

## 2nd Circuit Leaves Open Question of Whether 2nd Drug Possession Offense Constitutes “Aggravated Felony”

By Manuel D. Vargas of  
NYSDA’s Immigrant Defense Project (IDP)\*

On Feb. 1, 2005, the US Court of Appeals for the 2nd Circuit amended an earlier decision to withdraw a holding that a second drug possession offense constituted an “aggravated felony” for deportation purposes. *Durant v U.S.I.N.S.*, 2004 US App LEXIS 27904 at n.1 (2d Cir. 2005), amending the earlier opinion reported at 393 F3d 113 (2d Cir. 2004).

The question of what drug offenses may be deemed aggravated felonies for deportation purposes—and therefore lead usually to mandatory detention and deportation—remains confused under 2nd Circuit and Board of Immigration Appeals (BIA) case law. The immigration statute defines “aggravated felony” (AF) 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). In the past, the BIA has interpreted 101(a)(43)(B) to hold that a state drug offense qualifies as an AF 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. *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 potentially punishable as felonies only when the defendant has a prior final drug conviction. See 21 USC 801 *et seq.*, and especially 21 USC 844 (Penalties for simple possession). In 1996, the 2nd Circuit (covering cases arising in New York, Connecticut, and Vermont) deferred to this former BIA interpretation in *Matter of L-G-*. See *Aguirre v INS*, 79 F3d 315 (2d Cir. 1996); see also *Gerbier v Holmes*, 280 F3d 297 (3d Cir. 2002); *Cazarez-Gutierrez v Ashcroft*, 382 F3d 905 (9th Cir. 2004).

\* IDP provides backup support concerning criminal/immigration issues for defense attorneys, other immigrant advocates, and immigrants themselves. **Manuel D. Vargas** is Consulting Attorney and former Director of the Project. For hotline assistance, call the IDP at (212) 898-4132. IDP staffs the hotline Tuesdays and Thursdays from 1:30 to 4:30 p.m. and returns all messages left outside those times. IDP is located at 2 Washington Street, 7 North, New York NY 10004.

In 2002, however, the BIA modified its position. In *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the BIA indicated that a state simple possession drug offense would now be deemed an AF if it is classified as a felony under state law, even if it would not be classified as a felony under federal law, unless the case arises in a federal court circuit with a contrary rule. At the same time, the BIA held that state *misdemeanor* simple possession drug offenses would not be deemed an AF even if they might have been classified as a felony under federal law. See *Matter of Santos-Lopez*, 23 I&N Dec. 419 (BIA 2002) (applying new BIA approach in the Fifth Circuit); *Matter of Elgendi*, 23 I&N Dec. 515 (BIA 2002) (applying new BIA approach even in the 2nd Circuit).

Nevertheless, in cases arising in the 2nd Circuit, many Immigration Judges appear to continue to follow the 1996 2nd Circuit decision in *Aguirre v INS* and only deem state simple possession offenses to be AFs if they would be treated as felonies under federal law even if they are felonies under state law. This contrasts with the separate line of 2nd Circuit cases that hold, for illegal reentry enhanced sentence purposes, the term “aggravated felony” includes state felony drug possession offenses. See, e.g., *US v Pornes-Garcia*, 171 F3d 142 (2d Cir.), *cert. denied*, 528 US 880 (1999).

However, this adherence to the federal felony approach of *Aguirre* also means that, in cases arising in the 2nd Circuit, the federal immigration authorities will argue that second possession offenses constitute aggravated felonies, even if deemed a misdemeanor under state law, because second possession offenses may be prosecuted as felonies under federal law. See 21 USC. 844. The 2nd Circuit’s amended decision in *Durant*, and its earlier amended decision in *US v Simpson*, 319 F3d 81, at 86, n.7 (2d Cir. 2002, as amended Jan. 23, 2003) leave this question open in the immigration context.

**The bottom line:** In criminal proceedings involving drug charges, noncitizens and their criminal defense counsel should be aware that the law in this area remains in a state of flux. A first misdemeanor possession offense should not be deemed an AF; however, there continues to be a risk that a second possession offense, even if it is a misdemeanor, as well as a first possession offense if it is a felony, will be deemed an AF for immigration purposes. As for sale or intent to sell offenses, virtually any such offense will be deemed an AF, with the possible exception of misdemeanor sale of marijuana.

The 2nd Circuit’s amendment of the *Durant* decision means that noncitizens convicted of more than one drug possession offense, and their lawyers in immigration or federal court proceedings governed by 2nd Circuit law, may continue to argue that a second possession offense is not an AF for immigration purposes. For support for this argument, one can point to the decisions of two other

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### Judiciary Law

**Chap. 240 (A.7518) (Respite/incompetency period following jury service).** Effective: July 27, 2004.

Amends Judiciary Law § 524 to increase the respite period following jury service to 6 years (from four) and, if the juror served more than 10 days, to eight years. A shorter respite period of two years or more is authorized if a juror served fewer than three days of jury service.

### Correction Law

**Chap. 553(S.5408) (Merit Time eligibility for sentences of 1–3 years).** Effective: October 5, 2004.

When the merit time law was enacted in 1997, it inexplicably applied to sentences “in excess” of one year. Thus, inmates serving 1–3 year sentences were ineligible to earn merit time. Correction Law § 803 (1)(d) has now been amended to apply to sentences of “one year or more.”

**Chap. 555 (S.5873) (Warren County Jail).** Effective: October 5, 2004.

Amends Correction Law § 500-a to permit the Warren County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

**Chap. 559 (S.6065) (Putnam County Jail).** Effective: October 5, 2004.

Amends Correction Law § 500-a to permit the Putnam County Jail to be used for the detention of persons under arrest who are awaiting arraignment.

### Miscellaneous

**Chap. 111 (A.10103) (CPLR — Confidential names and addresses).** Effective: July 15, 2004.

Adds a new rule to the CPLR (§ 2103-a) to provide that any party in a civil proceeding may “keep his or her residential and business addresses and telephone numbers confidential from any party in any pleadings or other papers submitted to the court, where the court makes specific findings on the record supporting a conclusion that disclosure of such addresses or telephone numbers would pose an unreasonable risk to the health or safety of a party.”

**Chap. 190 (A.8586-a) (Animal Fighting).** Effective: July 20, 2004.

Amends Agriculture and Markets Law § 351 to prohibit the breeding, selling or offering to sell any animal under circumstances evincing an intent that such animal engage in animal fighting (Class E felony).

**Chap. 514 (A.8636-c) (Tongue Splitting).** Effective: November 1, 2004.

Adds a new section to the Public Health Law (§ 470) to prohibit the practice of tongue splitting except by physicians and dentists (first offense: Class A misdemeanor; second offense: Class E felony). ⚖

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### **Immigration Practice Tips** *(continued from p. 9)*

circuits that have found that—even if an individual has a prior drug conviction—a state drug possession offense should not be considered an “illicit trafficking” aggravated felony for federal immigration purposes if the conviction did not require the prosecution to allege and prove the prior conviction as is required under the federal Controlled Substances Act for a second possession offense to be treated as a felony. See 21 USC 851(a)(1) (“No person who stands convicted of an offense under this part shall be sentenced to increased punishment 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”); *Steele v Blackman*, 236 F3d 130 (3d Cir. 2001)(finding that second New York drug conviction is not an aggravated felony because state criminal proceedings did not involve findings or a plea satisfying the prior conviction element of an offense under the Controlled Substances Act punishable by imprisonment for more than a year); *Oliveira-Ferreira v Ashcroft*, 382 F3d

1045 (9th Cir. 2004)(finding that second state possession conviction should not be treated as punishable by more than one year’s imprisonment and therefore a felony under federal law by virtue of a recidivist sentence enhancement). ⚖

[**Ed. Note:** See p. 23 for information on the approaching Apr. 26, 2005 deadline for reopening old immigration cases to seek 212(c) waivers of deportation for lawful permanent residents (LPRs) who have been ordered deported because of criminal convictions for crimes to which the LPRs agreed to plead guilty or no contest before Apr. 1, 1997.]

**For more information on  
Immigration Law Relating to Criminal  
Proceedings, Visit the IDP page,  
under NYSDA Resources,  
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**First Department** *continued*

the defendant was obliged to present more evidence than his own testimony, and to denigrate as “technical” the defense theory of agency. The prosecutor ignored court warnings about not implying that the defendant had a duty to talk in a pretrial interview and not using a prior drug sale, admitted to show intent, to argue propensity to commit the charged crime. The errors were neither harmless nor cured. Judgment reversed, remanded for new trial. (Supreme Ct, New York Co [Soloff, J on motion, Cataldo, J at trial and sentence])

Juveniles (Delinquency) JUV; 230(15)

Re Johanna C., 11 AD3d 348, 783 NYS2d 32  
(1st Dept 2004)

**Holding:** The three orders adjudicating the appellant a juvenile delinquent involved three different incidents on different dates. Each of the petitions alleged third-degree assault and menacing. At disposition, the appellant made no admissions as to the first petition. As to the second, the appellant admitted only third-degree menacing. As to the third, she admitted only third-degree assault. “As the presentment agency concedes, there was no factual basis for the first order.” Nor was there a factual basis for the finding of assault in the second order and menacing in the third. One order reversed and petition dismissed, other orders modified. (Family Ct, Bronx Co [Cordova, J])

Search and Seizure (Arrest/  
Scene of the Crime Searches  
[Probable Cause (Informants)]) SEA; 335(10[g(iii)])

Matter of Jahad R., 12 AD3d 154; 783 NYS2d 578  
(1st Dept 2004)

The respondent-appellant was adjudicated a juvenile delinquent for possessing a weapon.

**Holding:** The anonymous, radio-transmitted tip that four or five black males were trying to shoot a gun into a vacant lot, uncorroborated by any police observation before the respondent-appellant was detained, did not provide reasonable suspicion justifying the detention. See *Florida v J.L.*, 529 US 266 (2000); cf *People v Appice*, 1 AD3d 244 lv den 1 NY3d 594. The respondent-appellant's inculpatory statements made on the way to the station and while being questioned at the station were a direct result of the initial unlawful detention and should have been suppressed. See *Dunaway v New York*, 442 US 200 (1979). This conclusion is not changed by the fact that after the respondent-appellant's detention, a second radio transmission was received saying that a gun had been thrown into the vacant lot, followed by the finding of a gun. Order of disposition reversed, petition dismissed. (Family Ct, Bronx Co [Cordova, J]) ♠

**ATTENTION GREENCARD HOLDERS  
WITH OLD DEPORTATION ORDERS!****APRIL 26 DEADLINE FAST APPROACHING:  
Can you reopen your old deportation case  
so that you may ask an immigration judge  
to let you stay in the United States legally?**

1. Are you now, or have you ever been, a lawful permanent resident (greencard holder)?  Yes  No
2. Were you ever ordered deported because of a criminal conviction?  Yes  No
3. If so, did you agree to plead guilty or "no contest" to the crime before April 1, 1997?  Yes  No
4. Did you fail to apply for, or did an immigration judge prevent you from applying for, a "212(c)" waiver of deportation during your deportation case?  Yes  No
5. Are you still in the United States?  Yes  No

If you answered “Yes” to all of the questions above, you might be eligible to file a Special Motion to reopen your old deportation case to seek a waiver of deportation called a “212(c) waiver.” Deadline for filing the Special Motion: April 26, 2005. **YOU SHOULD SEEK AN EXPERIENCED IMMIGRATION ATTORNEY BEFORE YOU MAKE THIS SPECIAL MOTION. FILING A SPECIAL MOTION IF YOU ARE NOT ELIGIBLE, OR FILING IT INCORRECTLY, WILL LIKELY RESULT IN DETENTION AND DEPORTATION.**

**For a free consultation, call the  
Immigrant Defense Project  
at 212-898-4132**

*(Make sure to collect as many of your old immigration papers and criminal conviction records before calling)*

The Immigrant Defense Project of the New York State Defenders Association is working with the Association of the Bar of the City of New York to provide free legal advice to immigrants potentially eligible to file this Special Motion. The Immigrant Defense Project is a New York-based not-for-profit group that defends the legal and human rights of immigrants at risk of detention and deportation under today's harsh immigration laws.