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## LEGAL TRENDS

### U.S. Supreme Court Rules Noncitizens with Two or More Misdemeanor Possession Convictions are not Automatic Aggravated Felons

By Joy Sanders

The Supreme Court recently settled a split among the federal Courts of Appeals regarding whether a second or subsequent offense for simple possession of a controlled substance is an aggravated felony under immigration law. In its unanimous and much awaited decision in *Carachuri-Rosendo v. Holder*, Case No. 09-60, 560 U.S. \_\_\_, (June 14, 2010), the Court held that such an offense is not an aggravated felony unless the offense was actually prosecuted on the basis of a prior conviction. The case has a Houston connection, as the late Joseph A. Vail, founder of the University of Houston Immigration Clinic, initially pursued Carachuri-Rosendo's appeal.

Carachuri-Rosendo, who entered the U.S. as a lawful permanent resident at age five, was convicted in his mid-twenties of two misdemeanor drug possession offenses in Texas. He received 20 days in jail for possession of less than two ounces of marijuana, and later 10 days in jail for possession of one anti-anxiety tablet without a prescription. The federal government initiated removal proceedings and argued that Carachuri-Rosendo was not eligible for a form of relief from removal known as cancellation of removal, because his second state conviction was deemed to be a federal drug trafficking crime, thus rendering him an aggravated felon.

For immigration law purposes, a state conviction for simple possession is not a drug trafficking crime unless the offense would be a felony under federal law. Thus, a state conviction for simple possession is not typically a drug trafficking crime because simple possession is ordinarily a misdemeanor under federal law. However, if a possession offense is committed after a prior drug conviction has become final, the subsequent conviction may be deemed a drug trafficking crime (and thus an aggravated felony) as a federal recidivist felony under 21 U.S.C. § 844(a).

The government's conclusion that Carachuri-Rosendo's second conviction was an aggravated felony was based on application of its "hypothetical approach," whereby *any* subsequent state possession offense could automatically be deemed a drug trafficking aggravated felony, even if the state conviction was not enhanced based on any prior drug conviction. Because the state hypothetically could have pursued a recidivist enhancement, the subsequent conviction was deemed to be a felony under federal law.

The Court unanimously rejected the government's position and reversed the contrary decision of the Fifth Circuit in *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), as well as a similarly contrary decision of the Seventh Circuit. The Court articulated five reasons for rejecting the government's "hypothetical approach." First, the Court stated that the government's position is inconsistent with the text of the immigration statute. Because the law requires a noncitizen to be convicted of an aggravated felony, the conviction itself should be considered rather than what could have been charged. Second, the Court found that the government approach "fails to give effect to the mandatory notice and process requirements" of the federal recidivism statute. To pursue the recidivist enhancement, a federal prosecutor must elect to charge the existence of a prior conviction in the subsequent proceeding, and must meet procedural requirements including notice and an opportunity to challenge the validity of the prior conviction. The hypothetical approach thwarts prosecutorial discretion and dispenses with procedural safeguards that are fundamental to federal drug laws. Third, the Court observed that the Fifth Circuit's reliance on *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) in upholding the government's approach was based on a misreading of that decision, because in *Lopez*, the Court employed a categorical approach that focused on the conduct that was actually punished, rather than the punishment that could have been imposed. Fourth, the Court noted that common practice in federal courts is inconsistent with the Government's position, in that the type of offense involved here would almost never, if ever, be prosecuted as a felony in a federal court. Last, the Court referenced its decision in *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004), which provided that ambiguities in criminal statutes, where referenced in immigration law, are construed in

favor of the noncitizen.

The *Carachuri-Rosendo* decision clearly establishes that if there is no finding of a prior conviction in the record of the subsequent conviction, the latter conviction may not be deemed an aggravated felony. In addition, even where there is some finding of a prior conviction, the conviction must adhere to the requirements of the federal recidivist felony statute. For instance, the prior conviction must be final, and a categorical approach is to be applied in determining whether the state offense meets the components of the federal law. The Court did not reach the issue of whether the federal notice and process requirements must be met in the state proceeding; however, the decision evidences that such procedural requirements are significant. The Board of Immigration Appeals' earlier ruling determined that notice and an opportunity to be heard are minimally required.

Geoffrey Hoffman, director of the UH Immigration Clinic, served as one of Carachuri-Rosendo's attorneys along with law students and pro bono attorneys. Hoffman noted that because of the nationwide, binding precedent set by the Court, "thousands of immigrants and detainees are now potentially eligible to apply for relief from removal, where previously they were found ineligible as aggravated felons."

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