

**THE SENTENCING IMPACT OF LOPEZ V. GONZALEZ**  
**by Kevin R. Blackwell and Martin Richey<sup>1</sup>**

On December 5, 2006, the United States Supreme Court decided *Lopez v. Gonzalez*,<sup>2</sup> which held that state drug convictions for conduct treated as a felony by the state, but as a misdemeanor under the federal Controlled Substances Act (CSA)<sup>3</sup>, do not constitute aggravated felonies under the Immigration and Nationality Act.<sup>4</sup> The Court’s decision in *Lopez* will affect federal sentencing practice under the illegal re-entry guideline (Unlawfully Entering or Remaining in the United States, §2L1.2<sup>5</sup>) of the United States Sentencing Commission’s Sentencing Guidelines. There were 11,057 offenders sentenced under this guideline in fiscal year 2006, which represents 16.8 percent of all offenders sentenced in the federal system in that fiscal year.<sup>6</sup> This paper examines the anticipated impact of *Lopez* on average sentence length for offenders sentenced under §2L1.2.

**Definition of “Aggravated Felony”**

The designation of an offense as an “aggravated felony”<sup>7</sup> has both civil and criminal consequences for aliens. Under federal criminal law, a conviction for an aggravated felony subjects an alien who unlawfully re-enters the United States to an enhanced statutory maximum penalty<sup>8</sup> and to an 8-level enhancement under the sentencing guidelines<sup>9</sup>. The guidelines define “aggravated felony” by ascribing to it “the same meaning given that term in [8 U.S.C. §

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<sup>2</sup> *Lopez v. Gonzalez*, 549 U.S. \_\_\_, 127 S.Ct. 625 (2006).

<sup>3</sup> 21 U.S.C. § 801 *et seq.*

<sup>4</sup> 8 U.S.C. 1101 *et seq.*

<sup>5</sup> See the United States Sentencing Commission’s Guideline Manual (November 1, 2007).

<sup>6</sup> See the United States Sentencing Commission’s *2006 Sourcebook of Federal Sentencing Statistics* (2006).

<sup>7</sup> The Immigration and Nationality Act defines the term “aggravated felony” at 8 U.S.C. § 1101.

<sup>8</sup> An offender convicted of 8 U.S.C. § 1326(b)(2) is subject to having the statutory maximum increased from 10 years to 20 years.

<sup>9</sup> An enhancement under the guideline structure increases the offense level of the offender above the base offense level set for the offense. See United States Sentencing Commission’s Guidelines Manual (November 1, 2007) at §2L1.2(b)(1)(C). Offenders sentenced under this guideline are subject to a base offense level of 8. An offender with a base offense level of 8 and no or minimal criminal history has a guideline range of 0 to 6 months. The addition of an 8-level enhancement would increase the offense level of the offender to 16, which carries a guideline range of 21-27 months.

1101(a)(43)].”<sup>10</sup>

Issues of statutory interpretation have arisen under several provisions of 8 U.S.C. § 1101(a)(43) in both the immigration and sentencing contexts. One such issue involves § 1101(a)(43)(B), which designates certain controlled substance offenses as aggravated felonies:

- (43) The term “aggravated felony” means—
  - (B) illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18).

Title 18 U.S.C. § 924(c), in turn, defines a “drug trafficking crime,” in pertinent part, as “any felony punishable under the Controlled Substances Act[.]”

### **The *Lopez* Decision**

Prior to *Lopez*, most courts interpreted “any felony punishable under the CSA” to include any state drug offense labeled a felony by the state and involving conduct punishable under the CSA, regardless of whether the conduct was punishable *as a felony* under the CSA.<sup>11</sup> Under this interpretation, simple drug possession (which in many states is considered a felony, but in almost all instances is considered a misdemeanor under the CSA<sup>12</sup>) was considered a “drug trafficking crime” under 8 U.S.C. § 1101(a)(43)(B), and therefore an aggravated felony. The minority view held that in order to constitute an “aggravated felony,” the state conviction must have been for conduct that would constitute a felony under the CSA.<sup>13</sup>

Rejecting the majority circuit court view, the Supreme Court, in an 8-1 decision, held that a state drug offense is an “aggravated felony” under 8 U.S.C. § 1101(a)(43)(B) only if the offense proscribes conduct punishable as a felony under the CSA. In reaching this conclusion, the Court focused on Congress’ use of the term “illicit trafficking” at the beginning of section 1101(a)(43)(B). In the Court’s view, “trafficking” connotes commercial dealing, which is not an element of state felony offenses which prohibit mere possession. Trafficking, the Court said,

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<sup>10</sup> Guidelines Manual, §2L1.2, Application note 3(A).

<sup>11</sup> See *United States v. Wilson*, 316 F.3d 506 (4<sup>th</sup> Cir. 2003); *United States v. Ibarra-Galindo*, 206 F.3d 1337 (9<sup>th</sup> Cir. 2000); *United States v. Pornes-Garcia*, 171 F.3d 142 (2<sup>nd</sup> Cir. 1999); *United States v. Simon*, 168 F.3d 1271 (11<sup>th</sup> Cir. 1999); *United States v. Hinojosa-Lopez*, 130 F.3d 691 (5<sup>th</sup> Cir. 1997); *United States v. Briones-Mata*, 116 F.3d 308 (8<sup>th</sup> Cir. 1997); *United States v. Cabrera-Sosa*, 81 F.3d 998 (10<sup>th</sup> Cir 1996); *United States v. Restrepo-Aguilar*, 74 F.3d 361 (1<sup>st</sup> Cir. 1996)

<sup>12</sup> Recidivist provisions aside, the CSA treats the simple possession of any controlled substance as a misdemeanor with the exception of cocaine base in excess of five grams and flunitrazepan (see 21 U.S.C. § 844(a)).

<sup>13</sup> See *United States v. Palacios-Suarez*, 418 F.3d 692 (6<sup>th</sup> Cir 2005).

should be given its ordinary meaning, and should not be read to include simple possession absent a clear indication from Congress that it intended such an unorthodox definition.<sup>14</sup>

## Sentencing Guidelines Implications

Offenders who are convicted of illegal re-entry<sup>15</sup> into the United States are sentenced under the federal sentencing guideline covered in §2L1.2.

This guideline provides for a base offense level of 8<sup>16</sup> and a graduated Specific Offense Characteristic (§2L1.2(b)) which increases the offense level for offenders from 4<sup>17</sup> to 16<sup>18</sup> levels based on the number and type of prior convictions of the offender.

As a result of the Court's decision in *Lopez*, the §2L1.2(b)(1) aggravated felony enhancement will not apply to state felony drug convictions where the underlying conduct would not constitute a felony under the federal Controlled Substances Act. Before the *Lopez* decision, an offender whose prior criminal history consisted solely of a simple drug possession conviction that was considered an aggravated felony would receive an 8-level enhancement under §2L1.2(b)(1)(C). After *Lopez*, such a prior offense will be considered "any other felony" under §2L1.2(b)(1)(D)<sup>19</sup> and will receive only a 4-level enhancement. In most cases, this will reduce the offender's sentencing range from 21-27 months to 10-16 months, a 52 percent decrease considering the bottom of the range.

Not all offenders with a previous conviction for simple possession would be affected by the *Lopez* decision. If the offender's prior criminal history includes other convictions which warrant a greater enhancement under §2L1.2(b)(1)(A)-(C), then *Lopez* will have no effect on the

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<sup>14</sup> *Lopez*, 127 S.Ct. at 629-32.

<sup>15</sup> Offenders convicted of illegal re-entry are mostly convicted of 8 U.S.C. § 1325(a) (second or subsequent offense) or 8 U.S.C. § 1326.

<sup>16</sup> A base offense level of 8 provides for a range of incapacitation of 0-6 months for an offender under Criminal History Category I to 18-24 months for an offender under Criminal History Category VI.

<sup>17</sup> A base offense level of 8 and an SOC addition of 4 levels gives the offender an offense level of 12. An offender with an offense level of 12 has a range of incapacitation of 10-16 months for an offender under Criminal History Category I to 30-37 months for an offender under Criminal History Category VI.

<sup>18</sup> A base offense level of 8 and an SOC addition of 16 levels gives the offender an offense level of 24. An offender with an offense level of 24 has a range of incapacitation of 51-63 months for an offender under Criminal History Category I to 100-125 months for an offender under Criminal History Category VI.

<sup>19</sup> Under §2L1.2(b)(1)(C), a conviction for an aggravated felony calls for an eight level enhancement; §2L1.2(b)(1)(D) calls for a four level enhancement for a conviction for any other felony not covered in §2L1.2(b)(1)(A)-(C).

offense level calculation.<sup>20</sup>

### **Sentence Length Impact**

To assess the impact of *Lopez* on average sentence length in unlawful reentry cases, Commission staff examined a random sample of cases sentenced under §2L1.2 during fiscal year 2006. This sample included 1,911 of the 11,057 offenders sentenced under §2L1.2 in which the Commission received all documentation, a 17.3 percent random sample. Of the 1,911 cases in the sample, 218 were identified as cases in which the offender received an 8-level enhancement under §2L1.2(b)(1)(C) on the basis of a simple possession conviction. Of the 218 cases identified in which a simple possession conviction triggered the 8-level enhancement, 145 (62.8 percent) would receive a 4-level increase after the *Lopez* decision<sup>21</sup>. These 145 cases, which would receive only a 4-level enhancement, represent 37.8 percent of all cases that received an 8 level enhancement in the sample, and 7.6 percent of all cases in the sample.

In order to assess the impact of the *Lopez* decision, these 145 cases were hypothetically “re-sentenced,” by assessing a four level enhancement as opposed to an eight level enhancement to each offender’s base offense level. Based on this new offense level, a new sentence of incarceration was calculated for each offender using the Sentencing Guidelines. The primary assumption incorporated into the “re-sentencing” of offenders is that offenders are re-sentenced to a position in the estimated new guideline range that is equivalent to the position of the sentence in the original guideline range.

This “re-sentencing” resulted in a decrease in sentences for the 145 offenders affected by *Lopez*. The average sentence for these offenders decreased from 18.1 months to 8.0 months (a 55.8 percent decrease). Incorporating this decrease into the entire sample of 1,911 cases, the average sentence length (for the entire sample, including those unaffected by the *Lopez* decision) decreased from 26.7 months to 25.9 months (a 3.0 percent decrease).

This analysis shows that the *Lopez* decision will have a significant effect on the length of sentences for approximately 7.6 percent of offenders sentenced under §2L1.2, one of the most frequently applied guidelines in the federal system. If it can be assumed that the *Lopez* decision will affect the entire population of cases sentenced under §2L1.2 as it affected the random sample, it is estimated that the *Lopez* decision will affect approximately 840 offenders per fiscal year.

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<sup>20</sup> Moreover, the CSA contains recidivist provisions which treat second and subsequent simple possession offenses as felonies (see 21 U.S.C. §844(a)).

<sup>21</sup> The remaining 73 offenders would still receive the 8-level enhancement, as their simple possession convictions were “possession with intent to distribute” convictions.