Immigration Practice Tips

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US Supreme Court Grants Cert on Whether a State Drug Possession Offense Constitutes a "Drug Trafficking" "Aggravated Felony"

On April 3, 2006, the Supreme Court granted certiorari in *Lopez v Gonzales* (Docket No. 05-547) and *Toledo-Flores v US* (Docket No. 05-7664). These cases raise the important issue of whether a state felony offense of simple possession of a controlled substance is a "drug trafficking" "aggravated felony" for federal immigration and sentencing purposes when such offense would be deemed a misdemeanor under federal law. The IDP, along with the National Association of Criminal Defense Lawyers, the National Legal Aid and Defender Association, the National Association of Federal Defenders, the Capital Area Immigrant Rights Coalition, and the Immigrant Legal Resource Center, had in January prepared and submitted an amici curiae brief in support of cert in the *Lopez* case, which raises the issue in the immigration deportation context. The *Toledo-Flores* case raises the issue in the context of the criminal sentence enhancement for the federal crime of illegal entry into the US following a prior conviction of an aggravated felony.

Background on the Question Presented

The question of what drug offenses may be deemed aggravated felonies—which generally triggers mandatory detention and deportation under federal immigration law and a stiff sentence enhancement in the federal sentencing context—has been confused under case law of the Board of Immigration Appeals (BIA) as well as the case law of the federal courts, including the US Court of Appeals for the 2nd Circuit, which has jurisdiction over removal cases heard in New York. 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 Second Circuit deferred to this former BIA interpretation in *Matter of L-G-*. *See Aguirre v INS*, 79 F.3d 315 (2d Cir. 1996).

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. Nevertheless, in cases arising in the 2nd Circuit, some Immigration Judges appear to continue to follow the 1996 2nd Circuit decision in *Aguirre* 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. However, other Immigration Judges follow the separate line of 2nd Circuit cases that hold that, at least for federal sentencing purposes, the term "aggravated felony" includes state felony drug possession offenses. *See, eg, US v Pornes-Garcia*, 171 F3d 142 (2d Cir.), *cert den* 528 US 880 (1999). There has been similar confusion or conflict in the case law elsewhere. *Compare Gerbier v Holmes,* 280 F3d 297 (3d Cir. 2002), *US v Palacios-Suarez*, 418 F3d 692 (6th Cir. 2005), *Gonzales-Gomez v Achim*, 441 F3d 532 (7th Cir. 2006), and *Cazarez-Gutierrez v Ashcroft*, 382 F3d 905 (9th Cir. 2004), with the lower court decision in *Lopez v Gonzales*, 413 F3d 934 (8th Cir. 2005) and several federal criminal sentencing cases such as *US v Toledo-Flores*, 149 FedAppx 241 (5th Cir. 2005).

The stakes are high. Immigrants deemed to have an aggravated felony conviction are not only deportable but also ineligible for waivers of removal, such as cancellation of removal for long-term permanent residents and asylum for those with a well-founded fear of persecution in their countries of removal, and thereby face virtual mandatory deportation. In addition, in the federal criminal system, a prior aggravated felony conviction subjects a person convicted for illegal reentry after deportation to a sentence enhancement of up to 20 years in prison. As the government has been aggressively seeking an expansion of the types of drug offenses that may be deemed a "drug trafficking" aggravated felony to include many simple possession offenses, these cases may present an opportunity to scale back this expansion in both the immigration and sentencing contexts. If these challenges are success-

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ful, some New York immigrants who plead guilty to simple possession offenses, even if a felony, will be able to avoid deportation without the possibility of a waiver and be able avoid stiff sentence enhancements after conviction for illegal reentry into the US.

What Has Been Happening Since the Cert Grant

The IDP, in collaboration with the National Immigration Project, has worked with counsel for the petitioners in *Lopez* and *Toledo-Flores* to develop legal arguments and to recruit the submission of a variety of amicus briefs in support of the petitioners, including briefs filed by the IDP with other criminal and immigration legal organizations, by immigrant community groups, by the American Bar Association, by Human Rights First, by the Center for Court Innovation and the New York Association of Drug Court Professionals, and by former federal immigration service general counsels. We hope to have these briefs posted shortly on the IDP website at www.immigrantdefenseproject.org. Argument before the Court is expected in October, with a decision not expected until several months later.

Practice Tips: If you are representing a noncitizen charged with a drug possession offense, be aware that whether conviction of that offense may be deemed a "drug trafficking" "aggravated felony" for immigration purposes is currently uncertain, even if the offense is a misdemeanor under state law. (This is because the federal government may argue that a misdemeanor possession offense preceded by a prior drug conviction is an aggravated felony because there is authority under federal law to penalize a second possession offense as a felony.) You should advise your client of this uncertainty so that he or she may consider this when deciding whether or not to plead guilty. Defense counsel may contact the IDP to learn of any new legal developments that relate to the particular possession offense at issue in a case. Finally, if your client decides to plead guilty based on any understanding that current law would or might not deem such conviction to trigger mandatory deportation, it might be advisable to include a statement of such understanding in the plea allocution in order to give your client the possibility of later withdrawal of the plea should this understanding be upset by later legal developments, such as an unfavorable result in the cases before the Supreme Court.

If you are representing a noncitizen convicted of a drug possession offense in immigration proceedings, and are litigating the issue of whether the offense is a drug trafficking aggravated felony and anticipate a possible negative result, consider asking the judge/court to hold the case in abeyance until the Supreme Court decides these cases. This may slow the litigation and keep a person in the US in the event that a favorable Supreme Court decision holds that such an offense is not an aggravated felony.

Finally, if you or someone you know (client, family member, friend) is facing or has faced deportation, denial of asylum or withholding of removal, or denial of naturalization because of a government claim that a simple possession drug offense is an aggravated felony, please contact us. We may be able to provide information about these and other legal challenges or how to get involved in advocacy on this issue. Call Benita Jain at (718) 858-9658 ext. 231 or Manny Vargas at (718) 858-9658 ext. 208 at the IDP, or Dan Kesselbrenner at the National Immigration Project at (617) 227-9727.

2nd Circuit Finds NY First-Degree Manslaughter is a Crime of Violence

On May 8, 2006, the 2nd Circuit ruled that first-degree New York manslaughter is a "crime of violence" aggravated felony for immigration purposes. In *Vargas-Sarmiento v US Department of Justice*, 448 F3d 159 (2d Cir. 2006), the 2nd Circuit held that this offense (Penal Law 125.20) is divisible into crimes that are categorically grounds for removal—in this case, "crime of violence" aggravated felony—and others that may not be. The Court then found that the only possible subsections under which the petitioner in this case could have been convicted based on its review of the record of conviction—subsection (1) ("With intent to cause serious physical injury to another person, he causes the death of such person or of a third person") or (2) ("With intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance")—were crimes that categorically, by their nature, are crimes of violence under the referenced definition in 18 USC 16(b) ("offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense"). Focusing on the specific intent requirement for conviction of these offenses to distinguish these offenses from the New York second-degree manslaughter offense found not to be a "crime of violence" aggravated felony in *Jobson v Ashcroft*, 326 F3d 367 (2d Cir. 2003), the Court stated: "[F]irst-degree manslaughter cannot be committed through mere reckless passivity or omission, circumstances identified in Jobson as presenting no risk of the intentional use of force . . . when [the perpetrator's] intent is to take a life, or at least to inflict serious physical injury —action likely to meet vigorous resistance from a victim—we can confidently conclude that inherent in the nature of the crimes is a substantial risk that the perpetrator may intentionally use physical force to achieve his criminal objective."

Although the petitioner in this case had presented hypothetical examples of cases—wife poisoning food to be eaten by husband, or wearing down the brake pads of

a car to be driven by her husband—where the petitioner argued an individual could commit the crime of first-degree manslaughter without any risk of the intentional use of physical force, the Court found that these hypotheticals did not change its conclusion. First, the Court stated: "Where a person's specific intent is to kill another human being or, at least, to cause him serious physical injury, there is necessarily a significant risk inherent in the nature of the crime that, if the perpetrator cannot initially achieve his objective without physical force, he may ultimately resort to force to do so." Second, the Court found that, even in these hypotheticals, the perpetrators have, in fact, intentionally used physical force. For example, with respect to the poisoning hypothetical, the Court stated that, "when the perpetrator poisons food that she intends her spouse to eat, she engages in no mere passive act or reckless omission. Rather she intentionally avails herself of the physical force exerted by poison on a human body deliberately to kill her husband."

Practice Tips: On a narrow level, this case shows the potential importance of trying to negotiate a plea to second-degree manslaughter when you are representing a noncitizen client charged with first-degree manslaughter who is willing to plead. On a broader level, however, this case confirms that, whenever you have a noncitizen client charged with a specific intent injury offense, you may be able to help such a client avoid mandatory detention and deportation upon later immigration proceedings if you negotiate a plea instead to an offense that does not categorically require a specific intent showing (or, in the alternative, if you negotiate a sentence that does not involve imprisonment of one year or more, the threshold for a crime of violence to be deemed an aggravated felony). And, finally, even more generally, this case is a reminder that, whenever you represent a noncitizen charged with a criminal offense that includes some conduct that may be deemed to fall within a ground of deportation and other conduct that does not, counsel might be able to help a client avoid deportation by being vigilant about what to keep out of a noncitizen's "record of conviction," which includes: certificate of disposition; charging document; plea agreement and plea colloquy transcript; verdict or judgment of conviction; and record of sentence.

IDP Launches New Website

This spring, the IDP has launched its new website at www.immigrantdefenseproject.org. Defense lawyers and others representing or counseling immigrants in criminal or immigration proceedings may find useful the following resources posted on this website:

- Resources for effective representation of immigrants in criminal proceedings, including one-page Immigration Consequences of Criminal Convictions Checklist, Quick Reference Chart for New York State Offenses, and Crim/Imm Practice Tips.
- Resources for effective representation or advocacy on behalf of immigrants in immigration proceedings or at risk of detention and removal due to contact with the criminal justice system, including Removal Defense Checklist in Criminal Charge Cases, and Deportation 101: Detention, Deportation, and the Criminal Justice System training curriculum for advocates.
- Additional Know Your Rights materials for immigrants themselves, including Immigration Detention and Removal: A Guide for Detainees and Their Families (prepared by the Legal Aid Society of New York), Pro Se Advisory: Appealing Removal Orders in Federal Court, and Citizenship Alert for Lawful Permanent Residents with Criminal Records. ⚖