LOPEZ v. GONZALES & TOLEDO-FLORES v. UNITED STATES: STATE FELONY DRUG CONVICTIONS NOT NECESSARILY AGGRAVATED FELONIES REQUIRING DEPORTATION

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I. INTRODUCTION

The United States Courts of Appeals split about whether state felony drug convictions, which were punishable only as misdemeanors under federal law, constituted aggravated felonies under immigration law.[1] The controversy was based upon the interpretation of the Immigration and Nationality Act ("INA"). Under the Act, an alien who is convicted of an "aggravated felony" is automatically deported from the United States.[2] According to the INA, an aggravated felony includes "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of Title 18)."[3] Although the INA does not define "illicit trafficking," Title 18 of the United States Code defines "the term 'drug trafficking crime' [as] any felony punishable under the Controlled Substances Act (21 U.S.C. [§] 801 et seq.)."[4] Although the Controlled Substances Act ("CSA") is a

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1. United States v. Briones-Mata, 116 F.3d 308, 310 (8th Cir. 1997), *quoted in* United States v. Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001) (holding that Congress made a deliberate choice to include, as "aggravated felonies," state felony convictions that would qualify only as misdemeanors under federal law); Aguirre v. Immigration and Naturalization Serv., 79 F.3d 315, 317 (2d Cir. 1996) (holding, in contrast to the Fifth and Eighth Circuit, that nationwide uniformity is important and state felonies are not aggravated felonies if the conviction would only amount to a misdemeanor under federal law).

2. 8 U.S.C. § 1227(a)(2)(A)(iii).

3. 8 U.S.C. § 1101(43)(B).

4. 18 U.S.C. § 924(c)(2).

federal statute, the INA's definitions of aggravated felonies expressly include crimes "whether in violation of state and federal law."[5] Because the INA was intended to include state convictions, the Court needed to clarify whether an "aggravated felony" under the INA included a felony conviction by state court that under federal law would be classified as only a misdemeanor.

In *Lopez v. Gonzales* and *Toledo-Flores v. United States* the Supreme Court answered this question.[6] Two non-citizens faced deportation for conviction for drug related offenses. Lopez was convicted of aiding and abetting the possession of cocaine, a felony under South Dakota law. In 1998, the Immigration and Naturalization Service (INS) initiated removal proceedings against Lopez, and he subsequently filed for a cancellation of the removal under INA § 240(a). However, Lopez was forbidden from cancelling the removal because of his status as an aggravated felon.[7] Lopez appealed the denial of his application, arguing that his South Dakota conviction was not an aggravated felony because it was not a felony under the CSA.

Toledo-Flores was convicted of felonious possession of cocaine in Texas. He was sentenced to two years in prison following his guilty plea for improper entry into the United States. His sentence was enhanced because of his prior aggravated felony conviction under the federal sentencing guidelines.[8] Toledo-Flores also argued that his conviction, although a felony under Texas state law, did not qualify as an aggravated felony under the CSA. Because the cases posed the same legal question, they were consolidated for judgment. The Supreme Court was asked to resolve whether a state felony conviction for a drug-related offense qualifies as an aggravated felony when the conviction under federal law would constitute only a misdemeanor.

Prior to the Supreme Court's decision, the Circuits were inconsistent in their treatment of state court felony convictions. The Fifth and Eighth Circuits consistently held that a state felony conviction, regardless of the treatment under federal law, was an

5. 8 U.S.C. § 1101(43) (penultimate sentence).
6. Lopez v. Gonzales, 127 S. Ct. 625 (2006).
7. I.N.A. § 240(a), 8 U.S.C. § 1229b(a).
8. U.S.S.G. § 2l1.2(b)(10(C).

"aggravated felony."[9] The Eighth Circuit stated that "Congress made a deliberate policy decision to include as an 'aggravated felony' a drug crime that is a felony under state law but only a misdemeanor under the CSA."[10] On the other hand, the Ninth circuit held "a state drug offense is an aggravated felony for immigration purposes only if it would be punishable as a felony under federal drug laws or the crime contains a trafficking element."[11] The Second, Third, and Sixth Circuits agreed with this interpretation.[12]

II. DEFINING "AGGRAVATED FELONY" UNDER IMMIGRATION LAW

In an 8-1 decision, the United States Supreme Court reversed the Fifth Circuit's ruling and agreed with the Second, Third, Sixth, and Ninth Circuits, holding that a state felony conviction, which would have been punishable as misdemeanor under federal law, is not an aggravated felony for purposes of the INA.[13] Although Lopez and Toledo-Flores's cases were consolidated, the Supreme Court found that Toledo-Flores's case was moot. Certiorari was improperly granted because the petitioner had already served his aggravated felony sentence.[14] Although Toledo-Flores's appeal concerned the enhancement of his sentence under Federal Sentencing Guidelines as a result of his prior state conviction being deemed an aggravated felony, his sentence was inactive by the time the Supreme Court heard his case. Conversely, the Court did decide the Lopez controversy even though he had already been deported. The Court reasoned that Lopez could still benefit from a ruling because he could file an application for cancellation of removal.[15]

In Lopez's case, the immigration judge initially held that Lopez's state offense was not an aggravated felony because the conduct was not punishable under the CSA.[16] However, the same judge reversed that decision when the Board of Immigration Appeals ("BIA")

9. Lopez v. Gonzalez, 417 F.3d 934 (8th Cir. 2005); United States v. Hernandez-Avalos, 251 F.3d 505, 510 (5th Cir. 2001).

10. United States v. Briones-Mata, 116 F.3d 308, 310 (8th Cir. 1997).

11. Cazarez-Gutierrez v. Ashcroft, 382 F.3d 905, 912 (9th Cir. 2004).

12. Aguirre v. Immigration and Naturalization Serv., 79 F.3d 315 (2d Cir. 1996); Gonzales-Gomez v. Achim, 441 F.3d 532 (7th Cir. 2006); Gerbier v. Holmes, 280 F.3d 297 (3d Cir. 2002); United States v. Palacios-Suarez, 418 F.3d 692 (6th Cir. 2005).

13. Lopez v. Gonzales, 127 S. Ct. 625 (2006).

14. Toledo-Flores v. United States, 127 S. Ct. 638 (2006).

15. *Lopez*, 127 S. Ct. at 629.

16. *Id.* at 628.

conformed to the Eighth Circuit's precedent, which considered state felony drug convictions to be aggravated felonies.[17] As a result, Lopez was unable to apply for a cancellation of his removal, and the Eighth Circuit Court of Appeals affirmed the BIA's decision.[18] The Supreme Court subsequently granted certiorari. The Government argued for a unique interpretation of the statutory language of the INA, which defined a drug trafficking crime as "any felony punishable under the Controlled Substances Act."[19] According to the Government's reading, any offense that was both a felony under state law and contained conduct that was punishable under the CSA would constitute an aggravated felony.[20] The Supreme Court disagreed, and ultimately held that Lopez's conviction of possession of a controlled substance did not contain the necessary trafficking element to qualify as an "aggravated felony."

Writing for the majority, Justice Souter relied upon the plain meaning of the word "trafficking." Lopez was charged with aiding and abetting another individual's cocaine possession, which is a felony under South Dakota state law. However, this conduct does not fall within the realm of "drug trafficking" because "ordinarily, 'trafficking' means some sort of commercial dealing."[21] Here, that dealing was not present. Lopez's conduct that resulted in the South Dakota conviction did not contain any trafficking elements. In a footnote, the Court explained that some forms of illicit trafficking do contain commercial elements, such as recidivist possession, but the majority was unwilling to include all possession offenses within the class of drug-trafficking offenses due to a few exceptions.[22]

In addition, the Court used the traditional tools of statutory interpretation to refute the Government's definition of aggravated felony. It highlighted that Congress was able to define when aggravated felonies were expressly based on convictions under state law in other parts of 18 U.S.C. § 924. "[T]he implication confirms that the reference solely to a 'felony punishable under the [CSA]' in § 924(c)(2) is to a crime punishable *as a felony* under the federal Act."[23]

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17. *See* Matter of Yanez-Garcia, 23 I&N Dec. 390 (2002).
18. *Gonzalez*, 417 F.3d at 934.
19. 18 U.S.C. § 924(c)(2).
20. Brief of Respondents at 18, Lopez v. Gonzalez, 417 F.3d 934 (8th Cir. 2005) (No. 04-2397).
21. *Lopez*, 127 S. Ct. at 630.
22. *Id.*
23. *Id.* at 631 (emphasis added).

The deliberate choice of language within the same Act sheds light on the intention of Congress to include only offenses that would be punishable as felonies under the CSA, as opposed to state felonies that are punishable under the CSA only as misdemeanors. The Court's rationale is taken directly from the petitioner's brief. Petitioner asserted that Congress in 18 U.S.C. § 924 expressly used the language "state law convictions" in subsections (g)(3) and (k)(2).[24] When placed in juxtaposition with subsection § 924(c), it becomes clear that "Congress understood drug offenses 'punishable under the Controlled Substances Act' not to include state offenses."[25] Here, the Court agreed with this reasoning and determined Congress' intent from the deliberate use of language in parallel subsections within § 924.

The Government also wanted the court to view § 924's definition of "sentence" as two distinct parts: (1) "felony" and (2) "punishable under the CSA." Once separated, the state conviction need only be a felony and contain conduct punishable under the CSA; the CSA need not punish such behavior as a felony as well. However, the Court disagreed with this reading. "The Government stresses that the text does not read 'punishable *as a felony*.'"[26] Instead, the Court reasoned, "[w]e do not use a phrase like 'felony punishable under the [CSA]' when we mean to signal or allow a break between the noun 'felony' and the contiguous modifier 'punishable under the CSA.' . . ."[27] The Court found no apparent reason to separate a noun from the modifier next to it.[28] As a result, the Court refused to hold that a misdemeanor punishable under the Act should be considered an aggravated felony.[29] In order to be deemed an aggravated felony, the offense must be a felony that is punishable as a felony under the CSA.[30] Nevertheless, the Court did not require that every state conviction have an identical federal counterpart to suffice as an aggravated felony. Instead, "a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony."[31]

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24. Brief of Petitioner at 23, Lopez v. Gonzalez, 417 F.3d 934 (8th Cir. 2005) (No. 04-2397).
25. *Id.*
26. *Lopez*, 127 S. Ct. at 631.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 633.
31. *Id*. at 631.

The Government's argument relied on the penultimate sentence of 8 U.S.C. § 1101(a)(43), where the definition of aggravated felonies included crimes "whether in violation of state and federal law"[32] to support its interpretation of the INA. However, the Court determined that the Government's contention was without merit and found no evidence that this last sentence was intended to change the definition of "aggravated felony" that Congress incorporated from Title 18 § 924(c)(2).[33] The Government admitted "it has never begun a prosecution under 18 U.S.C. § 924(c)(1)(A) where the underlying 'drug trafficking crime' was a state felony but a federal misdemeanor."[34] The penultimate sentence opens the door for state convictions to be treated as aggravated felonies under the INA, but the state felony convictions cannot be based on criminal conduct that would only suffice to sustain a misdemeanor conviction under federal law.[35]

Lastly, the Court believed that the Government's interpretation of the INA would create an unpredictable situation because the determination of aggravated felonies would be based upon different state criminal classifications. Congress specifically incorporated its own statutory scheme from Title 18 when it defined a drug trafficking crime under § 924(c)(2). The majority asserted that Congress would not have gone through this trouble if it "meant courts to ignore [that scheme] whenever a State chose to punish a given act more heavily."[36] Here, the Court identified the potential consequences of this approach. If a state punishes possession of one gram of contraband as a felony, then a state convict is subject to mandatory deportation because, like Lopez, he will be unable to petition for cancellation of removal.[37] However, the CSA expressly excludes from the list of deportable controlled substance violations "single offense[s] involving possession for one's own use of 30 grams or less."[38] Even though the federal government had deliberately excluded this type of possession offense as grounds for automatic deportation, state statutory schemes would be capable of overriding congressional intent. The Supreme Court did not want the determination of whether an offense is an

32. 8 U.S.C. § 1101(a)(43).
33. *Lopez*, 127 S. Ct. at 632.
34. *Id.*
35. *Id.*
36. *Id*. at 633.
37. *Id.*
38. 21 U.S.C. § 844(a).

"aggravated felony" to turn on the specific statutory scheme of each state. As a result, here, the Court followed Congress' intent to define aggravated felonies in accordance with federal law.

As the lone dissenter, Justice Thomas was not persuaded by the majority's reasoning. He did not agree that 18 U.S.C. § 924(c)(2) requires the Board of Immigration to define felonies according to federal law. Like the Government, Thomas relied on the plain meaning of the word felony, which is any crime that is punishable by more than one year in prison.[39] Also, Justice Thomas disagreed with the majority's claim that all trafficking offenses must contain a commercial element.[40] In fact, by the majority's own admission, some possession crimes fall within the definition of "illicit trafficking." These possession offenses are not merely a small class of exceptions, but "must include every type of possession offense under the CSA, so long as the offender has had a previous possession offense." The CSA includes repeat possession offenders within the class of "illicit trafficking."[41] He believed that the majority overlooked these important exceptions, and he agreed with the Government that any state felony conviction that is also punishable under the CSA is an aggravated felony.

Furthermore, Justice Thomas was not convinced that the various state statutory schemes create inconsistent results. He rejected the hypothetical offered by the majority as outrageous because no state would ever punish the possession of one gram of a controlled substance as a felony. In fact, it would be rare for the state and federal statutory scheme to depart dramatically: "[t]he mere possibility that a case could fall into this small gap and lead to removal provides no ground for the court to depart from the plain meaning of § 924(c)(2)."[42] Justice Thomas explained that the majority's decision will more significantly affect state removal proceedings because federal law tends to treat possession of large quantities of a controlled substance more harshly than state law.[43] Regardless, Justice Thomas's reasoning did not sway the other eight justices.

III. IMPACT AND CONCLUSION

39. *Lopez*, 127 S. Ct. at 634 (Thomas, J., dissenting).
40. *Id*. at 635–36.
41. 21 U.S.C. § 844(a).
42. *Lopez*, 127 S. Ct. at 637 (Thomas, J., dissenting).
43. *Id.*

The Supreme Court's decision will affect many immigrants with drug related convictions. The Los Angeles Times reported, "[f]rom mid-1997 to May 2006, federal officials used the aggravated felony provisions to deport an estimated 156,713 people through court proceedings, according to the Transactional Records Access Clearinghouse."[44] Because so many immigrants are deported as a result of criminal convictions, the Court's ruling will provide some immigrants with the chance to file a cancellation of removal application. However, all immigrants will not be affected by the change in deportation procedures. "[The *Lopez v. Gonzales*] decision does not affect illegal immigrants, who can be deported simply by virtue of being in the United States. It also doesn't affect naturalized citizens, who are treated like all other citizens and cannot be deported for criminal convictions."[45] With respect to legal immigrants, the definition of "aggravated felony" has been revised to create consistency amongst the circuits. Automatic deportation will not be required if a legal immigrant is convicted of a possession offense in a state whose statutory scheme punishes the offense as a felony, as long as the offense in not also a felony under federal law.

This case represents the second time in two years that the highest court has overruled the executive branch's interpretation of an immigration law. In 2004, the Court held that driving under the influence was not a crime of violence that required automatic deportation.[46] Additionally, on December 5, 2006, the Supreme Court heard oral arguments in *Duenas-Alvarez v. Gonzales*, a case involving a Peruvian citizen who was found guilty under California law of aiding and abetting the theft of an automobile.[47] The Ninth Circuit overturned the automatic deportation order in *Duenas-Alvarez*, holding that the California offense does not categorically qualify as a "theft offense" because it punishes a broader class of theft than defined under federal law, 8 U.S.C. § 1101(a)(3)(G).[48] In *Lopez*, the Supreme Court held that federal law should be used to define what constitutes an aggravated felony. In deciding *Duenas-Alvarez*, the

44. David G. Savage, *Court Bars Automatic Deportation in Drug Cases,* L.A. TIMES, Dec. 6, 2006, at A1.

45. Bob Egelko, *Legal immigrants can fight drug-related deportations; High court rules state crimes not grounds for automatic expulsion,* S.F. CHRON., Dec. 6, 2006, at A16.

46. Leocal v. Ashcroft, 543 U.S. 1 (2004).

47. Duenas-Alvarez v. Gonzales, 176 F. App'x. 820 (9th Cir. 2006), *cert. granted*, 127 S. Ct. 35 (Sept. 26, 2006).

48. *Id.*

Court should be consistent, and hold that an over-inclusive state criminal statute cannot be used to require automatic deportation unless the conduct would have also been punishable "as a felony" under federal law.