

Representing Noncitizens Charged With Drug Possession Offenses: The U.S. Supremes Let In A Little Light

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In December 2006, the U.S. Supreme Court, decided *Lopez v. Gonzales*, 127 S. Ct. 625; 2006 U.S. LEXIS 9442 (Dec. 5, 2006). The case resolved a conflict between the federal circuit courts about whether first-time state felony drug possession offenses could constitute “aggravated felonies” under immigration law. The Court rejected the government’s long-held position and held that they could not.¹ The Court left open whether a second drug possession conviction would constitute an aggravated felony under immigration law. Since the controlling Ninth Circuit caselaw is unclear (and unfavorable), practitioners cautioned to be aware that the analysis contained in this article does not extend to second possessory cases.

Classification of an offense as an aggravated felony under 8 U.S.C. 1101(a)(43) subjects a noncitizen to the harshest immigration consequences, including virtually certain deportation, ineligibility for almost all forms of “relief” from deportation, mandatory detention, and sentence enhancements for illegal reentry after deportation prosecution. Consequently, the *Lopez* decision is significant. It is important to note, however, that any conviction akin to a federal “trafficking offense, remains an aggravated felony under immigration law.”²

In light of *Lopez*, it seems appropriate to review some of the most important practice tips for representing noncitizens charged with simple possession and other minor drug offenses.

1. A conviction for even a minor drug offense, such as simple possession under RCW 69.50.4013, including attempt or conspiracy to possess, will trigger deportation and render a noncitizen inadmissible under the controlled substances violations grounds (even if they have lawful immigration status) unless they come within the *Lujan-Armendariz* exception articulated below.³

2. There is an exception for one conviction of simple possession of less than 30 grams of marijuana. A noncitizen is not deportable and a waiver of inadmissibility under 8 USC § 1182(h) may be available.⁴ However, since RCW 69.50.4014 is simple possession of less than 40 grams of marijuana, it is imperative that defense counsel plead with specificity and make sure that the plea statement—and charging document and judgment and sentence if possible—clearly reflect that the defendant possessed an amount less than 30 grams.

3. If there are no prior controlled substance convictions, the Ninth Circuit’s *Lujan-Armendariz* decision states that a first conviction for simple possession (felony or misdemeanor including attempt or conspiracy to possess) that is eliminated under a state rehabilitative scheme will be deemed eliminated for immigration purposes.⁵

¹ Two important exceptions to this rule are cases that involve more than five grams of crack cocaine or any amount of flunitrazepam See 21 U.S.C. 844(a).

² Importantly, a conviction for solicitation to deliver under 9A. 28.030 is *not* an aggravated felony.

³ See 8 U.S.C. § 1182(a)(2)(A); 1227(a)(2)(B)(ii).

⁴ See 8 U.S.C. 1182(h).

⁵ *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000), the exception is based on the Federal First Offender Act (FFOA), see 18 USC § 3607. This is also true if the first conviction is for an **offense less serious** than simple possession that is not analogous to a federal drug offense (e.g. being under the influence or possessing paraphernalia). See *Cardenas-Urriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

Numerous types of Washington State rehabilitative relief will qualify a noncitizen to fall within the Lujan-Armendariz rule including:

- Deferred Imposition of Sentence Dispositions;
- Drug Court Agreements: Note that the offense for which the defendant was permitted to enter into drug court must be a qualifying offense. Thus, drug court dispositions will not fall under the Lujan-Armendariz rule if the offense was for some other type of crime (e.g. theft offense) related to drug addiction;
- Expungements pursuant to RCW 9.94A.640 and RCW 9.96.060.

However, this outcome (ie. that the offense is not a deportable conviction for immigration purposes) is only ensured where the defendant has actually obtained the rehabilitative relief and completed whatever process is required (e.g., drug court or deferred sentence probationary conditions) prior to the initiation of removal/deportation proceedings.⁶ Thus, the person must remain in the country and have no contact with immigration authorities until the deferral is successfully completed. Defense counsel should negotiate for the shortest deferral period possible and advise clients to return for possible early dismissal as soon as possible.

4. Paraphernalia offenses under RCW 69.50.412(1), are considered controlled substance violations under immigration law.⁷ However, if this is a noncitizen's first time drug offense, s/he may fall within the Lujan-Armendariz exception analyzed above.⁸

5. Solicitation to Possess under RCW 9A.28.030: The Ninth Circuit has held that this offense is neither a controlled substance violation nor a drug trafficking aggravated felony under immigration law.⁹ If a defendant has lawful immigration status (e.g. a greencard or refugee status), a conviction for solicitation to possess (or deliver) will avoid deportation.

6. Given the complexity of the law and what is at stake, especially for noncitizens with lawful status, it is imperative to consult with competent immigration counsel to ensure that the immigration consequences of a chosen alternative will create the least possible immigration consequences. WDA's Immigration Project is available to provide case-by-case analysis and technical support to defenders representing noncitizen defendants. For contact information and additional resources, please go to www.defensenet.org.

⁶ See *Chavez-Perez v. Ashcroft*, 386 F.3d 1284; (9th Cir. 2004).

⁷ *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000).

⁸ *Cardenas-Uriarte v. INS*, 294 F.3d 1132 (9th Cir. 2000).

⁹ See *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997); *Leyva-Licea v. INS*, 187 F.3d 1147(9th Cir. 1999).