

# New York State Defenders Association Immigrant Defense Project

25 Chapel Street, Suite 703, Brooklyn, NY 11201 • Phone 718-858-9658 ext. 201 • Fax 800-391-5713 • www.immigrantdefenseproject.org

## PRACTICE ADVISORY: REMOVAL DEFENSE OF IMMIGRANTS IN DRUG POSSESSION CASES— THE IMPACT OF *LOPEZ V. GONZALES*

April 12, 2007

This practice advisory is an update of an earlier IDP advisory on the impact of the Supreme Court's decision in *Lopez v. Gonzales* (No. 05-547) (Dec. 5, 2006). Included are post-*Lopez* challenges to government arguments in removal proceedings that a drug simple possession offense (or an offense that otherwise may include non-trafficking conduct) is an aggravated felony.\*

### 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 simple drug possession offense may therefore be eligible to apply for cancellation of removal for lawful permanent residents, asylum and/or naturalization. This is now true even in cases arising in federal circuits such as the First, Second, Fourth, Fifth, Eighth, Tenth and Eleventh, where case law pre-*Lopez* deemed state felony possession offenses to be aggravated felonies.

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

The decision includes dicta indicating that **state 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 fact, finality and validity of the prior conviction has been provided in the criminal case. Thus, under the federal felony standard adopted by the Supreme Court in *Lopez*, a state drug possession conviction should not be transformed into a “drug trafficking” aggravated felony based on a prior conviction where the state criminal proceeding did not prove -- or offer an opportunity equivalent to that under federal law -- to challenge the fact, finality, and validity of the alleged prior conviction.

*Cont'd*

\* IDP wishes to acknowledge the input and assistance provided by Dan Kesselbrenner of the National Immigration Project and Nancy Morawetz, Mandy Hu, Carlin Yuen, and Caroline Cincotta 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) had reversed position and federal courts had been split on what state drug offenses constitute a "drug trafficking" aggravated felony for immigration 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, e.g., *United States v. Hernandez-Avalos*, 251 F.3d 505 (5th Cir. 2001). Subsequently, in 2002, in *Matter of Yanez-Garcia*, 23 I&N Dec. 390 (BIA 2002), the BIA 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 arises 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 (3d 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). 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 (1st Cir. 1992)(immigration context); *United States v. Simpson*, 319 F.3d 81 (2d 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.

## Practice Tips

In light of *Lopez*, immigration practitioners representing noncitizen clients with state simple drug possession convictions may wish to consider the following tips:

**Is my client removable?** Your client remains deportable or inadmissible if your client's conviction triggers regular controlled substance offense deportability or inadmissibility. The *Lopez* decision means, however, that your client now may no longer be barred from relief from removal such as cancellation of removal for certain lawful permanent residents,<sup>1</sup> asylum,<sup>2</sup> withholding of removal<sup>3</sup> and termination of removal proceedings in order to pursue naturalization.<sup>4</sup> Therefore, even if your client's case arises in a jurisdiction such as the First, Second, Fourth, Fifth, Eighth, Tenth, or Eleventh Circuits, where prior case law may have previously deemed your client's offense an aggravated felony and precluded eligibility for these forms of relief from removal, your client may now be eligible for these forms of relief.

**What should I do if my client is or was in INA 240 Immigration Judge removal proceedings?** Pursue all claims for relief from removal for which your client is now eligible, including cancellation of removal for certain lawful permanent residents, asylum, withholding of removal and termination of proceedings to pursue naturalization. If the case is now before the BIA or a federal court, seek remand for a new Immigration Judge hearing.

**What if my client is or was in INA 238 administrative removal proceedings ("Expedited Removal of Aliens Convicted of Committing Aggravated Felonies")?** Seek termination of proceedings on the basis that your client may no longer be deemed convicted of an aggravated felony. See 8 CFR 1238.1(d)(2)(iii)(Conversion to proceedings under section 240 of the Act). If your client already has a final administrative removal order but you are within 30 days of that order, petition for review to the U.S. Court of Appeals.

**What if an Immigration Judge has already ordered removal of my client?** If the immigration judge ordered your client removed without affording your client the opportunity to seek relief from removal for which your client is now eligible, but you're still within 30 days of that order, move to reconsider the case in light of *Lopez*, and also appeal to the BIA in order to protect your client's appeal rights. If you're within 90 days of the order, move to reopen the case in light of *Lopez*.

- ✓ If these time limits have passed, consider asking the Department of Homeland Security (DHS) trial attorney to join with you in a joint motion to reopen. See 8 CFR 1003.23(b)(4)(iv)(time limit does not apply to a motion to reopen agreed upon by all parties and jointly filed). Alternatively, request that the Immigration Judge on his or her own reconsider or reopen the case. See 8 CFR 1003.23(b)(1)(an Immigration Judge may upon his or her

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<sup>1</sup> Barred by aggravated felony—see INA 240A(a)(3)).

<sup>2</sup> Barred by aggravated felony—see INA 208(b)(2)(B)(i)).

<sup>3</sup> 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)).

<sup>4</sup> Barred by post-November 29, 1990 aggravated felony—see INA 101(f).

own motion at any time reopen or reconsider any case in which he or she has made a decision). The BIA has recognized limited discretionary powers under such a regulation to reopen or reconsider cases *sua sponte* in unique situations where it would serve the interest of justice as where there is change in law. See, e.g, *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998). For sample motions to reconsider and reopen prepared by the American Immigration Law Foundation, go to Sample *Lopez* Motions at [http://www.aifl.org/lac/clearinghouse\\_122106\\_lopezvgonzales.shtml](http://www.aifl.org/lac/clearinghouse_122106_lopezvgonzales.shtml).

**What if the BIA has already dismissed my client's appeal?** If you're within 30 days of the BIA's decision, move to the BIA to reconsider the case in light of *Lopez*, and petition for review to the U.S. Court of Appeals to protect your client's judicial review rights. If you're within 90 days of the BIA's decision, you may move to reopen the case in light of *Lopez*.

- ✓ If these time limits have passed, consider asking the DHS trial attorney to join with you in a joint motion to reopen to the BIA. See 8 CFR 1003.2(c)(3)(iii). Alternatively, request *sua sponte* reconsideration or reopening by the BIA. See 8 CFR 1003.2(a)(1); see also *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998). For sample motions to reconsider and reopen prepared by the American Immigration Law Foundation, go to Sample *Lopez* Motions at [http://www.aifl.org/lac/clearinghouse\\_122106\\_lopezvgonzales.shtml](http://www.aifl.org/lac/clearinghouse_122106_lopezvgonzales.shtml).

**What if a federal court of appeals has already dismissed my client's petition for review?** If you're within 45 days of the Court's dismissal of the petition, you may petition for panel rehearing (see FRAP 40) or, if within 90 days of the Court's dismissal, you may petition for a writ of certiorari to the Supreme Court (See Supreme Court Rules 10-16) in order to protect your client's judicial review rights. It may also be possible to file a motion asking the Court of Appeals to recall the mandate. For sample motions to recall the mandate prepared by the American Immigration Law Foundation, go to Sample *Lopez* Motions at [http://www.aifl.org/lac/clearinghouse\\_122106\\_lopezvgonzales.shtml](http://www.aifl.org/lac/clearinghouse_122106_lopezvgonzales.shtml).

- ✓ In any event, as the federal courts may want or expect exhaustion of any available administrative remedies, you should ask the DHS trial attorney to join with you in a joint motion to reopen to the BIA, see 8 CFR 1003.2(c)(3)(iii), or request *sua sponte* reconsideration or reopening by the BIA. See 8 CFR 1003.2(a)(1); see also *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998). For sample motions to reconsider and reopen prepared by the American Immigration Law Foundation, go to Sample *Lopez* Motions at [http://www.aifl.org/lac/clearinghouse\\_122106\\_lopezvgonzales.shtml](http://www.aifl.org/lac/clearinghouse_122106_lopezvgonzales.shtml).

**What if my client has already been deported and there is no pending petition for review with a federal court?** If your client was deported after having been barred from relief based on a finding that a state drug possession conviction was an aggravated felony, there is no clear remedy if your client doesn't already have a petition for review pending in federal court. You might try requesting *sua sponte* reconsideration or reopening by the Immigration Judge or the BIA. See 8 CFR 1003.23(b)(4)(iv) and 1003.2(a)(1); see also *Matter of X-G-W-*, 22 I&N Dec. 71 (BIA 1998). Be aware, however, that DHS generally takes the position that a removal

case may not be reconsidered or reopened after deportation. See *Navarro-Miranda v. Ashcroft*, 330 F.3d 672 (5<sup>th</sup> Cir. 2003). Nevertheless, such a request might provide a basis for a subsequent petition for review to a federal court of appeals. At least one federal court has ruled that the BIA has the power to reopen even where the individual has already been deported (although that case involved a timely filed motion to reopen filed from outside the U.S., as opposed to a request for *sua sponte* reopening). See *Cardoso-Tlaseca v. Gonzales*, 460 F.3d 1102 (9<sup>th</sup> Cir. 2006). At the very least, such a petition for review might provide a basis for negotiations with government lawyers with reopening as a goal.

- ✓ If you do get the case reopened, the federal government should give your client an opportunity to apply for any relief from removal for which he or she is now eligible, and a hearing on the application before an Immigration Judge. If your client is not allowed to return to the United States for the hearing, his or her presence should at least be allowed and arranged by video or phone from outside the country. In fact, in *Lopez*, Mr. Lopez himself has already been deported. Nevertheless, the Supreme Court rightly presumed that, if it grants relief, the government must figure out a way to allow him to pursue his application for cancellation of removal. See *Lopez* at n.2; see generally practice advisory entitled “Return to the United States after Prevailing on a Petition for Review” prepared by the American Immigration Law Foundation and posted at <http://www.aila.org/content/default.aspx?docid=21442>.

### **More Practice Tips**

**What if my client has more than one 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 where the state criminal proceeding did not prove -- or offer an opportunity equivalent to that under federal law – to challenge the fact, finality, and validity of the alleged prior conviction. 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.
- ✓ *In any event, the second or subsequent state drug possession conviction should not be deemed to correspond to an 844(a) offense if the state criminal proceeding did not include charging and proof of the fact, finality, and validity 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 fact, finality and 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); *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001); see also Point I.A.2 (pp. 14-18) in Brief of *Amicus Curiae* New York State Defenders Association for Respondent on Analysis of Second Possession Offenses after *Lopez v. Gonzales* (BIA 2007), available at [http://www.nysda.org/idp/docs/07\\_LopezNYSDAAmicus.pdf](http://www.nysda.org/idp/docs/07_LopezNYSDAAmicus.pdf); but see *U.S. v. Simpson*, 319 F.3d 81 (2d Cir. 2002) and *U.S. v. Sanchez-Villalobos*, 412 F.3d 572 (5<sup>th</sup> Cir. 2005)(pre-*Lopez* cases that found state possession offenses preceded by prior convictions to be aggravated felonies for criminal sentencing purposes by analogy to federal 844(a) recidivism offenses without consideration of the notice and proof requirements for 844(a) recidivism convictions).
- 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, unless the notice and proof requirements in the state criminal proceedings strictly correspond to those required under federal law, 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.

- The requirements for a conviction under the recidivist possession provisions of the Controlled Substances Act are substantive and significant. By including the requirements, Congress intended to punish as a felony only those offenses where, along with notice and proof of the elements of the current possession offense, there is also notice and proof of a prior conviction that can withstand collateral attack. Congress enacted 21 U.S.C. § 851 as part of the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 513, §§ 1101(b)(4)(A), 1105(a), 84 Stat. 1292, 1295. Before this law, a prior conviction typically resulted in mandatory and automatic sentencing enhancements, with no discretion given to the prosecutor even in many low-level cases. See United States v. Dodson, 288 F.3d 153, 159 (5th Cir. 2002) (discussing the legislative history of § 851). By enacting § 851, Congress intended “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 Committee on Interstate and Foreign Commerce, H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S.C.C.A.N. 4566, 4576 (“The severity of existing penalties...have [sic] led in many instances to reluctance on the part of the prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. ...[S]evere penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain....[M]aking the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties....”). Thus, prosecutors were given the option not to seek a sentencing enhancement in low-level cases. Furthermore, for cases where prosecutors did seek to use a prior conviction to enhance a sentence, Congress made the requirements of 21 U.S.C. § 851 strict and mandatory. See Noland, 495 F.2d at 533 (discussing how Congress used mandatory language in the text of § 851).
- Given this legislative context, the Supreme Court has repeatedly recognized the importance of strictly adhering to the requirements of 21 U.S.C. § 851. In United States v. LaBonte, 520 U.S. 751 (1997), the Court considered the appropriate sentencing instrument for recidivist offenders who may receive a higher sentence under either the statutory sentence enhancement of § 851 or under the “career offender” provisions of the United States Sentencing Commission’s Sentencing Guidelines. In deciding that the Sentencing Commission had improperly favored the Sentencing Guidelines’ “career offender” sentencing enhancements over the statutory enhancements, the Supreme Court specifically noted that “[t]he imposition of [a statutory § 851] enhanced penalty is not automatic” and should not be treated as such. Id. at 754. In Price v. United States, 537 U.S. 1152 (2003), the Supreme Court addressed the § 851 requirements specifically in the context of the recidivist enhancement in § 844(a). The Court held that petitioner’s 21 U.S.C. § 844(a) drug possession offense could not be treated as a felony given the government’s failure to file a notice of enhancement under § 851(a), and remanded a Fifth Circuit case with a contrary

holding to be reconsidered in light of LaBonte. In Price, the Solicitor General's brief acknowledged that the petitioner's drug offense could not be treated as a felony given the government's failure to file a notice of enhancement under 21 U.S.C. § 851(a), a fact that both the opinion and the dissent, filed for other reasons, also noted. Id.

- 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 Ninth Circuit Court of Appeals 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. See Oliveira-Ferreira v. Ashcroft, 382 F.3d 1045 (9<sup>th</sup> Cir. 2004).* Although 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 U.S.C. 924(c)(2) “drug trafficking crime” definition, see *Lopez* at n.6, this discussion is only footnote dicta without any discussion or analysis. Nevertheless, Ninth Circuit practitioners may be well-advised not to rely solely on *Oliveira-Ferreira* and to raise and preserve any other arguments, including those listed here, to respond to a DHS charge that a second or subsequent possession offense is an aggravated felony.
- ✓ *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 conduct that would be a felony under federal law but also conduct that would not be a felony?** Argue that conviction of such an offense does not necessarily establish that the offense would be a federal felony. For example, a state possession offense that includes a subsection penalizing possession with intent to sell should not categorically be determined to be a “drug trafficking crime” or an “illicit trafficking” aggravated felony if the government is unable to show by clear and convincing evidence that the individual was convicted under the “intent to sell” subsection. See *Escobar v. Attorney General of U.S.*, 2007 WL 676783 (3d Cir. 2007). For another 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 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 *Jeune v. Attorney General*, 476 F.3d 199 (3d Cir. 2007)(also finding that such an offense is not categorically an aggravated felony under the definition’s general “illicit trafficking” language in the absence of conclusive evidence of “unlawful trading or dealing”); *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.nysda.org/idp/docs/file12\\_05\\_GrantAmicusBrief.pdf](http://www.nysda.org/idp/docs/file12_05_GrantAmicusBrief.pdf); 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 *Levya-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 Alina Das at (718) 858-9658 ext. 203, 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 [adas@nysda.org](mailto:adas@nysda.org), [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 at the Board of Immigration Appeals or 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.