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SUPREME COURT TO CONSIDER WHETHER SECOND POSSESSION CONVICTION IS AN AGGRAVATED FELONY

Last week, the Supreme Court decided to hear an immigration case addressing whether a second drug possession conviction qualifies as an aggravated felony under INA § 101(a)(43)(B) ("drug trafficking crime"). The specific question before the Court is "Whether a person convicted under state law for simple drug possession (a federal law misdemeanor) has been 'convicted' of an 'aggravated felony' on the theory that he could have been prosecuted for recidivist simple possession (a federal law felony), even though there was no charge or finding of a prior conviction in his prosecution for possession." The case is *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *cert. granted*, 2009 U.S. LEXIS 9024 (U.S. Dec. 14, 2009) (09-60).

The petitioner in the case is an LPR who has lived in the US since he was four years old. He was convicted of possession of marijuana and then possession of Xanax. For this second offense, he was not prosecuted under Texas law as a recidivist, and the court sentenced him to only ten days in jail. Nonetheless, the Fifth Circuit held that petitioner's second possession offense is an aggravated felony because he could have been punished as recidivist, and thus he is ineligible for cancellation of removal.

This case follows from the Supreme Court's 2006 decision, *Lopez v. Gonzales*, 549 U.S. 47 (2006), involving a single drug possession conviction. In *Lopez*, the Court held that drug possession convictions that are state felonies, but would not be punishable as felonies under federal law, are not aggravated felonies under the INA. After *Lopez*, a circuit split developed regarding whether a second possession conviction is an aggravated felony where the person did not receive a felony sentence under a recidivist sentencing enhancement.

The majority of circuits to decide the issue – the First, Second, Third, and Sixth Circuits – have said that a person convicted a second time for simple possession has not been convicted of an aggravated felony in the absence of any recidivism finding in the proceedings

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FIRST CIRCUIT REJECTS BIA MANDATORY DETENTION PRECEDENT, *MATTER OF SAYSANA*

The First Circuit rejected the BIA's decision *Matter of Saysana*, 24 I&N Dec. 602 (BIA 2008). In this case, the BIA held that the mandatory detention provision, INA § 236(c), applies to any person with a qualifying conviction who was released from any non-DHS custody after the provision's effective date (October 9, 1998), regardless of whether the custody related to the qualifying conviction. *See Saysana v. Gillen*, No. 09-1179 (1st Cir. Dec. 22, 2009) http://www.ca1.uscourts.gov/cgi-bin/getopn.pl?OPINION=09-1179P.01A. The First Circuit disagreed with this interpretation. Instead, it ruled that the statute only contemplates mandatory detention following release from non-DHS custody that relates to the qualifying offense specified in the statute, not merely any release from any non-DHS custody. Further, the court held that even if the statute were ambiguous, the Board's interpretation was not a reasonable one.

NEW LITIGATION RESOURCES

Decisions on Motions to Suppress. The Legal Action Center recently posted a new Litigation Issue Page on our Clearinghouse website entitled, "Enforcement, Motions to Suppress." The page includes IJ and BIA decisions on motions to suppress filed by respondents in removal proceedings. http://www.legalactioncenter.org/clearinghouse/litigation-issue-pages/enforcement-motions-suppress

IJ Jurisdiction Over Bond Hearing Following Transfer. The National Immigration Project of the National Lawyers Guild recently issued a practice advisory entitled, "Immigration Court Jurisdiction to Conduct Bond Hearings Regardless Whether DHS Transfers Respondent After the Hearing Request is Filed." The advisory includes a model brief, sample bond hearing applications, and sample letters to DHS. The model brief argues that 8 C.F.R. § 1003.19(c) should be interpreted, consistent with its intent, to allow bond hearings to go forward even after a person is transferred. See http://www.nationalimmigrationproject.org/PA_IMM_CRT_CONDUCT_BOND_HEARING.pdf

Supreme Court Possession Case Continued

before the convicting court. In contrast, the Fifth Circuit and the Seventh Circuits have reached the opposite conclusion, finding that a second possession charge qualifies as an aggravated felony regardless of whether there was any recidivism finding by the convicting court. The BIA, agreeing with the majority approach, issued a precedent decision in petitioner Carachuri-Rosendo's case. *See Matter of Carachuri-Rosendo*, 24 I&N Dec. 382 (BIA 2007). The BIA, however, refused to apply its holding to the petitioner, finding it was bound by adverse Fifth Circuit law.

The Supreme Court is likely to hear arguments in this case next spring and issue a decision before the summer break. Find links to the documents in this case and read about other immigration cases before the Supreme Court at the Legal Action Center's Supreme Court Update page, http://www.legalactioncenter.org/supreme-court-update.

RES JUDICATA MAY BAR GOVERNMENT FROM INITIATING SECOND REMOVAL CASE

In a recent unpublished decision, an IJ terminated removal proceedings, finding that res judicata precluded the government from initiating removal proceedings where the IJ already had decided the issues in prior proceedings. See http://drop.io/9lbm9zi. This case serves a reminder that when the government seeks to reopen a case or initiate a second removal case against the same person, the respondent may have arguments that res judicata applies. Although 8 C.F.R. § 1003.30 says the government may lodge additional charges "[a]t any time during … proceedings," some courts have found that after removal proceedings are complete, res judicata operates to bar the government from relitigating an issue already decided or one that could have been raised in proceedings. Unfortunately, not all courts agree about res judicata's application in immigration proceedings. The following cases provide some guidance on how the courts view this issue:

Favorable Cases: *Al Mutarreb v. Holder*, 561 F.3d 1023 (9th Cir. 2009); *Bravo-Pedroza v. Gonzales*, 475 F.3d 1358 (9th Cir. 2007); *Guevara v. Gonzales*, 450 F.3d 173 (5th Cir. 2006)

Adverse Cases: *Channer v. DHS*, 527 F.3d 275 (2d Cir. 2008); *Alvear-Velez v. Mukasey*, 450 F.3d 672 (7th Cir. 2008); *Valencia-Alvarez v. Gonzales*, 469 F.3d 1319 (9th Cir. 2006); *Magasouba v. Mukasey*, 543 F.3d 13 (1st Cir. 2008)

NEW AT THE LAC …

District Court Jurisdiction to Consider Denial of Adjustment of Status. *Vaso v. Homeland Sec Agcy Dir, et al.*, No. 09-1988 (3d Cir. *amicus brief submitted* Dec. 18, 2009). The LAC submitted a brief addressing the district court's jurisdiction to review USCIS's denial of an application for adjustment of status. The LAC argues (1) district courts can review claims regarding statutory eligibility for benefits specified in § 242(a)(2)(B)(i); and (2) § 242(a)(2)(D) expands the court of appeals' jurisdiction and in no way limits district court jurisdiction over legal and constitutional questions. If you have a case raising § 242(a)(2)(D)'s effect on district court jurisdiction, please contact the Legal Action Center at clearinghouse@immcouncil.org.

Post Departure Motions to Reopen. *Pruidze v. Holder*, No. 09-3836 (6th Cir. *amicus brief submitted* Dec. 16, 2009). The LAC and the National Immigration Project of the National Lawyers Guild submitted an amicus brief arguing that the regulatory bar to motions to reopen after a person has departed the U.S. conflicts with the statute. If you have a case challenging the post departure bar, please email us at clearinghouse@immcouncil.org.

FIFTH CIRCUIT VACATES DECISION, FOLLOWS SUPREME COURT'S "CRIME OF VIOLENCE" ANALYSIS

The Fifth Circuit vacated a removal order and reversed its prior decision that unauthorized use of a vehicle (UUV) under Texas law is a crime of violence. The court found that it was bound by *Chambers v. United States*, 129 S. Ct. 687 (2009), in which the Supreme Court held that "the generic crime of violence or aggravated felony must itself involve purposeful, violent and aggressive conduct." *See Serna-Guerra v. Holder*, No. 07- 60634, 2009 U.S. App. LEXIS 26641 (5th Cir. 2009). The court found that UUV "has no essential element of violent and aggressive conduct."

Initially, the court of appeals, relying on its prior law that UUV is a crime of violence, had found that the petitioner was removable under 8 U.S.C. § 1227(a)(2)(A)(iii) (aggravated felony conviction). Thereafter, the petitioner sought Supreme Court review, and the Court remanded the case to the Fifth Circuit for further consideration in light of *Chambers*.

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