

**CASE NO. 06-4270**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT**

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**ZIA UL ISLAM RASHID,**

Petitioner,

v.

**ALBERTO GONZALES, U.S. Attorney General,**

Respondent.

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**ON APPEAL FROM A DECISION OF THE BOARD OF IMMIGRATION  
APPEALS**

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**BRIEF FOR AMICI CURIAE  
CRIMINAL DEFENSE ATTORNEYS OF MICHIGAN AND  
NEW YORK STATE DEFENDERS ASSOCIATION  
IMMIGRANT DEFENSE PROJECT  
IN SUPPORT OF PETITIONER**

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## PRELIMINARY STATEMENT

In its recent eight-one decision in *Lopez v. Gonzales*, the Supreme Court made clear that the inclusion of drug possession offenses in the drug “trafficking” aggravated felony deportation category conflicts with ordinary meaning of the term and Congress’s general statutory scheme for categorizing such offenses. 549 U.S. \_\_\_, 127 S. Ct. 625, 630 (2006). This Court must now address the government’s continued effort to treat many state drug possession offenses as “drug trafficking” aggravated felonies.

In *Lopez*, the Supreme Court determined that a state drug possession offense may not be transformed into a “drug trafficking” aggravated felony unless the state statutory offense strictly and categorically corresponds to a federal drug felony. Here, the government has taken the position that a low-level state misdemeanor marihuana possession offense is the equivalent of a federal recidivist possession felony based on a prior marihuana misdemeanor not at issue in the state criminal proceeding. Under federal law, however, a recidivist possession felony is a distinct offense, requiring proof of a final prior conviction in the criminal proceedings, notice to the defendant, and an opportunity to challenge the fact, finality, and validity of the prior conviction. This Court and others have consistently mandated strict adherence to the federal requirements for converting a second possession offense into a recidivist felony in a criminal proceeding.

In analyzing whether an offense constitutes an aggravated felony, the Supreme Court and this Court have rejected attempts to look beyond what was actually charged and proven in the criminal proceedings. Nevertheless, the government has taken the position in this case that any state drug possession offense where the Department of Homeland Security (“DHS”) presents information regarding a prior drug conviction should be treated as though a prosecutor had proven the fact, finality and validity of the prior conviction in the state criminal proceedings regardless of whether this, in fact, was the case. This Court should apply the Supreme Court’s strict federal felony standard and hold that a second or subsequent state possession conviction is not an aggravated felony where the state offense does not, in fact, correspond to the federal felony standard.

### **STATEMENT OF INTEREST**

*Amici* Criminal Defense Attorneys of Michigan (“CDAM”) and New York State Defenders Association (“NYSDA”) Immigrant Defense Project are concerned that the ruling below—that a state simple possession offense may be deemed a drug trafficking aggravated felony for federal immigration purposes—will result in significant consequences, unintended by Congress, for the many immigrants in Michigan and throughout the United States who have similar nontrafficking convictions.

CDAM, an affiliate of the National Association of Criminal Defense Lawyers, is a statewide nonprofit organization of several hundred public defenders and private criminal defense attorneys, who are dedicated to promoting expertise in criminal law, educating the bar and public of the need for quality and integrity in defense services and representation, and guarding against the erosion of the rights and privileges guaranteed by the United States and Michigan Constitutions and laws. Since its inception in 1976, CDAM has been active in providing continuing legal education for criminal defense lawyers and in serving as *amicus curiae* in cases of significance to the criminal jurisprudence of the State of Michigan. *See, e.g.,* Briefs of *Amici Curiae, Dye v. Hofbauer*, 546 U.S. 1 (2005); *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Bazzetta v. McGinnis*, 286 F.3d 311 (6th Cir. 2002).

NYSDA, which seeks to improve the quality of justice for citizens and noncitizens accused of crimes, has an interest in assisting the courts of the United States 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 (IDP), 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. Federal courts, including the Supreme Court, have accepted and relied on *amicus curiae* briefs submitted by NYSDA's Immigrant Defense Project in several important cases involving application of the immigration laws to criminal dispositions. *See, e.g.*, Brief of *Amici Curiae* NYSDA Immigrant Defense Project, et al, in *Lopez v. Gonzales*, 543 U.S. 1 (2006); Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, NYSDA, et al., in *Leocal v. Ashcroft*, 125 S. Ct. 377 (2004); Brief of *Amici Curiae* National Association of Criminal Defense Lawyers, NYSDA, et al., in *INS v. St. Cyr*, 121 S. Ct. 2271 (2001) (brief cited at n.50).

## **BACKGROUND**

Adopting the government's position that any second state drug possession offense may be treated as a serious federal recidivist felony would result in minor state possession offenses, some of which are not even crimes under state law, being deemed aggravated felonies. For example, adopting the government's position, the Board of Immigration Appeals ("BIA") has held that the second of two New York marihuana possession violations, which are not even crimes under New York law, *see* NYCPL §§ 10.00(3)-(5) (violations are a lesser category of offense distinct from misdemeanors and felonies), constituted an aggravated felony. *See In re:*

*Conrad O'Neil Minto*, 2005 WL 1104172 (BIA March 21, 2005)(unpublished decision). Thus, under the government's approach, aggravated felony consequences would apply to low-level marijuana possession offenses even where such offenses are punishable by a fine only. For instance, in Ann Arbor, Michigan, marihuana possession is a mere civil infraction punishable by a fine. See Charter for the City of Ann Arbor Michigan § 16.2. In Ohio, possession of less than 100 grams (3.5 ounces) of marihuana is a minor state misdemeanor punishable by a fine of not more than \$150 and no imprisonment. See ORC Ann. §§ 2925.11(C)(3)(a) and 2901.02(G) (2006).

The broad reach of the government's position is particularly troubling given that many misdemeanor or lesser convictions involve indigent defendants whose convictions are processed under questionable circumstances and may be found invalid if challenged. For example, Michigan's public defense system has been widely condemned as a result of a lack of state funding and oversight. The deficiencies in Michigan's indigent defense system have led to many defendants suffering harms that include wrongful denial of representation, wrongful conviction of crimes, guilty pleas to inappropriate charges, and denial of the right to trial when meritorious defenses are available. See, e.g., Complaint, *Duncan v. State of Michigan*, Case No. 07-30242 CZ (Mich. Cir. Ct. filed Feb. 22, 2007),

available at [http://www.aclu.org/images/asset\\_upload\\_file244\\_28623.pdf](http://www.aclu.org/images/asset_upload_file244_28623.pdf) (last visited May 9, 2007).

The questionable circumstances under which many state misdemeanor or lesser violation cases are processed makes them poor candidates to serve as predicates for federal felony recidivist convictions under the strict requirements of 21 U.S.C. § 851, which mandates that defendants must have notice and the opportunity to challenge the fact, finality and validity of a prior conviction in order to be convicted of a recidivist felony. *See infra* Point I.A.2. A federal prosecutor could not secure a recidivist felony conviction where he or she failed to charge a final prior conviction and/or the prior offense suffers from procedural and substantive infirmities that undermine its validity—a strong likelihood when the prior conviction is a misdemeanor or lesser offense. This Court now has the opportunity to consider whether minor state possession offenses—preceded by a prior minor and possibly invalid state offense that was not even mentioned, much less charged and proven—can nevertheless be deemed the equivalent of a federal recidivist felony and automatically trigger a “drug trafficking” aggravated felony designation.

### **SUMMARY OF ARGUMENT**

In *Lopez*, the Supreme Court held that a state drug possession offense constitutes a drug trafficking aggravated felony as a “felony punishable” under the

Controlled Substances Act “only if it proscribes conduct punishable as a felony under that federal law.” 127 S. Ct. at 633. *Lopez* thus adopts the federal felony standard previously followed by this Court in determining whether a state law conviction is a “drug trafficking” aggravated felony. *See United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005). This Court now faces the question of whether a *misdemeanor* state drug possession offense may be treated as the automatic equivalent of a federal recidivist felony even though the state criminal proceeding did not prove—or offer an opportunity equivalent to that required under federal law to challenge—the fact, finality and validity of the alleged prior conviction. This is an important question that this Court has not considered since the further guidance on the federal felony standard provided by the Supreme Court in *Lopez*.

The *Lopez* Court recognized that an ordinary reading of “illicit trafficking” does not include possession offenses. As such, the Court followed a strict approach in determining whether a state possession conviction corresponded to a felony such that it meets the drug trafficking aggravated felony designation. *Lopez* does not permit the government to deem an offense to be “a felony punishable under the Controlled Substances Act” based on a hypothetical prosecution, but instead takes a categorical approach, which is consistent with this Court’s jurisprudence, based on what was proven by the actual state prosecution. *See infra*

Point I.A.1. Under *Lopez* and this Court’s established jurisprudence regarding the federal recidivist conviction requirements, an individual may not be deemed convicted as a recidivist of “a felony punishable under the Controlled Substances Act” in the absence of notice, proof, and the opportunity to challenge the fact, finality, and validity of the prior conviction. *See infra* Point I.A.2. Even before *Lopez* was decided, this Court and other federal circuit courts have found that a second or subsequent possession offense cannot automatically be deemed an aggravated felony and have consistently mandated adherence to the statutory requirements of 21 U.S.C. §§ 844(a) and 851. *See infra* Point I.B.

Further, the government’s argument that any second or subsequent state possession offense should be automatically treated as a “drug trafficking” aggravated felony would lead to designating an immigrant an aggravated felon even though his or her prior conviction may have been invalid and not met the federal requirements, a result that would be clearly in conflict with federal legislative intent. *See infra* Point II. It would also ultimately lead to the absurd result of treating a second *federal misdemeanor* as a federal felony in the immigration context, even though it was not prosecuted as a felony in the federal court, another result in direct conflict with federal legislative intent. *See infra* Point III.

Finally, should the Court find any lingering ambiguities in interpretation of the federal “drug trafficking crime” definition, this Court should apply the rule of lenity to find that the simple drug possession offense at issue here should not be deemed a “drug trafficking” aggravated felony. *See infra* Point IV.

## ARGUMENT

**I. UNDER THE FEDERAL FELONY STANDARD ADOPTED BY THE SUPREME COURT IN *LOPEZ*, A STATE DRUG POSSESSION OFFENSE IS NOT AUTOMATICALLY CONVERTED 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.**

Under the Supreme Court’s strict federal felony standard in *Lopez v. Gonzalez*, those state drug possession convictions that do not correspond to felony convictions under the Controlled Substances Act (“CSA”) cannot be treated as “drug trafficking” felonies. In adopting this approach, the Supreme Court rejected a broader inquiry into what the government could have charged based on the facts underlying the case, and instead focused on the defendant’s actual state conviction. This approach is consistent with this Court’s jurisprudence, which, prior to *Lopez*, adopted the same federal felony approach to determine whether a state drug offense is a “drug trafficking” aggravated felony. *See United States v. Palacios-*

*Suarez*, 418 F.3d 692, 700 (6th Cir. 2005) (holding that state conviction is a drug trafficking aggravated felony only if it is punishable as a felony under federal law).

Since *Lopez*, this Court has not considered the question of whether a state drug possession offense may automatically be treated as the equivalent of a federal recidivist felony. The strict federal felony standard provided by *Lopez* now requires this Court to make an inquiry into whether the actual state offense at issue is punishable under the CSA as a recidivist felony under 21 U.S.C. § 844(a). A federal felony conviction under the recidivist possession statute requires notice and an opportunity to challenge the fact, finality, and validity of a prior conviction—none of which occurred in the criminal proceeding of Petitioner’s second simple possession offense here.

**A. Under *Lopez* and Sixth Circuit Precedent, this Court Must Apply a Strict and Narrow Test in Determining Whether a Possession Offense Fits Within the Definition of a “Drug Trafficking” Aggravated Felony.**

In *Lopez*, the Supreme Court expressed concern over identifying drug possession offenses as “drug trafficking” aggravated felonies because the plain and commonsense meaning of trafficking does not support such a reading. *Lopez*, 127 S. Ct. at 629-30. 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 Court noted that some state

non-trafficking offenses could counterintuitively come within the definition of illicit trafficking if they “correspond” to a felony under the CSA, *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. This approach is mirrored by Sixth Circuit precedent. *See infra* Point I.A.1.

- 1. Under *Lopez* and this Court’s federal felony approach, the determination of whether an offense is “a felony punishable under” the Controlled Substances Act must be based on an analysis of the actual state court conviction, not on a hypothetical prosecution or facts outside the record of conviction.**

The Supreme Court held that “a state offense constitutes a ‘felony punishable under the Controlled Substance Act’ only if it proscribes conduct punishable as a felony under that federal law.” *Lopez*, 127 S. Ct. at 633. Thus, the relevant inquiry under *Lopez* is to determine, through a strict comparison of the state offense with federal offenses under the CSA, how federal law would punish the offense as delineated in the actual state conviction, not whether some federal felony charge could have hypothetically been brought against the defendant based on facts not even at issue in the state criminal proceeding. *See id.*

The reasoning in *Lopez* thoroughly undermines any argument that the phrase “felony punishable under the Controlled Substances Act” permits a court to consider whether the offense is hypothetically punishable as a federal felony based on facts outside the record of conviction. Rather, the Supreme Court’s reasoning

clarifies that the focus of the analysis must be on whether the relevant statutory proscription is punishable as a federal felony, *i.e.*, how federal law treats the offense as it was actually charged and decided in the state criminal proceeding. *See Lopez*, 127 S. Ct. at 633.

The Supreme Court makes this distinction between actually determined guilt and hypothetical liability clear in its discussion of possession and possession with intent to distribute. The Supreme Court observed that “some States graduate offenses of drug possession from misdemeanor to felony depending on quantity, whereas Congress generally treats possession alone as a misdemeanor whatever the amount (but leaves it open to charge the felony possession with intent to distribute when the amount is large).” *Id.* at 632. A defendant with a large quantity of drugs might be charged with a state felony for 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 the ultimate conviction and its statutory proscriptions are taken into consideration, not the underlying facts. In other words, the fact that a state simple possession offense could have been charged as possession with intent to distribute will not convert the conviction into an aggravated felony. The Supreme Court recognized that, under its analysis, a defendant “convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation” because federal law

requires that the government charge possession with intent to distribute, and not simple possession, to obtain a felony conviction. *Id.* While recognizing the anomalies in which its strict federal felony approach might result given different state practices, the Supreme Court found such anomalies preferable to the many others that would result if a more expansive approach was taken. *Id.*

This approach follows the “categorical approach” that the Supreme Court and this Court use to determine generally if an offense constitutes an aggravated felony. Under the categorical approach, reviewing courts should look to the state statute defining the crime of conviction, not to facts not established, or even mentioned, in the state criminal proceeding. *See Taylor v. United States*, 495 U.S. 575, 575 (1990); *United States v. Sanders*, 470 F.3d 616, 622-23 (6th Cir. 2006)(applying categorical approach in determining whether an offense meets the definition of a violent crime for sentencing purposes); *United States v. Montanez*, 442 F.3d 485, 489 (6th Cir. 2006)(applying categorical approach in determining whether an offense meets the definition of a controlled substance offense for sentencing purposes); *Patel v. Ashcroft*, 401 F.3d 400, 409-11 (6th Cir. 2005)(applying categorical approach in determining whether an offense meets the definition of a “crime of violence” aggravated felony in immigration case); *see also Gonzalez v. Duenas-Alvarez*, 127 S. Ct. 815, 816 (2007)(clarifying that the *Taylor* categorical approach applies in immigration cases).

As this Court has explained, “[u]nder the categorical approach, it is not only impermissible, but pointless, for the court to look through to the defendant's actual criminal conduct.” *Montanez*, 442 F.3d at 489 (internal quotation marks and citations omitted). “[O]nly the minimum criminal conduct necessary to sustain a conviction under a given statute is relevant.” *Patel*, 401 F.3d at 409 (internal quotation marks and citations omitted). If the statutory definition of the state offense is not determinative, then a court may look to limited documents within the record of conviction. *See Montanez*, 442 F.3d at 489; *see also Shepard v. United States*, 544 U.S. 13 (2005) (explaining what documents within the record of conviction are permissible for examination by the court).

Thus, under both *Lopez* and this Court’s case law, a state possession conviction must actually correspond to a federal felony conviction to be deemed an aggravated felony based on the record of conviction and not merely reflect underlying conduct that could have possibly been prosecuted as a felony under federal law. To that end, the Supreme Court stated its willingness to tolerate “some disuniformity in state misdemeanor-felony classifications” that might result from insisting that the state conviction meet the requirements of the federal statute. *Lopez*, 127 S. Ct. at 629. It found this disuniformity preferable to allowing the states to supplant Congress’ own misdemeanor-felony classifications when Congress specifically constructed its immigration law to turn on them. *Id.* The

relevant inquiry is focused not on what a prosecutor could have charged, but on the actual state conviction.

**2. Under *Lopez* and this Court’s established jurisprudence regarding 21 U.S.C §§ 844(a) and 851, an individual may not be deemed convicted as a recidivist of “a felony punishable under the Controlled Substances Act” in the absence of notice, proof, and the opportunity to challenge the fact, finality, and validity of the prior conviction.**

Federal law outlines several requirements that must be met in order for a simple possession offense to be punishable as a felony under the recidivist possession provisions of 21 U.S.C. §§ 844(a) and 851 and thereby illogically be included in the definition of “illicit trafficking.” For a recidivist possession conviction, the prosecutor must establish that the offense was committed after a final prior conviction. 21 U.S.C. § 844(a). The prosecutor must file an information with the court and serve a copy of such information on the defendant before he or she enters a guilty plea or trial commences. 21 U.S.C. § 851(a). This information must state the prior convictions to be relied upon, and thus provide the defendant notice of the recidivist charge and potential 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, the defendant may deny any allegation of 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

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).

By including the § 851 requirements, Congress intended to punish as a recidivist felony only those offenses in which, along with notice and proof of the elements of the 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, automatic sentencing enhancements, with no discretion given to the prosecutor even in many low-level cases. *See U.S. 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 penalty structures for drug offenses. The purpose was to eliminate the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.” *United States v. Noland*, 495 F.2d 529, 533 (5th Cir. 1974) (internal quotations 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.C.A.N. 4566, 4576 (“The committee feels, therefore, that making the penalty structure in the law more flexible can actually serve to have a more deterrent effect than existing

penalties, through eliminating some of the difficulties prosecutors and courts have had in the past arising out of minimum mandatory sentences.”). Thus, prosecutors were given the option not to seek sentencing enhancements in low-level cases. Furthermore, for cases where prosecutors seek a recidivist conviction, Congress made the requirements of 21 U.S.C. § 851 strict and mandatory. *Noland, supra*, at 533 (discussing how Congress used mandatory language in the text of § 851).

Given this legislative history, 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 Supreme Court considered the appropriate sentencing instrument for recidivist offenders who may receive a higher sentence under either a statutory sentence enhancement 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” sentence enhancements over the statutory enhancements, the Supreme Court declared that “the imposition of [a statutory] enhanced penalty is not automatic,” and can only be applied when the § 851 requirements have been satisfied. *Id.* at 754. The Supreme Court also warned against reading § 851 in such a way as to “[subsume] within a single category both defendants who have received notice under § 851 and those who have not,” because the enhanced maximum term authorized under the statute

applies to defendants who receive notice under § 851 while the regular maximum term applies to defendants who do not receive notice. *Id.* at 759-60.

Later, in *Price v. United States*, the Supreme Court addressed § 851 specifically in the context of the recidivist enhancement in § 844(a), holding that the 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 as required in § 851(a), and remanding the case back to the Fifth Circuit to be reconsidered in light of *LaBonte*. 537 U.S. 1152, 1152 (2003). In *Price*, the Solicitor General acknowledged that the defendant's drug offense could not be treated as a felony because the government failed to file a notice of enhancement pursuant to § 851(a), a fact that both the opinion and the dissent, filed for other reasons, also noted. *Id.* This Court has also consistently recognized that § 851 provisions are meaningful and significant and must be adhered to before a drug possession offense may be punishable as a felony under the recidivist possession provisions of 21 U.S.C. §§ 844(a) and 851. In *United States v. Williams*, this Court stated that: "The government's failure to notify [a defendant]. . . that an enhanced penalty would be imposed if he had prior felony convictions. . .[affects his] substantial rights. Such errors are not harmless, and cannot be overlooked." 899 F.2d 1526, 1531 (6th Cir. 1990). This Court has highlighted the constitutional significance of § 851 by acknowledging that its purpose is to protect the due process rights of the defendant.

*United States v. King*, 127 F.3d 483, 488-89 (“Section 851 was designed to satisfy the requirements of due process. . . .”). In order to safeguard those due process rights, a defendant must have notice of the prosecutor’s intent to rely on a prior conviction for sentencing purposes and an opportunity to be heard on the prior conviction. *See Williams*, 899 F.2d at 1529. These requirements are mandatory and a *condition precedent* to the judge’s ability to grant a sentence enhancement under the CSA. *See United States v. Martinez*, 253 F.3d 251, 255 (6th Cir. 2001)(recognizing that the notice requirement in § 851 is mandatory); *King*, 127 F.3d at 487 (6th Cir. 1997)(“The requirements delineated in § 851 are mandatory, and a district court cannot enhance a defendant’s sentence based on a prior conviction unless the government satisfies them.”); *see also Sapia v. United States*, 433 F.3d 212, 217 (2d Cir. 2005)(“[Section] 851...constitutes a condition precedent to a court’s authority to impose a statutorily authorized sentence.”).

In the federal criminal context, a drug conviction is simply not a recidivist drug conviction unless these strict requirements are met. Thus, under the federal felony approach in *Lopez*, a state criminal conviction does not correspond to a federal recidivist felony conviction for immigration purposes unless the prior conviction was charged and proven as per these types of requirements. In the present case, however, the government argues that a Michigan misdemeanor marihuana possession offense is the equivalent of a recidivist federal felony even

though Petitioner's alleged prior conviction was never even at issue in the state criminal proceedings. The prior conviction was certainly not charged and proven in the state criminal proceedings, and neither the court nor the prosecutor gave the defendant an opportunity in the state criminal proceedings to challenge the fact, finality, and validity of any prior conviction. Indeed, Michigan has a recidivist possession statutory provision for second or subsequent drug offenses, *see* MCL § 333.7413(2), but this provision was not applied to the Petitioner.<sup>1</sup>

In short, under *Lopez* and this Court's precedents, a conviction for simple possession, where the criminal court never adjudicated or considered the fact, finality, or validity of any prior conviction, cannot be equated to a recidivist possession federal felony conviction.

**B. Even Before *Lopez* was Decided, This Court and Other Federal Circuit Courts Held That Second or Subsequent Possession Offenses Cannot Automatically Be Deemed Aggravated Felonies Where the Statutory Provisions of 21 U.S.C. §§ 844(a) and 851 Have Not Been Met.**

Even before *Lopez* was decided, this Court and other federal circuit courts held that second or subsequent state possession offenses cannot automatically be deemed aggravated felonies where the statutory requirements of 21 U.S.C.

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<sup>1</sup> Michigan's recidivist felony statute was not applied to Petitioner, and therefore, whether Michigan's recidivist possession provision corresponds to the federal felony recidivist provision is not at issue here.

§§ 844(a) and 851 have not been met. For example, in *United States v. Palacios-Suarez*, this Court recognized that a second simple possession conviction cannot be an aggravated felony if the § 844(a) requirement that a prior conviction be final has not been met. 418 F.3d 692, 700 (6th Cir. 2005). Specifically, this Court noted that when neither state conviction involves a trafficking element, “[the] sole inquiry under § 1101(a)(43)(B) is to determine whether the two state convictions could be considered felonies punishable under the CSA” and concluded that “in order to be eligible for the enhanced punishment, the defendant's second offense must occur after the prior drug conviction has become final.” *Id.* (emphasis in original). Having determined that the § 844(a) finality requirement was not met, this Court did not, and had no reason to, make any determination with regard to whether the other federal requirements were met. Thus, this Court recognized the importance of adhering strictly to the provisions in the CSA before labeling a simple possession conviction as an “illicit trafficking” crime. *Id.*

Nevertheless, the BIA in the instant matter misinterpreted *Palacios-Suarez* as standing for the proposition that second simple possession convictions can automatically be deemed to be felonies as long as information outside the record of conviction indicates that the first conviction was final. *In re: Zia Ul Islam Rashid*, 2006 WL 3252566 \*2 (BIA August 24, 2006). This is not what this Court held in *Palacios-Suarez*; rather, this Court held that a conviction where a prior conviction

was not final clearly could *not* be deemed to correspond to a federal felony and the Court did not need to address any other requirements under federal law. *Palacios-Suarez* simply cannot be read to hold that some federal requirements must be examined and met but not others – the Sixth Circuit decision does not state this and a court would be hard-pressed to explain such reasoning now in light of the Supreme Court’s analysis in *Lopez*. Thus, the BIA’s interpretation is a clear misapplication of this Court’s federal felony approach, and the strict federal standard set forth in *Lopez*, because the BIA did not go through an analysis to determine whether the federal requirements provided in §§ 844(a) and 851 were actually met.

Other federal circuits that carefully applied the federal felony standard in the immigration context, even before *Lopez*, have also held that the recidivist provision is not automatic. The First and the Third Circuits both flatly rejected arguments that a second or subsequent possession offense can automatically be treated as a federal recidivist possession felony. *See Berhe v. Gonzalez*, 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 of these circuits emphasized that the inquiry must focus on the burden the prosecutor actually met in the state proceeding, and not on alleged underlying facts. The *Steele* court 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, in *Berhe*, the First Circuit applied a federal felony analysis to hold that the petitioner’s second possession offense was not an aggravated felony because the state 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.

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 because the government 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 proceedings. *See Steele*, 236 F.3d at 137. Those requirements were considered necessary by the court because without them, “the record evidences no judicial determination that [the prior conviction] existed at the relevant time. For all that the record before immigration judge reveals, the initial conviction may have been constitutionally impaired.” *Steele*, 236 F.3d at 137-38 (citations omitted).

Thus, even pre-*Lopez*, courts that carefully applied a federal felony standard found that a state possession offense may not be deemed an aggravated felony based solely on underlying facts indicating a prior conviction. Post-*Lopez*, it is

even clearer that second or subsequent possession cannot be considered an aggravated felony where the state criminal proceeding neither proved nor offered an opportunity equivalent to that under federal law to challenge the fact, finality, and validity of any alleged prior conviction.

**II. THE GOVERNMENT’S ARGUMENT WOULD REQUIRE TREATING INDIVIDUALS WITH A POTENTIALLY INVALID PRIOR CONVICTION 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. As the Supreme Court in *Lopez* and this Court in *Palacios-Suarez* recognized, 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 §§ 844(a) and 851, Congress clearly intended to ensure that prior drug possession convictions that were not final or could not withstand a collateral attack on their validity would not be used as the basis for a federal felony recidivist possession conviction and therefore as the basis for an aggravated felony determination. As such, automatically treating any state possession offense as an aggravated felony where

underlying facts indicate a prior conviction is in conflict with Congress' intent in adopting §§ 844(a) and 851 and with the strict federal standard set forth in *Lopez*.

Moreover, the recidivist felony provision within 21 U.S.C. § 844(a) of the CSA cannot be read to the exclusion of the mandates provided under 21 U.S.C. § 851. When determining congressional intent regarding what offenses may be deemed felonies under the CSA, the statute must be read in its entirety.<sup>2</sup> To allow the government to cherry-pick certain provisions within the CSA and ignore others would circumvent Congress' intent to passing the various provisions in this statute. The §§ 844(a) and 851 provisions are complementary, and the recidivist enhancement cannot be applied without satisfying the mandates in § 851. Congress' "clear statutory command" explicitly requires that before a defendant can be convicted of felony recidivist possession, the government must provide notice of the prior conviction, and the defendant must have an opportunity to attack the fact, finality, and validity of that conviction.

Further, an examination of the circumstances under which many low-level drug possession charges are prosecuted indicates that many of the resulting

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<sup>2</sup> See *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.'"); see also *Williams v. Taylor*, 529 U.S. 362, 404 (2000) (describing this rule as a "cardinal principle of statutory construction"); 2A Norman J. Singer, *Statutes and Statutory Construction* § 46:06, at 181-90 (6th ed. 2000) ("A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant, and so that one section will not destroy another unless the provision is the result of obvious mistake or error.").

convictions suffer from inadequacies that would lead to their invalidation under the federal requirements of § 851. As discussed in the Background, *supra*, substantial constitutional violations, such as inadequate legal defense or deprivation of the right to counsel, are prevalent as a result of the questionable circumstances under which some states, including Michigan, process many misdemeanor or lesser criminal cases. *See* Background, *supra*,

Within this context, those convicted of misdemeanor and lesser possession offenses may have experienced legal defects in their proceedings that would, upon a § 851 type challenge, lead to a finding that a prior conviction was invalid. However, in state prosecutions that do not have notice and proof requirements corresponding to those under federal law, there is no assurance of the validity of the prior conviction. The government's approach forces Petitioner 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 legislative intent in adopting the federal standard for a recidivist possession felony and therefore with the decision of the Supreme Court in *Lopez*.

**III. THE GOVERNMENT'S INTERPRETATION MUST BE REJECTED BECAUSE IT WOULD LEAD TO THE ABSURD RESULT THAT ALL SECOND OR SUBSEQUENT *FEDERAL* MISDEMEANOR POSSESSION OFFENSES BE TREATED AS THE EQUIVALENT OF FEDERAL FELONIES IN THE IMMIGRATION CONTEXT EVEN THOUGH THE OFFENSE WAS NOT PROSECUTED AS A FEDERAL FELONY.**

It is well established that reviewing courts must avoid technically possible interpretations that produce 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); *United States v. Brown*, 25 F.3d 307, 309 (6th Cir. 1994); *United States v. Blackmon*, 914 F.2d 786, 789 (6th Cir. 1990). Accordingly, the government's position that any second or subsequent state possession offense may be considered sufficiently analogous to recidivist possession under the CSA to constitute an aggravated felony—regardless of whether 21 U.S.C. §§ 844(a) and 851-like requirements have been met in the criminal proceeding—should be rejected because it leads to the absurd result that any second or subsequent federal misdemeanor possession conviction would also be considered the equivalent of a federal felony recidivist conviction even though it was not prosecuted as a federal felony.

This absurdity is accentuated by the fact that most federal second or subsequent drug possession offenses are not actually prosecuted as recidivist

felonies under federal law.<sup>3</sup> In our experience, to the extent that recidivist enhancements in the CSA are used, they are applied to cases where the prior drug conviction is already a federal felony. *See, e.g., United States v. Fisher*, 33 Fed. Appx. 933 (10th Cir. 2002)(unpublished decision). Given the infrequency with which the recidivist enhancement is used in the context of federal defendants whose prior convictions are only misdemeanor drug possession convictions, to automatically treat any second or subsequent misdemeanor possession conviction as equivalent to federal felony recidivist possession would not only be an absurd result but would clearly conflict with the congressional intent reflected in the *Lopez* federal felony standard.

**IV. SHOULD THE COURT 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 COURT 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.

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<sup>3</sup> 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 case based on a prior misdemeanor simple drug possession conviction.

However, insofar as 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. *See Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting that, under the rule of lenity, ambiguities in criminal statutes must be construed in favor of the immigrant); *Fong Haw Tan v. Phelman*, 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”); *see also United States v. Palacios-Suarez*, 418 F.3d 692, 702 (6th Cir. 2005) (concurring)(“There being two arguably permissible constructions of this statutory language, the rule of lenity requires us to adopt the construction that is more favorable to the defendant.”).

## CONCLUSION

For the aforementioned reasons, *amici curiae* respectfully urge the Court to hold that a second or subsequent state possession offense may not be deemed a “drug trafficking” 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.

Respectfully submitted,



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**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)**

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6920 words, excluding the part of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
  
2. The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14 point.



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