In re L-G-, Respondent

Decided September 27, 1995

U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

(1) A federal definition applies to determine whether or not a crime is a "felony" within the meaning of 18 U.S.C. § 924(c)(2) (1994), and therefore is an "aggravated felony" under section 101(a)(43) of the Immigration and Nationality Act, 8 U.S.C. § 1101(a)(43) (Supp. V 1993).

(2) For immigration purposes, a state drug offense qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) if it is punishable as a felony under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.). *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), and *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990), *reaffirmed*.

(3) Although we disagree with the decision of the United States Court of Appeals for the Second Circuit in *Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994), which holds that an alien's state conviction for a drug offense that is a felony under state law, but a misdemeanor under federal law, qualifies as a conviction for an aggravated felony, we will follow this decision in matters arising within the Second Circuit's jurisdiction.

Pro se

FOR THE IMMIGRATION AND NATURALIZATION SERVICE: Craig A. Harlow, General Attorney

BEFORE: Board En Banc: SCHMIDT, Chairman; DUNNE, Vice Chairman; VACCA, HEILMAN, HURWITZ, COLE, and MATHON, Board Members. Concurring Opinion: HOLMES, VILLAGELIU, and ROSENBERG, Board Members.

SCHMIDT, Chairman:

The Immigration and Naturalization Service has moved for reconsideration of our decision of November 3, 1994.[1] In that decision, we sustained the respondent's appeal and remanded the record to the Immigration Judge for further consideration of the respondent's application for asylum and withholding of deportation under sections 208 and 243(h) of the Immigration and Nationality Act, 8 U.S.C. §§ 1158 and 1253(h) (1994). In so doing, we found that the respondent's offense under Louisiana law was *not* analogous to a

[1] *Matter of L-G-*, 20 I&N Dec. 905 (BIA 1994).

felony under the federal drug laws. Therefore, we concluded that the respondent's offense was not, on the record before us, an "aggravated felony" under section 101(a)(43) of the Act, 8 U.S.C. § 1101(a)(43) (Supp. V 1993), and that the respondent was eligible to apply for asylum and withholding of deportation.

Execution of our order has been deferred pending disposition of the instant motion. The motion to reconsider will be granted. Upon reconsideration, we will affirm our prior order.

I. BACKGROUND AND PRIOR ORDER

The respondent was convicted on November 13, 1990, in the 22nd Judicial District Court, Parish of St. Tammany, State of Louisiana, of the offense of possession of in excess of 400 grams of a Schedule II, Controlled Dangerous Substance, to wit, cocaine, in violation of section 40:967F(2) of the Louisiana Revised Statutes. As a result of that conviction, he was sentenced to serve a term of 20 years at hard labor. The respondent's offense of simple possession of a controlled substance is classified as a felony under Louisiana law because of the sentence imposed. *See* La. Code Crim. Proc. Ann. art. 933(3) (West 1984) ("'Felony' means an offense that may be punished by death or by imprisonment at hard labor."). The record does not reflect that the respondent has any other convictions.

The respondent was charged with deportability under sections 241(a)(2)(A)(iii) and (B)(i) of the Act, 8 U.S.C. §§ 1251(a)(2)(A)(iii) and (B)(i) (1994), as an alien who has been convicted of an aggravated felony and a controlled substance violation. In a decision dated June 8, 1994, the Immigration Judge found the respondent deportable as charged. He further determined that the respondent was ineligible, as an alien convicted of an aggravated felony, for asylum and withholding of deportation. He therefore pretermitted the filing of an application for such relief. The respondent appealed.

In our prior decision in this case, we noted that pursuant to *Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990), which was clarified by *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), a state drug conviction could be considered a conviction for a "drug trafficking crime," and therefore an aggravated felony, if the underlying offense was analogous to a felony under the federal drug laws. Accordingly, we addressed the question of whether the respondent's single offense of simple possession of cocaine was analogous to a federal felony drug offense.

The Controlled Substances Act at 21 U.S.C. § 844(a) (1994) criminalizes simple possession of controlled substances. However, simple possession of more than 5 grams of a mixture or substance which contains "cocaine base" is the *sole* offense under 21 U.S.C. § 844(a) that is punished as a felony even where the defendant has no prior drug convictions. If the defendant has any

prior drug convictions, simple possession of any controlled substance is also a felony under 21 U.S.C. § 844(a). As the respondent's single drug conviction under Louisiana law involved "cocaine," not "cocaine base," we determined in our prior order that his offense was not analogous to a felony under the Controlled Substances Act. We therefore held that the record failed to establish that the respondent was convicted of an aggravated felony within the meaning of the Act.

We have considered the Service's new arguments regarding the proper definition for determining what is a "felony" for immigration purposes. We reconfirm our conclusion that the respondent's conviction is not for an aggravated felony.

II. ISSUE PRESENTED

The issue now presented by this case is whether the respondent's drug offense qualifies as an aggravated felony under our immigration laws simply because it is classified as a felony under Louisiana law. In resolving this issue, we must decide whether a federal or state definition is applicable when determining whether a state drug offense qualifies as a "felony" under 18 U.S.C. § 924(c)(2) (1994), and therefore as an "aggravated felony" under section 101(a)(43) of the Act.

As a preface to discussion of this issue, we briefly set forth the statutes and case law which are pertinent to the question.

A. Statutory Language

Section 101(a)(43) of the Act defines a drug-related "aggravated felony" as follows:

> The term "aggravated felony" means . . . any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), *including any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code* . . . . Such term applies to offenses described in the previous sentence whether in violation of Federal or State law and also applies to offenses described in the previous sentence in violation of foreign law for which the term of imprisonment was completed within the previous 15 years. (Emphasis added.)

Under 18 U.S.C. § 924(c)(2), a "drug trafficking crime" is defined as "*any felony* punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." (Emphasis added.)

The Controlled Substances Act at 21 U.S.C. § 802(13) (1994) provides: "As used in this subchapter: The term 'felony' means any Federal or State offense classified by applicable Federal or State law as a felony." The definitions under 21 U.S.C. § 802 also apply to the Controlled Substances Import and Export Act, *see* 21 U.S.C. § 951(b) (1994), and the Maritime Drug Law Enforcement Act, *see* 46 U.S.C. App. § 1903(i) (1994).

B. The *Davis/Barrett* Test

The Board's previous decisions, *Matter of Davis, supra,* and *Matter of Barrett, supra,* essentially established a two-pronged test ("*Davis/Barrett* test") for determining whether a state drug offense qualifies as an aggravated felony under section 101(a)(43) of the Act. Under the first prong of that test, a state drug offense is an aggravated felony if it is a felony under state law and has a sufficient nexus to unlawful trading or dealing in a controlled substance to be considered "illicit trafficking" as commonly defined. *Matter of Davis, supra*. In its motion, the Service does not contend that the respondent's Louisiana drug offense meets this prong.

Under the second, alternate prong of the *Davis/Barrett* test, a state drug offense qualifies as a "drug trafficking crime," and thus as an aggravated felony (regardless of state classification as a felony or misdemeanor) if it is analogous to a *felony* under the federal statutes enumerated in 18 U.S.C. § 924(c)(2) ("federal drug laws"). *Matter of Davis, supra; Matter of Barrett, supra*. In other words, as discussed below, a state drug offense qualifies as a "drug trafficking crime" if it is *punishable as a felony* under the federal drug laws.

However, the Service urges us to consider the respondent's Louisiana drug offense a "drug trafficking crime" under 8 U.S.C. § 924(c)(2), and therefore an "aggravated felony" under our immigration laws, solely because of its classification as a felony under Louisiana state law. Effectively, we are asked to modify or expand the second prong of the *Davis/Barrett* test to include an offense that is punishable as a felony under state law, but not under federal law. For the reasons set forth below, we decline to do this. We hold that a federal, not a state, definition applies to determine whether or not a state drug offense is a "felony" within the meaning of 18 U.S.C. § 924(c)(2), and therefore is an "aggravated felony" under section 101(a)(43) of the Act.

III. SERVICE ARGUMENT THAT THE CONTROLLED SUBSTANCES ACT AT 21 U.S.C. § 802(13) REQUIRES APPLICATION OF STATE FELONY CLASSIFICATION

The Service agrees that a drug-related "aggravated felony" is defined under section 101(a)(43) of the Act to include any "drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2). The Service also recognizes that 18 U.S.C. § 924(c)(2) defines a "drug trafficking crime" as "any *felony* punishable under" the Controlled Substances Act, the Controlled Import and Export Act, or the Maritime Drug Enforcement Act. 18 U.S.C. § 924(c)(2) (emphasis added). In the Service's view, however, the definition of a "felony" in the Controlled Substances Act at 21 U.S.C. § 802(13) requires us to apply a state's classification of an offense as a felony in defining a "drug trafficking crime" in the immigration context.

More specifically, the Service points out that under 21 U.S.C. § 802(13), a "felony" is defined as "any Federal or State offense classified by applicable Federal or State law as a felony." Accordingly, the Service asserts that (1) the respondent has been convicted of a Louisiana state offense which is classified as a felony under state law, and (2) the respondent's Louisiana drug offense is "punishable under" the Controlled Substances Act. The Service argues in its brief that the offense therefore qualifies as a "felony under the Controlled Substances Act" pursuant to 21 U.S.C. § 802(13), even though it is *not* punishable as a *felony* under that statute. Consequently, the Service contends that the respondent has been convicted of a "drug trafficking crime" under 18 U.S.C. § 924(c)(2), irrespective of whether the crime is analogous to a felony under federal law.

In short, the Service argues that because the respondent's simple possession offense was classified as a felony by Louisiana, it should be considered an "aggravated felony" for immigration purposes. To buttress its position, the Service relies upon the Second Circuit's decision in *Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994), which holds that a state felony drug offense qualifies as a felony under the Controlled Substances Act, and therefore as an aggravated felony within the meaning of the Act, even if it would not be punishable as a felony under federal law.

IV. LEGAL REASONS FOR APPLYING A FEDERAL DEFINITION TO THE TERM "ANY FELONY"

The Service's argument requires us to reexamine our reasons for concluding that the key to the second prong of the *Davis/Barrett* test is that the crime be "punishable as a felony" under federal law, and that a federal, as opposed to state, felony definition applies. This, in turn, requires us to focus on the meaning of the term "any felony," which is used in defining a "drug trafficking crime" in 18 U.S.C. § 924(c)(2).

A. Title 18 Provides the Appropriate Definition of "Any Felony"

We note that the use of the term "any felony" in 18 U.S.C. § 924(c)(2) implies that Congress meant to include more than one kind of felony within the definition of "drug trafficking crime." Unlike the Service, however, we do not find that the definition of "drug trafficking crime" therefore encompasses all of the state, as well as federal, felony offenses that are punishable under the federal drug laws, regardless of whether the offenses are punishable as felonies or misdemeanors under those federal laws.

In section 101(a)(43) of the Act, Congress directs us to Title 18 of the United States Code, the general federal criminal statute, for the definition of "drug trafficking crime." We therefore find it appropriate to look to title 18 for the meaning of the term "any felony." *See Matter of Davis*, *supra*, at 542.

A classification of offenses as felonies or misdemeanors is found at 18 U.S.C. § 3559(a) (1994). We note that this section sets forth varying degrees of felony (and misdemeanor) offenses under federal criminal law, and that an offense is considered a felony under the statute where imprisonment for more than 1 year is authorized.[2] We find that this comprehensive list of felony classes provides a more reasonable explanation for the term "any felony" as used in 18 U.S.C. § 924(c)(2) than that proffered by the Service.

Specifically, we find that the term "any felony" under 18 U.S.C. § 924(c)(2) refers to any class of felony found under 18 U.S.C. § 3559(a). A "drug trafficking crime" under 18 U.S.C. § 924(c)(2) is therefore any felony violation of the federal drug laws, i.e., any offense under those laws where the maximum term of imprisonment authorized exceeds 1 year. *See, e.g., United States v. Knox*, 950 F.2d 516, 518 (8th Cir. 1991); *United States v. Contreras*, 895 F.2d 1241, 1244 (9th Cir. 1990); *Matter of Davis, supra.*

We find this less expansive interpretation of "drug trafficking crime" consistent with the statutory history of 18 U.S.C. § 924(c)(2). Prior to 1988, this provision defined "drug trafficking crime" as "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance." 18 U.S.C. § 924(c)(2) (1982 & Supp. IV 1986); *see United States v. Contreras, supra; see also United States v. Chaidez*, 916 F.2d 563 (9th Cir. 1990). Thus, the prior definition resembled the first prong of the *Davis/Barrett* test in that the offenses it described are those that we would consider to be "trafficking" as that term is commonly defined. Clearly, though, the definition only included *federal* felony offenses.

Congress labelled the 1988 amendment to the definition a "clarification," which indicates that the amendment was not intended to effect a major departure from prior law. *See* Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 6212, 102 Stat. 4181, 4360 (effective Nov. 18, 1988); *United States v. Contreras, supra*. Therefore, while the "drug trafficking crime" definition no longer requires a connection to "distribution, manufacture, or importation," we do not believe that the statute also was amended to directly implicate state law.

B. State Offenses May Be "Drug Trafficking Crimes" Pursuant to the Second Prong of the *Davis/Barrett* Test

For immigration purposes, this Board does include state drug offenses within the definition of a "drug trafficking crime" under certain cir-

[2] The classification of offenses at 18 U.S.C. § 3559(a) is set forth as follows:

> CLASSIFICATION. - An offense that is not specifically classified by a letter grade in the section defining it, is classified if the maximum term of imprisonment authorized is-
>
> (1) life imprisonment, or if the maximum penalty is death, as a Class A felony;

cumstances, regardless of the state's classification of an offense as a felony or a misdemeanor. We do so by way of analogy. *See Matter of Davis, supra; Matter of Barrett, supra*.

As we explained in *Matter of Barrett*, if an alien is convicted under state law of a drug offense for which he could have been convicted and punished under the federal drug laws, he has been convicted of an offense that is "punishable" under those laws. *Matter of Barrett, supra*, at 174-75. If the state offense could have been punished under the federal drug laws by a maximum term of imprisonment in excess of 1 year, i.e., if the analogous drug offense is classified as a "felony" under federal law, it satisfies the definition of a "drug trafficking crime" within the meaning of section 101(a)(43) of the Act. *Matter of Davis, supra; Matter of Barrett, supra*.[3] Thus, even if a state drug offense has no clear nexus to "trafficking," it may be an aggravated felony under the Act, *provided* it is *punishable as a felony* under the federal drug laws. This is true regardless of the offense's classification under state law. *Matter of Davis, supra*, at 543-44.

C. Simple Possession

To illustrate, we note that a defendant with no prior convictions who is charged with simple possession of more than 5 grams of a mixture or substance which contains cocaine base in violation of 21 U.S.C. § 844(a) is subject to a term of imprisonment of 5 to 20 years. 21 U.S.C. § 844(a); *Matter of Davis, supra*, at 543 n.6. Due to the potential sentence, simple possession of cocaine base generally is a felony under the Controlled Substances Act. 18 U.S.C. § 3559(a)(3)(4); *Matter of Davis, supra*, at 543 n.6; see also *United States v. Knox, supra*. As we observed in our prior order, this offense is therefore a "drug trafficking crime" within the ambit of 18 U.S.C. § 924(c)(2) and, consequently "illicit trafficking" in a controlled substance and an aggravated felony within the meaning of section 101(a)(43) of the Act. Pursuant to *Matter of Barrett, supra*, a state conviction analogous to such a federal conviction would also constitute a conviction for an aggravated felony. *Matter of Davis, supra*, at 542.

In contrast, the offense of simple possession of cocaine is punishable under the Controlled Substances Act by a "term of imprisonment of not more than 1 year," provided the defendant has no prior drug convictions. 21 U.S.C. § 844(a). The offense of simple possession of cocaine is therefore a misdemeanor under the Controlled Substances Act. 18 U.S.C. § 3559(a)(6); *United*

[3] The holding in *Barrett* was effectively codified by the amendments made to section 101(a)(43) of the Act by section 501 of the Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978, 5048, *as corrected by* section 306(a)(1) of the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991, Pub. L. No. 102-232, 105 Stat. 1733, 1751 (enacted Dec. 12, 1991). *See* 1990 U.S.C.C.A.N. 6472, 6553; *Matter of Davis, supra*, at 539-40.

States v. Brown, 761 F.2d 1272, 1278 (9th Cir. 1985) ("Possession of cocaine for personal use is only a misdemeanor."). We note that Congress' intention to make this offense a misdemeanor is confirmed by a review of the legislative history of the Comprehensive Drug Abuse Prevention and Control Act of 1970, of which the Controlled Substances Act is a part, wherein such simple possession is unambiguously described as a "misdemeanor." H.R. Rep No. 1444, 91st Cong., 2d Sess. *reprinted in* 1970 U.S.C.C.A.N. 4566, 4570, 4577; *see also United States v. Martin*, 599 F.2d 880, 889 (9th Cir.), *cert. denied*, 441 U.S. 962 (1979); *United States v. Swiderski*, 548 F.2d 445 (2d Cir. 1977).

Since a single offense of simple possession of cocaine under 21 U.S.C. § 844(a) is clearly a misdemeanor, it is not "any felony," as a crime must be to qualify as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2). Accordingly, a conviction under state law for simple possession of cocaine would not be analogous to a conviction for "any felony" under the Controlled Substances Act, regardless of the state's classification of the offense, unless it followed a prior drug conviction. *See* 21 U.S.C. § 844(a) (making a second offense a felony); *Matter of Davis, supra*, at 543 n.6. Therefore, a single offense of simple possession of cocaine under state law would not qualify as an aggravated felony within the meaning of section 101(a)(43) of the Act. *See generally Matter of Davis, supra; Matter of Barrett, supra.*

D. Conclusion Regarding the Application of a Federal Definition

For these reasons, we conclude that a federal definition applies in determining whether a state drug offense qualifies as a "felony" under 18 U.S.C. § 924(c)(2), and we affirm our holdings in *Matter of Davis, supra*, and *Matter of Barrett, supra*. Thus, a state drug offense may be considered a "drug trafficking crime," and therefore an aggravated felony under section 101(a)(43) of the Act, only if it is punishable as a felony under the federal drug laws.

V. THE APPLICATION OF A FEDERAL DEFINITION DOES NOT CONFLICT WITH THE CONTROLLED SUBSTANCES ACT AT 21 U.S.C. § 802(13)

A. Discussion of *Jenkins v. INS*

We recognize that the Second Circuit has followed a different approach for determining whether a state drug offense qualifies as a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c)(2). *See Jenkins v. INS, supra. Jenkins* involved an alien who had been convicted under New York law of the felony offense of attempted criminal possession of a controlled substance, namely, cocaine. He sought an automatic stay of deportation under section 106(a)(3) of the Act, 8 U.S.C. 1105a(a)(3) (1994), pending

adjudication of his petition for review of a decision by the Board.[4] The Service argued that Jenkins could not qualify for an automatic stay because he had been convicted of an aggravated felony. The court agreed, finding that because Jenkins' offense was classified as a felony under New York law, it qualified as a felony under the Controlled Substances Act and, therefore, as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2), notwithstanding the classification of possession of cocaine as a misdemeanor under federal law. *Jenkins v. INS, supra*, at 14.[5]

In reaching its conclusion, the Second Circuit noted that "[i]n order to meet the definition of an aggravated felony, an offense must . . . (a) qualify as a felony that is (b) punishable" by one of three statutes enumerated under 18 U.S.C. § 924(c)(2). *Id.* The court observed that the term "felony" is defined under one of those statutes, the Controlled Substance Act at 21 U.S.C. § 802(13), as "any Federal or State offense classified by applicable Federal or State law as a felony." Thus, the court reasoned as follows:

> The plain language of 21 U.S.C. § 802(13) states unequivocally that an offense meets the definition of a felony if "applicable Federal or State Law" classifies it as a felony. In this case, the "applicable" law - in the sense that it was the law actually applied to Jenkins - is the law of New York, which classifies his offense as a felony. Section 802(13)'s explicit reliance on state classifications represents a Congressional choice to include within the category of "felony" offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, and the Maritime Drug Law Enforcement Act, those crimes deemed serious enough by states to warrant felony treatment within their jurisdictions.

Jenkins v. INS, supra, at 14.

Based on this analysis, the Second Circuit views 21 U.S.C. § 802(13) as including any state felony offense as a "felony under the Controlled Substances Act" if the offense meets the single criterion of being punishable

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[4] Jenkins was charged with deportability under sections 241(a)(1)(A), (2)(A)(iii), and (2)(B)(i) of the Act, but the Service withdrew the aggravated felony charge under section 241(a)(2)(A)(iii). The Board dismissed his appeal from an Immigration Judge's decision finding him deportable under the remaining charges and ineligible for relief under sections 212(c) and (h) of the Act, 8 U.S.C. §§ 1182(c) and (h) (1994). *Jenkins v. INS, supra*, at 13.

[5] We note that the court cited *United States v. Forbes*, 16 F.3d 1294, 1301 n.10 (1st Cir. 1994), and *Amaral v. INS*, 977 F.2d 33, 36 n.3 (1st Cir. 1992), as authority for its conclusion. *Jenkins v. INS, supra*, at 14. The Service provides the same citations to further support its motion. Arguably, these cases indicate that the First Circuit also may view 21 U.S.C. § 802(13) as including any felony drug offense under state law as a felony under the Controlled Substances Act. However, the First Circuit cases do not include a full discussion of the issue, because in each situation the alien had a prior conviction which made the offense in question a felony under 21 U.S.C. § 844(a). In its holding in both cases, therefore, the First Circuit actually applied federal law in finding the aliens' state drug offenses analogous to felony offenses under the Controlled Substances Act. *See United States v. Forbes, supra; Amaral v. INS, supra; see also United States v. Rodriguez*, 26 F.3d 4 (1st Cir. 1994) (applying federal law in a more recent case in determining that an alien's two convictions under Massachusetts law for possession with intent to distribute an illegal drug were "trafficking" crimes under 18 U.S.C. § 924(c)(2) and aggravated felonies for the purposes of the Act).

under federal law, even though it may not be punishable *as a felony* under that statute. According to the court, any offense that meets that criterion qualifies as a "drug trafficking crime" within the meaning of 18 U.S.C. § 924(c)(2). *Id.*

B. Federal Law Provides the "Applicable" Definition

In responding to the position taken in *Jenkins*, we reiterate that Congress directs us in section 101(a)(43) of the Act to title 18 of the United States Code, the general federal criminal statute, for the definition of a "drug trafficking crime." *See* 18 U.S.C. § 924(c)(2). It makes no further reference to 21 U.S.C. § 802(13) for the definition of the term "any felony" used in 18 U.S.C. § 924(c)(2). We find that the plain language of § 924(c)(2) directs us to the Controlled Substances Act, and to the other enumerated federal drug laws, only for the purpose of determining whether an offense is "punishable" under its provisions as a felony, i.e., by a term of imprisonment in excess of 1 year. *See Matter of Davis*, *supra*, at 11.

Moreover, the Controlled Substances Act at 21 U.S.C. § 802(13) limits the scope of the definition of the term "felony" to that which is "*used* in this subchapter." 21 U.S.C. § 802(13); *see also* 21 U.S.C. § 951(b) (1994), 21 U.S.C. app. § 1903(i) (1994) (incorporating the definitions found under 21 U.S.C. § 802). A review of the Controlled Substances Act reveals that the term "felony" is generally used there for purposes other than to describe offenses that are punishable under its provisions, which is the relevant inquiry here.

Specifically, the term "felony" is primarily used in 21 U.S.C. § 802(13) to trigger statutory sentence enhancement for repeat offenders. For instance, a prior felony drug conviction under either state or federal law triggers mandatory sentence enhancement for a defendant who is convicted of a violation of 21 U.S.C. § 841(b) (1994). *See, e.g., United States v. Budd*, 23 F.3d 442, 447 (D.C. Cir. 1994), *cert. denied*, 513 U.S. 1115, 115 S. Ct. 910 (1995); *United States v. Melucci*, 739 F. Supp. 79, 81 (D.R.I. 1990). We note in this regard that Congress had to amend the enhancement provision of section 841(b) to clarify that it is also triggered by prior state convictions for felony drug offenses after several circuit courts held that the statute applied only to prior federal convictions. *See United States v. Beasley*, 12 F.3d 280, 284 (1st Cir. 1993); *United States v. Melucci, supra; see also* Anti-Drug Abuse Act of 1988, § 6452(a), 102 Stat. at 4371.[6]

[6] In addition, state felony offenses are specifically included under 21 U.S.C. § 824 (1994) (providing for the denial, revocation, or suspension of registration in the event of a conviction for a "felony") and 21 U.S.C. § 878 (1994) (describing the powers of enforcement personnel to make arrests). With the exception of 21 U.S.C. § 843(b) (1994), however, the term "felony" is used under Part D of the Controlled Substances Act, entitled "Offenses and Penalties,"

In the single instance under the Controlled Substances Act where the term "felony" is used to describe a punishable offense, i.e., 21 U.S.C. § 843(b) (1994), the statute specifies that it refers only to a felony violation of its provisions or of the Controlled Substances Import or Export Act. Specifically, 21 U.S.C. § 843(b) makes unlawful the use of a communication facility "in committing or in causing or facilitating the commission of any act or acts constituting a felony under any provision of this subchapter or subchapter II of this chapter." Federal case law demonstrates that only a felony as federally defined satisfies the elements of this offense. *Compare, e.g., United States v. Baggett*, 890 F.2d 1095 (10th Cir. 1989) (finding that because simple possession of heroin is a misdemeanor under 21 U.S.C. § 844(a), use of telephone facilities to obtain possession of the heroin does not constitute a violation of 21 U.S.C. § 843(b)) *with United States v. Willis*, 890 F.2d 1099 (9th Cir. 1989) (finding the defendant properly convicted of unlawful use of communications facility to facilitate the distribution of cocaine).[7]

This case law further supports our holding that the "applicable" law for determining whether a person has been convicted of a "felony under the Controlled Substances Act" is always federal law. This is logical because the Controlled Substances Act is a federal statute. The case before us illustrates the problem with the Second Circuit's holding to the contrary.

The respondent in this case was not charged and convicted in state court of any offense under the Controlled Substances Act. Rather, he was charged and convicted of an offense under section 40:967F(2) of the Louisiana Revised Statutes. That offense was simple possession of cocaine.

Had federal criminal proceedings in fact been brought against the respondent, the record indicates that he would have been convicted of a *misdemeanor* under the Controlled Substances Act. The record does not show either that the respondent has any prior drug convictions or that cocaine base was involved. It therefore does not follow that he has been convicted of a *felony* under the Controlled Substances Act simply because the State of Louisiana has classified his offense as such.[8]

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exclusively for the purpose of prescribing penalties for defendants with prior felony convictions. We note that the only use of the term "felony" found under the Controlled Substances Import and Export Act or the Maritime Drug Law Enforcement Act is likewise for the purpose of mandating enhanced penalties for defendants with prior felony convictions. *See* 21 U.S.C. §§ 960(b), 962(b) (1994); *see also* 46 U.S.C. app. § 1903(g) (referring to 21 U.S.C. §§ 960 and 962, while not actually using the term "felony").

[7] We note that several circuit courts have held that 21 U.S.C. § 843(b) can be violated by the mere purchase of a controlled substance for one's own use, but they have done so by finding that such purchase facilitates the offense of sale or distribution of a controlled substance, which clearly is a felony under the Controlled Substances Act. *See, e.g., United States v. Binkley*, 903 F.2d 1130 (7th Cir. 1990).

[8] We further note that a review of the pertinent case law involving 18 U.S.C. § 924(c)(2) reveals that state law generally has not been at issue for determining whether a defendant has committed a "drug trafficking crime." *See, e.g., United States v. Williams*, 985 F.2d 749 (5th

VI. POLICY REASONS FOR APPLYING A FEDERAL DEFINITION

In addition to our legal analysis, we find that policy reasons also support our conclusion that federal law provides the applicable definition for determining whether a state drug offense qualifies as a "drug trafficking crime" under 18 U.S.C. § 924(c)(2) for purposes of section 101(a)(43) of the Act. As we observed in *Matter of Barrett, supra:* "[T]he Immigration and Nationality Act generally does not attach different treatment to state and federal drug offenses with respect to excludability, deportability, or the negative effect of a drug conviction on various forms of relief from exclusion or deportation." *Id*. at 176; *see also Matter of Manrique*, 21 I&N Dec. 58 (BIA 1995); *Matter of Davis, supra; Matter of Cerna*, 20 I&N Dec. 399 (BIA 1991), *aff'd*, 979 F.2d 212 (11th Cir. 1992); *Matter of Ozkok*, 19 I&N Dec. 546, 550-51 (BIA 1988); *Matter of A-F-*, 8 I&N Dec. 429, 446 (BIA, A.G. 1959). Following the *Jenkins* ruling, however, would result in widely disparate consequences for similarly situated aliens based solely on differing state classifications of identical drug offenses.

As noted above, a single offense under federal law for simple possession of a controlled substance other than "cocaine base" is a misdemeanor under the Controlled Substances Act. While an alien with a federal conviction for such an offense may be deportable on this basis as one convicted of a controlled substance violation, he would not be convicted of an aggravated felony within the meaning of section 101(a)(43) of the Act. He therefore would not be precluded on this basis from consideration for various forms of relief under the Act. The same would be true for an alien convicted of the identical offense under a state law which, like federal law, does not designate the offense as a felony.

By contrast, under the *Jenkins* ruling, an alien convicted in a state where the offense is classified as a felony would be convicted of a "felony under the Controlled Substances Act" and, therefore, of a "drug trafficking crime." The identical offense would therefore be an aggravated felony under section 101(a)(43) of the Act, and consequently, the alien would be precluded by section 208(d) of the Act from applying for asylum and barred by section 243(h)(2) of the Act from receiving withholding of deportation, even if he faced imminent harm or death due to persecution in his native country.

Cir.), *cert. denied sub nom. Kitchens v. United States*, 510 U.S. 850 (1993); *United States v. Knox, supra; United States v. Fisher*, 912 F.2d 728 (4th Cir. 1990); *United States v. Contreras, supra*. Those cases where state offenses have been involved have been immigration-related cases, and for the most part, the offenses were punishable as felonies under the federal drug laws. *See generally, e.g., United States v. Lomas*, 30 F.3d 1191 (9th Cir. 1994), *cert. denied*, 513 U.S. 1176 (1995); *United States v. Forbes, supra; United States v. Amaral, supra; Kellman v. INS*, 750 F. Supp. 625 (S.D.N.Y. 1990); *Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990).

Matter of C-, 20 I&N Dec. 529 (BIA 1992); *Matter of K-*, 20 I&N Dec. 418 (BIA 1991), *aff'd*, 60 F.3d 1084 (4th Cir. 1995).[9]

Another instance in which an inconsistency could arise if a state definition is applied is in the case of an alien convicted of a single offense of simple possession of 30 grams or less of marihuana. Such an alien is not deportable under section 241(a)(2)(B)(i) of the Act as one convicted of a controlled substance violation, nor is he precluded from establishing good moral character under section 101(f)(3) of the Act, 8 U.S.C. § 1101(f)(3) (1994), or eligibility for a waiver under section 212(h) of the Act, 8 U.S.C. § 1182(h) (1994). It is clear, therefore, that Congress intended to exempt such aliens from the usual consequences of a controlled substance violation.

Some states may nevertheless classify the possession of an amount of marihuana less than 30 grams as a felony, even if the defendant is a first-time offender. This, in fact, is the case in North Dakota, where the unlawful possession of an amount of marihuana in excess of 28.35 grams is classified as a class C felony. *See* N.D. Cent. Code § 19-03.1-23(6) (1993). According to the analysis of the Service and the Second Circuit, therefore, a single offense of simple possession of 29 grams of marihuana could be an aggravated felony. Thus, although an alien convicted of this offense would not be deportable on this basis under section 241(a)(2)(B)(i) of the Act, he nevertheless would be deportable under section 241(a)(2)(A)(iii) of the Act as one convicted of an aggravated felony and could be precluded from all forms of relief from deportation. We do not believe that such inconsistent results are required by 21 U.S.C. § 802(13) or were intended by Congress.

VII. WE DECLINE TO FOLLOW JENKINS OUTSIDE THE SECOND CIRCUIT

Historically, we have followed the decisions of a circuit court in cases arising in that particular circuit. *Matter of Anselmo*, 20 I&N Dec. 25 (BIA 1989); *see also Matter of Bowe*, 17 I&N Dec. 488 (BIA 1980, 1981); *Matter of Gonzalez*, 16 I&N Dec. 134 (BIA 1977). Where we disagree with a court's position on a given issue, we decline to follow it outside the court's jurisdiction. *Matter of Anselmo*, *supra*, at 30-31.

[9] We further note that a review of the pertinent case law involving 18 U.S.C. § 924(c)(2) reveals that state law generally has not been at issue for determining whether a defendant has committed a "drug trafficking crime." *See, e.g., United States v. Williams*, 985 F.2d 749 (5th Cir.), *cert. denied sub nom. Kitchens v. United States*, 510 U.S. 850 (1993); *United States v. Knox*, *supra; United States v. Fisher*, 912 F.2d 728 (4th Cir. 1990); *United States v. Contreras*, *supra*. Those cases where state offenses have been involved have been immigration-related cases, and for the most part, the offenses were punishable as felonies under the federal drug laws. *See generally, e.g., United States v. Lomas*, 30 F.3d 1191 (9th Cir. 1994), *cert. denied*, 513 U.S. 1176 (1995); *United States v. Forbes*, *supra; United States v. Amaral*, *supra; Kellman v. INS*, 750 F. Supp. 625 (S.D.N.Y. 1990); *Leader v. Blackman*, 744 F. Supp. 500 (S.D.N.Y. 1990).

The Second Circuit has repeatedly expressed concern regarding disparate treatment of similarly situated aliens under the immigration laws. *See, e.g., Bedoya-Valencia v. INS*, 6 F.3d 891 (2d Cir. 1993); *Francis v. INS*, 532 F.2d 268 (2d Cir. 1976). We share that concern, as we have just discussed.

The Second Circuit nevertheless has unambiguously held that an alien's state conviction for a drug offense that is a felony under state law, but a misdemeanor under federal law, qualifies as a conviction for an "aggravated felony" for immigration purposes. *Jenkins v. INS, supra.* For the reasons outlined above, we disagree with the court's decision and believe it may lead to unfair results for aliens in some cases. We therefore respectfully decline to follow *Jenkins v. INS* outside the jurisdiction of the Second Circuit.

VIII. CONCLUSION

Our interpretation of the relevant statutes and our concern for the uniform application of the immigration laws require us to conclude that a federal definition of the term "felony" must be applied in examining whether a state drug offense that does not meet the first prong of the *Davis/Barrett* test may be considered an aggravated felony within the meaning of the Act. Thus, we find that for immigration purposes, the term "drug trafficking crime" as used in 18 U.S.C. § 924(c)(2) includes only those state drug offenses that are punishable as felonies under the federal drug laws. *See generally Matter of Davis, supra; Matter of Barrett, supra*. Therefore, to ascertain whether an alien with a state drug conviction has been convicted of a "drug trafficking crime," and thus an aggravated felony, it must be determined whether the offense could have been punished under the federal drug laws as a felony if the alien had been convicted under federal law.

In the present case, the respondent was convicted under state law of the felony offense of possession of cocaine. The analogous offense under the Controlled Substances Act is a misdemeanor. Thus, his offense is not punishable as a felony under the federal drug laws. Therefore, the record does not support a finding that the respondent has been convicted of a drug-related aggravated felony within the meaning of section 101(a)(43) of the Act. Accordingly, upon reconsideration, we will affirm our prior order.

ORDER: The motion to reconsider is granted.

FURTHER ORDER: The Board's order of November 3, 1994, in this case is affirmed.

Board Member Lauri S. Filppu did not participate in the decision in this case.

CONCURRING OPINION: David B. Holmes, Board Member

I respectfully concur.

I.

The history of this case and the issue before us are well set forth by the majority and will not be restated at length. The respondent was convicted in a Louisiana state court in 1990 of one count of possession of in excess of 400 grams of cocaine. The offense was classified as a felony under Louisiana state law. The respondent's state conviction was for an offense analogous to a federal offense punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.). However, the comparable federal offense (i.e., a single offense for simple possession of cocaine) is punishable as a misdemeanor, not as a felony.

The respondent was charged with being deportable both as one convicted of a controlled substance violation and as one convicted of an aggravated felony. The issue before us solely relates to the respondent's deportability as one convicted of an aggravated felony under section 241(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(2)(A)(iii) (1994).

Section 101(a)(43) of the I&N Act, 8 U.S.C. § 1101(a)(43) (Supp. V 1993), defines the term "aggravated felony" to include "any illicit trafficking in any controlled substance (as defined in section 102 of the Controlled Substances Act), including any drug trafficking crime as defined in section 924(c)(2) of title 18, United States Code." Section 101(a)(43) also specifies that the term aggravated felony "applies to an offense described in this paragraph whether in violation of Federal or State law." Because the respondent's state felony conviction did not involve "unlawful trading or dealing" in a controlled substance, he is deportable as one convicted of an aggravated felony only if his state conviction is included as a "drug trafficking crime" as that term is defined in 18 U.S.C. § 924(c)(2) (1994). *See Matter of Davis*, 20 I&N Dec. 536 (BIA 1992).

A "drug trafficking crime" is defined in section 924(c)(2) as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)." The term "felony," however, is not otherwise defined in section 924. Thus, the question arises whether in the immigration context a "drug trafficking crime," as defined in section 924(c)(2), includes a state felony conviction for an offense that would be punishable under one of the three Acts referenced in section 924(c)(2), but *not* punishable as a felony under federal law.

II.

The Board answered this question in the negative when this case was last before us. *Matter of L-G-*, 20 I&N Dec. 905 (BIA 1994); *see also Matter of Davis, supra; Matter of Barrett*, 20 I&N Dec. 171 (BIA 1990).[1] At least for

[1] As noted in the majority decision, the holding in *Matter of Barrett, supra*, was effectively codified by subsequent legislative action. *See Matter of Davis, supra*, at 542; *see also* H. Rept.

the purposes of the "aggravated felony" definition in section 101(a)(43) of the Act, the Board essentially concluded that section 924(c)(2) of title 18 was properly read as though it stated:

> A "drug trafficking crime" is any offense, whether in violation of Federal or State law, punishable as a felony under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.

The Immigration and Naturalization Service moves that we reconsider our conclusion in this regard, arguing that such a construction of the statutory language is wrong. The Service argues that the term "felony" as defined in the Controlled Substances Act at 21 U.S.C. § 802(13) (1994) requires the inclusion as an aggravated felony of any state felony offense that is punishable under the statutes enumerated in 21 U.S.C. § 924(c)(2), regardless whether the offense would be punishable as a felony under federal law. In making this argument, the Service significantly relies upon the decision of the United States Court of Appeals for the Second Circuit in *Jenkins v. INS*, 32 F.3d 11 (2d Cir. 1994), and the cases cited therein.

Section 802(13) of title 21 defines the term "felony" as used in that subchapter as "any Federal or State offense classified by applicable Federal or State law as a felony." This definition also applies to the Controlled Substances Import and Export Act and the Maritime Drug Law Enforcement Act. *See* 21 U.S.C. § 951(b) (1994); 42 U.S.C. App. § 1903(i) (1994). In *Jenkins v. INS, supra*, the United States Court of Appeals for the Second Circuit noted that the plain language of this definition unequivocally includes any offense classified by applicable state law as a felony and "represents a Congressional choice to include within the category of 'felony' offenses under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act, those crimes deemed serious enough by states to warrant felony treatment within their jurisdiction." Finding itself bound by this unambiguous language in section 802(13), the court held that an alien convicted of a drug offense categorized under New York law as a felony, but under federal law as a misdemeanor, had been convicted of an aggravated felony.

III.

While this "plain language" analysis is appealing, I agree with the majority that the issue does not appear as simple as was concluded in *Jenkins v. INS, supra*. The question before us is not the meaning of the term "felony" as used in the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act. Rather, it is the meaning of that term in 18 U.S.C. § 924(c)(2), particularly when that section is read within the context of the aggravated felony definition of section 101(a)(43)(B). In this regard I would note the following:

A.

First, as referenced above, the term "felony" is not defined in 18 U.S.C. § 924 and the definition of that term in 21 U.S.C. § 802 is specifically limited to its use "in this subchapter." Moreover, 18 U.S.C. § 924 does not incorporate the definitions of 21 U.S.C. § 802, although that is *expressly* done in the Controlled Substances Import and Export Act and the Maritime Drug Law Enforcement Act. *See* 21 U.S.C. § 951(b); 42 U.S.C. App. § 1903(i).

B.

Secondly, if one were to incorporate the 21 U.S.C. § 802(13) definition of "felony" into section 924(c)(2) of title 18, this latter section would read:

> A "drug trafficking crime" is *any Federal or State offense classified by applicable Federal or State law as a felony* that is punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act.

If the law were so written, I would agree with the Service that an alien convicted of a state felony punishable under the Controlled Substances Act, the Controlled Substances Import and Export Act, or the Maritime Drug Law Enforcement Act, would be convicted of an "aggravated felony" even if the analogous federal offense would only be punishable as a misdemeanor.

I note, however, that under this reading of section 924(c)(2), an alien convicted of a state misdemeanor would *not* be convicted of an "aggravated felony" even where the analogous federal offense would be punishable as a felony under one of the three Acts referenced in 18 U.S.C. § 924(c)(2). This appears clear because the pertinent language from 21 U.S.C. § 802(13) refers to "any Federal or State offense classified by *applicable* Federal or State law as a felony." As noted by the Second Circuit, the applicable law would be the law "actually applied" to the alien. *Jenkins v. INS, supra*, at 14.

In rejecting such an interpretation in *Matter of Davis, supra*, at 542-543, the Board noted:

> Under this analysis identical drug offenses in two different states which are analogous to an offense under the Controlled Substances Act, but are treated by one state as a felony and by the second as a misdemeanor, would result in a finding of "drug trafficking crime" for the offense in the first state and not for the second.

The Board did not find that such an inconsistent result was required by the language of 18 U.S.C. § 924(c)(2) or was intended by Congress. The Service did not challenge the Board's conclusion in *Davis*.

C.

Finally, the interpretation of the law presently urged by the Service could lead to results manifestly inconsistent with the intent of Congress as reflected in other provisions of the I&N Act. The offense at issue in the present case is

clearly a serious one. However, under the reading of the relevant law advanced by the Service, there is absolute deference to a state's categorization of a crime as a felony regardless of the nature of the offense and regardless of how that offense might otherwise be characterized or treated under the I&N Act.

For example, the majority notes that under North Dakota law, the unlawful possession of an amount of marihuana in excess of 28.35 grams is classified as a felony. *See* N.D. Cent. Code § 19-03.1-23(6) (1993). If an alien were convicted under this section of simple possession of 29 grams of marihuana, he or she would *not* be deportable under the specific deportation ground in the I&N Act related to controlled substance violations because that section expressly excludes from deportability one convicted of a "single offense involving possession for one's own use of 30 grams or less of marihuana." *See* section 241(a)(2)(B)(i) of the I&N Act. Yet, under the Service's interpretation of the law, such a respondent nonetheless would be deportable as one convicted of an aggravated felony with all of the grave consequences that may result from such a finding. *See, e.g.*, *Matter of Burbano*, 20 I&N Dec. 872, at 877 n.4 (BIA 1994). Absent clearer statutory language, I would not interpret the relevant law in this case in a manner so inconsistent with the statutory scheme of the I&N Act. *See United States v. McLemore*, 28 F.3d 1160, 1163 (11th Cir. 1994).

IV.

In 1977, then Chief Judge Kaufman of the United States Court of Appeals for the Second Circuit referred to the "baffling skein of provisions" in the I&N Act. *Lok v. INS*, 548 F.2d 37, 38 (2d Cir. 1977). These words seem equally true today, particularly when one must follow words and phrases through various statutes that were enacted to serve purposes other than those related to the immigration laws. The language of 18 U.S.C. § 924(c)(2) is amenable to various interpretations, especially when read within the context of the aggravated felony definition in section 101(a)(43) of the I&N Act. However, I find that the decisions of the majority in this case and in *Matter of Davis, supra*, and *Matter of Barrett, supra*, represent a reasoned construction of the relevant statutory language in the manner most consistent with the overall statutory scheme of the I&N Act. Accordingly, I concur with the majority's conclusion that, while the respondent is deportable as one convicted of a controlled substance offense, he is not separately deportable as one convicted of an aggravated felony.