

# New York State Defenders Association Immigrant Defense Project

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## **PRACTICE ADVISORY: DEFENDING IMMIGRANTS WITH PRIOR DRUG POSSESSION CONVICTIONS IN ILLEGAL ENTRY/REENTRY CASES— THE IMPACT OF *LOPEZ V. GONZALES***

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This practice advisory is IDP's second in a series of advisories on the impact of the Supreme Court's decision in *Lopez v. Gonzales* (No. 05-547) (Dec. 5, 2006).<sup>\*</sup> The Court's decision means that most state drug possession felony convictions – or at least first-time possession convictions – may no longer be considered aggravated felonies for either immigration or sentencing purposes. This advisory includes analysis of the decision and practice tips for federal defense practitioners contesting illegal entry/reentry aggravated felony sentence enhancements.

### **What the Supreme Court decided in *Lopez***

The Supreme Court held that the federal government may not apply the “drug trafficking” aggravated felony label to state felony drug possession offenses that would be misdemeanors under federal law. This means that all **state first-time drug simple possession offenses**—except for possession of more than five grams of crack cocaine and possession of flunitrazepam—are **NOT aggravated felonies**, even if classified as a felony by the state. Noncitizens convicted of a state first-time drug possession offense therefore should not be subject to an aggravated felony enhancement -- even in the First, Second, Fourth, Fifth, Eighth, Ninth, Tenth and Eleventh Circuits, where pre-*Lopez* decisions deemed state felony possession offenses to be aggravated felonies for sentencing purposes.

### **What the Supreme Court left open in *Lopez***

The decision includes dicta indicating that **second or subsequent drug simple possession offenses** may be deemed aggravated felonies if the state offense “corresponds” to the federal “recidivism possession” felony offense at 21 U.S.C. § 844(a) (possession of a controlled substance after a prior drug conviction has become final). Practitioners should know that under federal law, a second or subsequent possession offense may not be penalized as such a recidivism possession felony unless notice of the prior conviction has been given and an opportunity to challenge the prior conviction has been provided in the criminal case. They may therefore argue, in cases arising in any federal circuit, that where a second state possession conviction does not include such notice and opportunity for a hearing relating to any alleged prior drug conviction, that a second possession conviction is not an aggravated felony because it does not correspond to the federal felony recidivism possession offense at 21 U.S.C. § 844(a). *Cont'd*

<sup>\*</sup> This advisory is by IDP's Manuel D. Vargas and Marianne C. Yang. IDP wishes to acknowledge the input and assistance provided by Steve Sady, Chief Deputy Federal Public Defender, Portland, Oregon, Dan Kesselbrenner of the National Immigration Project, and Nancy Morawetz, Mandy Hu and Carlin Yuen of the NYU School of Law Immigrant Rights Clinic.

## **Background: More on Lopez**

**Mr. Lopez's conviction.** Mr. Lopez was convicted under state law of a first-time felony possession offense that the parties agreed would be a misdemeanor under federal law. He challenged the immigration agency's and lower court's findings that his offense was an aggravated felony and therefore a ground for mandatory deportation.

**Pre-Lopez case law conflict.** Over time, the Board of Immigration Appeals (BIA) reversed its position and federal courts had been split on what state drug offenses were a "drug trafficking" aggravated felony for immigration and for sentencing purposes.

The immigration statute defines "aggravated felony" to include "illicit trafficking in a controlled substance . . . , including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." See INA 101(a)(43)(B). The BIA had initially interpreted INA 101(a)(43)(B) and 18 U.S.C. 924(c) to hold that a state drug offense qualifies as an aggravated felony only if either (1) it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined or (2) regardless of state classification as a felony or misdemeanor, it is analogous to a felony under the federal Controlled Substances Act (the so-called **federal felony approach**). See *Matter of L-G-*, 21 I&N Dec. 89 (BIA 1995), *reaffirmed by Matter of K-V-D-*, 22 I&N Dec. 1163 (BIA 1999).

In general, the federal Controlled Substances Act punishes, as felonies, drug manufacture or distribution offenses (including offenses involving possession with intent to distribute), but simple possession drug offenses are generally misdemeanors. See 21 U.S.C. 801 et seq., and 21 U.S.C. 844 (penalizing possession offenses as misdemeanors unless the prosecution has charged and proven a prior final drug conviction, or possession of more than five grams of cocaine base or any amount of flunitrazepam).

Before and after *Matter of L-G-*, however, several federal circuit courts concluded, in the context of the prior aggravated felony sentence enhancement for the federal crime of illegal reentry after removal, that a state simple possession drug offense is an aggravated felony if it is classified as a felony under state law, even if it would not be classified as a felony under federal law (the so-called **state felony approach**). See *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1<sup>st</sup> Cir. 1996); *United States v. Polanco*, 29 F.3d 35 (2d Cir. 1994); *United States v. Wilson*, 316 F.3d 506 (4<sup>th</sup> Cir. 2003); *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5th Cir. 2001); *United States v. Briones-Mata*, 116 F.3d 308 (8<sup>th</sup> Cir. 1997); *United States v. Ibarra-Galindo*, 206 F.3d 1337 (9<sup>th</sup> Cir. 2000); *United States v. Cabrera-Sosa*, 81 F.3d 998 (10<sup>th</sup> Cir. 1996); *United States v. Simon*, 168 F.3d 1271 (11<sup>th</sup> Cir. 1999).

In 2002, in response to the trend in sentencing cases, the BIA, in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), reversed course and adopted the reasoning of the federal courts in the sentencing context and found that a state simple possession drug offense would be deemed an aggravated felony for immigration purposes if it is classified as a felony under state law, unless the case arose in a federal court circuit with a contrary rule.

After *Matter of Yanez-Garcia*, conflict in the case law only increased. Some federal circuit courts applied the state felony approach in both the immigration and sentencing contexts, see, e.g., the lower court decision in the case before the Supreme Court—*Lopez v. Gonzales*, 413 F.3d 934 (8<sup>th</sup> Cir. 2005). At the same time, several other courts lined up in support of the federal felony approach, at least in the immigration context. See, e.g., *Gerbier v. Holmes*, 280 F.3d 297 (3<sup>d</sup> Cir. 2002)(immigration context), *Cazarez-Gutierrez v. Ashcroft*, 382 F.3d 905 (9<sup>th</sup> Cir. 2004)(immigration context), *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6<sup>th</sup> Cir. 2005)(sentencing context, but applicable also in the immigration context), and *Gonzales-Gomez v. Achim*, 441 F.3d 532 (7<sup>th</sup> Cir. 2006)(immigration context). Two Circuits – the Second and the Ninth -- adopted different rules for sentencing and immigration cases. Compare *United States v. Pornes-Garcia*, 171 F.3d 142 (2<sup>d</sup> Cir. 1999) and *United States v. Ibarra-Galindo*, *supra* (sentencing cases following state felony approach), with *Aguirre v. INS*, 79 F.3d 315 (2<sup>d</sup> Cir. 1996) and *Cazarez-Gutierrez v. Ashcroft*, *supra* (immigration cases following federal felony approach). Yet other courts went so far as to find or suggest that a state drug offense is an aggravated felony if it is a felony under either state or federal law (the so-called “**either or**” approach). See, e.g., *Amaral v. INS*, 977 F.2d 33 (1<sup>st</sup> Cir. 1992)(immigration context); *United States v. Simpson*, 319 F.3d 81 (2<sup>d</sup> Cir. 2002)(sentencing context); *United States v. Sanchez-Villalobos*, 413 F.3d 575 (5<sup>th</sup> Cir. 2005)(sentencing context, but Fifth Circuit followed same rule in immigration and sentencing contexts).

**Lopez resolves case law conflict.** With *Lopez* the Supreme Court resolved this conflict, ruling in favor of the federal felony approach to interpreting the meaning of the 18 U.S.C. 924(c) “drug trafficking crime” term referenced in the aggravated felony definition. Thus, the government may no longer deem a state felony possession offense to be an aggravated felony unless it would be a felony under federal law.

The Court relied in part on the ordinary meaning of the “trafficking” term, noting that “[t]he everyday understanding of ‘trafficking’ should count for a lot here, for the statutes in play do not define the term . . . .” *Lopez*, slip op. at 5. Noting that “ordinarily ‘trafficking’ means some sort of commercial dealing,” the Court stated that reading 924(c) the government’s way would nevertheless turn simple possession into trafficking, “just what the English language tells us not to expect.” *Lopez* at 3. Although there are exceptions, the Court found that typically federal law treats non-trafficking offenses as misdemeanors, and therefore such offenses generally should not be deemed “drug trafficking crimes” in the absence of express Congressional command. The Court stated that the “inclusion of a few possession offenses in the definition of ‘illicit trafficking’ does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning.” *Lopez* at n.6. Moreover, the Court made clear that it did not matter what quantity of the controlled substance was possessed, since federal law punishes virtually all simple possession offenses as misdemeanors without, in general, designating any such offenses as felonies based on the quantity involved. See *Lopez* at 11-12.

The only exceptions to the general rule that simple possession offenses are misdemeanors under federal law, the Court noted, are offenses involving possession of two specific controlled substances—crack cocaine and flunitrazepam—as well as “recidivist possession,” citing 21 U.S.C. 844(a) (providing sentence enhancements for possession of more than five grams of cocaine base, known as “crack cocaine,” possession of any amount of flunitrazepam, and possession of a controlled substance after a prior drug conviction has become final). See *Lopez* at n.4 & n.6. The Court indicated that state counterparts may be deemed aggravated felonies if the state offense “corresponds” to the analogous federal offense. See *Lopez* at n. 6.

### **Does *Lopez* Apply to Sentencing Cases?**

Although *Lopez* was an immigration case and the Supreme Court dismissed as improvidently granted the companion sentencing case, *Toledo-Flores v. United States* (No. 05-7664), the Court made clear that its analysis also applies to sentencing cases:

- ✓ First, the Court listed the sentencing consequences as one of the collateral effects of an aggravated felony designation presumably at issue. See *Lopez* at 2.
- ✓ Second, the Court stated that it granted certiorari to resolve the conflict in the Circuits over the proper application of the aggravated felony definition to state drug possession felonies, citing both immigration and sentencing cases including the intra-Circuit conflict in the two circuits that apply different rules in the two contexts. See *Lopez* at 3 and n.3.
- ✓ Third, in rejecting the Government’s reading of the aggravated felony definition, the Court stated: “the Government’s reading would render the law of alien removal, . . . and the law of sentencing for illegal entry into the country, . . . dependent on varying state criminal classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose.” *Lopez* at 10 (emphasis added).
- ✓ Moreover, the Court has already made clear, in its prior decision just two years ago in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), that the aggravated felony term should have the same meaning in both the immigration and sentencing contexts. See *Leocal* at n.8.

## **Practice Tips**

In light of *Lopez*, federal criminal defense practitioners representing noncitizen clients who are charged with illegal entry/reentry and who have one or more prior state simple drug possession convictions may wish to consider the following tips:

**What if my client has one prior state felony drug possession conviction?** Even if your client is being prosecuted in the First, Second, Fourth, Fifth, Eighth, Ninth, Tenth, or Eleventh Circuits, all of which had prior case law finding such an offense to be an aggravated felony for sentencing purposes, you should point out that *Lopez* now applies and that your client is not subject now to an aggravated felony sentence enhancement. See discussion above entitled “Does *Lopez* Apply to Sentencing Cases?” The only exception would be if your client was convicted of possession of more than five grams of crack cocaine or any amount of flunitrazepam.

**What if my client has more than one prior state drug possession conviction?** You should argue that the later conviction does not correspond to a federal “recidivism possession” 21 U.S.C. 844(a) felony offense (possession of a controlled substance after a prior drug conviction has become final). Among the possible arguments are:

- ✓ *The second or subsequent state drug possession conviction should not be deemed to correspond to an 844(a) offense if the prior conviction was not final at the time of commission of the later offense.* See 21 U.S.C. 844(a)(providing for sentence enhancements based on a prior conviction but only if the offense at issue is committed after such prior conviction “has become final”). Examples of fact scenarios for state offenses that therefore should not be deemed counterparts to the federal offense include:
  - Later offense is committed while prior drug case is still pending in criminal court. See *U.S. v. Palacios-Suarez*, 418 F.3d 692 (6<sup>th</sup> Cir. 2005).
  - Later offense is committed while prior drug conviction is on appeal, or while the individual is still within the time to appeal the prior conviction. See *Smith v. Gonzales*, 468 F.3d 272 (5<sup>th</sup> Cir. 2006).
  - Guilty pleas for later offense and prior offense are taken on the same day.
- ✓ *The second or subsequent state drug possession conviction should not be deemed to correspond to an 844(a) offense if the state conviction does not include charging and proof of the prior drug conviction.* This is because, under federal law, a second or subsequent possession offense may not be penalized as a “recidivism possession” felony unless the U.S. Attorney before trial, or before entry of a guilty plea, has filed an information with the court stating in writing the previous conviction(s) to be relied upon, and the

defendant has had an opportunity to challenge the validity of the prior conviction(s) in a hearing in which the U.S. Attorney has the burden of proof beyond a reasonable doubt on any issue of fact. See 21 U.S.C. 851; see also *Berhe v. Gonzales*, 464 F.3d 74 (1<sup>st</sup> Cir. 2006) (“Because Berhe’s 1996 conviction is not a part of the record of the 2003 conviction, the government did not establish that Berhe was convicted of a hypothetical federal felony”); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); see also Point II (pp. 26-27) in *amici curiae* brief of the Committee for Public Counsel Services, National Immigration Project, and New York State Defenders Association in *Henry v. Gonzales*, Docket No. 05-2239 (1<sup>st</sup> Cir. 2005) and Point II (pp. 25-26) in *amicus curiae* brief of the New York State Defenders Association in *Martinez v. Ridge*, Docket No. 05-3189 (2d Cir. 2005), available at <http://www.immigrantdefenseproject.org>. If your client is being prosecuted in the Second or Fifth Circuits, be aware that there is pre-*Lopez* precedent in the sentencing context applying the federal felony approach to find that a second or subsequent possession offense to be an aggravated felony by analogy to 21 U.S.C. 844(a) recidivism offenses. See *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002); *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5<sup>th</sup> Cir. 2005); see also *U.S. v. Garcia-Olmedo*, 112 F.3d 399 (9<sup>th</sup> Cir. 1997)(subsequently found to be “no longer good law” in *U.S. v. Ballesteros-Ruiz*, 319 F.3d 1101, 1005 (9<sup>th</sup> Cir. 2003)). Nevertheless, these decisions so found without consideration of the notice and proof requirements for 844(a) recidivism convictions. In any event, in light of the *Lopez* decision’s focus on the primacy of federal offense classifications and the ordinary meaning of trafficking as encompassing only offenses of a commercial nature (see bullet points below), you should argue that these prior precedents need to be revisited in light of the analysis in *Lopez*.

- While the Supreme Court’s decision in *Lopez* includes dicta noting that federal law punishes as felonies possession offenses involving “repeat offenders” or “recidivist possession” (see *Lopez* at n.4 and n.6), the Court’s dicta expressly references 21 USC 844(a) federal offenses. The 844 (a) “recidivism” offenses require notice and an opportunity to challenge the prior conviction and its validity. See 21 U.S.C. 851. Some states have analogous recidivist offenses that do provide for enhanced sentencing where there is notice and proof of a prior conviction. However, if the state offense does not include such requirements, it should not be deemed to correspond to an 844(a) offense, just as a second or subsequent possession offense resulting in a federal misdemeanor conviction—because the prosecution chose not to file an information regarding a prior conviction—would not be considered an aggravated felony. As the *Lopez* decision notes, when discussing the possible anomaly that might be created by allowing an alien convicted by a state of possessing a large quantity of drugs to escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount, there is “no reason to think Congress meant to allow the States to supplant its own classification when it specifically constructed its immigration law to turn on them.” *Lopez* at 12.

- In addition, the Supreme Court goes to great length to emphasize the importance to proper statutory construction of considering the ordinary meaning of the term being interpreted—in this case “trafficking”:

The everyday understanding of “trafficking” should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant. . . . And, ordinarily, ‘trafficking’ means some sort of commercial dealing . . . Reading §924(c) the Government’s way, then, would often turn simple possession into trafficking, just what the English language tells us not to expect . . . Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here.

*Lopez* at 5-6. While this discussion related to the question directly presented in *Lopez* – whether a state first-time possession offense may be deemed an aggravated felony where there is no corresponding federal felony offense -- there is no reason that it should not also inform the question of whether a second or subsequent possession offense should be assumed to be an aggravated felony regardless of whether the state possession offense is truly a “recidivism” offense with the same notice and proof requirements as the federal recidivism offense.

- ✓ *The second or subsequent state drug possession conviction should not be deemed to correspond to an 844(a) offense if the record of conviction does not establish that the drug at issue in your client’s case is one listed in the federal controlled substance schedules.* See discussion below (last arrow).

**What if my client has been convicted of a state drug offense that covers both conduct that would be a felony under federal law and conduct that would not be a felony under federal law?** Argue that conviction of such an offense does not necessarily establish that the offense would be a federal felony. For example, a state marijuana “sale” offense that might cover transfer of a small amount of marijuana for no compensation should not categorically be considered a “drug trafficking crime” or an “illicit trafficking” aggravated felony since such a transfer without remuneration would be treated as a misdemeanor under federal law. See 21 U.S.C. 841(b)(4) (“distributing a small amount of marijuana for no remuneration” treated as simple possession misdemeanor under 21 U.S.C. 844); see also *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2004); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); Point II in *amicus curiae* brief of the New York State Defenders Association in *Matter of Grant*, A40 093 259 (BIA. 2005), available at <http://www.immigrantdefenseproject.org>; but see *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002)(finding NY misdemeanor marijuana “sale” offense to be a “drug trafficking crime” aggravated felony for criminal sentencing purposes without considering that the offense might cover transfer of a small amount of marijuana for no remuneration). This argument is also supported by the attention the *Lopez* decision pays to the fact that “ordinarily ‘trafficking’ means some sort of commercial dealing.” See *Lopez* at 5.

**What if my client has been convicted of a state drug offense that covers conduct that is not even punishable under federal law?** If the offense covers only conduct that is not punishable under federal law, argue that conviction of such an offense is not an aggravated felony. For example, the Ninth Circuit has found that a state conviction of solicitation to possess marijuana for sale is not punishable under the federal Controlled Substances Act since that Act does not mention solicitation although it does cover attempt and conspiracy, and therefore the offense is not an aggravated felony. See *Levy-Licea v. INS*, 187 F.3d 1147 (9<sup>th</sup> Cir. 1999); cf. *United States v. Aguilar-Ortiz*, 450 F.3d 1271 (11<sup>th</sup> Cir. 2006)(holding that a prior conviction for solicitation to deliver cocaine did not warrant a drug trafficking offense enhancement under U.S. Sentencing Guidelines Manual § 2L1.2(b)(1)(B)). If, on the other hand, the offense covers some conduct that is punishable under federal law and some that is not, argue that the conviction may not categorically be determined to be an aggravated felony. For example, the Ninth Circuit has applied *Leyva-Licea* in the sentencing context to find that a state offense that includes “offers” to transport, import, sell, furnish, administer, or give away marijuana thus includes solicitation conduct not covered under the Controlled Substances Act and, thus, could not categorically be determined to be an aggravated felony. See *United States v. Rivera-Sanchez*, 247 F.3d 905 (9<sup>th</sup> Cir. 2001).

**What if my client has been convicted of a state drug offense that appears to be one that would be a felony under federal law, but my client’s record of conviction does not establish that the drug involved is one listed in the federal controlled substance schedules?** Argue that the offense is therefore not necessarily an offense punishable under the federal Controlled Substances Act. The aggravated felony definition at INA 101(a)(43)(B) covers only drug offenses that relate to a substance included in the federal definition of “controlled substance” in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules). However, many states define “controlled substance” to include some substances that do not appear in the federal controlled substance schedules. Therefore, where the record of conviction in your client’s state criminal case does not establish the particular controlled substance involved, this may lend itself to an argument that your client’s particular offense is not necessarily an aggravated felony. See *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003)(finding a Connecticut conviction for “sale of hallucinogen/narcotic” to be an aggravated felony only after conducting analysis to determine that this offense necessarily involved a controlled substance listed on the federal schedules referenced in section 102 of the Controlled Substances Act).

## **Contact Us**

For the latest legal developments or litigation support on any of the issues discussed in this advisory, contact IDP's Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208. They may also be contacted by email at [bjain@nysda.org](mailto:bjain@nysda.org) and [mvargas@nysda.org](mailto:mvargas@nysda.org).

To help us monitor further developments on these issues, please let us know of any cases in the federal courts raising any of them, e.g., whether a second or subsequent state drug possession offense may be deemed an aggravated felony.