

**Your Firearm was not in or Affecting Interstate
Commerce? It Doesn't Matter: *Hernandez v. Holder*,
2009 WL 5125456
(5th Cir. Dec. 30, 2009)**

Highlight

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In 1981, Julian Nieto Hernandez (Hernandez), a Mexican citizen and native, was admitted to the United States.¹ In 1997, Hernandez was convicted of felony possession of marijuana under Texas state law.² A year later, the Petitioner was convicted of unlawful possession of a firearm under Texas law.³

As a result of these convictions, the Department of Homeland Security charged Hernandez with removal.⁴ The Department of Homeland Security made the removal charge pursuant to the Immigration and Nationality Act.⁵ Pursuant to 8 U.S.C. § 1229b(a), Hernandez asked the immigration judge to cancel his removal.⁶ Although § 1229b(a) permits discretionary authority for cancellation, a prerequisite to cancellation is that the person seeking cancellation “has not been convicted of any aggravated felony.”⁷ The immigration judge decided that the unlawful possession of a firearm conviction under state law constituted an aggravated felony for the purposes of § 1229b(a).⁸ Therefore, the immigration judge decided that Hernandez was not eligible for the cancellation of his removal.⁹ The Board of Immigration Appeals agreed with the judge. Hernandez appealed to the Fifth Circuit.¹⁰

An alien is not entitled to cancellation of removal if the alien has

¹ Hernandez v. Holder, 2009 WL 5125456, *1 (5th Cir. 2009).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.* Whether the marijuana conviction was sufficient to charge Petitioner with removal is not in dispute as Petitioner conceded this point in his removal hearing. *Id.*

⁶ *Id.*

⁷ *Id.*; 8 U.S.C. § 1229b(a)(3) (2006).

⁸ Hernandez v. Holder, 2009 WL 5125456, *1 (5th Cir. Dec. 30, 2009).

⁹ *Id.*

¹⁰ *Id.*

been convicted of an aggravated felony.¹¹ An aggravated felony, for the purposes of eligibility for cancellation of removal, is “an offense described in section 922(g)(1) . . . of title 18, United States Code.”¹² Aggravated felony under 18 U.S.C. § 922(g)(1) makes it “unlawful for any person who has been convicted of a felony to possess, in or affecting interstate commerce, any firearm.”¹³

Hernandez argued before the Fifth Circuit that his conviction under the Texas law for unlawful possession of a firearm is not an offense under § 922(g)(1) because the Texas conviction lacks the interstate commerce element that the conviction under § 922(g)(1) requires.¹⁴ The Fifth Circuit, in its decision, had to decide the issue as to whether a state conviction for unlawful possession of a firearm must also meet the interstate commerce requirement to be sufficient to constitute an offense “described in” § 922(g)(1).¹⁵

The Fifth Circuit applied a *de novo* standard of review because Hernandez raised a question of law.¹⁶ The court began with statutory interpretation of 8 U.S.C. § 1101(a)(43)(E)(ii). According to the statute, an aggravated felony is an offense described in § 922(g)(1), which is the statute for unlawful possession of a firearm that contains an interstate commerce element.¹⁷ In what the court terms the “penultimate sentence” in § 1101(a)(43), the court points to statutory language that shows that the statute is to apply to offenses, whether the offenses are committed under state or federal law.¹⁸ The court also notes that the interstate commerce element in § 922(g)(1) is merely an element included to provide for federal jurisdiction over the offense.¹⁹ Because the interstate commerce is merely a jurisdictional requirement, the Fifth Circuit determined that according to congressional intent, this element is irrelevant when determining the definition of aggravated felony.²⁰

The court also assessed the language “described in” as opposed to “defined in.”²¹ The Fifth Circuit stated that the term used in § 1101(a)(43)(E), “described in,” is a looser standard than the phrase

¹¹ *Id.*; 8 U.S.C. § 1229b(a)(3).

¹² *Id.*

¹³ *Id.*

¹⁴ *Id.* at *2.

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* (citing *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 502 (7th Cir. 2008)).

²¹ *Id.* at *3.

“defined in” that is used in other parts of § 1101(a)(43).²² The Fifth Circuit states that this distinction expresses congressional intent to include more than a “negligible number” of state unlawful possession crimes as aggravated felonies because few states, if any, would be likely to include an interstate commerce element as part of the crime.²³ The Fifth Circuit did not believe that Congress intended to exclude state crimes that did not require an interstate commerce jurisdictional element from the definition of aggravated felony.²⁴

In reasoning that Congress intended to include state unlawful possession crimes as part of the definition of aggravated felony, despite the lack of the interstate commerce element, the Fifth circuit held that Hernandez was not eligible to have his removal cancelled.²⁵ The decision is a narrow but important holding. Now, in the Fifth Circuit, conviction for unlawful possession of a firearm does not have to include the added interstate commerce element of the federal crime in order to satisfy the aggravated felony provision in § 1101(a)(43)(E)(ii).²⁶ Thus, a state law conviction for unlawful possession, without meeting the jurisdictional requirements of the federal crime, may be sufficient to prove an alien ineligible for cancellation of removal.²⁷

This decision is important for future cases because it expands the scope of the aggravated felony provision of § 1101(a)(43)(E)(ii) in reference to state unlawful possession of firearm convictions. Additionally, this decision could make many individuals ineligible for cancellation of removal due to a state conviction of unlawful possession of a firearm, even though the individual may fail the requisite interstate commerce element of § 922(g)(1). This is a significant change in the law because the only way that Congress may regulate firearms is through the connection with interstate commerce.²⁸ This decision allows the federal government to use unlawful possession of firearm convictions, not connected with interstate commerce, against individuals in removal proceedings. The federal government would not be able to charge a person with the unlawful possession without this element, but now the states can and that conviction can be used to prove individuals

²² *Id.* (citing *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 502 (7th Cir. 2008)).

²³ *Id.* (quoting *Negrete-Rodriguez v. Mukasey*, 518 F.3d 497, 501-02 (7th Cir. 2008)).

²⁴ *See id.*

²⁵ *Id.* at *4.

²⁶ *Id.*

²⁷ *See id.*

²⁸ *See id.* at *2 (“Because § 922(g)(1)’s interstate commerce element is simply an element that that ensures federal jurisdiction . . .”).

ineligible for cancellation of removal proceedings.

This law is important to practitioners because there is significantly more at stake now with unlawful possession of firearm convictions. Now, a person may not be eligible for cancellation of removal proceedings with a state conviction for unlawful possession of a firearm. Therefore, practitioners will have to be aware that the cancellation of removal proceedings, if they are brought against an individual, will not be possible with this type of conviction. Practitioners should warn clients of the risk of such a conviction. This is not fair to individuals that already have a state conviction for unlawful possession because these individuals did not have notice that the government would be able to institute removal proceedings without the option of cancellation for a state conviction of unlawful possession of a firearm. Additionally, the government is held to a high standard in which it must always prove every element of a crime. In this situation, however, the government is not required to prove every element of the federal crime to make a person ineligible for cancellation of removal proceedings. Instead, the government may rely on the state convictions that do not require the interstate commerce element that the federal crime requires.²⁹

In conclusion, this case is an important decision by the Fifth Circuit as it broadens the scope of aggravated felonies for the purpose of proving persons ineligible for cancellation of removal proceedings. Although Hernandez may not have been able to foresee this result, practitioners can now warn their clients of the risks that state convictions for unlawful possession of a firearm will have on their immigration status in the United States. The stakes just got a little higher for state convictions of aliens.

²⁹ The interstate commerce element may not be difficult to prove in unlawful possession cases under federal law because most firearms have probably traveled in interstate commerce in some way. Therefore, proving this element may be trivial. Nonetheless, the decision seems to be a bit of a paradigm shift in that the government is not required to prove each element when it uses the conviction to pursue removal proceedings and prevent cancellation of those proceedings.