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Justices Ponder Conditions for Automatic Deportation

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WASHINGTON, Oct. 3 – The intersection of federal criminal law and immigration law is a perilous place for the millions of legal residents of the United States who are not citizens: one slip, one criminal conviction, can mean deportation.

The justices of the Supreme Court struggled, during the first argument of their new term on Tuesday, to understand exactly how the two statutory frameworks intersect.

The question, posed by two separate cases that were consolidated for a single argument, was whether immigration officials can treat an immigrant's state-court conviction for possession of a small quantity of illegal drugs as an "aggravated felony" as long as the crime is considered a felony under the state law, even if federal law treats the same conduct as only a misdemeanor.

Conviction of an "aggravated felony" has dire consequences for a noncitizen, including automatic deportation without the usual rights of appeal and a permanent bar against returning to the United States.

Congress added the category of aggravated felony to federal immigration law in 1988, and it includes a number of specific offenses. Among them is a "drug trafficking crime" that in turn is defined as "any felony punishable under the Controlled Substances Act," the basic federal drug law. Does a particular drug crime that is a felony under the law of a state become a "felony punishable under the Controlled Substances Act," even if federal law would treat it only as a misdemeanor?

Although the government's position has shifted over time, its current view is that the answer is yes. The law of the "jurisdiction of conviction," Deputy Solicitor General Edwin S. Kneedler told the court, is what determines whether the crime is an aggravated felony.

Lawyers for two lawful permanent residents caught up in this statutory maze argued the opposite. "State felonies are not themselves punishable under the Controlled Substances Act," Robert A. Long Jr., representing José Antonio López, told the court. "It is not a federal crime to violate state law," he added.

Mr. López, a native of Mexico who became a permanent legal resident in 1990, pleaded guilty in a South Dakota court in 1997 to "aiding and abetting possession of cocaine," a felony under South Dakota law for which he served 15 months in prison. Under federal law, a first offense of possessing cocaine is a misdemeanor.

At the time, the Board of Immigration Appeals took the position that a drug crime that was not a federal felony could not be considered an "aggravated felony." While the non-aggravated-drug conviction made Mr. López deportable, it left officials with the discretion to treat him leniently, including granting him a "cancellation of removal."

But while his case was pending before an immigration judge, the Board of Immigration Appeals changed its position and ruled that a state-law drug felony was an aggravated felony. Mr. López lost his final appeal last year before the United States Court of Appeals for the Eighth Circuit, in St. Louis. He was deported to Mexico in January. His Supreme Court appeal is López v. Gonzales, No. 05-547.

The other case before the court, Toledo-Flores v. United States, No. 05-7664, was brought by another Mexican, Reymundo Toledo-Flores. He was convicted in Texas of possession of 0.16 grams of cocaine, less than six one-thousandths of an ounce, a felony under Texas law. He lost an appeal before the United States Court of Appeals for the Fifth Circuit, in New Orleans, and was deported in April.

As is often the case with questions of statutory interpretation, the argument on Tuesday was dense, dry and technical. But the human dilemmas created by the government's current interpretation have drawn considerable attention to the case.

Dozens of civil rights and criminal defense groups signed briefs on the immigrants' behalf, as did the American Bar Association and three men who served as general counsels of the Immigration and Naturalization Service under Presidents Bill Clinton and George W. Bush.

The former officials' brief said that "because the 'aggravated felony' categorization has such sweeping consequences and essentially eliminates the capacity of the immigration enforcement system to differentiate among individual circumstances," it should apply only when Congress has been completely clear.

Several justices found the language less than clear. Referring to the phrase "any felony punishable under the Controlled Substances Act," Justice Stephen G. Breyer said to Mr. Kneedler, the government's lawyer, "I could look at those words a thousand times and not have a clue" whether the law covers state felonies that are only federal misdemeanors.

Justice Ruth Bader Ginsburg observed that "it seems to me unseemly" that "because of the happenstance of the states in which they were convicted," one immigrant could be "barred from ever coming back" while another who committed the identical offense would not be.

Mr. Long, the lawyer for Mr. López, agreed with the observation. He said the government's interpretation would permit individual states to "banish" immigrants by labeling minor offenses as felonies.

Part of the argument was spent debating whether, for technical reasons, Mr. Toledo-Flores's appeal was moot, as the government argued. His lawyer, Timothy Crooks, said the case was not moot because under the conditions of his "supervised release" in Mexico, Mr. Toledo-Flores must observe certain rules, including abstention from alcohol.

Justice Antonin Scalia replied that this was not a burden with sufficient real consequences to keep the case alive.

"Nobody thinks your client is really, you know, abstaining from tequila down in Mexico," Justice Scalia said.