SUPREME COURT OF THE UNITED STATES

No. 05–547

JOSE ANTONIO LOPEZ, PETITIONER *v.* ALBERTO R. GONZALES, ATTORNEY GENERAL

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[December 5, 2006]

JUSTICE SOUTER delivered the opinion of the Court.

The question raised is whether conduct made a felony under state law but a misdemeanor under the Controlled Substances Act is a "felony punishable under the Controlled Substances Act." 18 U. S. C. §924(c)(2). We hold it is not.

I

A

The Immigration and Nationality Act (INA) defines the term "aggravated felony" by a list that mentions "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18)." §101(a)(43)(B), as added by §7342, 102 Stat. 4469, and as amended by §222(a), 108 Stat. 4320, 8 U. S. C. §1101(a)(43)(B). The general phrase "illicit trafficking" is left undefined, but §924(c)(2) of Title 18 identifies the subcategory by defining "drug trafficking crime" as "any felony punishable under the Controlled Substances Act" or under either of two other federal statutes having no bearing on this case. Following the listing, §101(a)43 of the INA provides in its penultimate sentence that "[t]he term

[aggravated felony] applies to an offense described in this paragraph whether in violation of Federal or State law" or, in certain circumstances, "the law of a foreign country." 8 U. S. C. §1101(a)(43).

An aggravated felony on a criminal record has worse collateral effects than a felony conviction simple. Under the immigration statutes, for example, the Attorney General's discretion to cancel the removal of a person otherwise deportable does not reach a convict of an aggravated felony. §1229b(a)(3). Nor is an aggravated felon eligible for asylum. §§1158(b)(2)(A)(ii), 1158(b)(2)(B)(i). And under the sentencing law, the Federal Guidelines attach special significance to the "aggravated felony" designation: a conviction of unlawfully entering or remaining in the United States receives an eight-level increase for a prior aggravated felony conviction, but only four levels for "any other felony." United States Sentencing Commission, Guidelines Manual §2L1.2 (Nov. 2005) (hereinafter USSG); *id.*, comment., n. 3 (adopting INA definition of aggravated felony).

B

Although petitioner Jose Antonio Lopez entered the United States illegally in 1986, in 1990 he became a legal permanent resident. In 1997, he was arrested on state charges in South Dakota, pleaded guilty to aiding and abetting another person's possession of cocaine, and was sentenced to five years' imprisonment. See S. D. Codified Laws §22–42–5 (1988); §22–6–1 (Supp. 1997); §22–3–3 (1988). He was released for good conduct after 15 months.

After his release, the Immigration and Naturalization Service (INS)[1] began removal proceedings against Lopez,

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[1]The INS's immigration-enforcement functions are now handled by the Bureau of Immigration and Customs Enforcement in the Department of Homeland Security. See *Clark* v. *Martinez*, 543 U. S. 371, 374, n. 1 (2005).

on two grounds: that his state conviction was a controlled substance violation, see 8 U. S. C. §1227(a)(2)(B)(i), and was also for an aggravated felony, see §1227(a)(2)(A)(iii). Lopez conceded the controlled substance violation but contested the aggravated felony determination, which would disqualify him from discretionary cancellation of removal. See §1229b(a)(3). At first, the Immigration Judge agreed with Lopez that his state offense was not an aggravated felony because the conduct it proscribed was no felony under the Controlled Substances Act (CSA). But after the Board of Immigration Appeals (BIA) switched its position on the issue, the same judge ruled that Lopez's drug crime was an aggravated felony after all, owing to its being a felony under state law. See *Matter of Yanez-Garcia*, 23 I. & N. Dec. 390 (2002) (announcing that BIA decisions would conform to the applicable Circuit law); *United States* v. *Briones-Mata*, 116 F. 3d 308 (CA8 1997) *(per curiam)* (holding state felony possession offenses are aggravated felonies). That left Lopez ineligible for cancellation of removal, and the judge ordered him removed. The BIA affirmed, and the Court of Appeals affirmed the BIA, 417 F. 3d 934 (CA8 2005).[2]

We granted certiorari to resolve a conflict in the Circuits about the proper understanding of conduct treated as a felony by the State that convicted a defendant of committing it, but as a misdemeanor under the CSA.[3] 547 U. S.

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[2] Although the Government has deported Lopez, we agree with the parties that the case is not moot. Lopez can benefit from relief in this Court by pursuing his application for cancellation of removal, which the Immigration Judge refused to consider after determining that Lopez had committed an aggravated felony.

[3] Compare *United States* v. *Wilson*, 316 F. 3d 506 (CA4 2003) (state-law felony is an aggravated felony); *United States* v. *Simon*, 168 F. 3d 1271 (CA11 1999) (same); *United States* v. *Hinojosa-Lopez*, 130 F. 3d 691 (CA5 1997) (same); *United States* v. *Briones-Mata*, 116 F. 3d 308 (CA8 1997) *(per curiam)* (same); *United States* v. *Cabrera-Sosa*, 81 F. 3d 998 (CA10 1996) (same); *United States* v. *Restrepo-Aguilar*, 74 F. 3d

___ (2006). We now reverse.

II

The INA makes Lopez guilty of an aggravated felony if he has been convicted of "illicit trafficking in a controlled substance . . . including," but not limited to, "a drug trafficking crime (as defined in section 924(c) of title 18)." 8 U. S. C. §1101(a)(43)(B). Lopez's state conviction was for helping someone else possess cocaine in South Dakota, which state law treated as the equivalent of possessing the drug, S. D. Codified Laws §22–3–3, a state felony, §22–42–5. Mere possession is not, however, a felony under the federal CSA, see 21 U. S. C. §844(a), although possessing more than what one person would have for himself will support conviction for the federal felony of possession with intent to distribute, see §841 (2000 ed. and Supp. III); *United States* v. *Kates*, 174 F. 3d 580, 582 (CA5 1999) *(per curiam)* ("Intent to distribute may be inferred from the possession of a quantity of drugs too large to be used by the defendant alone").

Despite this federal misdemeanor treatment, the Government argues that possession's felonious character as a state crime can turn it into an aggravated felony under the INA. There, it says, illicit trafficking includes a drug trafficking crime as defined in federal Title 18. Title 18 defines "drug trafficking crime" as "any felony punishable

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361 (CA1 1996) (same), with *Gonzales-Gomez* v. *Achim*, 441 F. 3d 532 (CA7 2006) (state-law felony is not an aggravated felony); *United States* v. *Palacios-Suarez*, 418 F. 3d 692 (CA6 2005) (same); *Gerbier* v. *Holmes*, 280 F. 3d 297 (CA3 2002) (same). Two Circuits have construed the aggravated felony definition one way in the sentencing context and another in the immigration context. Compare *United States* v. *Ibarra-Galindo*, 206 F. 3d 1337 (CA9 2000) (in sentencing case, state-law felony is an aggravated felony); *United States* v. *Pornes-Garcia*, 171 F. 3d 142 (CA2 1999) (same), with *Cazarez-Gutierrez* v. *Ashcroft*, 382 F. 3d 905 (CA9 2004) (in immigration case, state-law felony is not an aggravated felony); *Aguirre* v. *INS*, 79 F. 3d 315 (CA2 1996) (same).

under the Controlled Substances Act (21 U. S. C. 801 et seq.)," §924(c)(2), and the CSA punishes possession, albeit as a misdemeanor, see §405(a), 102 Stat. 4384, as renumbered and amended by §1002(g), 104 Stat. 4828, 21 U. S. C. §844(a). That is enough, says the Government, because §924(c)(2) requires only that the offense be punishable, not that it be punishable as a federal felony. Hence, a prior conviction in state court will satisfy the felony element because the State treats possession that way.

There are a few things wrong with this argument, the first being its incoherence with any commonsense conception of "illicit trafficking," the term ultimately being defined. The everyday understanding of "trafficking" should count for a lot here, for the statutes in play do not define the term, and so remit us to regular usage to see what Congress probably meant. *FDIC* v. *Meyer*, 510 U. S. 471, 476 (1994). And ordinarily "trafficking" means some sort of commercial dealing. See Black's Law Dictionary 1534 (8th ed. 2004) (defining to "traffic" as to "trade or deal in (goods, esp. illicit drugs or other contraband)"); see also *Urena-Ramirez* v. *Ashcroft*, 341 F. 3d 51, 57 (CA1 2003) (similar definition); *State* v. *Ezell*, 321 S. C. 421, 425, 468 S. E. 2d 679, 681 (App. 1996) (same). Commerce, however, was no part of Lopez's South Dakota offense of helping someone else to possess, and certainly it is no element of simple possession, with which the State equates that crime. Nor is the anomaly of the Government's reading limited to South Dakota cases: while federal law typically treats trafficking offenses as felonies and nontrafficking offenses as misdemeanors, several States deviate significantly from this pattern.[4]

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[4]Several States punish possession as a felony. See, *e. g.*, S. D. Codified Laws §§22–42–5 (2004), 22–6–1 (2005 Supp.); Tex. Health & Safety Code Ann. §481.115 (West 2003); Tex. Penal Code Ann. §§12.32–12.35

Reading §924(c) the Government's way, then, would often turn simple possession into trafficking, just what the English language tells us not to expect, and that result makes us very wary of the Government's position. Cf. *Leocal* v. *Ashcroft*, 543 U. S. 1, 11 (2004) ("[W]e cannot forget that we ultimately are determining the meaning of the term 'crime of violence'"). Which is not to deny that the Government might still be right; Humpty Dumpty used a word to mean "'just what [he chose] it to mean—neither more nor less,'"[5] and legislatures, too, are free to be unorthodox. Congress can define an aggravated felony of illicit trafficking in an unexpected way. But Congress would need to tell us so, and there are good reasons to think it was doing no such thing here.[6]

First, an offense that necessarily counts as "illicit trafficking" under the INA is a "drug trafficking crime" under

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(West 2003); see also n. 10, *infra*. In contrast, with a few exceptions, the CSA punishes drug possession offenses as misdemeanors (that is, by one year's imprisonment or less, cf. 18 U. S. C. §3559(a)), see 21 U. S. C. §844(a) (providing for "a term of imprisonment of not more than 1 year" for possession offenses except for repeat offenders, persons who possess more than five grams of cocaine base, and persons who possess flunitrazepam), and trafficking offenses as felonies, see §841 (2000 ed. and Supp. III).

[5] L. Carroll, Alice in Wonderland and Through the Looking Glass 198 (Messner 1982).

[6] Of course, we must acknowledge that Congress did counterintuitively define some possession offenses as "illicit trafficking." Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in §924(c)(2), such as possession of cocaine base and recidivist possession, see 21 U. S. C. §844(a), clearly fall within the definitions used by Congress in 8 U. S. C. §1101(a)(43)(B) and 18 U. S. C. §924(c)(2), regardless of whether these federal possession felonies or their state counterparts constitute "illicit trafficking in a controlled substance" or "drug trafficking" as those terms are used in ordinary speech. But this coerced inclusion of a few possession offenses in the definition of "illicit trafficking" does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning.

§924(c), that is, a "felony punishable under the [CSA]," §924(c)(2). And if we want to know what felonies might qualify, the place to go is to the definitions of crimes punishable as felonies under the Act; where else would one naturally look? Although the Government would have us look to state law, we suspect that if Congress had meant us to do that it would have found a much less misleading way to make its point. Indeed, other parts of §924 expressly refer to guilt under state law, see §§924(g)(3), (k)(2), and the implication confirms that the reference solely to a "felony punishable under the [CSA]" in §924(c)(2) is to a crime punishable as a felony under the federal Act. See *Russello* v. *United States*, 464 U. S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" (alteration in original; internal quotation marks omitted)). Unless a state offense is punishable as a federal felony it does not count.

The Government stresses that the text does not read "punishable as a felony," and that by saying simply "punishable" Congress left the door open to counting state felonies, so long as they would be punishable at all under the CSA. But we do not normally speak or write the Government's way. We do not use a phrase like "felony punishable under the [CSA]" when we mean to signal or allow a break between the noun "felony" and the contiguous modifier "punishable under the [CSA]," let alone a break that would let us read the phrase as if it said "felony punishable under the CSA whether or not as a felony." Regular usage points in the other direction, and when we read "felony punishable under the . . . Act," we instinctively understand "felony punishable as such under the

Act" or "felony as defined by the Act."[7] Without some further explanation, using the phrase to cover even a misdemeanor punishable under the Act would be so much trickery, violating "the cardinal rule that statutory language must be read in context." *General Dynamics Land Systems, Inc.* v. *Cline*, 540 U. S. 581, 596 (2004) (internal quotation marks and brackets omitted). That is why our interpretive regime reads whole sections of a statute together to fix on the meaning of any one of them, and the last thing this approach would do is divorce a noun from the modifier next to it without some extraordinary reason.

The Government thinks it has a good enough reason for doing just that, in the INA provision already mentioned, that the term "aggravated felony" "applies to an offense described in this paragraph whether in violation of Federal or State law." 8 U. S. C. §1101(a)(43). But before this provision is given the Government's expansive treatment, it makes sense to ask whether it would have some use short of wrenching the expectations raised by normal English usage, and in fact it has two perfectly straightforward jobs to do: it provides that a generic description of "an offense . . . in this paragraph," one not specifically couched as a state offense or a federal one, covers either one, and it confirms that a state offense whose elements include the elements of a felony punishable under the CSA is an aggravated felony. Thus, if Lopez's state crime actually fell within the general term "illicit trafficking,"

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[7] With respect to this last possibility, for purposes of §924(c)(2) the crimes the CSA defines as "felonies" are those crimes to which it assigns a punishment exceeding one year's imprisonment. As the Government wisely concedes, see Brief for Respondent 25, although for its own purposes the CSA defines the term "felony" standing alone as "any Federal or State offense classified by applicable Federal or State law as a felony," 21 U. S. C. §802(13), that definition does not apply here: §924(c)(2) refers to a felony "punishable under the [CSA]," not to conduct punishable under some other law but defined as a felony by the CSA.

the state felony conviction would count as an "aggravated felony," regardless of the existence of a federal felony counterpart; and a state offense of possessing more than five grams of cocaine base is an aggravated felony because it is a felony under the CSA, 21 U. S. C. §844(a).[8]

The Government's reliance on the penultimate sentence of 8 U. S. C. §1101(a)(43) is misplaced for a second reason. The Government tries to justify its unusual reading of a defined term in the criminal code on the basis of a single sentence in the INA. But nothing in the penultimate sentence of §1101(a)(43) suggests that Congress changed the meaning of "felony punishable under the [CSA]" when it took that phrase from Title 18 and incorporated it into Title 8's definition of "aggravated felony." Yet the Government admits it has never begun a prosecution under 18 U. S. C. §924(c)(1)(A) where the underlying "drug trafficking crime" was a state felony but a federal misdemeanor. See Tr. of Oral Arg. 33–36. This is telling: the failure of even a single eager Assistant United States Attorney to act on the Government's interpretation of "felony punishable under the [CSA]" in the very context in which that phrase appears in the United States Code belies the Government's claim that its interpretation is the more natural one.[9]

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[8] Although the parties agree that Congress added the provision that both state and federal offenses qualify as aggravated felonies to codify the BIA's decision in *Matter of Barrett*, 20 I. & N. Dec. 171 (1990), see also H. R. Rep. No. 101–681, pt. 1, p. 147 (1990) (noting that the provision reflects congressional approval of *Barrett*), our enquiry requires looking beyond Congress's evident acceptance of *Barrett*. In *Barrett*, the BIA held only that the phrase "'drug trafficking crime'" includes state "crimes analogous to offenses under the Controlled Substances Act," *Barrett*, *supra*, at 177, 178, without specifying whether a state crime must be "analogous" to a CSA felony, as opposed to a CSA misdemeanor, to count.

[9] Contrary to the Government's response at oral argument, such a prosecution should be possible under the Government's proffered

Finally, the Government's reading would render the law of alien removal, see 8 U. S. C. §1229b(a)(3), and the law of sentencing for illegal entry into the country, see USSG §2L1.2, dependent on varying state criminal classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose. It may not be all that remarkable that federal consequences of state crimes will vary according to state severity classification when Congress describes an aggravated felony in generic terms, without express reference to the definition of a crime in a federal statute (as in the case of "illicit trafficking in a controlled substance"). But it would have been passing strange for Congress to intend any such result when a state criminal classification is at odds with a federal provision that the INA expressly provides as a specific example of an "aggravated felony" (like the §924(c)(2) definition of "drug trafficking crime"). We cannot imagine that Congress took the trouble to incorporate its own statutory scheme of felonies and misdemeanors if it meant courts to ignore it whenever a State chose to punish a given act more heavily.

Two examples show the untoward consequences of the Government's approach. Consider simple possession of marijuana. Not only is it a misdemeanor under the CSA, see 21 U. S. C. §844(a), but the INA expressly excludes "a single offense involving possession for one's own use of 30 grams or less" from the controlled substance violations

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interpretation because this subset of "drug trafficking crime[s]" still "may be prosecuted in a court of the United States," 18 U. S. C. §924(c)(1)(A), albeit at the misdemeanor level. For the same reason, the dissent's argument that our reading renders superfluous the requirement in §924(c)(1)(A) that the crime "may be prosecuted in a court of the United States" misses the mark. *Post*, at 3 (opinion of THOMAS, J.). That phrase would be no less superfluous under the dissent's preferred reading, which would still require that the offense be "capable of punishment under the Controlled Substances Act," *post*, at 1, and therefore subject to prosecution in federal court.

that are grounds for deportation, 8 U. S. C. §1227(a)(2)(B)(i). Yet by the Government's lights, if a State makes it a felony to possess a gram of marijuana the congressional judgment is supplanted, and a state convict is subject to mandatory deportation because the alien is ineligible for cancellation of removal. See §1229b(a)(3).[10] There is no hint in the statute's text that Congress was courting any such state-by-state disparity.

The situation in reverse flouts probability just as much. Possessing more than five grams of cocaine base is a felony under federal law. See 21 U. S. C. §844(a). If a State drew the misdemeanor-felony line at six grams plus, a person convicted in state court of possessing six grams would not be guilty of an aggravated felony on the Government's reading, which makes the law of the convicting jurisdiction dispositive. See Brief for Respondent 48. Again, it is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers.

True, the argument is not all one-sided. The Government points out that some States graduate offenses of drug possession from misdemeanor to felony depending on quantity, whereas Congress generally treats possession alone as a misdemeanor whatever the amount (but leaves it open to charge the felony of possession with intent to distribute when the amount is large). Thus, an alien

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[10] Indeed, several States treat possession of less than 30 grams of marijuana as a felony. See Fla. Stat. §§893.13(6)(a)–(b), 775.082(3)(d) (2006) (punishing possession of over 20 grams of marijuana as a felony); Nev. Rev. Stat. §§453.336(1)–(2) (2004), §§453.336(4), 193.130 (2003) (punishing possession of more than one ounce, or 28.3 grams, of marijuana as a felony); N. D. Cent. Code Ann. §§19–03.1–23(6) (Lexis Supp. 2005), 12.1–32–01(4) (Lexis 1997) (same); Ore. Rev. Stat. §161.605(3) (2003), Act Relating to Controlled Substances, §33, 2005 Ore. Laws p. 2006 (same).

convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount. This is so, but we do not weigh it as heavily as the anomalies just mentioned on the other side. After all, Congress knows that any resort to state law will implicate some disuniformity in state misdemeanor-felony classifications, but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them.

In sum, we hold 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. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.