

The Aggravation Continues

By Jennifer M. Chacón

In a previous column, I wrote about the oral argument in the Supreme Court case of *Carachuri-Rosendo v. Holder*, 2010 DJDAR 8882. In that case, a long-time lawful permanent resident was appealing the 5th Circuit's conclusion that he was ineligible for relief from deportation in the form of cancellation of removal because he had been convicted of an "aggravated felony." Jose Carachuri-Rosendo's conviction involved a 10-day sentence for a misdemeanor drug offense, but because it was his second offense, he could have been prosecuted (had the Texas prosecutor so chosen) as a recidivist. The prosecutor in his case did not choose to apply the recidivist provision.

Under federal law, he also could have been charged as a recidivist, and if convicted as one, he would have been guilty of a felony punishable by a sentence of as high as two years. Such a conviction would be an "aggravated felony" as defined by the Immigration and Nationality Act. The Supreme Court sought to determine "whether the mere possibility, no matter how remote, that a [two]-year sentence might have been imposed in a [hypothetical] federal trial is a sufficient basis for concluding that a state misdemeanant who was not charged as a recidivist [in state court] has been 'convicted' of an 'aggravated felony' within the meaning of Section 1229b(a)(3)."

On June 14, the Supreme Court unanimously answered this question in the negative, and held that Carachuri-Rosendo's misdemeanor conviction for minor drug possession did not warrant classification as an "aggravated felony." The Court's decision in *Carachuri-Rosendo* is fairly straightforward. The Court stressed that "[t]he prosecutor in Carachuri-Rosendo's case declined to charge him as a recidivist," and concluded that "[h]e has, therefore, not been convicted of a felony punishable under the Controlled Substances Act."

While this does not guarantee Carachuri-Rosendo the opportunity to remain in the United States — his offense still makes him removable, and indeed, he has conceded that he is removable — the ruling does give him an opportunity to argue to an immigration judge that he should be granted relief from removal. If he were to pursue this argument, Carachuri-Rosendo would presumably point to the positive equities of his case, including his long-time residence in the United States, his extensive family ties, and the relatively minor nature of his offenses. Under the immigration statute, he will need to establish that his deportation would cause severe and unusual hardship to his U.S. citizen family members.

The *Carachuri-Rosendo* case serves as a sort of bookend to the Supreme Court's 2006 decision in *Lopez v. Gonzales*, 549 U. S. 47, 56 (2006). In that case, the Supreme Court determined that in order to be an "aggravated felony" for immigration law purposes, a state drug conviction must be punishable as a felony under federal law. The Court reasoned that "a state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it proscribes conduct punishable as a felony under that federal law."

Taken together these cases provide important guidance to immigration courts seeking to determine the applicability of the aggravated felony provision of the Immigration and Nationality Act in cases involving state court drug offenses. Specifically, the court should look to the state court conviction to determine whether the drug offense for which the noncitizen actually was convicted would have been punishable as a felony under the federal Controlled Substance Act. If the answer is no, the *Lopez* decision makes clear that the conviction does not qualify as an aggravated felony for immigration purposes. If the answer is that the defendant could have been — but was not — convicted of a greater offense that would have qualified as an aggravated felony, the *Carachuri-Rosendo* decision makes clear that this fact is insufficient to elevate the offense to an aggravated felony for immigration purposes. The court must look to the actual conviction, not to any possible convictions that might have been possible.

These two cases cover just one small subsection of the Immigration and Nationality Act's aggravated felony definition. But that definition spans pages and consists of 21 separate subsections. Some subsections of the aggravated felony definition require the interpretation of what Justice John Paul Stevens characterized in his majority opinion in *Carachuri-Rosendo* as a "maze of statutory cross-references."

The Supreme Court has had the opportunity to review several of the other subsections of the aggravated felony definition in recent years. *Leocal v. Ashcroft*, 543 U. S. 1 (2004), discussed the aggravated felony subsection premised on convictions for a "crime of violence" as defined by 18 U.S.C. Section 16. *Nijhawan*

v. Holder, 2009 DJDAR 8553, addressed the extent to which courts could look to the record of conviction to determine whether the harm to the victim exceeded \$10,000 as required by the aggravated felony subsection dealing with fraud crimes. Many other provisions of the aggravated felony provisions have been analyzed and applied by lower courts, and many of these discussions involve navigating the complex patchwork of cross-references mentioned by Justice Stevens in the *Carachuri-Rosendo* decision.

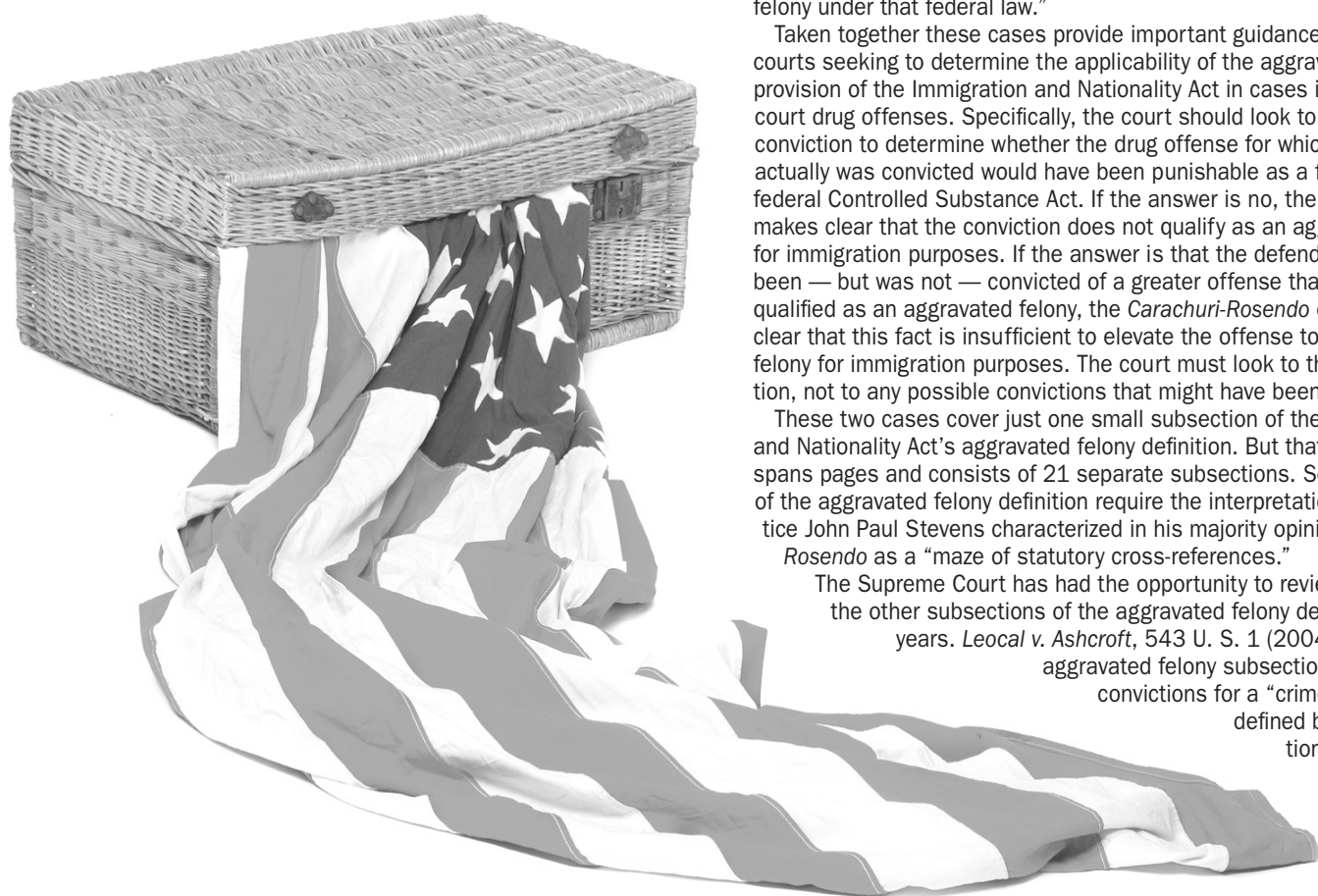
While courts work their way through the fine points of the aggravated felony definition, the lives of many lawful permanent residents are upended. Hundreds of noncitizens were deemed ineligible for cancellation of removal and ultimately removed from the country for driving under the influence before the Supreme Court determined that this offense was not a "crime of violence" for purposes of the aggravated felony definition. Most of those people have never been able to return. The Supreme Court's decision in *Carachuri-Rosendo* indicates in footnote eight that the very man whose case they were favorably deciding had already been removed from the country pending his successful appeal. This presumably had a disruptive effect not only on his life, but on the lives of his citizen family members as well.

How is the noncitizen to learn of the immigration consequences of the choices he makes when faced with criminal charges? The Supreme Court decisions of the past few years point to the unfortunate fact that in many cases, the law will be unsettled and unclear. Some noncitizens therefore will continue to be subjected to removal even when they have meritorious claims to remain.

But even where the law is clear, a noncitizen is often not well-positioned to figure out the law for herself. Thus, effective assistance of counsel at the stage of the criminal trial is critically important to the noncitizen concerned with the collateral immigration consequences of a criminal proceeding. Recognizing this, the Supreme Court recently held in *Padilla v. Kentucky*, 2010 DJDAR 4858, that defense lawyers are required by the Sixth Amendment to warn a defendant when his plea agreement is likely to have adverse immigration consequences. This ruling has had tremendous implications for defense counsel, which I will explore in my next column.

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