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PRELIMINARY STATEMENT

This is one of many cases now before the Board of Immigration Appeals (“BIA”) in which the Department of Homeland Security (“DHS”) continues to argue—even after the Supreme Court’s near unanimous December 2006 decision in Lopez v. Gonzales requiring that a state drug possession offense must correspond to a federal felony to be deemed a “drug trafficking” aggravated felony—that certain state nontrafficking offenses may be categorically deemed drug trafficking aggravated felonies without regard to the requirements of the federal felony standard.

In order to determine which state drug offenses may be deemed “drug trafficking crimes,” the Supreme Court held that a state offense must strictly correspond to a federal drug felony. As the “drug trafficking crime” terminology suggests, federal drug felonies are, by and large, trafficking offenses. As the Court noted, a “coerced” exception is the recidivist possession felony under 21 U.S.C. § 844(a). See Lopez v. Gonzales, 127 S.Ct. 625, 630 n.6 (2006). Under 21 U.S.C. §§ 844(a), as elucidated in 21 U.S.C. § 851, however, a possession offense may not be prosecuted as a felony unless the government—in the criminal proceedings—bears the burden of proving a final prior drug conviction and provides the defendant with proper notice and an opportunity to challenge the fact, finality, and validity of the prior conviction.

Nevertheless, the DHS argues in this case and others that any state drug possession offense where the DHS presents information regarding a prior drug offense should be treated as though state prosecutors had charged and proven the fact, finality, and validity of the prior conviction in the state criminal proceedings regardless of whether this was, in fact, the case. The DHS’ position is in striking contrast to the strict federal standard approach of the Supreme Court. In Lopez, the Court made clear that the determination of whether a state nontrafficking

conviction may be treated as an aggravated felony must be based on what was actually proven in the state criminal case, rather than on what charges a federal prosecutor could hypothetically have brought based on the underlying facts. Thus, the Court found that the fact that a state simple possession offense involving a large quantity of drugs could have been charged as possession with intent to distribute by a federal prosecutor will not convert the simple possession conviction into an aggravated felony because “intent to distribute” was simply not at issue in the state case.

Moreover, the actual practice of federal prosecutors is that they rarely, if ever, exercise their discretion under federal law to prosecute second or subsequent drug possession offenses as recidivist felonies in the absence of other more serious charges. Despite the fact that federal prosecutors generally do not find it appropriate to prosecute second or subsequent possession offenses as felonies, the DHS’ position would nevertheless attach drastic “aggravated felony” consequences to all second or subsequent state possession offenses, regardless of their seriousness or of the validity of the prior conviction. In addition to being in conflict with the clear command of Lopez and the BIA’s own categorical approach, the DHS’ position would lead to such absurdities as allowing second federal misdemeanors and state non-criminal violations to be deemed aggravated felonies as the equivalent of federal felonies.

The BIA should apply the strict federal standard set out by the Supreme Court in Lopez and hold that a second or subsequent state possession conviction is not an aggravated felony where the state offense does not correspond to the federal standard requiring notice, proof and an opportunity to challenge the fact, finality, and validity of any alleged prior conviction.

STATEMENT OF INTEREST

Amicus New York State Defenders Association (“NYSDA”), which seeks to improve the quality of justice for citizens and noncitizens accused of crimes, has an interest in assisting the BIA and the federal courts in reaching fair and accurate decisions about the application of federal immigration law to immigrants with past criminal convictions. NYSDA is a not-for-profit membership association of more than 1,300 public defenders, legal aid attorneys, assigned counsel, and others dedicated to developing and supporting high quality legal defense services for all people, regardless of income. Among other initiatives, NYSDA operates the Immigrant Defense Project, which provides defense attorneys, immigration lawyers and immigrants with expert legal advice, publications and training on issues involving the interplay between criminal and immigration law.

NYSDA and its Immigrant Defense Project are concerned that, if the BIA adopts the DHS’ position that the drug possession conviction in this case may be deemed a drug trafficking aggravated felony, this will result in significant consequences, unintended by Congress, for the many immigrants in New York State and throughout the United States who have similar or even lesser nontrafficking convictions. If the BIA finds that second or subsequent possession offenses can categorically be deemed drug trafficking aggravated felonies, lawful permanent resident immigrants and other non-citizens with such nontrafficking convictions will be at permanent risk of removal without any opportunity to apply for relief—regardless of their individual equities—if they seek to naturalize, travel abroad, or have any other contact with DHS.

The BIA, as well as the federal courts, including the Supreme Court, have accepted and relied on amicus curiae briefs submitted by NYSDA’s Immigrant Defense Project in important cases involving application of the immigration laws to criminal dispositions. See Brief of

Amicus Curiae New York State Defenders Association in Matter of Devison-Charles, 22 I&N Dec. 1362 (BIA 2000, 2001) (amicus brief acknowledged with appreciation in n.2 of Board's January 18, 2001 decision on government's motion for reconsideration); see also Brief of Amici Curiae NYSDA Immigrant Defense Project, et al, in Lopez v. Gonzales, 127 S. Ct. 625 (2006); Brief of Amici Curiae National Association of Criminal Defense Lawyers, New York State Defenders Association, et al, in Leocal v. Ashcroft, 125 S.Ct. 377 (2004); Brief of Amici Curiae National Association of Criminal Defense Lawyers, New York State Defenders Association, et al, in Immigration and Naturalization Service v. St. Cyr, 121 S.Ct. 2271 (2001) (amicus brief cited at n.50); and Briefs of Amicus Curiae New York State Defenders Association submitted to the First Circuit in Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006), to the Second Circuit in Calcano-Martinez, et al. v. INS, Dkt. No. 98-4033 (amicus brief cited in companion case of St. Cyr v. INS, 229 F.3d 406, at n.7 (2d Cir. 2000)); Pottinger, et al. v. Reno, 2000 U.S. App. LEXIS 33521 (2d Cir. 2000); Zgombic v. Farquharson, 69 Fed. Appx. 2 (2d Cir. 2003); Rankine et al v. Reno, 319 F.3d 43 (2d Cir. 2003); Jobson v. Ashcroft, 326 F.3d 367 (2d Cir. 2003); Dickson v. Ashcroft, 346 F.3d 44 (2d Cir. 2003), and to the Third Circuit in Ponnapula v. Ashcroft, 373 F.3d 480 (3rd Cir. 2004).

BACKGROUND

The DHS' position that any state drug possession offense where the DHS presents information regarding a prior drug conviction may be treated as corresponding to a serious federal recidivist felony will lead, and has already led, to minor state possession offenses, some of which are not even crimes under state law, being deemed aggravated felonies. For example, prior to Lopez, the DHS successfully argued, in an unpublished case, that a second misdemeanor marijuana possession conviction for which the respondent received a suspended sentence and



probation was an aggravated felony based on an earlier marijuana possession conviction that was punished with three days jail time. See In re: Augustus Denizil Stewart, 2004 WL 848506 (BIA March 1, 2004). The DHS even successfully argued that two marijuana possession violations, which are not regarded as crimes under New York law, see NYCPL §§ 10.00(3)-(5) (violations constitute a lesser category of offense distinct from misdemeanors and felonies), constitute an aggravated felony. See In re: Conrad O'Neil Minto, 2005 WL 1104172 (BIA March 21, 2005) (unpublished disposition). Thus aggravated felony consequences, under the DHS' approach, would apply to offenses that are in the same category as traffic infractions. See NYCPL § 1.20(39) (“‘petty offense’ means a violation or a traffic infraction”).

The broad reach of the DHS' position in these cases is particularly troubling given the large number of often minor drug possession arrests in the United States and the quick and often careless procedures for processing them. According to the Federal Bureau of Investigation's Uniform Crime Statistics, there were 1,846,400 drug abuse violation arrests by state and local authorities in the United States in 2005, of which more than 80% were for drug possession. U.S. Dept. of Just., Bureau of Just. Statistics, DRUG AND CRIME FACTS, <http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm> (last modified Sept. 21, 2006). The sheer volume of drug possession arrests means that many of the drug possession convictions ultimately obtained unavoidably suffer from significant procedural defects. Misdemeanor possession offenses are often processed by means of rapid procedures that may give rise to constitutional violations. For example, in New York State, many misdemeanor or lesser cases outside of New York City are heard by town or village justices, seventy-five percent of whom are not lawyers, and denial of defendants' right to counsel is widespread. See William Glaberson, Broken Bench: In Tiny Courts of New York, Abuses of Law and Power, N.Y. TIMES, September 25, 2006, at 1;

see also New York Judicial Selection, http://www.ajs.org/js/NY_methods.htm; N.Y. State Court'n on the Future of Indigent Def. Servs., FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 18, 2006), at 21-23.

The possibility of quick and careless processing of the large number of drug possession arrests is not limited to cases that result in misdemeanor or lesser convictions. Many states classify most possession offenses as felonies, creating large numbers of cases at the felony level, along with the same inevitable pressures for rapid adjudication that may lead to procedural defects in misdemeanor or lesser cases. See, e.g., S.D. Codified Laws §§ 22-42-5 & 22-42-6 (2006) (statute at issue in Lopez classifying almost all simple possession offenses as felonies). For example, in Florida, where most possession offenses are felonies, see, e.g., Fla. Stat. § 893.13 (classifying most simple possession offenses in Florida as felonies), judges must advise defendants that a guilty plea could lead to deportation if they are not citizens. See Florida R. Crim. P. Rule 3.172(c)(8) (to determine voluntariness of a plea, “judge must inform [defendant] that if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service”). Nevertheless, Florida courts have found that judges have failed to advise defendants of the immigration consequences of guilty pleas and have vacated those pleas as invalid. See, e.g., Plkwhrah v. State, 829 So.2d 402 (2002); Elharda v. State, 775 So.2d 321 (2000); Sanders v. State, 685 So.2d 1385 (1997). Thus, many individuals with drug possession convictions, both felony and misdemeanor, may have experienced procedural deficiencies that would, upon challenge, lead to a determination that their convictions were invalid. The BIA now has the opportunity to address whether minor and possibly invalid convictions such as these may be treated as if they would have been found to be a valid basis for serious federal recidivist

possession felony convictions.

SUMMARY OF ARGUMENT

In Lopez v. Gonzales, 549 U.S. _____, 127 S. Ct. 625 (2006), the Supreme Court held that a state drug offense constitutes a drug trafficking aggravated felony as a “felony punishable under the Controlled Substances Act,” and therefore an aggravated felony under the Immigration and Nationality Act (“INA”) § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), “only if it proscribes conduct punishable as a felony under that federal law.” Lopez, 127 S. Ct. at 633 (emphasis added). Under the strict federal felony standard adopted by the Supreme Court in Lopez, it is clear that a state drug conviction covering nontrafficking conduct is not “punishable” as an aggravated felony “drug trafficking crime” under 8 U.S.C. § 1101(a)(43)(B) based solely on alleged underlying facts, rather than the crime the prosecutor chose to charge and prove in the state criminal proceedings. This conclusion follows the categorical approach employed by the BIA, which requires that the BIA, in determining whether a state offense is an aggravated felony, look only to what was at issue in the state criminal proceeding and not to facts not charged or proven by the state prosecutor.

As applied to second or subsequent state possession offenses where there is no evidence that a prior conviction was even at issue in the criminal proceeding, the approach of the Supreme Court in Lopez and the BIA’s own categorical approach require that such convictions not automatically be treated as aggravated felonies. Under the federal Controlled Substances Act, a misdemeanor possession offense is converted into a recidivist felony only if the U.S. Attorney files an information with the sentencing court charging the prior drug conviction, and the court gives the defendant an opportunity to challenge the fact, finality and validity of the prior conviction in a hearing at which the government generally has the burden of proof beyond a

reasonable doubt on any issue of fact. See 21 U.S.C. §§ 844(a), 851. A federal prosecutor cannot obtain a felony recidivist enhancement without providing notice and meeting its burden of proving the existence of a prior final conviction that can withstand collateral attack.

Therefore, under the federal felony standard adopted in Lopez, a second or subsequent state nontrafficking offense is not equivalent to a federal recidivist possession felony where the federal recidivist offense requirements were not met in the state criminal proceeding. See infra Point I.A.

The conclusion that a second or subsequent state possession offense may not automatically be treated as a federal felony is further supported by the fact that the DHS' approach is clearly in conflict with Congressional intent and would lead to absurd results. Under the federal Controlled Substances Act, prior convictions that are found to be invalid cannot serve as a basis for a felony recidivist enhancement. The DHS' approach, however, would require treating all prior state convictions, including low-level felony, misdemeanor, and lesser offenses, many of which are prosecuted using summary procedures that raise substantial questions as to their validity, as the basis for a recidivist possession conviction corresponding to a federal felony. See infra Point I.B. Moreover, if all second or subsequent state drug possession offenses may automatically be treated as the equivalent of federal felonies, then it follows that all second or subsequent federal misdemeanor possession offenses may automatically be treated as the equivalent of federal felonies, despite the fact that federal prosecutors elected not to seek a felony recidivist enhancement—an absurd result that is clearly in conflict with Congressional intent. See infra Point I.C.

The problems inherent in DHS' approach are confirmed by the fact that it has been rejected by the federal circuit courts that have carefully applied the federal felony standard in the

immigration context. Adoption of DHS' approach would put the BIA in direct conflict with the First, Third, and Ninth Circuits, as well as with the general trend in the federal courts toward a recognition that second or subsequent state possession offenses may not automatically be treated as aggravated felonies. See *infra* Point II.

Finally, should the BIA find that there is any lingering ambiguity as to whether or not a second or subsequent possession offense such as the one at issue here can be deemed an aggravated felony, the BIA should apply the rule of lenity to find that such convictions do not constitute aggravated felonies. See *infra* Point III.

ARGUMENT

I. UNDER THE FEDERAL FELONY STANDARD ADOPTED BY THE SUPREME COURT IN LOPEZ, A STATE DRUG POSSESSION OR OTHER NONTRAFFICKING CONVICTION CANNOT BE TRANSFORMED INTO A “DRUG TRAFFICKING” AGGRAVATED FELONY BASED ON A PRIOR CONVICTION WHERE THE STATE CRIMINAL PROCEEDING DID NOT PROVE—OR OFFER AN OPPORTUNITY EQUIVALENT TO THAT UNDER FEDERAL LAW TO CHALLENGE—THE FACT, FINALITY, AND VALIDITY OF THE ALLEGED PRIOR CONVICTION.

The DHS' position that a state drug possession conviction is automatically converted into a “drug trafficking” aggravated felony simply because facts not charged or proven by the state prosecutor indicate a prior conviction is contrary to the express reasoning of the Supreme Court in the Lopez decision. The DHS' interpretation runs afoul of the Supreme Court's strict federal felony standard, which requires an inquiry into whether the state offense at issue is actually punishable as a felony under federal law, not an inquiry into what charges federal prosecutors might have been able to file against the defendant based on the alleged underlying facts. Indeed, the DHS' reasoning is contrary to the BIA's own categorical analysis of “aggravated felonies.” Application of the Lopez analysis and the categorical approach leads inexorably to a conclusion that the “conduct proscribed” by second or subsequent state nontrafficking offenses is not

punishable as a felony under federal law where the state criminal proceedings did not prove—or offer an opportunity equivalent to that under federal law to challenge—the fact, finality and validity of the prior conviction. Any alternative interpretation would allow invalid state possession convictions, which cannot serve as the predicate for a felony recidivist enhancement under federal law, to transform a state simple possession conviction into an aggravated felony, and would lead to the absurd consequence of automatically treating second federal misdemeanor possession convictions as aggravated felonies, a result clearly in conflict with Congressional intent. Thus, under Lopez, a second or subsequent state drug possession or other nontrafficking offense may not automatically be considered a “drug trafficking” aggravated felony.¹

¹ The BIA has never resolved the question of whether and under what circumstances second or subsequent drug possession convictions can automatically be treated as drug trafficking aggravated felonies. In Matter of Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002), respondent raised the argument that his state felony drug possession conviction was not analogous to a federal felony, and therefore not an aggravated felony, in the absence of compliance with requirements analogous to those of 21 U.S.C. § 851. See id. at 392. However, the BIA did not reach the issue because it held that, under the state-felony approach applied at the time by several Circuit courts, the drug possession conviction was a drug trafficking aggravated felony based on its designation as a felony by the state of conviction. Id. at 399. Similarly, while the BIA in Matter of Davis noted that a state conviction might in some cases be analogous to the federal felony of recidivist possession in 21 U.S.C. § 844, that case involved a state conviction for conspiracy to distribute a controlled substance rather than multiple state convictions for drug possession. See Davis, 20 I&N Dec. at 537. The BIA therefore did not address in Davis under what circumstances a second or subsequent state possession offense would correspond to a federal recidivist possession offense. See id.; Letter of Bryan S. Beier, Senior Litigation Counsel, Office of Immigration Litigation (requesting remand to the BIA in Salazar-Regino v. Trominski, Dkt. No. 03-41492 (2d Cir. 2007), because “the Board has previously declined to address the circumstances when a second illegal drug possession conviction should be considered a “felony punishable under the Controlled Substances Act” under 21 U.S.C. § 844(a)’s recidivist possession provision... The Board should be permitted to address that issue on remand.”)(copy attached). The BIA has thus never resolved whether a second or subsequent state possession conviction may be treated as an aggravated felony when the prior conviction was not even at issue in the state prosecution.

A. The strict federal felony standard adopted in Lopez and the categorical approach of the BIA dictate that a second or subsequent state possession offense is not “punishable” as a recidivist felony under federal law, and therefore not an aggravated felony, where notice and proof requirements were not met in the state criminal proceeding.

Under Lopez, the BIA must look skeptically upon claims that a state nontrafficking offense constitutes a federal felony. The Court noted that the “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.” Lopez, 127 S.Ct. at 630 n.6. While the Supreme Court noted in Lopez that some state non-trafficking offenses could counterintuitively come within the definition of illicit trafficking if they “correspond” to a felony under the Controlled Substances Act, see Lopez, 127 S. Ct. at 630 n.6, the Court also laid out a strict test for determining when a state offense in fact corresponds to a federal felony.

In Lopez, the Supreme Court made clear that determining whether a state offense is “punishable” under federal law does not involve a broader inquiry into what charges a federal prosecutor could have brought against the defendant based on the alleged underlying facts of the case. This strict approach to determining whether a state offense corresponds to a federal felony under the Controlled Substances Act follows previous Supreme Court and BIA case law applying a “categorical approach” to determine whether an offense is an aggravated felony. Such an approach looks only to what was charged and proven in the criminal proceedings rather than to any underlying facts. As a federal felony conviction for recidivist possession requires notice, proof, and an opportunity to challenge the fact, finality, and validity of a prior conviction, a second or subsequent state possession offense simply cannot be converted into the equivalent of a federal recidivist possession felony where these requirements were not met in the state

criminal proceeding. Thus, applying the Lopez analysis to second or subsequent state nontrafficking convictions that do not meet these federal requirements demonstrates that they do not correspond with a federal felony such as to allow them to be considered drug trafficking aggravated felonies.

1. Under Lopez and BIA case law, courts must focus on the actual state conviction, and not on what the defendant was hypothetically chargeable with based on alleged underlying facts, to determine whether the offense is punishable as a federal felony.

Under the Supreme Court's approach in Lopez, courts must focus on what was actually charged and proven in the state criminal proceeding and determine whether it strictly corresponds with a crime punishable as a felony under the Controlled Substances Act. Thus, under Lopez, "punishable" does not mean "hypothetically chargeable with." The relevant inquiry under Lopez is to determine, through a strict comparison of the state offense with federal offenses under the Controlled Substances Act, how federal law would punish the conduct actually proven in the state prosecution.

In its discussion of the offenses of possession and possession with intent to distribute, the Supreme Court made clear that courts must look to the crime that was actually charged and proven in state court, rather than to a hypothetical federal prosecution. The Supreme Court noted that "some States graduate offenses of drug possession from misdemeanor to felony depending on quantity, whereas Congress generally treats possession alone as a misdemeanor," but allows federal prosecutors to choose to charge an individual with felony possession with intent to distribute when the amount is sufficiently large. Id. at 633. In a case where the underlying facts indicate that the defendant possessed a sufficient quantity of drugs to be charged with the felony of possession with intent to distribute under federal law, a state prosecutor might charge the defendant with either state simple possession (a misdemeanor under federal law), or possession

with intent to distribute (a felony under federal law). But for purposes of the Supreme Court's strict federal felony analysis, only a conviction for the second offense is an aggravated felony. See id. The fact that a state simple possession offense involving a large quantity of drugs could have been charged as possession with intent to distribute by a federal prosecutor will not convert the simple possession conviction into an aggravated felony because "intent to distribute" was not actually at issue in the state case. The Supreme Court explicitly recognized and accepted this effect of its federal felony approach, noting that, under its analysis, a defendant "convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation" since federal law does not punish simple possession as a felony. Id.

The Lopez approach follows the "categorical approach" generally used by the BIA and the Supreme Court to determine if an offense constitutes an aggravated felony. Under the categorical approach, a court looks "only to the statutory definitions" of offenses, and "not to the particular facts underlying those convictions." Taylor v. United States, 495 U.S. 575, 600 (1990); see also Matter of Ramos, 23 I&N Dec. 336 (BIA 2002) ("[W]e follow a categorical approach, under which 'we look to the statutory definition, not the underlying circumstances of the crime.'" (quoting Matter of B-, 21 I&N Dec. 287, 289 (BIA 1996)). If a statute is divisible, covering some conduct within the aggravated felony definition and other conduct that does not fall within that definition, courts and the BIA may look to the record of conviction for the limited purpose of determining for what offense the individual was convicted. See Ramos, 23 I&N Dec. at 340; Matter of Sweetser, 22 I&N Dec. 709 (BIA 1999). See also Shepard v. United States, 544 U.S. 13, 26 (2005) (holding that evidence that may be considered in applying the categorical approach generally only includes "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which

the defendant assented”). “In making such an inquiry the [BIA] still do[es] not delve into the underlying facts that may have been presented in the criminal proceeding, but focus[es] instead on” what had to be proven to sustain a conviction. Ramos, 23 I&N Dec. at 340.

Under both Lopez and BIA case law, the adjudicator must not search beyond the record of conviction to determine what crime an individual could hypothetically have been charged with in federal court, but must instead focus on the conduct actually proscribed by the state offense that had to be proved to sustain the state conviction. Lopez therefore requires that the BIA apply to this case the categorical approach with which it is familiar from other cases involving aggravated felonies and crimes of moral turpitude. See, e.g., Matter of Vargas-Sarmiento, 23 I&N Dec. 651 (BIA 2004) (using categorical approach to determine whether state offense is a crime of violence aggravated felony); Matter of Teiwani, 24 I&N Dec. 97 (BIA 2007) (using categorical approach to determine whether offense is a crime involving moral turpitude). In fact, in many cases involving state drug possession offenses, application of the Lopez strict federal felony standard will be quite straightforward: where there is no evidence in the record of conviction that a prior conviction was charged and proven in the state case, the conviction cannot be designated an aggravated felony.

2. A second or subsequent state possession offense does not correspond to a federal recidivist possession felony in the absence of notice, proof, and an opportunity to challenge the fact, finality, and validity of any alleged prior conviction.

Applying the Lopez standard and the BIA’s categorical approach to state possession offenses where a prior conviction was not charged and proven in the state criminal proceedings requires finding that such offenses do not correspond to a federal recidivist felony.

Nontrafficking crimes, in and of themselves, are generally not punishable as felonies under federal law. See 21 U.S.C. § 844(a). Federal law only punishes a second or subsequent state

possession offense as a felony where the prosecutor has met requirements designed to establish the existence of a prior final conviction that can withstand collateral attack.

In order for an offense to be punished as a felony under the recidivist possession provisions of 21 U.S.C. §§ 844(a) and 851, strict requirements of notice and proof must be met in order to ensure the fact, finality, and validity of an alleged prior conviction. First, the prosecutor must file an information with the court and serve a copy of such information on defendant before he or she enters a guilty plea or trial commences. 21 U.S.C. § 851(a). This information must state the prior final convictions to be relied upon and provide the defendant notice of the potential for increased punishment. *Id.* Upon receiving the information, the defendant has a statutory right to challenge the prior conviction. 21 U.S.C. § 851(c). Specifically, a defendant may deny the allegation of a prior conviction or challenge the conviction as invalid by filing a written response to the prosecutor's information. *Id.* The court must then hold a hearing on the issues raised by the defendant—a hearing in which the government generally has the burden of proof beyond a reasonable doubt on any issue of fact. 21 U.S.C. § 851(c)(1). These requirements and their consequences must be explained to the defendant by the court. 21 U.S.C. § 851(b).

The requirements for a conviction under the recidivist possession provisions of the Controlled Substances Act are substantive and significant. By including the requirements, Congress intended to punish as a felony only those offenses where, along with notice and proof of the elements of the current possession offense, there is also notice and proof of a prior conviction that can withstand collateral attack. Congress enacted 21 U.S.C. § 851 as part of the Comprehensive Drug Abuse and Control Act of 1970, Pub. L. No. 513, §§ 1101(b)(4)(A), 1105(a), 84 Stat. 1292, 1295. Before this law, a prior conviction typically resulted in mandatory

and automatic sentencing enhancements, with no discretion given to the prosecutor even in many low-level cases. See United States v. Dodson, 288 F.3d 153, 159 (5th Cir. 2002) (discussing the legislative history of § 851). By enacting § 851, Congress intended “to make more flexible the penalty structure for drug offenses.” United States v. Noland, 495 F.2d 529, 533 (5th Cir. 1974) (internal quotation marks omitted); see also Report of House Committee on Interstate and Foreign Commerce, H. Rep. No. 91-1444, 91st Cong., 2d Sess., 1970 U.S.C.A.N. 4566, 4576 (“The severity of existing penalties...have [sic] led in many instances to reluctance on the part of the prosecutors to prosecute some violations, where the penalties seem to be out of line with the seriousness of the offense. . . . [S]evere penalties, which do not take into account individual circumstances, and which treat casual violators as severely as they treat hardened criminals, tend to make convictions somewhat more difficult to obtain... [M]aking the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing penalties...”). Thus, prosecutors were given the option not to seek a sentencing enhancement in low-level cases. Furthermore, for cases where prosecutors did seek to use a prior conviction to enhance a sentence, Congress made the requirements of 21 U.S.C. § 851 strict and mandatory. See Noland, 495 F.2d at 533 (discussing how Congress used mandatory language in the text of § 851).

Given this legislative context, the Supreme Court has repeatedly recognized the importance of strictly adhering to the requirements of 21 U.S.C. § 851. In United States v. LaBonte, 520 U.S. 751 (1997), the Court considered the appropriate sentencing instrument for recidivist offenders who may receive a higher sentence under either the statutory sentence enhancement of § 851 or under the “career offender” provisions of the United States Sentencing Commission’s Sentencing Guidelines. In deciding that the Sentencing Commission had improperly favored the Sentencing Guidelines’ “career offender” sentencing enhancements over

the statutory enhancements, the Supreme Court specifically noted that “[t]he imposition of [a statutory § 851] enhanced penalty is not automatic” and should not be treated as such. Id. at 754.

In Price v. United States, 537 U.S. 1152 (2003), the Supreme Court addressed the § 851 requirements specifically in the context of the recidivist enhancement in § 844(a). The Court held that petitioner’s 21 U.S.C. § 844(a) drug possession offense could not be treated as a felony given the government’s failure to file a notice of enhancement under § 851(a), and remanded a Fifth Circuit case with a contrary holding to be reconsidered in light of LaBonte. In Price, the Solicitor General’s brief acknowledged that the petitioner’s drug offense could not be treated as a felony given the government’s failure to file a notice of enhancement under 21 U.S.C. § 851(a), a fact that both the opinion and the dissent, filed for other reasons, also noted. Id.²

² Circuit courts have similarly demanded strict adherence to the requirements of § 851 in a variety of contexts. See, e.g., United States v. Flowers, 464 F.3d 1127, 1131 (10th Cir. 2006) (“We have . . . always required strict compliance with § 851. The language of the statute . . . does impose strict requirements on the government before the government can seek an increase in the statutory mandatory maximum or minimum sentence. That Congress intended § 851 to provide a measure of protection to defendants from the use of prior convictions to change the statutory sentences for crimes also argues in favor of strictly enforcing § 851 against the government.” (internal quotation marks, brackets and citations omitted)); United States v. Martinez, 253 F.3d 251, 255 n.4 (6th Cir. 2001) (stating that the government could not rely upon defendant’s prior conviction to enhance his sentence where it failed to file prior conviction information under § 851); United States v. Green, 175 F.3d 822, 836 (10th Cir. 1999) (vacating enhanced sentence where government failed to meet its burden to prove the fact of prior convictions pursuant to § 851, where convictions were under a different name); United States v. Sanchez, 138 F.3d 1410, 1416 (11th Cir. 1998) (vacating sentence where government failed to file proper information and court did not hold a hearing to address defendant’s claims that his prior convictions were invalid under § 851, noting that “[t]he language of the statute is mandatory, requiring strict compliance”); United States v. Ruiz-Castro, 92 F.3d 1519, 1536 (10th Cir. 1996) (remanding case for resentencing where it was unclear whether the defendant fully “appreciated his ability to challenge the prior conviction for sentencing purposes” under § 851); United States v. Levey, 76 F.3d 671, 674 (5th Cir. 1996) (holding that, because government withdrew its notice of intent to rely on prior convictions under § 851, the district court improperly considered those prior convictions in sentencing); United States v. Johnson, 944 F.2d 396, 407 (8th Cir. 1991) (vacating sentence where government did not file timely information regarding its intent to rely on prior convictions under § 851, noting that the government must strictly adhere to § 851 to “allow[] the defendant ample time to determine

A federal recidivist possession conviction is clearly invalid in the absence of compliance with the notice and proof requirements of 21 U.S.C. §§ 844(a) and 851. Under the federal felony standard in Lopez, a state possession conviction is therefore also not “punishable” as a federal recidivist felony unless the state criminal proceeding established the existence of a prior final conviction that can withstand collateral attack. As with convictions for simple possession of a large quantity of drugs, that the underlying facts reveal that a federal prosecutor could, hypothetically, have charged an individual with a federal felony does not make the state offense punishable as a federal felony. A state nontrafficking offense cannot correspond to a federal recidivist possession felony where the state criminal proceeding did not prove—or offer an opportunity equivalent to that under federal law to challenge—the fact, finality, and validity of the prior conviction.

B. The DHS’ position would require treating individuals with potentially invalid prior convictions that might not serve as a valid basis for a felony enhancement under federal law as aggravated felons, a result clearly in conflict with Congressional intent.

The conclusion that second or subsequent state drug possession offenses may not automatically be deemed aggravated felonies is further confirmed by the fact that such an interpretation leads to results that are inconsistent with Congressional intent. The Court in Lopez recognized that Congress intended for the definition of aggravated felonies to turn on a federal, rather than a state, standard. Lopez, 127 S.Ct. at 632 (“Congress has apparently pegged the immigration statutes to the classifications Congress itself chose”). In adopting the strict requirements of 21 U.S.C. § 851, Congress clearly intended to ensure that federal possession convictions that could not withstand a collateral attack on their validity would not be used as the

whether he should enter a plea or go to trial, and to plan his trial strategy with full knowledge of the consequences of a potential guilty verdict”).

basis for a federal felony recidivist possession conviction and therefore as the basis for an aggravated felony. See supra Point I.A.2. The DHS' position that any state possession offense where underlying facts indicate a prior conviction should be treated as an aggravated felony will allow invalid prior convictions to be the basis for an aggravated felony determination, a result in conflict with Congressional intent in adopting 21 U.S.C § 851 and with the requirement of a federal standard as set forth in Lopez.

An examination of the summary procedures often used to prosecute the high volume of drug possession arrests indicates that many of the resulting convictions suffer from inadequacies that would lead to their invalidation under the federal requirements of § 851. In fact, low-level drug offenses are charged and prosecuted in a summary fashion in both the state and federal systems. See infra Background. Under federal law, petty misdemeanor drug charges can be initiated and resolved through a ticket mechanism that does not apprise the recipient of the elements of the charge against them, of their right to a trial, or of the effect of paying the fine. See Mary Warner, The Trials and Tribulations of Petty Offenses in the Federal Courts, 79 N.Y.U. L. REV. 2417, 2417 (2004). Courts have recognized that the use of such summary procedures can lead to invalid convictions. See Dean v. United States, 418 F. Supp. 2d 149 (E.D.N.Y. 2006) (holding that a conviction obtained through a federal ticket was not valid where petitioner was not aware that his collateral forfeiture constituted a guilty plea). The processing of misdemeanor or lesser cases in state courts raises similar concerns. The rapid procedures used to dispose of such misdemeanor arrests can lead to substantial constitutional violations, such as deprivation of the right to counsel.³ See id.

³ For example, in 2005, there were 81,949 misdemeanor drug arrests in New York State. N.Y. State Div. of Crim. Justice Servs., ADULT ARRESTS: NEW YORK STATE BY COUNTY AND REGION 2005, <http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year2005.htm> (last modified Jan. 26,

State felony drug possession convictions may similarly involve procedural defects that would, upon challenge under 21 U.S.C. § 851, prevent their use as the basis for a federal felony conviction. Some states classify almost all drug possession offenses as felonies, creating the same pressures toward summary adjudication, and procedural deficiencies, as exist in jurisdictions with large numbers of misdemeanor drug arrests. See, e.g., Fla. Stat. § 893.13 (classifying most simple possession offenses in Florida as felonies). In addition, as discussed in the Background section above, procedural rules governing the validity of plea agreements are in some cases violated by state judges, rendering both misdemeanor and felony convictions invalid.

Within this context, those convicted of state possession offenses may have experienced procedural defects that would, upon challenge, lead to a finding that a prior conviction was invalid. However, in state nontrafficking prosecutions that do not meet the federal requirements of notice and proof, no notice of the consequences of that prior conviction or any opportunity for a hearing on claims of invalidity is available. The DHS' approach forces respondent and others in a similar position to face the vast, negative consequences of an "aggravated felony" designation based on a possibly invalid prior conviction, a result clearly in conflict with the federal standard for a recidivist possession felony and therefore with the decision of the Supreme Court in Lopez.

2006). Most misdemeanants are arraigned, plead guilty and are sentenced all on the same day. See N.Y. State Bar Ass'n, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17-18 (2001). Furthermore, every New York Criminal Court Judge in New York City handles, on average, more than 5000 cases per year, meaning that judges can often only spend minutes per case. See Daniel Wise, Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation, N.Y.L.J., May 22, 2000, at 1.

C. The DHS' interpretation must be rejected because it would require the absurd result that all second or subsequent federal misdemeanor possession offenses, which are clearly not felonies under federal law, and state non-criminal dispositions be treated as the equivalent of federal felonies.

The Supreme Court has frequently rejected possible interpretations of statutes that would lead to "absurd results." See Rowland v. Cal. Men's Colony, 506 U.S. 194, 200 (1993); EEOC v. Commercial Office Prods. Co., 486 U.S. 107, 120 (1988). Such results are particularly to be avoided where there is no evidence that Congress considered or intended them. See INS v. St. Cyr, 533 U.S. 289, 320 n.44 (2001) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night" (citations and quotations omitted)). The interpretation of § 924(c)(2) urged by the DHS here would create precisely such absurd, clearly unintended results.

If a second or subsequent state possession offense may be considered sufficiently analogous to recidivist possession under the Controlled Substances Act to constitute an aggravated felony despite the lack of proof of a prior conviction, then a second or subsequent federal possession offense without such proof could also be considered an aggravated felony—despite the fact that it is clearly not a felony under federal law. Similarly, under the DHS' argument, in any states that have a recidivist possession enhancement statute that corresponds to the federal recidivist enhancement, a second or subsequent state possession offense could be considered an aggravated felony even when state prosecutors declined to charge the offense under that state's recidivist possession provision.⁴

The absurdity of this result is confirmed by the fact that most federal second or

⁴ Some states have recidivist enhancement statutes, although they may or may not correspond to the strict requirements for the federal felony recidivist enhancement. See, e.g., Mass. Gen. Laws ch. 94C, § 34, ch. 278, § 11A.

subsequent drug possession offenses are not actually prosecuted as recidivist felonies under federal law in the absence of other more serious charges. In actual federal practice, the recidivist enhancement in §§ 844(a) and 851 is rarely, if ever, used to elevate a defendant with only misdemeanor possession convictions on his or her record to felony recidivist status.⁵ To the extent that recidivist enhancements in the Controlled Substances Act are used, they have been applied to cases where the prior drug conviction is already a federal felony, 21 U.S.C. § 841(b) (a result inapplicable to the case at hand because any previous federal “drug trafficking crime” felony would necessarily be considered an aggravated felony), or where other more serious, non-drug-related charges are also involved. See, e.g., United States v. Fisher, 33 Fed. Appx. 933 (10th Cir. 2002) (court stated of defendant charged with possession of firearms and ammunition after former conviction of a felony, possession of a firearm during and in relation to a drug trafficking crime, possession of methamphetamine with intent to distribute, possession of LSD, and possession of marijuana, that “[t]he government sought an enhancement of Mr. Fisher’s sentence because of a prior felony conviction.”).

There are several possible explanations for this reluctance to use the recidivist enhancement for a defendant who only has prior simple drug possession convictions. The first and most obvious reason is that the prosecutor may not wish to undertake, or may not be able to meet, the specific requirements of 21 U.S.C. §§ 844(a) and 851 in most federal possession cases. A prosecutor may not want to go through the process of filing an information in the case. If a prosecutor chooses to charge the drug possession as a class A misdemeanor instead of a

⁵ A comprehensive search on the major online legal search engine Westlaw has not yielded any cases, published or unpublished, where a federal recidivist enhancement was applied to a simple drug possession based on a prior misdemeanor simple drug possession conviction. The ALLEDIS database, meaning all federal cases, was searched for all cases that included references to 21 U.S.C. §§ 844 and 851 by using the search term: (“21 U.S.C. § 844” “21 U.S.C.A. § 844) & (“21 U.S.C. § 851” “21 U.S.C.A. § 851”).

recidivist felony, he or she has the freedom to charge the person by complaint rather than indictment or information. See Fed. R. Crim. P. 58(b)(1). Moreover, the validity of the prior possession conviction may be questionable, and thus pose a barrier to meeting the strict requirements of § 851. Because of the summary fashion in which many simple possession convictions are charged and prosecuted, sometimes without defense counsel or even a court appearance, many would be vulnerable to collateral attack if the government sought to use them as a basis for a recidivist enhancement charge. See infra Part I.B. Treating a second federal misdemeanor possession conviction as an aggravated felony where a federal prosecutor chose not to, or could not, meet the requirements of § 851 would clearly undermine the purpose of Congress in enacting this provision.

Perhaps more importantly, prosecutors may exercise their discretion not to use the recidivist enhancement even in cases where it would be sustained simply because they believe it is not the appropriate punishment for a particular defendant. As the legislative history discussed above in Point I.A.2 makes clear, Congress felt that automatic recidivist enhancements where there were prior drug possession convictions might in some cases be unduly severe, and gave prosecutors the opportunity to exercise their discretion to determine in which cases such a serious penalty is appropriate. Any attempt to automatically treat second or subsequent federal possession offenses as aggravated felonies fundamentally undermines this prosecutorial discretion, a discretion that the Supreme Court has explicitly recognized in the context of recidivist enhancements under § 851:

 Insofar as prosecutors, as a practical matter, may be able to determine whether a particular defendant will be subject to the enhanced statutory maximum, any such discretion would be similar to the discretion a prosecutor exercises when he decides what, if any, charges to bring against such a criminal suspect. . . . Any disparity in the maximum statutory penalties between defendants who do and those who do not receive the notice [under § 851(a)(1)] is a foreseeable—but



hardly improper—consequence of the statutory notice requirement.

LaBonte, 520 U.S. at 761-62.

The rarity of prosecutions for federal recidivist possession also highlights the incongruity of automatically treating all second or subsequent state possession convictions as aggravated felonies where corresponding notice and proof requirements have not been met. The rarity of such federal prosecutions suggests that federal prosecutors have made a judgment that most second or subsequent possession convictions could rarely successfully be prosecuted as recidivist felonies in compliance with the requirements of §§ 844(a) and 851, or that it is rarely appropriate to punish individuals with only possession convictions as felons. In the face of that collective judgment, the DHS has argued that it is nonetheless appropriate to treat all second or subsequent state drug possession convictions as aggravated felonies, regardless of how minor they may be and in the absence of any evidence that Congress intended to make all such crimes aggravated felonies. Thus, despite the fact that federal prosecutors have only found it necessary to apply a recidivist possession enhancement in cases where there are serious prior felony charges, the DHS' position would require that even non-criminal dispositions, such as New York state violations, and other minor convictions with little to no jail time, be treated as aggravated felonies. See infra Background. To automatically treat all such state possession offenses as “drug trafficking crime” aggravated felonies where no prosecutor determined that this was the appropriate punishment and there was no notice, proof, or opportunity to challenge the fact, finality, and validity of the prior conviction is clearly contrary to Congressional intent.

II. THE CLEAR TREND IN THE CIRCUIT COURTS IS TOWARD A FINDING THAT SECOND OR SUBSEQUENT NONTRAFICKING OFFENSES MAY NOT AUTOMATICALLY BE DEMED AGGRAVATED FELONIES.

The federal courts that have carefully applied the federal felony standard to the

issue of second or subsequent state possession offenses in the immigration context have found that such offenses cannot automatically be deemed aggravated felonies. The First and Third Circuits, carefully applying the federal felony standard later adopted by the Supreme Court in Lopez, both rejected arguments that a second or subsequent possession offense can automatically be treated as a federal recidivist possession felony. See Berthe v. Gonzales, 464 F.3d 74, 85-86 (1st Cir. 2006); Steele v. Blackman, 236 F.3d 130, 137-38 (3d Cir. 2001). In reaching their holdings, both Circuits emphasized that the inquiry must focus on the burden the prosecutor actually bore in the state proceeding, and not on alleged underlying facts. The court in Steele noted that to allow reliance on the underlying facts to convert a state possession conviction into an aggravated felony would be “simply to ignore the requirement that there be a conviction” at all. See id. at 138 (rejecting the government’s reliance on the fact that Steele admitted to the prior conviction before the immigration judge). Similarly, the First Circuit applied a federal felony analysis to hold that Berthe’s second possession offense was not an aggravated felony because the prosecutor had not “met its burden of proving that Berthe had a prior conviction for a drug offense.” Berthe, 464 F.3d at 85-86.

Moreover, in Steele, the Third Circuit specifically addressed the requirements of §§ 844(a) and 851 and held that a petitioner’s subsequent conviction was not an aggravated felony where the federal recidivist possession felony requirements of notice and proof were not met. See Steele, 236 F.3d at 137. The court found that Steele’s conviction was not the equivalent of a federal recidivist possession felony because the prosecutor did not provide notice and proof of a final prior conviction and Steele did not have an opportunity to challenge that conviction in his criminal proceeding:



If a United States Attorney wants a felony conviction, he or she must file an information under 21 U.S.C. § 851 alleging, and subsequently prove, that the defendant has been previously convicted of a drug offense at the time of the offense being prosecuted. . . . Steele's "one time loser" status was never litigated as a part of a criminal proceeding. . . . As a result, the record evidences no judicial determination that that status existed at the relevant time. For all that the record before the immigration judge reveals, the initial conviction may have been constitutionally impaired.

Steele, 236 F.3d at 137-38 (citations omitted). The court in Steele thus recognized that for a state offense to be analogous to a federal recidivist felony, the prosecutor must prove a prior final conviction and petitioner must receive notice and an opportunity to challenge the previous conviction in the state criminal proceedings. In addition, the Ninth Circuit, applying different reasoning, has ruled out the possibility of treating a second or subsequent state possession offense as an aggravated felony, holding that only the statutory offense itself, without regard to recidivist sentencing enhancements, can be considered in determining whether an offense is an aggravated felony, and has also acknowledged the finality requirement of § 844(a). See United States v. Ballesteros-Ruiz, 319 F.3d 1101, 1104 (9th Cir. 2003).

The holdings of the First, Third, and Ninth Circuits reflect a general trend among the federal courts toward a finding that second or subsequent state possession offenses should not automatically be deemed aggravated felonies. The Sixth Circuit has held that a second possession conviction cannot be treated as an aggravated felony in the absence of evidence in the record demonstrating that the first conviction was final, United States v. Palacios-Suarez, 418 F.3d 692, 700 (6th Cir. 2005), and was recently joined in that conclusion by the Fifth Circuit. See Carville Smith v. Gonzales, 468 F.3d 272 (5th Cir. 2006). In Carville Smith, the Fifth Circuit also questioned its own earlier statement, in a criminal case prior to Lopez, that a second state possession offense could be an aggravated felony, noting that its significance was "uncertain." Id. at 276 n.3; see United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005)

(observing, in an alternative holding in an illegal reentry case and without addressing the requirements of § 851, that a second state possession offense was the equivalent of federal recidivist possession). More recent actions of the Fifth Circuit suggest a growing awareness that it must evaluate second or subsequent possession offenses carefully in light of the federal felony standard of Lopez. In fact, in a recent order in a two possession case, the Fifth Circuit denied the government's motion to dismiss and granted a stay of removal where the government had argued that the Fifth Circuit's case law required that the immigrant's second possession offense be treated as an aggravated felony. See Semedo v. Gonzales, Dkt. No. 06-61102 (5th Cir. 2007) (copy of Pacer docket attached).

The Second Circuit, in which this case arose, has thus far declined to address the issue of whether and under what circumstances a second or subsequent possession offense constitutes an aggravated felony in the immigration context. In one pre-Lopez criminal sentencing case, the Court issued an opinion holding that the defendant's subsequent possession conviction constituted an aggravated felony, but clearly limited its holding to the sentencing context. See United States v. Simpson, 319 F.3d 81, 86 n.7 (2d Cir. 2002) (as amended April 2, 2003) ("We offer no comment on whether such convictions constitute 'aggravated felonies' for any purpose other than the Guidelines."). While in Durant v. INS, the Court initially issued a short opinion stating, with little analysis, that the petitioner's second possession conviction constituted an aggravated felony, it later amended the decision by eliminating the discussion of the aggravated felony issue altogether and noted the lack of briefing on the "complex issue." See Durant v. INS, 393 F.3d 113, 115 (2d Cir. 2004), amended by Durant v. INS, Docket No. 99-4096-ag, 2004 U.S. App. LEXIS 27904, at *2 n.1 (2d Cir. December 16, 2004) ("We are reluctant to adjudicate this complex issue without the benefit of full briefing Accordingly, we do not address [the

issue[er]”). In Vacchio v. Ashcroft, a case arising under the Equal Access to Justice Act (“EAJA”), while the Court concluded that the government’s argument that a second possession conviction constituted an aggravated felony was “substantially justified” for purposes of defeating the petitioner’s EAJA claim, it did not treat Simpson as controlling authority in the immigration context. Vacchio v. Ashcroft, 404 F.3d 663, 677 (2d Cir. 2005) (as amended May 11, 2005) (citing Simpson, 391 F.3d at 85). More importantly, the Second Circuit and the parties in this case have recognized that Lopez now provides the proper approach to analyzing the second possession issue in this case. The parties stipulated to remand of this case to the BIA for consideration “in light of Lopez,” suggesting that the Board consider the fact that respondent “was not charged under a recidivist statute.” See Powell v. Gonzales, Dkt. No. 06-5315-ag (2d Cir. 2007) (copy of Order attached). This stipulation and the Second Circuit’s so ordering of it reflect an awareness that the federal felony standard of Lopez requires a careful analysis of the circumstances under which a second or subsequent possession offense may constitute an aggravated felony.

Thus, even pre-Lopez, courts that carefully applied a federal felony approach found that a state possession offense may not be deemed an aggravated felony based solely on underlying facts suggesting a prior conviction. Post-Lopez, it is even more clear that a second or subsequent possession or other nontrafficking offense cannot be considered an aggravated felony where the state criminal proceeding did not prove—or offer an opportunity equivalent to that under federal law to challenge—the fact, finality, and validity of any alleged prior conviction. Adoption of the DHS’ interpretation, in addition to creating a conflict with Lopez, would put the BIA in direct conflict with the First, Third, and Ninth Circuits and with the overall trend of the federal courts. The holdings of the federal courts further confirm that a state simple possession offense is not



automatically converted to a federal felony in the absence of notice, proof, and an opportunity to challenge the fact, finality, and validity of a prior conviction.

III. SHOULD THE BIA FIND THAT THERE IS ANY LINGERING AMBIGUITY AS TO WHETHER A STATE SECOND OR SUBSEQUENT POSSESSION OFFENSE CAN AUTOMATICALLY BE TREATED AS AN AGGRAVATED FELONY, THE BIA SHOULD APPLY THE RULE OF LENITY TO FIND THAT SUCH OFFENSES ARE NOT AGGRAVATED FELONIES.

Under the federal felony standard adopted by the Supreme Court in Lopez, a state simple possession offense is not “punishable” as a felony under federal law, and therefore not an aggravated felony, without notice, proof, and an opportunity to challenge the fact, finality and validity of the alleged prior conviction. However, insofar as the BIA finds that there is any lingering ambiguity as to whether a second or subsequent state possession conviction is “punishable” as a federal felony in the absence of the federal requirements, applicable rules of lenity require that such ambiguity be resolved in favor of the immigrant. The compulsion to construe ambiguity in favor of the immigrant is particularly great where both criminal and immigration statutes are at issue, because the criminal law and immigration law rules of lenity both demand that the adjudicator adopt from the reasonable interpretations the approach that encroaches least on the immigrant’s liberty. See Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004) (noting that ambiguities in criminal statutes referenced in the immigration statute must be construed in favor of the immigrant); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948) (applying the immigration law rule of lenity and stating that “We resolve the doubts in favor of that construction because deportation is a drastic measure and at times the equivalent of banishment or exile...since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used”); Matter of Farias, 21 I&N Dec. 269, 274 (BIA 1996)

(“When confronted with statutory ambiguity, courts have held that doubts should be resolved in favor of the alien.”); Matter of Salazar-Regino, 23 I&N Dec. 223 (BIA 2002) (“The Supreme Court’s edict that ‘[w]e resolve the doubts in favor of that [more narrow] construction because deportation is a drastic measure and at times the equivalent of banishment or exile’ is as applicable today as it was nearly 55 years ago when first pronounced.”).

The nature of a “drug trafficking crime” aggravated felony determination particularly counsels in favor of application of the rule of lenity. An aggravated felony designation results in severe consequences for the immigrant and for the policy goals of the INA. Aggravated felons are subject to deportation and are ineligible for voluntary departure, cancellation of removal, asylum, withholding of removal and withholding under the Convention Against Torture, meaning that they can be removed from the United States despite evidence that they will be persecuted in the country of removal. The removal process under the INA “normally, and critically, is premised upon individualized decisions about... whether particular circumstances warrant relief from removal.” See Brief of Former General Counsels of the Immigration and Naturalization Service as Amici Curiae in Support of Petitioner Jose Antonio Lopez, 2006 WL 1706672, at *5.⁶ An aggravated felony designation removes this reasonable possibility of individualized decisions about eligibility for relief. See id. Given the severe consequences of an aggravated felony designation for respondent and others in this situation, the BIA should adopt the rule that is both consistent with Lopez and that does not dramatically expand the definition of a drug trafficking aggravated felony and limit individualized decision-making in the absence of a

⁶ Owen B. Cooper served as General Counsel from October 1999 to February 2003, David A. Martin served as General Counsel from August 1995 to January 1998, and Paul W. Virtue served as Deputy General Counsel from November 1988 to January 1997, as Acting Executive Associate Commissioner for Programs from January 1997 to February 1998, and as General Counsel from March 1998 to May 1999.

clear Congressional command to do so.

CONCLUSION

For the aforementioned reasons, amicus curiae respectfully requests that, consistent with the reasoning in Lopez, the Board hold that a second or subsequent state possession or other nontrafficking offense may not be deemed an aggravated felony where the state criminal proceeding did not prove—or offer an opportunity equivalent to that under federal law to challenge—the fact, finality, and validity of the prior conviction.

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