

## **PRACTICE ADVISORY**

### **Using Lopez v. Gonzales to Challenge Aggravated Felony Drug Trafficking Charges or Bars on Relief\***

May 19, 2008

#### **Overview**

This practice advisory's purpose is to aid immigration law practitioners (and immigrants themselves) in developing legal arguments that certain drug-related crimes do not constitute aggravated felonies. In doing so, this practice advisory provides the following information:

- **Background information** about Lopez v. Gonzales, 127 S.Ct. 625 (2006), a Supreme Court decision bearing on drug trafficking aggravated felony determinations.
- **A checklist of questions** to consider when the government has alleged that a state drug offense is a drug trafficking aggravated felony. The checklist suggests arguments that could be raised to challenge such drug trafficking aggravated felony allegations either when raised in the context of a deportability charge or a claim of ineligibility for relief from removal.

#### **Lopez v. Gonzales Background Information**

##### *The Supreme Court's Decision on Drug Trafficking Aggravated Felonies*

In 2006 the Supreme Court decided Lopez v. Gonzales, 127 S.Ct. 625 (2006), and found that South Dakota's law making it a state felony to aid and abet "another person's possession of cocaine" did not constitute an aggravated felony. Lopez at 628. This decision rejected the government's argument that any state felony, such as the South Dakota felony statute at issue in Lopez, could constitute an aggravated felony under the INA.

In making this decision, the Court interpreted two statutory provisions:

- **8 U.S.C. § 1101(a)(43)**, which is the INA section defining an aggravated felony as being "**illicit trafficking** in a controlled substance (as defined in section 802 of Title 21), including a **drug trafficking crime** (as defined in section 924(c) of Title 18)."
- **18 U.S.C. § 924(c)(2)**, which is the statute incorporated into the INA's definition of "drug trafficking crime" It states that a drug trafficking crime is "any felony punishable under the Controlled Substances Act."

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\* This advisory was prepared for the NYSDA Immigrant Defense Project by Carrie Johnson of the NYU Law School Immigrant Rights Clinic under the supervision of Professor Nancy Morawetz.

In examining these statutes, the Court discussed two different ways a state statute could constitute an aggravated felony. Under the first method, the court looked to the definition of “illicit trafficking” and determined that a state felony had to fall within the “everyday understanding” of illicit trafficking in order to qualify. Under the second method, the court looked to the definition of “drug trafficking crime” and determined that a state statute had to “proscribe[ ] conduct punishable as a felony under” the Controlled Substances Act (CSA). Lopez, at 633. This interpretation adhered to the INA’s incorporation of 18 U.S.C. § 924(c)(2), which explicitly links the definition of “drug trafficking crime” to felonies in the CSA.

The below chart highlights the Court’s analysis in interpreting these phrases, although practitioners should note that it is typically understood that “drug trafficking crime[s]” are just one subset of “illicit trafficking” crimes:

**The Supreme Court’s Interpretation of  
8 USC § 1101(a)(43) in Lopez v. Gonzales**

The term "**aggravated felony**" means - -  
**(B) illicit trafficking** in a controlled substance (as defined in section 802 of Title 21), *including a drug trafficking crime* (as defined in section 924(c) of Title 18);



<b>ILLICIT TRAFFICKING</b> ↓	<b>DRUG TRAFFICKING CRIME</b> ↓
Notes that the phrase is not defined by the statute	Notes that the phrase is defined by an incorporated reference to 18 U.S.C. § 924(c) as being “any felony punishable under the Controlled Substances Act (CSA).”
Emphasizes the “everyday understanding” of trafficking and concludes that “ordinarily ‘trafficking’ means some sort of commercial dealing.” p. 630 Uses Black’s Law Dictionary in reaching this conclusion.	States that “[u]nless a state offense is punishable as a federal felony it does not count” under this definition. p.631
Expresses that unless explicitly defined so by Congress, “trafficking” should not be defined in “an unexpected way.” p.630.	Notes that no U.S. Attorney has ever argued, in the criminal context, that 18 U.S.C. § 924(c) should be interpreted as including state felonies which are only misdemeanors under federal law. p.632
Also, concludes that if a “state crime actually fell within the general term ‘illicit trafficking,’ the state felony conviction would count as an ‘aggravated felony,’ regardless of the existence of a federal felony counterpart.” p.631-32.	States that “Congress has apparently pegged the immigration statutes to the classifications Congress itself chose.” p.633
	Concludes that Congress did not welcome “state-by-state disparity” based on a state felony designation when the crime would be a misdemeanor under federal law. p.633
	Decides that a state offense may only be considered a drug trafficking crime “if it proscribes conduct punishable as a felony under that federal law [the CSA].” p.633

# Drug Trafficking Aggravated Felony Checklist

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# Drug Trafficking Aggravated Felony Checklist

## *Questions In Detail*

### PART I: BACKGROUND QUESTIONS

#### **What Crime Was My Client Convicted Of?**

The obvious first step a practitioner should take is to identify the state statute that your client was convicted under. Based on the governing statute, 8 U.S.C. § 1101(a)(43), and the Supreme Court’s analysis in Lopez v. Gonzales, the state statute of conviction must constitute a “drug trafficking” aggravated felony. As was explained above, an aggravated felony determination in this context can be made in either of the following ways:

- **Drug Trafficking Crime:** By prohibiting the same conduct constituting a “felony punishable under the Controlled Substances Act” 18 U.S.C. § 924(c).

*OR*

- **Illicit Trafficking:** By falling into the commonly understood definition of “illicit trafficking,” despite not having a “federal felony counterpart.” Lopez at 631-32.

Parts II and III of this checklist present various arguments that practitioners can use to argue that a state statute of conviction does not qualify as a “drug trafficking crime” or more broadly as “illicit trafficking.”

#### **Does the Statute of Conviction Have Many Sub-Sections?**

In evaluating your client’s conviction, it is important to carefully examine the statute. It is possible that the statute of conviction encompasses different kinds of criminal activity, and it might be important to determine if your client was convicted of a specific subsection of that statute.

If your client was not convicted of a specific subsection, you should review the remaining parts of the checklist while considering all the language included in the relevant statute.

### PART II: DRUG TRAFFICKING CRIME QUESTIONS

#### **Is My Client’s State Conviction Significantly Different from the Alleged Federal Felony Counterpart?**

The Lopez opinion explained that a state statute of conviction must be comparable to a federal felony under the CSA in order to qualify as a “drug trafficking crime.” Should the state statute, instead, proscribe conduct punishable as a federal misdemeanor, then the state statute might not be considered an aggravated felony. Similarly, if the state statute proscribes conduct not criminalized at all under the CSA, then the state statute might not be considered an aggravated felony.

According to this analysis, which is often referred to as the categorical approach, practitioners must compare state statutes of conviction with its alleged federal felony counterpart. Such a comparison should determine whether any part of the state statute might not be equivalent to a federal felony under the CSA, and a state statute with these

non-felony portions is often described as being “broader” than the federal felony statute. Should the state statute be broader than its alleged federal felony counterpart, then practitioners have an argument, based on the Supreme Court’s analysis in Lopez, that the state offense “does not count” because only certain parts of the state statute are comparable to federal felonies.

Consider the following questions in considering whether your client’s state statute of conviction is broader than its federal counterpart.

► **Step One: Are the legal terms of art defining terms in the state statute broader than those used in the federal statute?**

Examine both the state statute of conviction and the alleged federal counterpart statute. Are there any legal terms of art in the state statute that might be broader than the federal statute? If the state terminology is broader, there may be a strong legal argument that the state statute of conviction is not comparable to the alleged federal felony counterpart.

**Examples:**

State drug statutes often include provisions that criminalize a person *offering* to sell a controlled substance as opposed to actually selling a controlled substance. Because the Controlled Substances Act does not mention solicitation (or offering) offenses, some courts have found that state statutes including these solicitation provisions are not aggravated felonies because they are not comparable to the CSA. The following cases have raised this issue:

- Levy-Licea v. INS, 187 F.3d 1147 (9th Cir. 1999) (state conviction of solicitation to possess marijuana for sale is not punishable under the federal CSA).
- U.S. v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (holding that an offer to “sell, furnish, or give away a controlled substance” is not an aggravated felony because it is a solicitation offense not included in the CSA).
- U.S. v. Aquilar-Ortiz, 450 F.3d 1271 (11th 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)).
- Mendieta-Robles v. Gonzales, 226 Fed.Appx. 564 (6th Cir. June 12, 2007) (holding that Ohio statute including an “offer to sell” component is not an aggravated felony, because “the mens real element of each crime are substantially different.)

Additionally, this point has also been raised with regard to New York Penal Law § 220.00 et seq., which defines “sell” as meaning “to sell, exchange, give or dispose of to another, or to offer or agree to do the same.” § 220.00(1). See [http://www.nysda.org/idp/docs/07\\_MartinezFinalandFormattedAmicusBrief12-3-07.pdf](http://www.nysda.org/idp/docs/07_MartinezFinalandFormattedAmicusBrief12-3-07.pdf).

Practitioners should also consider whether legal terms of art in the federal counterpart statutes are narrower than the state statute of conviction. Such a determination would reach the same argument that the state statute of conviction is broader than its so-called federal counterpart.

**Example:**

The Second Circuit has narrowly defined the word “distribute” in 21 U.S.C. § 841, a statute under the CSA. This enables practitioners, upon comparison, to argue that the federal statute is narrower than the underlying state conviction. U.S. v. Swiderski, 548 F.2d 445, 451 (2d Cir. 1977) (involving “the passing of a drug between joint possessors who simultaneously acquired possession at the outset for their own use,” which results in the court’s finding that such a transfer does not constitute a distribution under § 841).

► **Step Two: Are there legal principles used in the state criminal law (ex: presumptions) that are broader than those used in the federal criminal law?**

In addition to examining statutory language, practitioners should also examine whether legal principles, such as presumptions, are broader under state law than the federal counterpart. A broader presumption or similar legal principle under state law might have resulted in a conviction that would not be possible under federal law.

**Example:**

Drug convictions involving automobiles often involve presumptions that are used to prove possession. Differences between state and federal presumptions might also make some state statutes broader than their alleged federal counterparts.

For example, under New York Penal Law § 220.25(1), “The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found.” However, under federal law, a permissible inference of drug possession in an automobile involves considering “the totality of the evidence.” U.S. v. Badilla, 419 F.3d 1128 (10<sup>th</sup> Cir. 2005). Accordingly, it might possible to argue that the state possession presumption is broader than the totality of the evidence standard used in federal court.

**Is the Government Arguing that a State Low-level Marijuana Distribution Conviction is Comparable to 21 U.S.C. § 841(b)(1)(D)**

An important legal issue has emerged regarding the comparison of some state marijuana statutes with the marijuana provisions in the Controlled Substances Act. The CSA has two key provisions regarding marijuana offenses. The first, 21 U.S.C. § 841(b)(1)(D), is a federal felony provision regarding distribution crimes involving less than 50 kilograms of marijuana. The second, 21 U.S.C. § 841(b)(4), is a federal misdemeanor provision regarding marijuana offenses involving “a small amount of marihuana for no

remuneration.” However, the second provision (21 U.S.C. § 841(b)(4)) is structured as an exception to 21 § 841(b)(1)(D), and it is often raised only in the sentencing context. This complex statutory structure has spurred litigation on the issue of whether state marijuana statutes including non-remunerative transfers of small amounts of marijuana should be designated as aggravated felonies.

The BIA recently issued a precedent decision, Matter of Aruna, 24 I&N Dec. 452 (BIA 2008), speaking directly on this issue. In Aruna, the BIA held that a Maryland marijuana statute encompassing small amounts of marijuana with transfers not involving remuneration or compensation was, nevertheless, an aggravated felony under the categorical approach. In making this determination, the BIA concluded that the “small amount” and “no remuneration” aspects of many state marijuana statutes were not alone sufficient to avoid an aggravated felony determination. Instead, the BIA held that an individual in immigration proceedings bears the burden of proving that their conviction actually involved a small amount of marijuana without remuneration. The BIA, however, acknowledged in its opinion that federal courts owe no deference to the BIA’s conclusion on this question of federal criminal law. See Aruna, at n.4.

The BIA further acknowledges that its legal conclusion has been rejected by the Third Circuit, and that it is bound by that court’s contrary conclusion in cases arising in that Circuit. Id. These Third Circuit cases include:

- Jeune v. Att’y Gen., 476 F.3d 199 (3d Cir. 2007) (examining a conviction under 35 Pa. Stat. Ann. § 780-113(a)(30), which includes transfers of marijuana for no remuneration, and determining that it is not an aggravated felony because it was comparable to 21 U.S.C. § 841(b)(4)).
- Wilson v. Ashcroft, 350 F.3d 377 (3d Cir. 2003) (holding that N.J. Stat. Ann. § 2C:35-5b(11), which punishes transfers of amounts over 1 ounce (28.3 grams) and under 5 pounds (2268 grams), is co-extensive with 21 U.S.C. § 841(b)(4)).
- Steele v. Blackman, 236 F.3d 130 (3d Cir. 2001) (holding that N.Y. Penal Law § 221.40 is not an aggravated felony, because it is comparable to 21 U.S.C. § 841(b)(4))

Accordingly, these cases are controlling in the Third Circuit. However, outside of the Third Circuit, practitioners should preserve for appeal arguments that a conviction under a state statute punishing non-remunerative transfers of small amounts of marijuana is not a conviction of an aggravated felony.

**Example:**

This issue is also being litigated in the Second Circuit regarding whether N.Y. Penal Law § 221.40, the same statute at issue in the Third Circuit’s Steele opinion, constitutes an aggravated felony. See Martinez v. Mukasey (07-3031-ag) (2d Cir.). To see further arguments that N.Y. Penal Law § 221.40 is not an aggravated felony, please look at the amicus brief submitted by the Immigrant Defense Project in Martinez v. Mukasey, which is available here: [http://www.nysda.org/idp/docs/07\\_MartinezFinalandFormattedAmicusBrief12-3-07.pdf](http://www.nysda.org/idp/docs/07_MartinezFinalandFormattedAmicusBrief12-3-07.pdf).

## **☑ Is the Government Arguing that Two Possession Convictions Should Result in an Aggravated Felony Determination?**

In some instances, the government has argued that a drug simple possession conviction preceded by another such offense, even if these offenses are only misdemeanors or lesser violations, nonetheless constitutes an aggravated felony. The government's argument rests on 21 U.S.C. § 844(a), which is a statute under the Controlled Substances Act punishing some recidivist drug possession offenses as a felony instead of as a misdemeanor. In response, many practitioners have argued that multiple possession offenses cannot automatically fall under the "recidivist" provision in 21 U.S.C. § 844(a). Instead, practitioners have argued that individuals must be charged as recidivists in order to fall under this statute and be potentially subject to an aggravated felony determination on possession offenses alone.

In December 2007, the BIA decided two cases that speak to this issue. See Matter of Carachuri-Rosendo, 24 I&N Dec. 382 (BIA 2007) and Matter of Thomas, 24 I&N Dec. 416 (BIA 2007). These precedent BIA decisions stand for the proposition that – in cases arising outside the Second, Fifth and Seventh Circuits – the BIA recognizes that a non-citizen with more than one state drug possession conviction may not be deemed convicted of an aggravated felony where the state prosecutors did not rely on a prior conviction to charge and convict the individual as a recidivist. Id. However, in cases arising in the Fifth Circuit, as well as the Second and Seventh Circuits, the BIA indicated that it was constrained by circuit precedent to find that a second or subsequent state possession conviction may be deemed an aggravated felony regardless of whether the state prosecuted the individual as a recidivist. See Matter of Carachuri-Rosendo, 24 I&N Dec. at 385-88, 392-93.

For more information on how to challenge aggravated felony charges based on multiple possession convictions, please consult IDP's "Practice Advisory: The Impact of the BIA Decisions in *Matter of Carachuri* and *Matter of Thomas* on Removal Defense of Immigrants with More than One Drug Possession Conviction," which is available at: [http://www.nysda.org/idp/docs/07\\_PRACTICEADVISORYCARACHURI.pdf](http://www.nysda.org/idp/docs/07_PRACTICEADVISORYCARACHURI.pdf). Please also contact IDP for the latest developments in litigation on this issue.

### **PART III: ILLICIT TRAFFICKING QUESTIONS**

#### **☑ Does the State Statute Involve Acts of "Illicit Trafficking?"**

Even if the state statute does not constitute an aggravated felony under the "drug trafficking crime" prong, an analysis under the "illicit trafficking" prong must also be undertaken. In fact, some courts will conduct the "illicit trafficking" analysis before reaching the "drug trafficking crime" inquiry. See Rendon v. Mukasey, 2008 WL 726354 (9th Cir. March 19, 2008).

In Lopez, the Court highlights two components of the "illicit trafficking" analysis: 1) the presence of some kind of commercial dealing or transaction; and 2) the categorization as a state felony. Each of these points are addressed in turn.

► **Step One: Does the state offense necessarily involve “trafficking”?**

Only those state statutes with a trafficking element may be considered an aggravated felony under the “illicit trafficking” prong. Therefore, practitioners should carefully consider whether their client’s state statute of conviction necessarily contains a trafficking element. The Supreme Court notes in Lopez that “illicit trafficking” is undefined in the INA, and the Court concludes that the “everyday understanding” of trafficking should be used to interpret its meaning. The court concludes that “ordinarily ‘trafficking’ means some sort of commercial dealing.” Lopez, at 630.

BIA case law also describes the definition of “trafficking.” In Matter of Davis, a BIA case decided before Lopez, the BIA looks to Black’s Law Dictionary and defines “traffic” as being “commerce; trade; sale or exchange of merchandise, bills, money, and the like. The passing of goods or commodities from one person to another for an equivalent in goods of money.” Matter of Davis, 20 I. & N. Dec. 536 (1992). It also defines “trafficking” as being “[t]rading or dealing in certain goods and commonly used in connection with illegal narcotic sales.” Id. The BIA then concludes that the “essential” part of this meaning is “its business or merchant nature, the trading or dealing of goods.” But, they also conclude that only “a minimal degree” of these acts is necessary to qualify as trafficking. Id.

**Examples:**

In addition, the following cases also describe the definition of “illicit trafficking”:

- **Rendon v. Mukasey**, 2008 WL 726354 (9th Cir. March 19, 2008) (examining Kansas statute and determining that “possession with intent to sell” involves a trafficking element and is, therefore, an aggravated felony).
- **Arce-Vences v. Mukasey**, 512 F.3d 167 (5th Cir. 2007) (finding that possession between 50 and 2,000 pounds of marijuana was not a illicit trafficking and not, therefore, an aggravated felony because it did not involve or require commercial dealing).
- **Garcia-Echaverria v. US**, 376 F.3d 507, 513 (6th Cir. 2004) (stating that “trafficking requires ‘unlawful trading or dealing of a controlled substance.’”).
- **Gerbier v. Holmes**, 280 F.3d 297 (3d Cir. 2002) (citing to Matter of Davis and finding that trafficking must involve “the unlawful trading or dealing of a controlled substance.”).

► **Step Two: Is the state statute a felony under state law?**

In order to constitute an aggravated felony under the illicit trafficking prong, the state statute of conviction must constitute a felony. See Matter of Davis, 20 I. & N. Dec. 536, 541 (1992) (stating that an illicit trafficking offense includes “any state...felony conviction involving the unlawful trading or dealing of any controlled substance as defined in section 102 of the Controlled Substances Act.”).

While not directly addressing the issue, the Lopez court also indicated the necessity of having a state felony (as opposed to a state misdemeanor or lesser crime) in order

to constitute an aggravated felony under the illicit trafficking prong. Lopez, at 631-32 (stating that if a “state crime actually fell within the general term ‘illicit trafficking’ the state felony conviction would count as an ‘aggravated felony,’ regardless of the existence of a federal felony counterpart.”).

#### PART IV: DIVISIBILITY QUESTIONS

##### **Can I Argue that the State Statute is NOT Divisible?**

If you conducted the above analysis and determined that the state statute contains both conduct that would be a felony under federal law and conduct that would not be a federal felony, then argue that the statute is **not divisible**. Different Circuits consider the question of divisibility differently, and the case law for the relevant Circuit should be researched on this issue.

If a statute is not divisible, then a conviction under the state statute would not result in an aggravated felony determination.

##### **Example:**

The Second Circuit has recently stated that a statute is divisible “where the removable and non-removable offenses they describe are listed in different subsections or comprise discrete elements of a disjunctive list of proscribed conduct.” Dulal v. Whiteway, 501 F.3d 116, 126 (2d Cir. 2007). Furthermore, the Second Circuit has noted that, “[t]here are strong arguments for finding divisible only those statutes where the alternative means of committing a violation, some of which constitute removable conduct and some of which do not, are enumerated as discrete alternatives.” Id., at 127.

Consequently, in the Second Circuit, practitioners would have a strong argument against divisibility if the client’s state statute of conviction **does not** distinguish various kinds of conduct into either separate subsections or “discrete alternatives.” Id.

Should you choose to do so, practitioners can also argue in the alternative that, should the statute be divisible, that the modified categorical approach also bars an aggravated felony determination. The modified categorical approach enables the court to look at specified documents in the record of conviction to determine whether they necessarily establish that the case at hand was an aggravated felony. See Id., at 131.

Practitioners should examine the client’s record of conviction before making this argument. Look at the information presented in the documents that comprise the record of conviction. Consider whether this information might persuade a court that your client’s underlying crime involves the part of the state crime comparable to the federal felony. If not, then the conviction should not be deemed an aggravated felony.

## PART V: DRUG SCHEDULES QUESTIONS

### **☑ Are there drugs included on the state drug schedules that are not included on the federal drug schedules?**

There are certain situations where differences between the state drug schedules and the federal drug schedules might help practitioners argue that a state conviction is not an aggravated felony under the INA. This would happen in a situation where 1) the controlled substance was not specifically identified in the record of conviction and 2) the state drug schedule was broader than the federal drug schedule. These are examined below in turn.

#### ▶ **Step One: Does my client’s record of conviction fail to identify the controlled substance at issue in his/her conviction?**

It is important to determine whether your client’s conviction specifies a specific controlled substance. This is important because the federal drug schedules control the aggravated felony determination, not the state drug schedules. This is based on the definition of drug trafficking aggravated felonies in 8 USC § 1101(a)(43)(B), which states that: “illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18).” This definition incorporates 21 USC § 802 et seq., which is part of the Controlled Substances Act, to define which controlled substance offenses may constitute aggravated felony crimes.

Therefore, when individual controlled substances are not specified in the statute of conviction, the state and federal schedules themselves must be compared in order to determine whether a state conviction is an aggravated felony. That question is examined below.

#### ▶ **Step Two: Is the relevant state drug schedule broader than the corresponding federal drug schedule?**

While a somewhat complicated undertaking, practitioners should compare state and federal drug schedules when a client’s conviction does not specify the underlying controlled substance. A broad state drug schedule is one that includes at least one controlled substance not included in the federal schedule.

#### **Examples:**

Ruiz-Vidal v. Gonzales, a 2007 case in the Ninth Circuit, is a perfect example of how the state and federal drug schedules sometimes differ. Ruiz-Vidal v. Gonzales, 473 F.3d 1072 (9th Cir. 2007). In this case the petitioner argued that he was not removable because he had not been convicted of a controlled substance offense as defined under 8 USC § 1227(a)(2)(B)(i).<sup>1</sup> The court in Ruiz-Vidal

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<sup>1</sup> The government here did not pursue an aggravated felony charge for removability, but the case is still useful in the aggravated felony context because the comparison between state and federal schedules is the same.

noted that, “We note that California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA.” Because the government did not prove a specific substance was involved in Ruiz-Vidal’s conviction, the court held that “DHS has failed to establish unequivocally that the particular substance which Ruiz-Vidal was convicted of possessing in 2003 is a controlled substance as defined in section 102 of the Controlled Substances Act.”

The Second Circuit engages in a similar comparison of state and federal schedules in Gousse v. Ashcroft, 339 F.3d 91 (2d Cir. 2003). However, the court in Gousse concludes that the Connecticut state schedules are not broader than the federal schedules, which renders the petitioner’s state conviction an aggravated felony. While this case is decided against the petitioner, it is a useful example of how courts have engaged in state and federal drug schedule comparisons.

In comparing the state and federal drug schedules, practitioners should focus their research on determining whether any controlled substances are included on the relevant state schedule but not included on the relevant federal schedule. Practitioners look out for two situations that might point to a broad state drug schedule: 1) where a controlled substance has been removed from the federal drug schedule but where it has not been removed from the state drug schedule; and 2) where a state has added a controlled substance to the state drug schedule that has not been added to the corresponding federal drug schedule. Finding one of these two situations might demonstrate that the state drug schedule is broader than its federal counterpart. Accordingly, a state conviction under schedule might not necessarily correspond with the so-called federal counterpart drug schedule.

To begin this analysis, practitioners should research how controlled substances are both added to or removed from the state’s drug schedules. Practitioners should also research how controlled substances are shifted between the various drug schedules. In all states, state legislatures have the power to add or subtract controlled substances from the drug schedules. In addition, some states have also delegated the responsibility of updating the drug schedules to state agencies. It is important to note, however, that each state places different restrictions on the agency’s delegated authority over the state drug schedules. Accordingly, practitioners should determine how state agencies are involved (if at all) in overseeing and modifying the relevant state’s drug schedules by answering the following two questions: 1) How are controlled substances added to the drug schedules of the relevant state?; and 2) How are controlled substances shifted between the various drug schedules of the relevant state?

Answering these questions will help practitioners determine whether there might be any controlled substances included in the relevant state drug schedule that are not included in the alleged federal drug schedule counterpart.