

Immigration Practice Tips

Criminal Defense of Immigrants in State Drug Cases—The Impact of *Lopez v Gonzales*

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[Ed. note: This is a shortened version of the third in a series of practice advisories on the impact of the recent Supreme Court's decision in *Lopez v Gonzales*. It was written for use in any state and therefore is not as specific to New York cases as most *Immigration Practice Tips* that appear in the REPORT. For the full Dec. 14, 2006 advisory, including background on *Lopez*, go to IDP's website at www.immigrantdefenseproject.org.

The decision in *Lopez v Gonzales* (No. 05-547) (Dec. 5, 2006) answers an important question for criminal lawyers representing immigrants: What state drug offenses are “aggravated felonies” and thereby trigger mandatory deportation without the possibility of a waiver?

What the Supreme Court Decided in *Lopez*

The Supreme Court held in *Lopez* that the federal government may not apply the aggravated felony label to state felony drug possession offenses that would be misdemeanors under federal law. This means that **state first-time drug simple possession offenses (i.e. those without an ‘intent to sell’ element)**—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. Thus, while noncitizen clients convicted of such offenses will generally still face regular drug offense deportability or inadmissibility, some may be eligible to seek discretionary relief from removal in later immigration proceedings, e.g., cancellation of removal, asylum or naturalization.

What *Lopez* Means for State Criminal Defense Practice

We distill the import of *Lopez* for state criminal defenders into the following four general principles:

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IDP provides training and legal support to defense attorneys, other immigrant advocates, and immigrants themselves in defending against the immigration consequences of criminal dispositions. For backup assistance on individual cases, call IDP at (718) 858-9658 ext. 201. We return messages. IDP is located at 25 Chapel Street, Box 703, Brooklyn, NY 11201.

1. Conviction of, or mere guilty plea to, virtually any drug offense still generally triggers deportability and/or inadmissibility, even if later vacated or expunged based on rehabilitation or participation in drug treatment. In fact, for some noncitizen clients, a drug possession conviction or plea may result in removal without any possibility of a waiver. If your noncitizen client is convicted of virtually any drug offense relating to a “controlled substance” as defined in section 102 of the Controlled Substances Act (referencing federal controlled substance schedules published at 21 USC 812), he or she will become removable despite the Supreme Court decision in *Lopez*. Your client’s conviction will trigger regular controlled substance offense deportability for lawfully admitted immigrants,¹ or inadmissibility for others who now or in the future may be seeking lawful admission.² The only exception is for deportability purposes and applies only to lawfully admitted immigrants convicted of a single offense involving possession for one’s own use of thirty grams or less of marijuana.³

Even a drug conviction later expunged via a rehabilitative statute—or a mere guilty plea to a drug offense later vacated, e.g., due to successful completion of a drug treatment program—may be sufficient for your client to be deemed convicted for immigration purposes and rendered removable (unless the disposition involves a first-time possession offense and the removal case later arises in the 9th Circuit).⁴ Moreover, if your client is a lawful permanent resident immigrant (“green card” holder) who was admitted to the United States (US) less than seven years before the alleged commission of the drug offense, conviction or plea to a drug offense may trigger *mandatory deportation*.⁵ And, if your client is a noncitizen who does not have lawful permanent resident status, trial conviction or plea to virtually any drug offense will trigger *inadmissibility without a waiver* if the client is now applying, or in the future plans to apply, for permanent resident status.⁶

2. *Lopez*, however, dictates that most first-time drug possession convictions that have no ‘intent to sell’ element will no longer trigger the more certain *mandatory deportation consequences attached to the “aggravated felony” label*. Your client convicted of such a first-time possession offense—even if deemed a felony under state law—will no longer be deemed convicted of an aggravated felony. The only exceptions would be, as noted above, if your client was convicted of crack cocaine or flunitrazepam offenses that would be felonies under federal law.⁷

This is important: If your client is convicted of a first-time drug possession offense, he or she may avoid the statutory aggravated felony bars for eligibility for removal relief such as cancellation of removal for certain lawful permanent residents,⁸ asylum,⁹ withholding of removal,¹⁰ and termination of removal proceedings in

order to pursue naturalization.¹¹ Whether your client may be able to obtain such relief will depend on whether he or she is otherwise eligible and the strength of the claim.

For example, if your client is a lawful permanent resident and is convicted of a drug offense that triggers removability but is not an aggravated felony, your client may later be eligible for the relief of cancellation of removal as long as s/he has resided continuously in the US for at least seven years prior to commission of the offense.¹² To be granted such relief, your client will have to show favorable factors such as family ties within the US, residency of long duration in the country, evidence of hardship to the individual and family if deportation were to occur, service in the armed forces, history of employment, existence of property or business ties, existence of value and service to the community, proof of genuine rehabilitation, and evidence attesting to good moral character.¹³ It is estimated that about one-half of applicants whose applications for the similar “212(c) waiver” cancellation predecessor form of relief were decided between 1989 and 1995 were granted such relief.¹⁴

Finally, it should be noted that avoiding the aggravated felony label also avoids other negative immigration consequences under the immigration laws, such as the stiff sentence enhancements that exist for the federal crime of illegal reentry after deportation subsequent to an aggravated felony conviction.¹⁵

3. Whether a conviction of a second possession offense may be deemed an aggravated felony remains uncertain, and may depend on the law of the federal court circuit in which your client’s removal case later arises. The only drug offense plea that is currently safe from aggravated felony consequences is a first-time possession offense. If preceded by a prior drug conviction, even a misdemeanor possession offense might be deemed an aggravated felony. This is because the government may continue to argue, as it has in the past, that under the federal felony approach adopted by the Supreme Court in *Lopez*, a misdemeanor possession offense preceded by a prior drug conviction must be deemed an aggravated felony because of the authority under federal law to penalize a second or subsequent possession conviction as a felony.¹⁶ Some federal circuits have adopted this position.¹⁷

However, other circuits have applied the federal felony approach to find that the later conviction does not correspond to a federal “recidivism possession” 21 USC 844(a) felony offense if the state conviction did not involve notice and proof of the prior conviction as required for a federal possession recidivism conviction under 21 USC 851.¹⁸ In addition, even if a circuit has stated that a second or subsequent possession offense may be deemed an aggravated felony, it may not so find if the prior conviction was not yet final at the time of commission of the later

offense. This is because a second or subsequent state drug possession conviction is subject to an 844(a) recidivism sentence enhancement only if the prior conviction was final at the time of commission of the later offense.¹⁹ It should be noted that the 9th Circuit has ruled that a second or subsequent state drug possession conviction should not be treated as punishable by more than one year’s imprisonment and therefore a “felony” punishable under the Controlled Substances Act by virtue of a recidivist sentence enhancement;²⁰ however, the *Lopez* decision contains language characterizing federal convictions of misdemeanor possession offenses with a recidivist enhancement to a potential sentence in excess of one year as “felonies” falling within the 18 USC 924(c)(2) “drug trafficking crime” definition. See *Lopez* at n.6.

4. Conviction of any drug sale, possession with intent to sell, or other offense akin to a federal “trafficking” offense continues to trigger aggravated felony mandatory deportation consequences. Any state drug offense that corresponds to a federal felony drug offense listed at 18 USC 841 *et seq.*—generally true trafficking-type offenses such as drug distribution or intent to distribute offenses—is an aggravated felony. However, conviction of a state offense that covers conduct that may not be a federal felony (*e.g.*, possession, transfer of marijuana without remuneration, or maybe offer to sell—see practice tips below), as well as conduct that would be a federal felony, may not necessarily be deemed an aggravated felony unless the federal government is able to establish, through the state record of conviction, that your client was convicted of that portion of the statute relating to the covered conduct that would be a federal felony.

PRACTICE TIPS

In light of *Lopez*, state criminal defense practitioners representing noncitizen clients facing state drug charges may wish to consider the following:

—**Avoid drug conviction or plea, if possible.** This includes a guilty plea to a drug offense combined with some penalty or restraint ordered by a court (*e.g.*, court-ordered commitment to a drug treatment program) since such a disposition may be deemed a conviction for immigration purposes even if the plea is later vacated. If possible, when there is a possibility of placement in a drug treatment or other alternative-to-incarceration program, try to negotiate a disposition that does not involve an up-front guilty plea to a drug offense.

—**If this is your client’s first drug offense charge, plead to possession rather than sale.** If your permanent resident client will plead guilty, you should negotiate a plea to a simple possession offense rather than a sale or possession with intent-to-sell or other trafficking-type offense in order to preserve the possibility of relief from

removal. Moreover, since the Court made clear that it did not matter what quantity of the controlled substance was possessed as long as the possession offense does not contain a distribution, intent to distribute, or other federal “trafficking” element, your client may in some states be able to offer a plea to a simple possession offense that is of a comparable or even higher level than the “trafficking” offense charged. Even if your client is not a permanent resident, avoiding the aggravated felony label may enable your client to apply for asylum if otherwise eligible or, if your client is deported, may avoid the stiff federal prior aggravated felony sentence enhancement if your client is convicted in the future of the crime of illegal reentry after deportation.

—If your client has a prior drug conviction(s), file an appeal of the prior conviction(s), or seek leave to appeal the prior conviction(s), if possible. *Lopez* leaves open the question of whether a second state drug possession conviction may be deemed an aggravated felony. However, a second state possession offense should not be deemed to correspond to a federal 21 USC 844(a) recidivism possession offense if the prior conviction was not final at the time of commission of the later offense. Thus, if your client is still within the time to file an appeal of the prior conviction as of right, you might advise your client to appeal the prior conviction. If the time for an appeal of right has passed but there is still time to seek discretionary leave to appeal the prior conviction, you might advise your client to seek such leave. See *Smith v Gonzales*, 468 F3d 272 (5th Cir. 2006) (later offense committed while individual still within the time to seek leave to appeal the prior conviction).

—If your client has a prior drug conviction(s), avoid plea to offense that involves charge and proof of the prior conviction(s). As discussed above, a second state drug possession conviction might be deemed not to correspond to a federal 21 USC 844(a) recidivism possession offense if the conviction does not include charging and proof of the prior drug conviction. Thus, if your state has separate offenses for those convicted of possession depending on whether the prosecution chooses to charge and prove a prior conviction of a drug offense, you should seek to avoid the offense involving proof of the prior conviction. Be aware, however, that this strategy may not work if your client’s later removal case falls within the jurisdiction of the 2nd Circuit (Connecticut, New York, Vermont) or the 5th Circuit (Canal Zone, Louisiana, Mississippi, Texas). See *US v Simpson*, 319 F3d 81 (2d Cir. 2002).

—If possible, plead to a preparatory or accessory-after-the-fact offense. For removal cases arising in the 9th Circuit, a state conviction of a free-standing preparatory or accessory offense such as solicitation, even if the underlying offense is a drug offense, should not be deemed an aggravated felony. See *Levy-Licea v INS*, 187 F3d 1147 (9th

Cir. 1999). Therefore, if your noncitizen client is charged with a drug offense, you might offer an alternate plea to such a preparatory or accessory offense. At present, this strategy may work only if your client’s later removal case falls within the jurisdiction of the 9th Circuit (Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, Washington); however, even for clients whose cases will probably not fall within 9th Circuit jurisdiction, such a disposition may offer your client an argument to avoid removal or mandatory removal.

—If your client will plead guilty to a state drug offense that covers conduct that would be an aggravated felony but also conduct that would not, keep out of the record of conviction any information that would help establish that the conduct is an aggravated felony. Under immigration case law, an offense that covers some conduct that is an aggravated felony and some that is not may not categorically be determined to be an aggravated felony. For example, the 3rd Circuit has found that 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 would be treated as a misdemeanor under federal law. See 21 USC 841(b)(4) (“distributing a small amount of marijuana for no remuneration” treated as simple possession misdemeanor under 21 USC 844); *Wilson v Ashcroft*, 350 F3d 377 (3rd Cir. 2004). See also *US v Rivera-Sanchez*, 247 F3d 905 (9th Cir. 2001). However, be aware that the immigration authorities may look to the record of conviction to determine whether your client was convicted of that portion of the statute relating to conduct that would be an aggravated felony. Therefore you may help your noncitizen client avoid removal if you either make sure the record of conviction establishes conduct that would not be considered an aggravated felony, or keep out of the record of conviction any information that would help the federal government establish conduct that would be an aggravated felony.

—If your client will plead guilty to a state drug offense whose elements do not establish the controlled substance involved, keep out of the record of conviction any information that would help establish that the substance involved is one listed in the federal controlled substance schedules. 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 published at 21 USC 812). However, many states define “controlled substance” to include some substances that do not appear in the federal controlled substance schedules. Therefore, if you are able to avoid the record of conviction in your client’s state criminal case establishing the particular controlled substance involved,

this may offer your client an argument in later immigration proceedings that his or her particular offense is not necessarily an aggravated felony.

—If your client will plead guilty based on an understanding that the plea will not trigger removal, or at least mandatory removal, advise your client to allocate to his or her understanding. You might advise your client to include such a statement of his or her understanding in the plea allocution in order to provide some basis for a later withdrawal of the plea should this understanding be upset by later legal developments.

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, or for support on issues involving drug possible alternative-to-incarceration (ATI) disposition cases, contact IDP's Alina Das at (718) 858-9658 ext. 203. They may also be contacted by email at bjain@nysda.org, mvargas@nysda.org and adas@nysda.org.

Endnotes

1. See INA 237(a)(2)(B)(i), 8 USC 1227(a)(2)(B)(i).
2. See INA 212(a)(2)(A)(i)(II), 8 USC 1182(a)(2)(A)(i)(II).
3. See INA 237(a)(2)(B)(i), 8 USC 1227(a)(2)(B)(i).
4. See INA 101(a)(48)(A), 8 USC 1101(a)(48)(A) (guilty plea combined with some penalty or restraint ordered by a court sufficient to be deemed conviction for immigration purposes); see also *Matter of Roldan-Santoyo*, 22 I&N Dec. 512 (BIA 1999) (giving no effect to vacatur of drug guilty plea under Idaho withholding of adjudication statute); but see *Lujan-Armendariz v INS*, 222 F3d 728 (9th Cir. 2000) (holding that first-time drug possession offense expunged under state law is not a conviction by analogy to the Federal First Offender Act).
5. The relief of cancellation of removal for lawful permanent resident immigrants is barred not only if the individual is convicted of an aggravated felony, but also if the individual commits any drug offense before the person has continuously

Defender News *(continued from page 6)*

needles were inserted all the way through his veins and into the flesh in his arms. (www.nbc11.com, 12/15/06, www.nypost.com, 12/18/06.)

In New York, only one death penalty case remains in the system after a jury instruction provision in the capital punishment statute was found unconstitutional in 2004. John Taylor's case is pending in the Court of Appeals. Argument is expected to be scheduled in the spring. (Check the NYSDA website, www.nysda.org, for a Court of Appeals update provided every two months by Robert Dean of the Center for Appellate Litigation.) Taylor's case will be decided by a court that will have experienced sub-

stantial turnover in its members since the ruling in *People v LaValle*, 3 NY3d 88. (www.nysun.com, 11/17/06.)

6. The waiver of inadmissibility available for persons seeking lawful permanent resident status who have been convicted of, or who have admitted, crimes is not available for any drug offense other than a single offense of simple possession of 30 grams or less of marijuana. See INA 212(h), 8 USC 1182(h).

7. See 21 USC 844(a).
8. Barred by aggravated felony—see INA 240A(a)(3).
9. Barred by aggravated felony—see INA 208(b)(2)(B)(i).
10. Barred by aggravated felony or felonies for which the person has been sentenced to an aggregate term of imprisonment of at least 5 years—see INA 241(b)(3)(B).
11. Barred by post-November 29, 1990 aggravated felony—see INA 101(f).

12. See INA 240A(a) & (d), 8 USC 1229b(a) & (d).
13. See *Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1998).
14. See *INS v St. Cyr*, 533 US 289 at 296, n.5 (2001).
15. See INA 276(b)(2), 8 USC 1326(b)(2).

16. See 21 USC 844(a) (subjecting individuals convicted of possession of a controlled substance after a prior drug conviction has become final to a maximum sentence in excess of one year).

17. See *US v Sanchez-Villalobos*, 412 F3d 572 (5th Cir. 2005) (finding second misdemeanor possession offense constituted an aggravated felony); *US v Simpson*, 319 F3d 81 (2d Cir. 2002) (finding second misdemeanor possession offense to be an aggravated felony in illegal reentry sentencing context but declining to comment on whether such offense would be an aggravated felony in the immigration context).

18. See *Berhe v Gonzales*, 464 F3d 74 (1st 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 F3d 130 (3rd Cir. 2001).

19. See 21 USC 844(a) (providing for sentence enhancement based on a prior conviction only if the offense at issue is committed after such prior conviction "has become final"); see also *US v Palacios-Suarez*, 418 F3d 692 (6th Cir. 2005) (later offense committed while prior drug case still pending in criminal court); *Smith v Gonzales*, 468 F3d 272 (5th Cir. 2006) (later offense committed while individual still within time to seek leave to appeal prior conviction).

20. See *Oliveira-Ferreira v Ashcroft*, 382 F3d 1045 (9th Cir. 2004).

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Sad News In the Defense Community

Maxian's Death a Loss for Many

Former NYSDA Board Member Michele Maxian, who spent her entire legal career at The Legal Aid Society of New York City, died Nov. 14, 2006 at the age of 55. Widely admired among defense lawyers, the client community,

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