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Eleventh Circuit Court of Appeals
56 Forsyth Street, NW
Atlanta, GA 30303

RE: *Rodrigues v. U.S. Attorney General*, No. 06-11700-DD

Dear Eleventh Circuit Court of Appeals:

This is a proposed amicus letter brief filed in the above-referenced case. We are concurrently filing a motion for leave to file this letter brief. As explained in that motion, this amicus letter brief addresses the impact on this Court's case law of the United States Supreme Court's recent decision in *Lopez v. Gonzales*, 549 U.S. ___, 127 S. Ct. 625, 2006 U.S. LEXIS 9442 (Dec. 5, 2006). The Supreme Court decision in *Lopez* was issued after the principal briefing was already complete in the instant case. *Lopez* is a landmark case that has fundamentally altered the analysis of whether state controlled substance offenses constitute aggravated felonies under federal immigration law. The need for this amicus briefing arose only after the Supreme Court's *Lopez* decision.

In *Lopez*, the Supreme Court considered whether a state felony conviction for aiding and abetting another person to possess cocaine constitutes an aggravated felony under immigration law. The aggravated felony definition includes "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U.S.C. § 1101(a)(43)(B). While "illicit trafficking" is undefined in the statute, the phrase "a drug trafficking crime" is defined as "any felony punishable under the Controlled Substances Act" (or two other enumerated federal statutes). The Supreme Court in *Lopez* held that a state drug offense constitutes a drug trafficking aggravated felony under the Controlled Substances Act "only if it proscribes conduct punishable as a felony under that federal law." *Lopez*, 127 S. Ct. at 633 (emphasis added). The Court rejected the government's argument that all state drug offenses designated as felonies under state law, including the aiding and abetting possession offense at issue in *Lopez*, qualify as "illicit trafficking."

The Court took as its starting point the plain language of the phrase “illicit trafficking” and found that “ordinarily ‘trafficking’ means some sort of commercial dealing.” *Id.* at 630. “Commerce,” the Court noted, is “no element” of the crime of helping someone else to possess. To qualify as an illicit trafficking offense under *Lopez*, a state offense must have a minimum element of “commercial dealing” or, at the very least, strictly correspond to a *federal* felony. Under this federal felony approach, courts must closely analyze the requirements for conviction of a state drug offense to determine whether these requirements correspond to those of a federal drug *felony*. Only those state drug offenses with true “federal felony counterpart[s]” constitute aggravated felonies. *Id.* at 631-32 (noting that a state offense is an aggravated felony if it is “a state offense *whose elements* include the elements of a felony punishable under the [Controlled Substance Act]”) (emphasis added).

In adopting the federal felony approach, the Supreme Court reinforced the longstanding rule that courts must take a categorical approach to analyzing whether or not a state criminal offense triggers a ground of removal under federal immigration law. *Jaggernaut v. U.S. Attorney General*, 432 F.3d 1346, 1353 (11th Cir. 2005) (citing *In re Batista-Hernandez*, 21 I&N Dec. 955, 970 (BIA 1997)) (citing *Taylor v. United States*, 495 U.S. 575 (1990)). The Supreme Court adopted the categorical approach in *Taylor v. United States*, 495 U.S. 575 (1990), when analyzing whether a state conviction for burglary fell within the generic definition of burglary for purposes of a federal sentencing enhancement. As applied in the immigration context, *Taylor*’s categorical approach requires that courts determine whether all possible conduct criminalized under a particular state statute falls within the federal immigration ground of removal at issue. If it is possible to violate the state statute in a way that falls outside the ambit of the ground of removal, a conviction under that statute does *not* trigger removal. The actual circumstances of the crime are irrelevant. Courts look only at the elements of the criminal statute and, if the statute is divisible, the official court record of conviction. *Jaggernaut*, 432 F.3d at 1349 n. 1 (restating settled law that the “record of conviction includes the charging document, plea, verdict or judgment, and sentence” and nothing else).

Lopez has had a dramatic impact on the case law of this Court. First and foremost, *Lopez* has overruled this Court’s decision in *United States v. Simon*, 168 F.3d 1271 (11th Cir. 1999), and this Court’s subsequent unpublished decisions that rely on *Simon*.¹ *Simon* addressed whether a state felony conviction for simple possession of cocaine constituted an aggravated felony for the purposes of enhanced sentencing in an illegal reentry case. The *Simon* Court held that a state simple possession offense constituted an aggravated felony, even though the offense would have been punishable as a misdemeanor under federal law. *Simon*’s state felony approach now stands in direct contradiction to *Lopez*’s holding that a state felony conviction for aiding and abetting the

¹ Unpublished cases of this Court involving possession of cocaine that are overruled by *Lopez* include *United States v. Aurelien*, 177 Fed. Appx. 15 (11th Cir. 2006) (relying on *Simon* to find that simple possession is an aggravated felony if it is a felony under state law); *United States v. Herrera*, 140 Fed. Appx. 58 (11th Cir. 2005) (same).

possession of cocaine is *not* an aggravated felony because it would only be punishable as a misdemeanor under federal law. Indeed, the Supreme Court in *Lopez* understood that it was overruling *Simon*. It cited to *Simon* as one of the decisions that created the “conflict in the Circuits” necessitating the granting of certiorari. *Lopez*, 127 S. Ct. at 629 n. 3.

After *Lopez*, this Court’s post-*Simon* unpublished decisions involving other offenses that cover non-trafficking conduct must also be revisited. These decisions relied on *Simon* and failed to follow the strict federal felony and categorical approaches adopted in *Lopez*. In *United States v. Cabrera-Ruiz*, 132 Fed. Appx. 288, 291 (11th Cir. 2005), for example, this Court held that a Florida conviction for delivery of cannabis is an aggravated felony. Under *Lopez*, this Court’s analysis was incorrect for two reasons. First, *Cabrera-Ruiz* followed the state felony approach in *Simon* that was overruled in *Lopez*. Second, the Court failed to discuss, or even mention, the statute under which the petitioner was convicted or the record of conviction in the petitioner’s case. The Court nowhere analyzed whether all conduct punishable under the state statute would either 1) involve commercial dealing or 2) strictly correspond to a felony under federal law. This lack of analysis is a critical defect in the decision because delivery of cannabis under Florida law *does not necessarily involve* an element of commercial dealing. Nor is delivery of cannabis necessarily punishable as a felony under federal law. Distribution of a small amount of cannabis without remuneration, for example, violates the Florida statute but does *not* involve commerce and is a federal misdemeanor. 21 U.S.C. § 841(b)(4); *Steele v. Blackman*, 236 F.3d 130, 135 (3d Cir. 2001).

This Court’s decision in *Baig v. U.S. Attorney General*, 2006 U.S. App. LEXIS 16796 (11th Cir. 2006), also does not survive *Lopez*. *Baig* involved two convictions, one for simple possession of cocaine and another for purchase of cannabis. This Court followed *Simon*’s state felony rule to conclude that each of these convictions constituted aggravated felonies. *Lopez* compels the opposite result. Both possession of cocaine and purchase of cannabis would be misdemeanors under federal law. . . . Although a second possession offense can, in theory, be enhanced to a felony under federal law, this is possible only after the U.S. Attorney has filed an information with the sentencing court charging the prior drug conviction and the criminal court has provided the defendant with an opportunity to challenge the fact, finality, and validity of the prior conviction. In such a hearing, the U.S. Attorney has the burden of proof beyond a reasonable doubt on all issues of fact. 21 U.S.C. § 851(a)-(c). Following *Lopez*’s strict federal felony and categorical approaches, the only second state possession or purchase offenses that are punishable as federal felonies are those in which the record of conviction contains notice and proof of the fact, finality, and validity of the alleged prior drug offense. *See Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3rd Cir. 2001). A court cannot look behind a person’s state conviction to facts outside the record of conviction and speculate whether a federal prosecutor could have charged a federal felony based on facts not pled to or proven in the state case. The Supreme Court’s discussion of the federal recidivist enhancement statute in a footnote in *Lopez* is consistent with this conclusion. By noting that state offenses that “*correspond to . . . recidivist possession*” would qualify as felonies under federal law, the Court was *not* saying that any second state conviction would qualify as a federal felony. *Lopez*, 127 S.

Ct. at 630 n. 6 (emphasis added). Rather, the Court was saying only that second state convictions that strictly comport with the federal requirements for enhancing a misdemeanor to a felony “correspond to” federal felonies.²

This Court’s decision in *Soler-Somohano v. U.S. Attorney General*, 130 Fed. Appx. 298 (11th Cir. 2005), was also wrongly decided in light of *Lopez*. In *Soler-Somohano*, this Court found that a Florida conviction for “trafficking in 400 grams or more of cocaine, in violation of Fla. Stat. Ann. § 893.135, clearly fits within the I.N.A.’s definition of ‘aggravated felony.’” Under *Lopez*, however, this Court was required to analyze whether Fla. Stat. Ann. § 893.135 punishes non-trafficking conduct that would only be a misdemeanor under federal law. This statute, in fact, criminalizes non-trafficking conduct that is only a federal misdemeanor. For example, actual or constructive *possession* of 150 kilograms of cocaine violates the statute. Possession of this amount of cocaine contains no element of commercial dealing and would be a federal misdemeanor. As recognized by the Supreme Court in *Lopez*, “Congress generally treats possession alone as a misdemeanor whatever the amount.” *Lopez*, 127 S. Ct. at 633. As a result, “an alien convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount.” *Id.* Thus, not all convictions under Florida’s trafficking statute constitute aggravated felonies.

The above analyses are illustrations of how this Court’s prior decisions relying on *Simon* are inadequate under the *Lopez* framework. The examples are not meant to be exhaustive. There are other unpublished decisions following *Simon* are similarly flawed based on the principles laid out in *Lopez*. See, e.g., *Petit-Frere v. United States AG*, 199 Fed. Appx. 926, n. 2 (11th Cir. 2006) (concluding that possession of cocaine with intent to sell is an aggravated felony without analyzing the comparable federal statute).

In sum, *Lopez* has dramatically altered the framework within which this Court must analyze drug convictions to determine whether they are aggravated felonies. Beyond overruling *Simon*’s holding about drug possession offenses, *Lopez* mandates that courts follow a strict federal felony approach and rigorously compare the requirements for convicting under state statutes to their federal counterparts. Only those state convictions that precisely correspond to federal felonies qualify as aggravated felonies. In the instant case, the Court or the Board of Immigration Appeals, if the Court remands

² Further support for the view that a second state drug possession offense is not automatically an aggravated felony is the fact that federal prosecutors rarely seek to enhance a second misdemeanor offense into a felony. Most federal second drug possession offenses are prosecuted as misdemeanors. In fact, Congress passed 21 U.S.C. § 851 to replace mandatory enhancements and “to make more flexible the penalty structure for drug offenses.” *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974) (internal quotation marks omitted); see also Report of House Comm. on Interstate and Foreign Commerce, H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4566, 4576 (noting that harsh minimum mandatory sentences were making prosecutors reluctant to prosecute and that a more flexible approach was warranted).

this case, must strictly apply *Lopez's* analytical principles when deciding whether any of the petitioner's convictions constitute aggravated felonies.

Respectfully submitted,



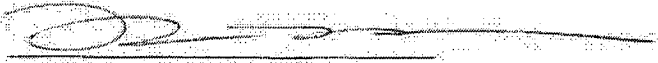
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CERTIFICATE OF SERVICE

I, Rebecca Sharpless, certify that, on February 17, 2007, I mailed a true and correct copy of the foregoing letter brief to Andrew C. MacLachlan, Office of Immigration Litigation, Civil Division, U.S. Department of Justice, P.O. Box 878, Ben Franklin Station, Washington, DC 20044 and Andy G. Strickland, 4554 Central Avenue, Suite E, St. Petersburg, FL 33711.



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