CSA.

Insofar as the Government suggests that requiring a prosecutorial charge of recidivism would unduly complicate the removal process, *see* Gov't Br. 32-34, the Government is mistaken. The Government would simply need to show that a state's recidivism law requires a prosecutorial charge of recidivism or produce a prosecutorial charge filed against the alien. If the Government is unable to do so, it will have failed to meet its burden to show that an alien was convicted of a felony punishable under the CSA. *See Rodriquez*, 128 S. Ct. at 1791.[2]

III. LENITY PRINCIPLES REQUIRE RESOLVING ANY AMBIGUITIES IN PETITIONER'S FAVOR

The text of the INA and other pertinent considerations establish that petitioner was not convicted of a felony punishable under the CSA. To the extent there is ambiguity on the matter, however, two rules of lenity apply. First, as the Government acknowledges, *see* Gov't Br. 50-51, the criminal rule of lenity applies because the INA uses terms from criminal statutes. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Second, there is a "longstanding principle of construing any lingering ambiguities in deportation

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[2] For the reasons explained in petitioner's opening brief (at 29-34), a state conviction should be considered to qualify as a felony punishable under the CSA only if, in addition to a prosecutorial charge of recidivism, there was also an opportunity to challenge the validity of any charged prior conviction. While the latter requirement, unlike the requirement of a prosecutorial charge, lacks a textual specification establishing it as a precondition to a felony sentence, it too is an integral feature of Section 851.

statutes in favor of the alien." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987). The Government questions that principle's applicability on the ground that Congress did not wish to give the benefit of the doubt to aliens. Gov't Br. 50-51 n.25. But Congress preserved for certain permanent resident aliens subject to removal an opportunity to apply to the Attorney General for discretionary cancellation of removal. 8 U.S.C. § 1229b. That provision reflects Congress's intent to give certain permanent resident aliens the benefit of the doubt. In any event, regardless of whether one or two principles of lenity apply, any ambiguity must be resolved in petitioner's favor.

Insofar as the text of the statute fails unequivocally to resolve this case in petitioner's favor, the statute is at least ambiguous. Suppose a person pleads guilty to drug possession under Section 844(a) in exchange for a prosecutor's agreement to abandon any charge of recidivism, and is then convicted based on that plea without any finding of recidivism by the court. If the question were asked whether that person has been convicted of a felony punishable under the CSA, the most straightforward answer is no: he has been convicted of misdemeanor drug possession, not the felony of recidivist possession. At the very least, however, the person could not be considered to have *unambiguously* pleaded guilty to a felony as defined by the CSA when the effect of his plea was to avoid any possibility of a felony sentence.

CONCLUSION

For the foregoing reasons, and those set forth in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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Attorneys for Petitioner

Dated: March 24, 2010

APPENDIX

APPENDIX

SAMPLE JUDGMENT

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Northern District of Iowa

United States of America
v.
JUSTIN COLE

JUDGMENT IN A CRIMINAL CASE

CASE NUMBER:
CR06-2046-001-MWB
USM NUMBER:
(USM Number)
Wallace L. Taylor
Defendant's Attorney

THE DEFENDANT:

□ pleaded guilty to count(s) _____

□ pleaded nolo contendere to count(s) which was accepted by the court. _____

■ was found guilty on count(s) after a plea of not guilty. **1 and 2 of the Superseding Indictment**

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
21 U.S.C. §§	**Possession**	**05/02/2006**	**1**

841(a)(1), 841(b)(1)(B), 851, and 860	**With Intent to Distribute 5 Grams or More of Crack Cocaine After Prior Felony Drug Conviction and Within 1,000 Feet of a Protected Location**		
21 U.S.C. §§ 844(a) & 851	**Possession of Marijuana After Two Previous Possession of Marijuana Convictions**	**05/02/2006**	**2**

The defendant is sentenced as provided in pages 2 through **6** of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

■ Counts **remaining against the defendant in CR06-2046-001-MWB** are dismissed on the motion of the United States.

IT IS ORDERED that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special

assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

December 20, 2007
Date of Imposition of Judgment
/s/Mark W. Bennett
Signature of Judicial Officer
Mark W. Bennett
U.S. District Court Judge
Name and Title of Judicial Officer
12/28/07
Date

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 2 — Imprisonment

Judgment — Page 2 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of: **210 months. This term consists of 210 months on Count 1 and 36 months on Count 2 of the Superseding Indictment, to be served concurrently**.

■ The court makes the following recommendations to the Bureau of Prisons:

It is recommended that he participate in the Bureau of Prisons' 500 hour Comprehensive Residential Drug Abuse Program.

It is recommended that he be designated to a Bureau of Prisons facility in Waseca, Minnesota; Oxford, Wisconsin; or in close proximity to his family, which is commensurate with his security and custody classification needs.

■ The defendant is remanded to the custody of the United States Marshal.

□ The defendant shall surrender to United States Marshal for this district:
  □ at _____ □ a.m. □ p.m. on _____.
  □ as notified by the United States Marshal.

□ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:
  □ before 2 p.m. on _____.
  □ as notified by the United States Marshal.
  □ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____to _____
at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshal

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 3 — Supervised Release

Judgment Page
3 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of: **8 years. This term consists of 8 years on Count 1 and 1 year on Count 2 of the Superseding Indictment, to be served concurrently.**

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

■ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. (Check, if applicable.)

■ The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall register with the state sex offender registration agency in the state where the defendant resides, works, or is a student, as directed by the probation officer. (Check, if applicable.)

☐ The defendant shall participate in an approved program for domestic violence. (Check, if applicable.)

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use,

distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such

notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

SPECIAL CONDITIONS OF SUPERVISION

The defendant must comply with the following special conditions as ordered by the Court and implemented by the U.S. Probation Office:

1. The defendant must participate in and successfully complete a program of testing and treatment for substance abuse.

2. The defendant is prohibited from the use of alcohol and is prohibited from entering bars, taverns, or other establishments whose primary source of income is derived from the sale of alcohol.

3. The defendant shall submit to a search of his or her person, residence, adjacent structures, office or vehicle, conducted by a United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable

suspicion of contraband or evidence of a violation of a condition of release; failure to submit to a search may be grounds for revocation; he or she shall warn any other residents that the residence or vehicle may be subject to searches pursuant to this condition. This condition may be invoked with or without the assistance of law enforcement, including the U.S. Marshals Service.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

Judgment — Page 5 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	**$200**	**$0**	**$0**

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**

TOTALS $____ $ ____

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 06/05) Judgment in a Criminal Case
Sheet 6 — Criminal Monetary Penalties

Judgment — Page 6 of 6

DEFENDANT: **JUSTIN COLE**
CASE NUMBER: **CR06-2046-001-MWB**

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A ■ Lump sum payment of $ **200** due immediately, balance due

☐ not later than _____, or

☐ in accordance with ☐C, ☐D, ☐E, or ☐F below; or

B ☐ Payment to begin immediately (may be combined with ☐C, ☐D, or ☐F below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____ (e.g., months or years), to commence _____(e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____(e.g., weekly, monthly, quarterly) installments of $ _____ over a period of _____(e.g., months or years), to commence _ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within __ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☐ Special instructions regarding the payment of criminal monetary penalties:

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court costs(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.