

# Memorandum



BIA 07-04

Subject	Date
CASE HOLD - Recidivist State simple drug possession offenses	June 25, 2007

To	From
Board Legal Staff	Juan P. Osuna, Acting Chairman <i>JPO</i>

On June 5, 2007, the en banc Board examined the issue of whether, under *Lopez v. Gonzales*, 127 S.Ct. 625 (2006), a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony notwithstanding that the second offense did not charge the alien as a recidivist. Panel One has scheduled an oral argument for July 12, 2007, to further consider the matter.

Accordingly, pursuant to 8 C.F.R. § 1003.1(e)(8)(iii), I am directing that the adjudication time limits be temporarily suspended in individual cases **arising out of the Court of Appeals for Second, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth and Eleventh Circuit** that involve the issue of whether a second State drug possession offense committed after the first such offense has become final constitutes an aggravated felony notwithstanding that the second offense did not charge the alien as a recidivist. If you come across a case with this issue, please bring it to the attention of a Team Leader or Senior Panel Attorney so that the adjudication clock can be promptly stopped, and the record may be placed in designated cabinets.

Cases arising out of the First, Third and Sixth Circuits should apply the following applicable precedents:

First Circuit      *Berhe v. Gonzales*, 464 F.3d 74 (1<sup>st</sup> Cir. 2006)

Third Circuit      *Gerbier v. Holmes*, 280 F.3d 297 (3d Cir. 2002)

Sixth Circuit      *United States v. Palacios-Suarez*, 418 F.3d 692 (6<sup>th</sup> Cir. 2005)