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**Practice Advisory on *Carachuri-Rosendo v. Holder*, June 17, 2010**

**Introduction**

On June 14, 2010, the U.S. Supreme Court issued its unanimous decision in Carachuri-Rosendo v. Holder, No. 09-60, 2010 U.S. LEXIS 4764 (June 14, 2010), a case that affects many immigrants convicted of drug offenses. This memo is intended to explain how the case affects immigrants in Massachusetts.

**What you need to know**

The Carachuri-Rosendo case clarifies the meaning of a “drug trafficking crime,” which is a type of aggravated felony. An aggravated felony is the most serious type of offense in the immigration context. It bars an immigrant from nearly all defenses to deportation, and subjects immigrants to nearly automatic deportation, mandatory detention, and permanent exile from the U.S. The Supreme Court held that a second conviction for drug possession, where the defendant was not tried or sentenced as a subsequent offender, did not qualify as a drug trafficking crime under 8 U.S.C. §1101(a)(43)(B), and thus was not an aggravated felony. This decision overturns case law in the Fifth Circuit (the originating circuit for the Carachuri-Rosendo case) and the Seventh Circuit.

*This case does not change the consequences to immigrants who are in removal proceedings in Massachusetts, because the First Circuit made the same holding four years ago in Berhe v. Gonzales, 464 F.3d 74, 85 (1<sup>st</sup> Cir. 2006). However, the Carachuri-Rosendo case may still affect immigrant defendants in Massachusetts because Immigration & Customs Enforcement frequently transfers its detainees to detention facilities in other states while they are in removal proceedings.*

After the Carachuri-Rosendo and Berhe cases, the following drug offenses are considered aggravated felonies:

- Drug trafficking;
- Possession with intent to distribute;
- Distribution of drugs;
- Manufacturing drugs;
- Possession of flunitrazepam or more than 5 grams of a cocaine-based drug;
- A second or subsequent drug possession *if the prior conviction is part of the record*. See G.L.c. 94C, §34. (It is unclear at this point if the prior conviction needs to be alleged and proven, or if it is sufficient for the prior conviction to simply appear anywhere in the record of conviction. Thus, to avoid an aggravated felony on this basis, nothing in the complaint or indictment, docket sheet, plea colloquy, admission, jury instructions, or sentencing reports should refer to a prior drug conviction).

The only drug offense that is not an aggravated felony is simple possession (except for flunitrazepam and more than 5 grams of cocaine). This includes situations in which the defendant has more than one conviction for possession. *Notwithstanding this, an immigrant who has been convicted of drug possession is still deportable under 8 U.S.C. §1227(a)(2)(B) as one who has been convicted of a controlled substance violation (except if it is a single offense for possession of 30 grams or less of marijuana)*. Carachuri-Rosendo does not change that. But since that immigrant is no longer considered an aggravated felon, he may be eligible for defenses to deportation.

### **Background and Details**

Mr. Carachuri-Rosendo was a thirty-two-year-old permanent resident of the U.S. who lived in Texas from the age of five. In 2004, he was convicted of possessing less than two ounces of marijuana, a misdemeanor, and was sentenced to 20 days of imprisonment. In 2005, he was convicted of possessing one tablet of Xanax, another misdemeanor. The prosecutor elected not to pursue a recidivist sentencing enhancement for this second offense, and Mr. Carachuri-Rosendo was sentenced to ten days of imprisonment. He was later placed in removal proceedings and barred from raising defenses to deportation due to a finding that his second drug offense was an aggravated felony. He was ultimately deported to Mexico while his federal appeal was pending.

Drug trafficking crimes, as defined in 18 U.S.C. §924(c), are aggravated felonies, including both Federal and State crimes. See 8 U.S.C. §1101(a)(43)(B). Section 924(c), in turn, defines “drug trafficking crimes” as any felony punishable under the Controlled Substances Act (18 U.S.C. §801 et seq.) and two other federal statutes. The Controlled Substances Act, in turn, states that simple possession, except possession of

flunitrazepam and more than 5 grams of cocaine, is a misdemeanor. See 18 U.S.C. §844. However, simple possession is punishable as a felony if it is a subsequent offense and a prosecutor follows specific procedures set out at 18 U.S.C. §851, including filing an information with the court and providing the defendant with an opportunity to respond.

In the Carachuri-Rosendo case, the Supreme Court overruled the Fifth Circuit and held that one who has been convicted of two drug possession offenses has not been convicted of an aggravated felony unless he was convicted or sentenced as a subsequent offender. The Court noted that from a common sense standpoint, one who has been convicted of possessing a small amount of marijuana and one Xanax tablet is not a drug trafficker under an “everyday understanding” of that term. It then gave four reasons for its rejection of the Fifth Circuit’s decision. First, it held that a defendant has to have been actually *convicted* of an offense that either is a federal felony or parallels a federal felony; it is not enough to speculate as to what might have been charged. Secondly, it held that the Fifth Circuit’s holding fails to give effect to the due process safeguards present in the federal recidivist provision.

Thirdly, the Court held that, contrary to the Fifth Circuit’s characterization of its prior decision in Lopez v. Gonzales, 549 U.S. 47 (2006), it does not take a “hypothetical” approach to analyzing drug trafficking crimes. On the contrary, Lopez requires analysis of the actual conviction and the “conduct actually punished by the state offense,” and not facts that “did not serve as a basis for the state conviction and punishment.” And finally, the Court held that the Fifth Circuit’s decision is not consistent with “common practice in federal courts,” nor the U.S. Sentencing Guidelines.

As a result of this decision, Mr. Carachuri-Rosendo will be still be deportable under 8 U.S.C. §1227(a)(2)(B), because he is still subject to the ground of deportability for those convicted of controlled substance violations. However, he will be eligible to apply for defenses to deportation, such as cancellation of removal under 8 U.S.C. §1229b(a), because he no longer has an aggravated felony on his record.

*For questions about how this case affects your client or general immigration questions, please contact the Immigration Impact Unit at (617) 623-0591.*