

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2012

(Submitted: February 5, 2013 Decided: February 19, 2013)

Docket No. 12-2798

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Manuel Pascual, AKA Scarface Gomez,

Petitioner,

- v.-

Eric H. Holder, Jr., United States Attorney General,

Respondent.
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Before: JACOBS, Chief Judge, KEARSE and CARNEY,
 Circuit Judges.

Petitioner, a citizen of the Dominican Republic, seeks review of a Board of Immigration Appeals order, affirming an immigration judge's finding that Manuel Pascual had been convicted of an aggravated felony, and was therefore ineligible for cancellation of removal from the United States. For the following reasons, we conclude that Pascual's New York state conviction under NYPL § 220.39(1) constitutes an aggravated felony, which deprives this Court of jurisdiction to review the order of removal.

1 THOMAS EDWARD MOSELEY,
2 Law Offices of Thomas E. Moseley
3 Newark, New Jersey, for
4 Petitioner.

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6 BENJAMIN MARK MOSS,
7 United States Department of
8 Justice, Office of Immigration
9 Litigation, for Respondent.

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11 PER CURIAM:

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13 Manuel Pascual, a citizen of the Dominican
14 Republic, petitions for review of a Board of Immigration
15 Appeals ("BIA") decision to affirm an immigration judge's
16 ("IJ") finding that Pascual had been convicted of an
17 aggravated felony, and was therefore ineligible for
18 cancellation of removal. Pascual also seeks review of the
19 BIA's denial of a continuance to seek post-conviction relief
20 and moves for a stay of removal pending appeal, leave to
21 proceed in forma pauperis and appointment of counsel. The
22 Government moves to dismiss Pascual's petition for review on
23 the ground that the BIA's determination that Pascual had
24 been convicted of an aggravated felony deprives this Court
25 of jurisdiction to review the agency's order of removal. We
26 grant the Government's motion and dismiss Pascual's petition
27 because the BIA correctly determined that Pascual had been
28 convicted of an aggravated felony. We also deny Pascual's
29 additional motions as moot.

1 **BACKGROUND**

2 Pascual was admitted to the United States as a legal
3 permanent resident in 1993. In 2003, Pascual was served
4 with a Notice to Appear charging him with removability under
5 the Immigration & Nationality Act ("INA") § 237(a)(2)(B)(i),
6 8 U.S.C. § 1227(a)(2)(B)(i), by reason of a 2000 Connecticut
7 state conviction for cocaine possession. Then in December
8 of 2011, he was served with an additional charging document
9 seeking his removal pursuant to INA § 237(a)(2)(A)(iii), 8
10 U.S.C. § 1227(a)(2)(A)(iii), by reason of an aggravated
11 felony, citing a 2008 New York state conviction for third-
12 degree criminal sale of a controlled substance, cocaine, in
13 violation of New York Penal Law ("NYPL") § 220.39(1). In
14 January of 2012, Pascual appeared by counsel before an IJ
15 and conceded removability based on the possession crime, but
16 challenged removability based on an aggravated felony
17 conviction. In an oral decision, the IJ ordered Pascual
18 removed to the Dominican Republic, finding that the
19 Government established removability based on Pascual's
20 Connecticut and New York convictions. The IJ also found
21 that the New York conviction was an aggravated felony and as
22 such, Pascual was statutorily ineligible for cancellation of

1 removal. Pascual appealed this decision to the BIA, which
2 affirmed. Pascual now seeks review in this Court.

4 DISCUSSION

5 Although this Court lacks jurisdiction to review final
6 orders of removal against aliens convicted of an aggravated
7 felony, see 8 U.S.C. § 1252(a)(2)(C), we have jurisdiction
8 to review constitutional claims or questions of law,
9 including whether a specific conviction constitutes an
10 aggravated felony. See 8 U.S.C. § 1252(a)(2)(D); Pierre v.
11 Holder, 588 F.3d 767, 772 (2d Cir. 2009). We review
12 interpretations of law and the application of law to fact de
13 novo. See Alsol v. Mukasey, 548 F.3d 207, 210 (2d Cir.
14 2008). A determination that Pascual's conviction under NYPL
15 § 220.39 constitutes an aggravated felony, however, results
16 in the mandatory dismissal of Pascual's appeal. See Higgins
17 v. Holder, 677 F.3d 97, 100 (2d Cir. 2012).

18 This Court has not previously decided whether a
19 conviction under NYPL § 220.39, a Class B felony,
20 constitutes an aggravated felony conviction. See
21 Montesquieu v. Holder, 350 F. App'x 569, 571 (2d Cir. 2009).
22 Some district courts in this Circuit have ruled that it is.

1 See Del Orbe v. Holder, 12 CIV. 1057 PAE, 2012 WL 3826182,
2 at *3-4 (S.D.N.Y. Aug. 27, 2012); United States v. Minotta-
3 Caravalle, 5:10-CR-14-01, 2010 WL 4975643, at *5 (D. Vt.
4 Nov. 30, 2010). We agree. Unpublished opinions in other
5 circuits are in accord. See, e.g., Medina Lopez v. Attorney
6 Gen. of U.S., 425 F. App'x 146, 149 (3d Cir. 2011); Griffith
7 v. Attorney Gen. of U.S., 400 F. App'x 632, 635 (3d Cir.
8 2010); Clarke v. Holder, 386 F. App'x 501, 503 (5th Cir.
9 2010).

10 An "aggravated felony" is defined to include "illicit
11 trafficking in a controlled substance (as defined in section
12 802 of Title 21), including a drug trafficking crime (as
13 defined in section 924(c) of Title 18)." 8 U.S.C. §
14 1101(a)(43)(B). The Supreme Court has held that such a
15 state offense "constitutes a 'felony punishable under the
16 Controlled Substances Act ['CSA' 21 U.S.C. § 801, et seq.]'
17 only if it proscribes conduct punishable as a felony under
18 that federal law." Lopez v. Gonzales, 549 U.S. 47, 60
19 (2006). For a state drug offense to rank as an aggravated
20 felony, "it must correspond to an offense that carries a
21 maximum term of imprisonment exceeding one year under the

1 CSA." Martinez v. Mukasey, 551 F.3d 113, 117-18 (2d Cir.
2 2008).

3 In deciding whether a state conviction corresponds to
4 an "aggravated felony," we employ a "categorical approach"
5 under which "the singular circumstances of an individual
6 petitioner's crimes should not be considered, and only the
7 minimum criminal conduct necessary to sustain a conviction
8 under a given statute is relevant.'" Gertsenshteyn v. U.S.
9 Dep't of Justice, 544 F.3d 137, 143 (2d Cir. 2008)

10 (quoting Dalton v. Ashcroft, 257 F.3d 200, 204 (2d Cir.
11 2001)). The question, then, is whether the elements of NYPL
12 § 220.39 would be punishable as a felony under federal
13 criminal law. See Lopez, 549 U.S. at 57. The federal
14 statute analogous to NYPL § 220.39 is 21 U.S.C. § 841(a)(1),
15 which prohibits, inter alia, the distribution of, or
16 possession with intent to distribute a controlled substance,
17 an offense punishable by a term of imprisonment greater than
18 one year.

19 Pascual relies on an unpublished Fifth Circuit decision
20 to argue that a conviction under of NYPL § 220.39 is not
21 categorically an aggravated felony because statutes that
22 punish "offers to sell," see NYPL § 220.00(1), are not drug

1 trafficking crimes under the CSA. Davila v. Holder, 381 F.
2 App'x 413, 416 (5th Cir. 2010). This Court, however, has
3 held that "distribution," within the meaning of 21 U.S.C. §
4 841(a)(1) does not require a "sale" to take place: "The word
5 'distribute' means 'to deliver,' [21 U.S.C.] § 802(11); and
6 'deliver' means 'the actual, constructive, or attempted
7 transfer of a controlled substance,' [21 U.S.C.] § 802(8)."
8 United States v. Wallace, 532 F.3d 126, 129 (2d Cir. 2008)
9 (emphasis added). Therefore, even if Pascual did no more
10 than offer or attempt to sell cocaine, the state offense
11 would be conduct punishable as a federal felony, thus
12 rendering it an aggravated felony.

13 As a result of the BIA's correct finding that Pascual
14 was convicted of an aggravated felony, this Court lacks
15 jurisdiction over his petition for review, and we must grant
16 the Government's motion to dismiss. Accordingly, we do not
17 consider Pascual's additional claims, including the IJ's
18 denial of a continuance. Cf. Blake v. Gonzales, 481 F.3d
19 152, 162-63 (2d Cir. 2007) (declining to address challenges
20 to IJ's denial of a continuance after concluding that the
21 Court lacked jurisdiction over petitioner's petition for
22 review due to the BIA's aggravated felony finding).

1 For the foregoing reasons, the petition for review is
2 dismissed for lack of jurisdiction.