

New York State Defenders Association

Immigrant Defense Project

3 W. 29th Street, Suite 803, New York, New York 10001 • Tel: 212-725-6422 • Fax: 800-391-5713 • www.ImmigrantDefenseProject.org

***Pro Se* Advisory for Immigrants with Multiple Drug Possession Convictions: Instructions for Challenging Whether You Have Been Convicted of an Aggravated Felony**

Last updated October 17, 2007

This advisory is for information purposes only and is not a substitute for legal advice. The information here may no longer be up-to-date. You should talk to a qualified immigration expert in order to prepare your case in immigration court.

This advisory applies to you if you (1) have been convicted more than once for possession of a drug and (2) are being charged by the Department of Homeland Security as having been convicted of an aggravated felony because of your drug possession offenses. The advisory includes background information on aggravated felonies and drug convictions, a sample brief that can be completed and submitted to the Immigration Judge, and instructions for writing and submitting the brief.

Please note that the attached sample brief addresses only the issue of whether a subsequent drug possession offense is an aggravated felony. **This sample brief does not address all the legal issues that you might need to raise before an Immigration Judge. If you have additional arguments that you need to make in your case, you should add those arguments to any written briefs or oral arguments you make in immigration court.**

Background Information on Aggravated Felonies and Drug Convictions

1. Aggravated Felony as Ground for Deportation and as Bar to Relief

The Department of Homeland Security (DHS) may charge you as deportable for having a conviction for an aggravated felony if your criminal conviction falls into categories listed in the Immigration and Nationality Act (INA) § 101(a)(43), 8 U.S.C. § 1101(a)(43). The aggravated felony charge would be on the Notice to Appear that you received from the DHS. The DHS must then prove to the Immigration Judge that you were convicted of an aggravated felony. If the Immigration Judge agrees with the DHS that you have an aggravated felony, then you are deportable. Note that you could also be deportable for convictions that are not aggravated felonies.

Having an aggravated felony bars you from applying for certain forms of relief, such as cancellation of removal, asylum, and/or naturalization. If you can prove to the Immigration Judge that you do not have an aggravated felony, then you may be eligible to apply for that relief. Note that each form of relief has other requirements not discussed in this advisory.

2. Most First-Time Simple Possession Convictions Are Not Aggravated Felonies

One type of aggravated felony under federal immigration law is “drug trafficking,” which includes drug offenses that would be felonies (i.e., punishable by a sentence of more than one year) under federal law. It generally does not include state drug possession offenses that would be misdemeanors (i.e., punishable by a year or less) under federal law. The key issue is how the conviction would be treated under *federal law*. In the case of *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) the Supreme Court decided that even if the state law classifies the offense as a felony, it would generally not be a “drug trafficking” aggravated felony for immigration purposes if the offense would not be a felony under *federal law* as well. A conviction for a **first-time drug simple possession offense is generally not an aggravated felony. There are two exceptions to this rule. The first exception is for simple possession of more than five grams of crack cocaine. The second exception is for simple possession of flunitrazepam, a date rape drug. All other first-time possession offenses are NOT aggravated felonies**, even if classified as a felony by the state. Non-citizens convicted of a state first-time simple drug possession offense may therefore be eligible to apply for cancellation of removal for lawful permanent residents, asylum and/or naturalization, and certain other forms of relief from removal.

3. Subsequent Possession Conviction Is Not an Aggravated Felony If Not Prosecuted as a Recidivist Offense

As mentioned above, the Supreme Court in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006), held that that most first-time possession convictions were not drug trafficking aggravated felonies. There is a federal statute—21 U.S.C. § 844(a)—that increases the punishment for a conviction for drug possession from a misdemeanor to a felony if preceded by a prior drug conviction. The Court said that a conviction for a subsequent offense under § 844(a) would be a conviction for an aggravated felony. The Court also said that a conviction for a state offense that corresponded to a recidivist conviction under § 844(a) would also be a conviction for an aggravated felony.

In order for an offense to be a subsequent offense under § 844(a), (1) the prosecutor must have **proved a prior conviction**, (2) that **prior conviction must be “final”** before the subsequent possession offense was committed, and (3) government must fulfill the requirements of § 851—to **provide the defendant with notice about the recidivist enhancement and an opportunity to challenge the fact, finality, and validity of the prior conviction**.

The DHS has been arguing that any subsequent possession conviction, at least when the first conviction is final before the second offense, is a conviction for an aggravated felony. The DHS argues that as long as an immigrant could have *possibly* received a recidivist enhancement similar to that under federal law at § 844(a), that immigrant is an aggravated felon.

No circuit court has agreed with the DHS on this issue in a binding decision yet. In fact, the First and Third Circuits have held that the defendant must have been convicted under a statute that follows the requirements of §§ 844(a) and 851 for the second and subsequent conviction to be an aggravated felony. See *Berhe v. Gonzales*, 464 F.3d 74, 85–86 (1st Cir. 2006); *Steele v. Blackman*, 236 F.3d 130, 137–38 (3d Cir. 2001). In addition, the Ninth Circuit has held that a subsequent possession conviction cannot be treated as an aggravated felony conviction at all. *Oliveira-Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004). However, immigrants in removal proceedings within the Ninth Circuit should also raise any arguments based on the state disposition not meeting the requirements of §§ 844(a) and 851. The Fifth and Sixth Circuit have addressed the finality requirement, holding that a prior possession conviction that was not “final” under § 844(a) cannot be used to convert a subsequent possession conviction into an aggravated felony. See *Smith v. Gonzales*, 468 F.3d 272, 277 (5th Cir. 2006); *United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005). Furthermore, as discussed on pages 8–9 of the sample brief, the decisions that the DHS often cites to support its position are no longer treated as binding by the circuit courts that issued them.

However, the Supreme Court has not yet heard a case specifically addressing this issue of recidivist offenses, so the law is in flux. That is why you should submit a brief to the Immigration Judge explaining why your subsequent possession conviction is not an aggravated felony.¹

The sample brief presents arguments as to why the correct reading of the Supreme Court’s *Lopez* decision and statutory law is that recidivist enhancements are not automatic and require proof, notice and opportunity to challenge. Briefly, those arguments are that

- (1) *Lopez* requires courts to apply a strict federal felony standard comparing state convictions to their federal counterparts,
- (2) recidivist convictions under §§ 844 and 851 occur only if the government fulfilled statutory proof, notice and opportunity to challenge requirements,
- (3) only state convictions that correspond to the requirements under both §§ 844 and 851 can be aggravated felonies,
- (4) courts should interpret any ambiguity in the applicable statutes favorably toward immigrants given that the end result—deportation—is a serious consequence.

Using the Sample Brief

You can use the sample brief in your immigration proceeding. These instructions will help you to fill out the brief.

Page 1 – Header

1. Fill out your name, address, and alien number in the top left corner.

¹ If you received an enhanced sentence for your subsequent conviction because you had already received a conviction for possession, then the attached sample brief is not sufficient to prove to the Immigration Judge that you do not have an aggravated felony. You would additionally need to point out any differences between the state recidivist statute you were convicted under and the federal offense described by 21 U.S.C. §§ 844(a) and 851. You should speak to a qualified immigration expert to prepare a brief that explains these differences.

2. Fill out the name city and state of the immigration court.
3. Fill out your name and alien number in the “In the Matter of” box.

Pages 2-10 – A #

1. Fill out your alien number at the bottom right corner of every page in the blank spot provided.

Page 2 – Statement of Facts

1. List the offenses that the DHS says you have been convicted of. You should copy the following information from the Notice to Appear:
 - a. date of conviction and/or commission
 - b. statute
 - c. name of the offense name
 - d. sentence imposed.

For example: “Convicted on October 5, 2006, of N.Y. Penal Law § 220.03, possession of controlled substance, with a 10-day sentence.”

DO NOT LIST ANY CONVICTIONS THAT THE DHS HAS NOT LISTED IN THE NOTICE TO APPEAR.

Page 7 – Finality and State Recidivist Statutes

In the lines provided at the top of page 7, you should add, if applicable, the sentences that are explained on pages 4–5 of this advisory about (a) the finality of your first possession conviction and (b) the state recidivist statutes you could have been—but were not—charged under. If neither of these options applies to you or you are unsure what to write, leave the lines on page 7 blank.

Page 7 – (a) Finality

If your first conviction was not final before the second possession offense was committed, then you could not have been convicted for recidivist possession under § 844(a). For example, you could not be charged as a recidivist under federal law if

- a. the time to appeal or seek discretionary review of the first conviction has not run out before your second possession offense was *committed* (whether or not you actually appealed your conviction),
or
- b. you received a conviction for a possession offense and were later charged with a possession that occurred *before* that first conviction (this includes if you received multiple possession convictions on the same day).

1. If your first conviction for possession **was not final** as described above before you committed the second possession offense, then you should add the following sentence:

Respondent could not have received a recidivist enhancement similar to § 844 because Respondent’s

alleged prior conviction for possession was not final before the alleged second possession offense was committed because _____ [*insert the appropriate phrase from the options below*]:

- a. “the time for appeal and/or discretionary review had not run.”
- or*
- b. “the second possession offense occurred before Respondent had been convicted of the prior offense.”

For example: “Respondent could not have received a recidivist enhancement similar to § 844 because Respondent’s alleged prior conviction for possession was not final before the alleged second possession offense was committed because the time for appeal and/or discretionary review had not run.”

2. If your first conviction for possession **was final** before you committed the second possession offense, then do not write a sentence about finality on page 7.

Page 7 – (b) State Recidivist Statutes

Most states have some way of enhancing sentences for recidivist offenders either through enhancements for specific types of repeat possession offenses, for controlled substances offenses in general, or for any subsequent state misdemeanor or felony offense. Since you were not charged as a recidivist or repeat offender under those statutes, the point you’re making here is that the prosecutor had the choice to try to get a recidivist enhancement and he did not actually get that enhancement. The court should honor that choice and also recognize that the prosecutor may not have pursued the recidivist enhancement because your prior conviction was not valid in some way.

1. In the lines provided at the top of page 7, let the Immigration Judge know that the state where you were convicted has a recidivist enhancement statute(s) that you could have been charged under. To do this:
 - a. Look up the state where you received your subsequent possession conviction in the chart on pages 7–10 of this advisory entitled “State Recidivist Provisions” (please note that this chart may be incomplete).
 - b. Compare your conviction with the convictions that can receive recidivist enhancements in that state.
 - c. If you find a recidivist enhancement statute that could have applied to you, write the following sentence in the blank on page 7 (if you wrote a sentence addressing finality, then this sentence should follow the finality sentence):

“Respondent was not charged as a recidivist offender under the state’s recidivist law. See _____ [*insert the statute number(s) and parenthetical(s) from the chart*].”

For example, if you were convicted twice of marijuana possession in Alabama but did not receive a recidivist enhancement, you would write: “Respondent was not charged as a recidivist offender under relevant state law. See Ala. Code § 13A-12-213(a)(2) (recidivist enhancement for second and subsequent marihuana possession offense).”

2. If you cannot find a recidivist enhancement statute that you could have been charged under for that state, do not write a sentence about state recidivist statutes on page 7.

Page 10 – Conclusion

1. If you wrote sentences on page 7, rewrite them in the lines provided at the top of page 10.

For example: “Respondent could not have received a recidivist enhancement similar to § 844 because Respondent’s alleged prior conviction for possession was not final before the alleged second possession offense was committed because the time for appeal and/or discretionary review had not run. Respondent was not charged as a recidivist offender under relevant state law. *See* Ala. Code § 13A-12-213(a)(2) (recidivist enhancement for second or subsequent marihuana possession offense).”

2. If you did not write anything on page 7, then you should not write anything in this blank space on page 10.

Page 10 – Signature

1. Write the date on the line after “Date.”
2. Sign your name on the line above “Respondent Name.”
3. Print your name on the blank space after “Respondent Name.”

Certificate of Service

The last page of the sample is the Certificate of Service. If you are filing your motion before your court date, then fill out the Certificate of Service on both the Immigration Judges’ and DHS’ copy.

1. Fill out the name city and state of the immigration court.
2. Fill out your name and alien number in the “In the Matter of” box.
3. Fill out your name, the date on which you submitted the brief, and DHS’ address (which should be on your Notice to Appear) in the short paragraph.
4. Place a check or “x” next to the method by which you submitted your brief to DHS.
5. Sign your name on the line above “Respondent’s Name.”
6. Print your name on the blank space after “Respondent’s Name.”

Submitting the Brief

You should file the brief with the Immigration Court and with DHS at least ten days before your next hearing date. Bring copies with you to the hearing just in case they did not receive them yet. It should be signed, stapled, and two-hole punched at the top.

State Recidivist Provisions Chart

*Look up the state where you received your subsequent possession conviction and compare your conviction with what convictions can receive recidivist enhancements in that state. If you think you could have been charged as a recidivist in that state, follow the directions on page 5 of this advisory on how to fill out the lines at the top of pages 7 and 10 of the sample brief with that information. **Please note that this chart does not necessarily include all states or all recidivist or repeat offender statutes. The chart may be incomplete and may no longer be up-to-date.***

State	Recidivist statute(s) applicable to possession
Alabama	- Ala. Code § 13A-12-213(a)(2) (providing recidivist enhancement for second or subsequent marihuana possession conviction) - Ala. Code § 13A-12-231(12) (providing recidivist enhancement for second or subsequent conviction under Ala. Code § 13A-12-231(1)–(11))
Alaska	- Alaska Stat. § 12.55.155(c)(31) (providing recidivist enhancement for conviction of five or more class A misdemeanors)
Arizona	- Ariz. Rev. Stat § 13-901.01(F) (providing recidivist enhancement for second possession of a controlled substance conviction) - Ariz. Rev. Stat. § 13-604 (providing recidivist enhancement for second or subsequent felony conviction)
Arkansas	- Ark. Code Ann. § 5-64-401(c)(2) (providing recidivist enhancement for second or subsequent possession of a controlled substance conviction)
California	- Cal. Health & Saf. Code § 11357(b) (providing recidivist enhancement for certain third or subsequent cannabis-related conviction)
Colorado	- Col. Rev. Stats. § 18-18-405 (providing recidivist enhancement for subsequent controlled substance conviction under same statute) - Col. Rev. Stats. § 18-18-406 (providing recidivist enhancement for subsequent marihuana possession conviction)
Connecticut	- Conn. Gen. Stat. § 21a-279 (providing recidivist enhancement for second or subsequent conviction for possession of a narcotic, hallucinogen, cannabis-type substance)
District of Columbia	- D.C. Code § 48-904.08 (providing recidivist enhancement for second or subsequent controlled substance conviction)
Georgia	- Ga. Code Ann. § 16-13-30 (providing recidivist enhancement for second or subsequent controlled substance conviction)
Hawaii	- Haw. Rev. Stat. § 706-662 (providing recidivist enhancement for certain third or subsequent felony convictions)
Idaho	- Idaho Code § 37-2739 (providing recidivist enhancement for second or subsequent controlled substance conviction) - Idaho Code § 19-2514 (providing recidivist enhancement for third felony conviction)
Illinois	- 720 Ill. Comp. Stat. Ann. § 570/408 (providing recidivist enhancement for second or subsequent controlled substance conviction) <i>Note: does not apply to cannabis possession</i> - 720 Ill. Comp. Stat. Ann. § 550/4 (providing recidivist enhancement for second and subsequent cannabis possession conviction)

State Recidivist Provisions Chart

State	Recidivist statute(s) applicable to possession
Indiana	- Ind. Code Ann. § 35-48-4-11 (providing recidivist enhancement for second or subsequent conviction for marihuana/hashish/ hash oil)
Iowa	- Iowa Code § 124.401(5) (providing recidivist enhancement for second or subsequent conviction for controlled substance possession) - Iowa Code § 902.8 (providing recidivist enhancement for third or subsequent felony)
Kansas	- Kan. Stat. Ann. § 65-4162 (providing recidivist enhancement for second or subsequent conviction for possession of various controlled substances)
Kentucky	- Ky. Rev. Stat. § 218A.1415–1417 (providing recidivist enhancement for second or subsequent conviction for possession of various controlled substances) - Ky. Rev. Stat. § 532.080 (providing recidivist enhancement for second or subsequent felony conviction)
Louisiana	- La. Rev. Stat. 40:966(E) (providing recidivist enhancement for second or subsequent marihuana possession conviction) - La. Rev. Stat. § 40:982 (providing recidivist enhancement for second or subsequent controlled substance conviction)
Maine	- 17-A Maine Rev. Stat. § 1107-A (providing recidivist enhancement for cocaine possession following prior controlled substance conviction)
Maryland	- Md. Crim. Law Code Ann. § 5-905 (providing recidivist enhancement for second or subsequent controlled substances conviction)
Massachusetts	- Mass. Gen. L. ch. 94C, § 34 (providing recidivist enhancement for second or subsequent controlled substances possession conviction)
Michigan	- Mich. C. L. § 333.7413 (providing recidivist enhancement for second or subsequent controlled substances conviction)
Minnesota	- Minn. Stat. §§ 152.021-152.025 (providing recidivist enhancement for subsequent controlled substances possession conviction)
Mississippi	- Miss. Code Ann. § 41-29-147 (providing recidivist enhancement for second or subsequent controlled substances possession conviction) - Miss. Code Ann. § 99-19-81 (providing recidivist enhancement for third or subsequent felony conviction)
Missouri	- Mo. Rev. Stat. § 195.295 (providing recidivist enhancement for subsequent controlled substances possession conviction)
Montana	- Mont. Code Ann. § 45-9-102(2) (providing recidivist enhancement for subsequent conviction of marijuana possession) - Mont. Code Ann. § 45-9-102(5) (providing recidivist enhancement for subsequent conviction of methamphetamine possession)
Nebraska	- Neb. Rev. Stat. Ann. § 28-416(13) (providing recidivist enhancement for subsequent conviction of marijuana possession) - Neb. Rev. Stat. Ann. § 29-2221(1) (providing recidivist enhancement when two prior felony convictions received sentences of more than one year)
Nevada	- Nev. Rev. Stat. Ann. § 453.336 (providing recidivist enhancement for subsequent convictions of controlled substances possession)

State Recidivist Provisions Chart

State	Recidivist statute(s) applicable to possession
New Hampshire	- N.H. Rev. Stat. Ann. § 651:6(II)(a) (providing recidivist enhancement when two prior convictions received sentences of more than one year)
New Mexico	- N.M. Stat. Ann. § 30-31-23 (providing recidivist enhancement for subsequent marijuana possession conviction) - N.M. Stat. Ann. § 31-18-17 (providing recidivist enhancement for second or subsequent felony conviction)
New York	- N.Y. Penal Law § 70.70 (providing recidivist enhancement for second felony drug conviction)
North Carolina	- N.C. Gen. Stat. § 14-7.1 (providing recidivist enhancement for fourth or subsequent felony conviction)
North Dakota	- N.D. Cent. Code, § 12.1-32-09 (providing recidivist enhancement for drug possession offenses under N.D. Cent. Code § 19-03.1-23(6)) <i>Note: does not apply to possession of 1/2-1 ounces of marijuana</i>
Ohio	- Ohio Rev. Code Ann. § 2925.11(c)(2)(a) (providing recidivist enhancement for second or subsequent conviction of controlled substances possession)
Oklahoma	- 63 Okla. Stat. Ann. § 2-402(B) (providing recidivist enhancement for second or subsequent controlled substances convictions) - 21 Okla. Stat. Ann. § 51.1 (providing recidivist enhancement if convicted of any crime within ten years of prior conviction for offense punishable by imprisonment)
Pennsylvania	- 35 Pa. Stat. § 780-113(b) (providing recidivist enhancement for second or subsequent controlled substance conviction)
Rhode Island	- R.I. Gen. Laws § 21-28-4.01(c)(3) (providing recidivist enhancement if pleads no contest to second or subsequent marijuana possession offense) - R.I. Gen. Laws § 21-28-4.11 (providing recidivist enhancement for second conviction of various controlled substance offenses) - R.I. Gen. Laws § 21-28-4.14 (providing recidivist enhancement for third conviction of various controlled substance offenses) - R.I. Gen. Laws § 12-19-21(a) (providing general habitual offender enhancement if convicted of two or more felonies arising from separate instances and sentenced to imprisonment for a crime punishable by at least one year in prison)
South Carolina	- S.C. Code Ann. § 44-53-370(d) (providing recidivist enhancement for second or subsequent controlled substance possession conviction) - S.C. Code Ann. § 44-53-375(A) (providing recidivist enhancement for second or subsequent possession of methamphetamine or cocaine base)
South Dakota	- S.D. Codified Laws § 22-7-7 (providing recidivist enhancement for second or third felony conviction) - S.D. Codified Laws § 22-7-8 (providing recidivist enhancement for fourth or subsequent felony provided a prior felony was a crime of violence) - S.D. Codified Laws § 22-7-8.1 (providing recidivist enhancement for fourth or subsequent felony if none of the previous felonies was a crime of violence)
Tennessee	- Tenn. Code Ann. § 39-17-418(e) (providing recidivist enhancement for third or subsequent conviction of controlled substances possession)

State Recidivist Provisions Chart

State	Recidivist statute(s) applicable to possession
Texas	<ul style="list-style-type: none"> - Tex. Penal Code § 12.43 (providing recidivist enhancement for second or subsequent misdemeanor conviction) - Tex. Penal Code § 12.42 (providing recidivist enhancement for second or subsequent felony conviction)
Utah	- Utah Code Ann. § 58-37-8(2) (providing recidivist enhancement for second or subsequent conviction for controlled substances possession)
Vermont	<ul style="list-style-type: none"> - 18 Vt. Stat. Ann. § 4230(a)(1) (providing recidivist enhancement for second or subsequent conviction for marijuana possession) - 18 Vt. Stat. Ann. § 4238 (providing recidivist enhancement for second or subsequent conviction for controlled substances possession) <i>Note: does not apply to marijuana possession</i> - 13 Vt. Stat. Ann. § 11 (providing recidivist enhancement for fourth or subsequent felony conviction)
Virginia	- Va. Code Ann. § 18.2-250.1(A) (providing recidivist enhancement for second or subsequent conviction for marijuana possession)
Wisconsin	<ul style="list-style-type: none"> - Wis. Stat. § 961.41(3g) (providing recidivist enhancement for second or subsequent conviction for controlled substances possession) - Wis. Stat. § 939.62 (providing recidivist enhancement if convicted of felony or of three misdemeanors within previous five years)
Wyoming	<ul style="list-style-type: none"> - Wyo. Stat. § 35-7-1031(c) (providing recidivist enhancement for third or subsequent conviction for possession of small amounts of controlled substances) - Wyo. Stat. § 35-7-1038 (providing recidivist enhancement for second or subsequent conviction for controlled substances possession not covered by § 35-7-1031(c))

Respondent Name: _____

A-number: _____

Respondent Address: _____

PRO SE

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
CITY, STATE: _____**

_____)	
In the Matter of:)	
)	
_____, _____)	
LAST NAME, First Name)	In Removal Proceedings
)	
A# _____)	
)	
Respondent)	
_____)	

**RESPONDENT'S BRIEF IN SUPPORT OF FINDING THAT RESPONDENT'S
ALLEGED SUBSEQUENT DRUG POSSESSION OFFENSE IS NOT AN
AGGRAVATED FELONY**

I. INTRODUCTION

Respondent has not been convicted of an aggravated felony. As such, Respondent is not removable as someone convicted of an aggravated felony and is not barred from relief from removal. Respondent therefore contests removability as an aggravated felon, if so charged, and seeks to apply for all relief for which Respondent is eligible.

II. STATEMENT OF FACTS

The DHS alleges that Respondent has been convicted of the following offenses (herein Respondent lists each alleged conviction and the date of each alleged conviction in the DHS' Notice to Appear ("NTA")):

As evident from the statutory offenses and any record of conviction for these alleged convictions, Respondent was not convicted as a recidivist offender under state or federal law. Since Respondent was not convicted as a recidivist offender, Respondent did not receive notice of any such "recidivist" charge, Respondent had no opportunity to challenge the fact, finality, and validity of the alleged prior conviction in Respondent's criminal proceeding, and the prosecutor never proved that Respondent was a recidivist.

III. LEGAL ARGUMENTS

A. None of Respondent's alleged convictions constitute an aggravated felony in its own right

As the Court held in Lopez v. Gonzales, 127 S. Ct. 625 (2006), the "drug trafficking" aggravated felony label does not apply to state felony drug possession offenses that would be misdemeanors under federal law. Simple possession offenses, with the exception of possession of more than five grams of crack cocaine and possession of flunitrazepam, are misdemeanors under the Controlled Substances Act ("CSA"). See 21 U.S.C. § 844(a). Since each of

Respondent’s alleged convictions for possession of a controlled substance would have been a misdemeanor if charged under federal law, they are not aggravated felonies in their own right.

B. Respondent’s alleged subsequent possession conviction is not an aggravated felony because Respondent was not convicted of a recidivist offense that mirrors 21 U.S.C. § 844(a) and fulfills the requirements of 21 U.S.C. § 851

The Supreme Court in Lopez developed a strict federal felony standard that applies the categorical approach to determine whether an offense is an aggravated felony. This approach only looks to what was charged and proven in the criminal proceeding at issue rather than to any facts not established in that proceeding. Since a federal felony conviction for recidivist possession pursuant to 21 U.S.C. §§ 844(a) and 851 requires notice, proof, and an opportunity to challenge the fact, finality, and validity of a prior conviction, a state possession offense where these requirements were not met in the state proceeding cannot be converted into the equivalent of a federal recidivist possession felony.

1. Courts must focus on what was established by the actual state conviction—and not on what might have hypothetically been charged—to determine whether the offense is punishable as a federal felony

Under the strict federal felony standard in Lopez, courts must focus on what was actually charged and proven in the state criminal proceeding in order to determine whether the state conviction establishes a “conviction” of a crime that is punishable as a felony under the CSA. Lopez, 127 S. Ct. at 633. For purposes of removability and eligibility for cancellation, the Immigration and Nationality Act (“INA”) directs courts to determine whether an individual was “convicted” of an aggravated felony, not whether the individual could have been charged with an aggravated felony. See INA § 237(a)(2)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii); INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). Thus, the term “punishable” must be read in the context of what the individual was charged and convicted, not of what he or she could have been charged.

Under this standard in Lopez, someone who has multiple drug possession convictions cannot automatically be deemed an aggravated felon. While the Supreme Court in Lopez recognized that Congress had “counterintuitively” labeled recidivist drug possession as a federal felony, the Court noted that only a conviction under the federal recidivist possession statute in the CSA and its specific “state counterparts” would be an aggravated felony. See Lopez, 127 S. Ct. at 630 n.6. The Court’s use of the term “state counterparts” reiterates that only convictions under true statutory counterparts to the federal recidivist statute—i.e., state recidivist statutes that correspond to the federal recidivist possession statute—can be considered aggravated felonies. Id.

2. A state possession conviction does not correspond to a federal recidivist possession felony where the state conviction did not meet the strict and mandatory requirements of 21 U.S.C. §§ 844(a) and 851

To obtain a felony conviction for recidivist possession, several requirements must be met under 21 U.S.C. §§ 844(a) and 851. Section 844(a) requires a prosecutor to establish a prior conviction, which must be final before the commission of the subsequent offense. Section 851(a)(1) requires the prosecutor to file notice with the court before trial that the government is seeking a recidivist enhancement. Section 851(b) requires the court to ask the defendant, prior to sentencing, whether he affirms or denies the prior conviction. Section 851(c) allows for the defendant to issue a written denial of any allegation regarding the prior conviction. If the defendant denies any of the allegations in the notice, then a hearing is held where the U.S. attorney has the burden of proving beyond a reasonable doubt any factual issue. 21 U.S.C. § 851(c)(1).

These requirements under 21 U.S.C. § 844(a) and 851 are crucial to the inquiry into whether Respondent’s possession offense corresponds to a federal recidivist possession felony

and therefore a “drug trafficking” aggravated felony. Under the INA § 101(a)(43)(B), a “drug trafficking crime” is defined in relevant part as “any felony punishable under the [CSA].” 18 U.S.C. § 924(c)(2). The term “felony” is defined as “an offense for which the maximum term of imprisonment authorized” is “more than one year.” 18 U.S.C. § 3559(a); see Lopez, 127 S. Ct. at 630 n. 4. In order to determine whether Respondent has an aggravated felony, this Court must determine the “maximum term of imprisonment authorized” for Respondent’s simple possession offenses.

Unless the requirements for a felony conviction under 21 U.S.C. §§ 844(a) and 851 have been met, the “maximum term of imprisonment authorized” for a simple possession offense is not more than one year. Compliance with § 851 is critical to determining the length of sentences for which defendants with multiple prior convictions are punishable. See United States v. LaBonte, 520 U.S. 751, 754 (1997). The Supreme Court has held that the unenanced maximum applies for defendants who did not receive notice under § 851(a)(1). See id. at 760 (“[F]or defendants who have received the notice under § 851(a)(1), . . . the ‘maximum term authorized’ is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies.”). The Supreme Court applied this rule in Price v. United States, 537 U.S. 1152 (2003), remanding that § 844 case back to the Fifth Circuit. In its decision following the remand, the Fifth Circuit acknowledged that since Price did not receive notice that his prior convictions would be used in his criminal proceeding, “his 21 U.S.C. § 844 conviction could not be a felony.” United States v. Price, No. 00-51078, 67 Fed. Appx. 243, *2–3 (5th Cir. 2003) (not for publication) (emphasis added).

This Court should apply similar reasoning to Respondent’s case. The definition of an aggravated felony in the INA, and the CSA to which it refers, turn explicitly on whether an

offense is punishable by a “maximum term of imprisonment authorized” of “more than one year” under 18 U.S.C. § 3559(a). See INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B); 18 U.S.C. § 924(c)(2). A subsequent possession offense is not punishable by “more than one year” unless 21 U.S.C. §§ 844(a) and 851 requirements are met—i.e., unless the prosecutor made recidivism an issue by establishing a final prior conviction that can withstand collateral attack.¹ In Respondent’s case, none of the offenses listed in the NTA were charged and proven to be a recidivist possession offense. Indeed, it defies logic to presume that the Supreme Court envisioned that a state simple possession conviction such as the one alleged in Respondent’s case—where recidivism was never charged and proven—would be considered a “state counterpart” to federal recidivist possession. See Lopez, 127 S.Ct. at 630 n.6. States do punish recidivist offenses. See Parke v. Raley, 506 U.S. 20, 27 (1992) (“Statutes that punish recidivists more severely than first offenders have a long tradition in this country that dates back to colonial times. Such laws currently are in effect in all 50 States, and several have been enacted by the Federal Government, as well.” (internal citations omitted)). However, Respondent was not charged and convicted as a recidivist drug possessor under any state or federal law, and the requirements of 21 U.S.C. §§ 844(a) and 851 were never met in Respondent’s criminal case. Thus, the “maximum term of imprisonment authorized” for each of the offenses listed in the NTA in Respondent’s case is not more than one year under federal law.

¹ To ignore whether these requirements are met would eviscerate any distinction between possession and recidivist possession offenses, violating the proposition expounded by the Supreme Court that the “imposition of an enhanced penalty is not automatic.” See LaBonte, 520 U.S. at 754 n.1. Indeed, if the requirements for a recidivist conviction can be ignored in this inquiry, then the DHS could argue that even an actual federal misdemeanor is equivalent to a federal felony or that an offense preceded by an invalid conviction could be equivalent to a federal felony. Such results would be clearly contrary to Lopez and demonstrate the inherent flaws in such an approach.

Therefore, Respondent’s possession conviction is not a “state counterpart” to federal recidivist possession under the CSA and is not a drug trafficking aggravated felony. _____

3. Circuit case law supports Respondent’s argument that subsequent possession convictions are not automatically federal recidivist offenses

Circuit court case law supports Respondent’s argument. The First and Third Circuits, carefully applying the federal felony standard later adopted by the Supreme Court in Lopez, both rejected arguments that a subsequent possession offense can automatically be treated as a federal recidivist possession felony. See Berhe 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 courts emphasized that the inquiry must focus on the burden the state prosecutor actually bore in the criminal proceeding and not on alleged underlying facts. The Third Circuit recognized 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 because Steele did not have an opportunity to challenge the prior conviction in his criminal proceeding. Steele, 236 F.3d at 137–38. Similarly, the First Circuit held that Berhe’s second possession offense was not an aggravated felony because the prosecutor had not “met its burden of proving that Berhe had a prior conviction for a drug offense.” Berhe, 464 F.3d at 85–86.

The Ninth Circuit, applying the federal standard but adopting different reasoning, has

flatly ruled out the possibility of treating a subsequent state possession conviction as an aggravated felony conviction, 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. See Oliveira-Ferreira v. Ashcroft, 382 F.3d 1045 (9th Cir. 2004).

The law in the Second and Fifth Circuits no longer, if they ever did, support a contrary argument. Both circuits, prior to Lopez, applied a state or federal felony approach to the drug aggravated felony issue that Lopez rejected. See United States v. Simpson, 319 F.3d 81 (2d Cir. 2002); United States v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005). Even before Lopez, the Second Circuit did not treat Simpson as binding precedent on the multiple possession issue for the immigration context. See Simpson at 86 n.7 (“We offer no comment on whether such convictions constitute ‘aggravated felonies’ for any purpose other than the Guidelines.”); Durant v. INS, 393 F.3d 113, 115 (2d Cir. 2004), amended by Durant v. INS, 2004 U.S. App. LEXIS 27904, at *2 n.1 (2d Cir. Dec. 16, 2004) (“We are reluctant to adjudicate this complex issue without the benefit of full briefing. . . . Accordingly, we do not address [the issue].”). Similarly, before Lopez was decided, the Fifth Circuit questioned the significance of its holding in Sanchez-Villalobos that a second state possession offense could be an aggravated felony under the federal standard. Smith v. Gonzales, 468 F.3d 272, 276 n.3 (5th Cir. 2006) (“The effect of Part B [stating that the possession conviction was a felony under federal law] in Sanchez-Villalobos is uncertain.”). Since Lopez, the Fifth Circuit has remanded a criminal illegal reentry case involving two prior possession convictions for reconsideration of an aggravated felony sentence enhancement in light of Lopez, despite Sanchez-Villalobos. See U.S. v. Arevalo-Sanchez, 2006 WL 870362 (5th Cir. Mar. 21, 2007) (unpublished).

Additionally, the Fifth and Sixth Circuits have recognized the federal recidivist

possession statute's requirement that the prior conviction must be final before the subsequent offense is committed. See United States v. Palacios-Suarez, 418 F.3d 692, 700 (6th Cir. 2005) (holding subsequent commission not to be recidivist under § 844(a) since occurred before the prior conviction); Smith v. Gonzales, 468 F.3d 272, 277 (5th Cir. 2006) (holding subsequent commission not to be recidivist under § 844(a) since occurred before time for discretionary review of prior conviction had run).

Thus, the circuit court case law supports Respondent's position that requirements similar to those of §§ 844(a) and 851 for proof, finality, notice, and opportunity to challenge must be met in order for the subsequent conviction to be the equivalent of a federal felony recidivist offense.

4. If this Court finds there to be any lingering ambiguity, it should apply the rule of lenity to find that such offenses are not aggravated felonies

Finally, if this Court finds any lingering ambiguity as to whether a subsequent state possession conviction corresponds to a conviction "punishable" as a federal felony without meeting the federal requirements, applicable rules of lenity require that such ambiguity be resolved in favor of the non-citizen. Ambiguities must be construed in favor of the non-citizen because deportation is a drastic measure. Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004); Fong Haw Tan v. Phelan, 333 U.S. 6, 10 (1948). Particularly given the severe consequences of receiving an aggravated felony designation, this Court should adopt a rule that is consistent with Lopez and does not drastically expand the definition of a drug trafficking aggravated felony.

IV. CONCLUSION

Respondent was allegedly convicted of a simple possession offense preceded by another drug offense, neither of which individually constitute an aggravated felony. Since Respondent was not charged as a recidivist offender, Respondent had no opportunity to challenge the fact, finality, and validity of Respondent’s alleged prior conviction. _____

Respondent’s alleged subsequent state conviction for possession is not a “counterpart” to a federal recidivist felony conviction and is not an aggravated felony. See Lopez, 127 S. Ct. at 630 n.6. Respondent therefore contests removability as an aggravated felon, if so charged, and seeks to apply for all relief for which Respondent is eligible.

Date: _____

Respectfully submitted,

Respondent Name: _____

PRO SE

CERTIFICATE OF SERVICE

**UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE IMMIGRATION JUDGE
CITY, STATE _____**

In the Matter of:)
)
)
_____,)
LAST NAME, First Name) In Removal Proceedings
)
A# _____)
)
Respondent)
_____)

**RESPONDENT'S BRIEF IN SUPPORT OF FINDING THAT RESPONDENT'S
ALLEGED SUBSEQUENT DRUG POSSESSION OFFENSE IS NOT AN
AGGRAVATED FELONY**

I, _____, hereby affirm that on _____, 20____, I
submitted this brief to the DHS, located at _____, by:

- Hand
- Internal mail
- U.S. Postal Service
- Fed Ex / UPS
- Other _____

Sincerely,

Respondent Name: _____

PRO SE