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BOARD OF IMMIGRATION APPEALS

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| In the Matter of: | ) | File No.: A [redacted] |
| [redacted] | ) | |
| In removal proceedings | ) | |

# BRIEF OF AMICUS CURIAE NEW YORK STATE DEFENDERS ASSOCIATION FOR RESPONDENT

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Dickson v. Ashcroft, 346 F.3d. 44 (2d Cir. 2003) ....................4, 5

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EECO v. Commercial Office Prods. Co., 486 U.S. 107 (1988) ....................25

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Fong Haw Tan v. Phelan, 333 U.S. 6 (1948) ....................41

Henry v. Gonzales, Dkt. No. 05-2239 (1st Cir.) ....................4

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United States v. Martinez, 253 F.3d 251 (6th Cir. 2001) ....................20
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§ 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(B)(ii) ....32
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NYCPL § 1.20(39) ....30
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**OTHER**

Brief of Former General Counsels of the Immigration and Naturalization Service as Amici Curiae in Support of Petitioner Jose Antonio Lopez, 2006 WL 1706672 .........................42

Glaberson, William. Broken Bench: In Tiny Courts of New York, Abuses of Law and Power, N.Y. Times, September 25, 2006.......................................................................................24

New York Judicial Selection, http://www.ajs.org/js/NY_methods.htm .......................................24

New York State Bar Association, THE COURTS OF NEW YORK: A GUIDE TO COURT PROCEDURES 17-18 (2001) ..............................................................................................23

New York State Commission on the Future of Indigent Defense Services, FINAL REPORT TO THE CHIEF JUDGE OF THE STATE OF NEW YORK (June 18, 2006).......................24

New York State Division of Criminal Justice Services, ADULT ARRESTS: NEW YORK STATE BY COUNTY AND REGION 2005, http://criminaljustice.state.ny.us/crimnet/ojsa/arrests/year2005.htm (last modified Jan. 26, 2006) .......................................................................................................................23

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 ........................................................................16

United States Department of Justice, Bureau of Justice Statistics, DRUG AND CRIME FACTS, http://www.ojp.usdoj.gov/bjs/dcf/enforce.htm (last modified Sept. 21, 2006) .................23

Warner, Mary. The Trials and Tribulations of Petty Offenses in the Federal Courts, 79 N.Y.U L. Rev. 2417 (2004). .............................................................................................................23

Wise, Daniel. Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics Investigation, N. Y. L. J., May 22, 2000..............................................................................23



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## PRELIMINARY STATEMENT

Amicus curiae, which has filed amicus briefs that the Board has accepted in four other cases addressing the issue raised in this case,[1] submits this amicus brief in response to the request of the Board dated June 18, 2007.

Resolution of the issue raised by this and other cases pending before the Board is important because the Department of Homeland Security ("DHS") continues to argue—even after the Supreme Court's 8-1 December 2006 Lopez decision requiring that a state drug possession conviction must correspond to a federal felony in order to be deemed a "drug trafficking" aggravated felony—that certain state nontrafficking convictions may categorically be deemed drug trafficking aggravated felonies without regard to the requirements of the federal felony standard. The DHS so argues despite the fact that circuit courts that followed the federal test later adopted by the Supreme Court in Lopez have already rejected DHS arguments that nontrafficking possession convictions such as the one at issue in this case may categorically be deemed "drug trafficking" aggravated felonies.

In essence, the DHS appears to argue in this case that *any* state possession conviction where the DHS submits evidence of a prior drug conviction may be deemed the equivalent of a federal recidivist felony, and, therefore, a "drug trafficking" aggravated felony, regardless of whether or not the prior conviction was even at issue in the state criminal proceeding relating to the second conviction. Under federal law, however, a federal recidivist felony conviction is simply not possible unless the fact, finality, and validity of any alleged prior conviction is established in the criminal proceeding relating to the second conviction. Therefore, as found by the federal circuit courts that have rejected the DHS' sweeping approach, a state conviction

[1] In re Santos, A35 572 054; In re Powell, A17 560 142; In re Arias, A18 663 104, and Matter of Yanez-Garcia, A91 334 042.



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where the prior conviction was not even at issue in the state criminal proceeding may not be deemed to correspond to a federal recidivist felony. Such a state conviction corresponds instead to a federal misdemeanor possession conviction where there may have been a prior conviction but the federal prosecutor either could not prove, or chose not to prove, the fact, finality and validity of that prior conviction.

The position of the federal circuit courts that have rejected the DHS' sweeping approach is now buttressed by the strict federal standard approach of the Supreme Court. In Lopez, the Court made clear that the determination 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. Thus, the Court found that the amount of drugs underlying a state simple possession conviction would not make that possession offense "punishable as" a federal felony, despite 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. The Court concluded that the drug amount would not convert the simple possession conviction into an aggravated felony because "intent to distribute" was simply not at issue in the state case.

In fact, the actual practice of federal prosecutors is that they rarely, if ever, seek to prosecute second or subsequent drug possession offenses as recidivist felonies in the absence of other more serious charges. Nevertheless, the DHS' position would attach drastic "aggravated felony" consequences to virtually all second or subsequent state possession offenses, regardless of their seriousness or the possible invalidity of the prior conviction. Thus, for example, the DHS has argued that even a state *non-criminal* disposition preceded by another such disposition may be deemed to correspond to a serious federal recidivist felony—a result that is patently

absurd. Moreover, the logical extension of the DHS' argument is that even a *federal misdemeanor* possession conviction may be treated as a *federal felony* if the DHS submits evidence of a prior conviction even where the federal prosecutor may have been unable to obtain a felony conviction because of inability to prove the fact, finality, or validity of that prior conviction—a result that is not only absurd but clearly contrary to Congressional intent.

The Board should apply the strict federal felony 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 conviction does not actually correspond to a federal felony.

## 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 Board 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 nationwide with expert legal advice, publications and training on issues involving the interplay between criminal and immigration law.

The NYSDA Immigrant Defense Project is concerned that, if the Board 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



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lesser nontrafficking convictions. If the Board finds that a possession offense can categorically be deemed a drug trafficking aggravated felony whenever the DHS submits evidence of a prior conviction whether or not the fact, finality, or validity of the prior conviction was charged and proven in the state criminal proceeding, 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 the DHS.

The Board, as well as federal courts including the Supreme Court, has accepted and relied on amicus curiae briefs submitted by NYSDA's Immigrant Defense Project in many 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, 543 U.S. 1 (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 Henry v. Gonzales, Dkt. No. 05-2239 (decision published in companion case of 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)), Jobson v. Ashcroft, 326 F.3d 367 (2d Cir. 2003), and Dickson v.



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Ashcroft, 346 F.3d 44 (2d Cir. 2003); and to the Third Circuit in Ponnapula v. Ashcroft, 373 F.3d 480 (3rd Cir. 2004).

The Board has already accepted amicus briefing from NYSDA and its Immigrant Defense Project on the issue presented in this case in four cases: In re Santos, A35 572 054; In re Powell, A17 560 142 ; In re Arias, A18 663 104, and Matter of Yanez-Garcia, A 91 334 042. Santos, Powell, and Yanez are still pending before the Board. In Arias, the Board vacated and remanded a removal order applying the law of the First Circuit in Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006). The unpublished opinion in Arias noted that the government had failed to apprise the Board of controlling authority and expressed appreciation for our amicus brief. (A copy of the Arias opinion is attached).

**SUMMARY OF ARGUMENT**

In Lopez v. Gonzales, 127 S. Ct. 625 (2006), the Supreme Court held that a state drug conviction constitutes a conviction of 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 facts not established in the state criminal proceeding in question cannot convert a state nontrafficking drug conviction into a conviction "punishable" as an aggravated felony "drug trafficking crime" under 8 U.S.C. § 1101(a)(43)(B). This conclusion follows the categorical approach employed by the Board, which requires that the Board, in determining whether a state conviction may be deemed a conviction of an aggravated felony, look only to what was at issue in the state criminal proceeding in question and not to facts not charged or



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proven by the state prosecutor. See infra Point I generally and Point I.A.1.

As applied to state possession convictions where there is no evidence that a prior conviction was even at issue in the criminal proceeding in question, the approach of the Supreme Court in Lopez and the Board's own categorical approach require that such convictions not 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, prior to a plea or trial, 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 court cannot convict someone of a recidivist felony without notice and proof of a prior final conviction that can withstand collateral attack. Therefore, under the federal felony standard adopted in Lopez, a state conviction of a possession offense is not equivalent to a federal recidivist possession felony conviction where these recidivist offense requirements were not met in the state criminal proceeding. See infra Point I.A.2 and I.A.3.

The conclusion that a state drug possession conviction preceded by a prior drug conviction may not automatically be treated as corresponding to a federal recidivist 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 conviction. 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 a presumed valid 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 a federal prosecutor may have been unable to make the showings necessary to obtain a felony recidivist conviction—an absurd result that is clearly in conflict with Congressional intent. See infra Point I.C.

Moreover, the DHS' proposed approach to interpretation of the drug trafficking aggravated felony ground sweeps broadly to cover relatively minor state possession offenses and to bar the possibility of relief from removal for long-time lawful permanent resident immigrants convicted of such minor offenses. See infra Point II.A. This approach undermines the statutory graduated scheme of consequences that applies deportability consequences to virtually all possession offenses but imposes the maximum penalty of deportability without relief only to "trafficking" offenses. See infra Point II.B.

In fact, the DHS' proposed approach has already been rejected by several federal circuit courts. There are at least three circuits, the First, the Third and the Ninth, that have squarely rejected the arguments the DHS makes in this case. Other circuits, including the Fifth, Sixth and Eighth Circuits, have also rejected broad government arguments relating to application of the federal recidivist standard in multiple possession cases. See infra Point III.A

Contrary to the DHS' suggestions in briefs submitted in other cases currently pending before the Board, there is no current binding circuit law that supports its position. The Fifth Circuit and the Second Circuit, the circuits that have issued decisions on which the DHS relies in sentencing cases involving multiple prior possession convictions, have specifically



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acknowledged that Lopez requires reconsideration of the multiple possession issue and, even before Lopez, both had retreated from the suggestion that they had opined in a binding way on this issue. Indeed, the Fifth Circuit has denied the government's motion to dismiss and ordered a stay of removal in a case that raises this issue, and both the Fifth and Second Circuits have remanded other cases that raise this issue for reconsideration in light of Lopez. See infra Point III.B.

Thus, in seeking to formulate a national position, the Board faces controlling immigration precedents that reject the DHS' position in the First, Third, and Ninth Circuits, and at least partly reject it in other circuits, and no controlling authority that supports it. The current state of circuit law makes clear that, if the Board were to adopt the DHS' position, there would immediately be disuniformity between the rule announced by the Board and the rule that the Board would be required to apply in those circuits that have rejected the DHS' position. See infra Point III.C.

Finally, should the Board 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 Board should apply the rule of lenity to find that such a conviction does not constitute an aggravated felony. See infra Point IV.

## 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 ESTABLISH—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 what was actually charged and proven in the state criminal proceeding constitutes a conviction of an offense punishable as a felony under federal law, not an inquiry into what charges federal prosecutors *might* have been able to file against the defendant. Indeed, the DHS' reasoning is contrary to the Board's own categorical approach to determining when a "conviction" of an "aggravated felony" has occurred. Application of the Lopez analysis and the categorical approach leads inexorably to a conclusion that the "conduct proscribed" by a state nontrafficking statute is not punishable as a felony under federal law where the state criminal proceeding did not establish—or offer an opportunity equivalent to that under federal law to challenge—the fact, finality and validity of any prior conviction. Any alternative interpretation would allow invalid state possession convictions, which cannot serve as the predicate for a felony recidivist conviction under federal law, to transform a subsequent state simple possession conviction into an aggravated felony, and would also lead to the absurd consequence of automatically treating second federal misdemeanor possession convictions as aggravated felonies, both results clearly in conflict with Congressional intent. Thus, under Lopez and the Board's categorical approach, a state drug possession disposition such as the one at issue here that did not charge and prove a prior drug conviction simply may not automatically be considered a "drug trafficking" aggravated felony.[2]

[2] The Board 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 the Board's decision in Matter of Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002), the respondent in that case raised the argument that his state drug possession conviction was not analogous to a federal felony conviction, and therefore not a conviction of 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 Board did not reach the issue because it held that, under the state felony approach applied at the time by several circuit courts, the possession conviction was a drug trafficking aggravated felony based on its

**A. The strict federal felony standard adopted in Lopez and the categorical approach of the Board dictate that a state possession offense is not "punishable" as a recidivist felony under federal law, and therefore is not an aggravated felony, where the state criminal proceeding does not establish the factors required for a federal recidivist felony conviction.**

Under Lopez, the Board must look skeptically upon claims that a state nontrafficking conviction corresponds to a federal felony conviction. 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 nontrafficking 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 nontrafficking conviction in fact corresponds to a federal felony conviction.

In Lopez, the Supreme Court made clear that determining whether a state offense is "punishable" as a felony under federal law does not permit a broad inquiry into what charges a federal prosecutor could have brought against the defendant. Rather, the strict approach in Lopez to determining whether a state offense corresponds to a federal felony under the

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designation as a felony by the state of conviction. Id. at 399. Similarly, while the Board 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 Board therefore did not address in Davis under what circumstances a second or subsequent state possession conviction would correspond to a federal recidivist possession conviction. See id.; Letter of Bryan S. Beier, Senior Litigation Counsel, Office of Immigration Litigation (requesting remand to the Board in Salazar-Regino v. Trominski, Dkt. No. 03-41492 (5th 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 Board has thus never resolved whether a second or subsequent state possession conviction may be treated as a conviction of an aggravated felony when the prior conviction was not even at issue in the state prosecution.

Controlled Substances Act follows previous Supreme Court and Board 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 proceeding at issue rather than to any facts not established in that proceeding. 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 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.

**1. Under Lopez and Board case law, courts must focus on what was established by the actual state conviction, and not on what the defendant might have been hypothetically chargeable with, 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 in order to determine whether the state conviction establishes "conviction" of 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 charged and proven in the state prosecution.

Aggravated felony analysis has always been limited to the actual state conviction as it was charged and proven. This is, in part, because the relevant removability provision, INA § 237 (a)(2)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), and the statutory bar to cancellation, INA § 240A (a)(3), 8 U.S.C. § 1229b(a)(3), both direct the court to determine whether an individual was "convicted" of an aggravated felony, not whether he could have been charged with an aggravated felony. 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. It therefore follows that the term "punishable" simply does not permit an immigration court to look at facts *not* charged and proven in the state criminal proceeding at issue in order to determine whether a hypothetical federal prosecutor might have charged the offender differently.

Indeed, in Lopez, the Supreme Court could not have made it clearer that courts must look to the crime that was actually charged and proven in state court, rather than what offense might have been hypothetically chargeable. In its discussion of the offenses of possession and possession with intent to distribute, 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. Lopez, 127 S. Ct. at 633. In a case where the underlying facts indicate that the defendant possessed a sufficiently large 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 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 possession with intent to distribute may be deemed 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 state 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 strict 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" used by the Board 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 may cover some conduct within the aggravated felony definition and other conduct that does not fall within that definition, courts and the Board may look to the record of conviction for the limited purpose of determining of what "divisible" portion of the statute 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 [Board] 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 Board case law, then, the adjudicator may not search beyond the record of conviction at issue 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



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the state offense that had to be proved to sustain the state conviction. Lopez therefore requires that the Board 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 an offense was a crime of violence aggravated felony); Matter of Tejwani, 24 I&N Dec. 97 (BIA 2007) (using categorical approach to determine whether an offense was a crime involving moral turpitude). Indeed, in many cases involving state drug possession offenses, application of the Lopez strict federal felony standard will be quite straightforward: where the state offense was not, in fact, prosecuted as a recidivist offense and therefore did not require the prosecutor to charge and prove even the fact of a prior conviction, much less its finality or validity, the state offense simply cannot be designated a recidivist possession aggravated felony.[3]

[3] The DHS has argued in other cases that, had the issue in this case arisen in the context only of a relief application, and not as an issue of deportability, the respondent would bear the burden of establishing by a preponderance of the evidence that his convictions did not constitute an aggravated felony. In this case, the DHS has charged aggravated felony deportability; however, even if this case involved only eligibility for relief, the DHS brief is incorrect. DHS regulations specifically provide that the respondent has such a burden *only* "[i]f *the evidence indicates* that one or more of the grounds for mandatory denial of the application for relief may apply." See 8 CFR § 1240.8(d)(emphasis added). Thus, in a case where deportability is not at issue but eligibility for relief is, the regulations clarify that there must first be evidence that indicates that the offense may be an aggravated felony before the burden shifts to the respondent seeking cancellation of removal to establish that his or her offense is not an aggravated felony. Given the categorical approach to determining what state convictions constitute aggravated felonies, where an examination of the state statute does not indicate that the conviction may be an aggravated felony, the burden does not shift. Cf, e.g., Alvarado v. Gonzales, 449 F.3d 915 (9th Cir. 2006)(In interpreting similar regulation that imposes burden on asylum applicant of proving by a preponderance of evidence that a mandatory bar does not apply if "the evidence indicates" that the bar applies, court required proof on both elements of the mandatory bar before the burden shifted to the respondent). In any event, as the Supreme Court has found, Congress has established a specific legal standard that must be met before an offense may be deemed a "drug trafficking" aggravated felony—the federal felony standard. Once such a specific legal standard has been identified for when an offense fits within a statutory ground for removal or ineligibility for relief from removal, a conviction of an offense that cannot be found to meet that standard does not fit within the definition regardless of who bears the burden. Thus, under the categorical approach, if the statutory description of the offense (and, for divisible statutes, the record of conviction) does not establish that a conviction of the offense at issue could meet this federal standard, the inquiry must end there, as demonstrated by the result in Lopez – where, in fact, eligibility for relief, not deportability, was at issue. 127 S. Ct. at 628 (Lopez conceded drug deportability,



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**2. A state possession conviction does not correspond to a federal recidivist possession felony where the state conviction did not meet the requirements of 21 U.S.C. §§ 844 and 851 of establishing—or offering an opportunity equivalent to that under federal law to challenge—the fact, finality, and validity of any prior conviction.**

Applying the Lopez standard and the Board's categorical approach to state possession offenses where a prior conviction was not charged and proven in the state criminal proceeding 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 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 conviction(s) 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. This gives the defendant an opportunity to

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but contested aggravated felony ineligibility for relief). To find otherwise would conflict with the principle, recognized by the Supreme Court, that adjudicators may not reach different results when applying the same statutory language to identical convictions simply because they arise in different contexts. See e.g., Leocal v. Ashcroft, 543 U.S. 1, 11 n.8 (2004)(finding that, whatever the context, "we must interpret the [aggravated felony] statute consistently").

challenge the existence of a prior conviction that is final and has not been reversed on appeal or successful collateral attack, as well as giving many defendants the possibility of raising a challenge to validity of the prior conviction in the current criminal proceeding. 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 clearly 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. Moreover, 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, in order to give prosecutors discretion not to seek recidivist treatment. 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.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 recidivist sentence enhancement in low-level cases. Importantly, however, 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).[4]

The DHS has sought to dismiss the requirements under section 851 as “sentencing procedures” that have no relevance to civil immigration proceedings because they concern “punishment.” This argument misses the mark. First, such requirements cannot be characterized as mere “procedures.” They safeguard important rights that go to the heart of the validity of the convictions to be relied upon. As the Supreme Court has noted in a criminal sentencing case pre-dating § 851 where the government relied upon a prior conviction obtained in violation of the defendant’s right to counsel, “[t]o permit a conviction obtained in violation of Gideon v.

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[4] Amicus is aware that the DHS has tried to support its argument that §§ 844(a) and 851 requirements need not have been followed in the underlying criminal proceeding based on analogies to criminal sentencing cases interpreting various provisions in the U.S. Sentencing Guidelines. However, as the Supreme Court noted in LaBonte, a case in which the Court interpreted the term "maximum term authorized" in U.S. Sentencing Guidelines Manual § 4B1.1, whether the federal requirements for enhancement had been followed in the criminal proceeding at issue absolutely governs such a term. See United States v. LaBonte, 520 U.S. 751, 759-760 ("[F]or defendants who have received the notice under § 851(a)(1), as respondents did here, the 'maximum term authorized' is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies."). Other Sentencing Guidelines provisions that specifically direct a sentencing court to assess the factual context and not the conviction or sentence obtained have no applicability here. In fact, contrary to the strict requirements of § 851 where a felony conviction may be sought based on a prior "conviction," see 21 U.S.C. § 851, certain Sentencing Guidelines may allow an offense to be considered a felony "whether or not a criminal charge was brought, or conviction obtained." See, e.g., Application Note 7 to Sentencing Guideline § 2K2.1; United States v. Irby, 240 F.3d 597 (7th Cir. 2001). Therefore, to draw analogies to certain Sentencing Guidelines provisions without acknowledging the very different contexts governing them is misleading.

Wainwright to be used against a person either to support guilt or enhance punishment for another offense is to erode the principle of that case. Worse yet, since the defect in the prior conviction was denial of the right to counsel, the accused in effect suffers anew from the deprivation of that Sixth Amendment right." Burgett v. Texas, 389 U.S. 109, 115 (1967) (citation omitted). Second, the fact of the matter is that an offense is not punishable as a recidivist felony under federal law unless the requirements of §§ 844(a) and 851 are met. Thus, there is no question that these requirements matter here, and that they must have been met in the state criminal proceeding. The immigration judge does not readjudicate the criminal charges but instead must evaluate whether what was charged and proved in the state criminal process matches the requirements of the federal classification. The immigration judge cannot, and should not, for example, evaluate whether a prior conviction was invalid. What an immigration judge can evaluate is whether the state conviction established the validity of the prior conviction. In short, the essential question, under the Board's categorical approach, is whether the state conviction established what has to be proven for a federal felony conviction.[5]

[5] In an analogous context, the Fourth Circuit has applied the categorical approach specifically to hold that just because a prior conviction *could have been* enhanced under a recidivist provision, it cannot retroactively be treated *as if it were in fact* enhanced where statutory safeguards impose additional requirements necessary for such enhancements. In United States v. Williams, 326 F.3d 535 (4th Cir. 2003), the government sought to enhance the defendant's sentence for being a felon in possession of a firearm pursuant to 18 U.S.C. § 924(e). To be eligible for an enhancement under that provision, a defendant must have at least three prior convictions for "serious drug offenses" (or violent felonies). The statute defines "serious drug offenses" as those "for which a maximum term of imprisonment of ten years or more is prescribed by law." § 924(e)(2)(A). The defendant conceded that he had one prior serious drug offense, a conviction in North Carolina state court for trafficking cocaine, but denied that two New Jersey state drug convictions qualified as "serious drug offenses" under the statute.

The Fourth Circuit examined those state convictions under the categorical approach to determine whether they would count as the additional required predicate offenses. Id. at 538 (citing Taylor, 495 U.S. at 600). The Fourth Circuit determined that maximum term of imprisonment for each offense as actually charged and proven was only five years, and thus insufficient to constitute a "serious drug offense." However, the government argued that the defendant's convictions qualified as "serious drug offenses" because the sentences for each offense *could have been* enhanced to ten years based on a prior conviction, even though the necessary steps were not taken to enhance those sentences in the actual state

3. **Both Supreme Court and circuit court case law confirm that the requirements of 21 U.S.C. §§ 844 and 851 are strict and mandatory.**

Both Supreme Court case law and case law from the circuits has made clear that the requirements of 21 U.S.C. §§ 844 and 851 are substantive requirements that must be adhered to strictly. 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 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. Then, in Price v. United States, 537 U.S. 1152

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criminal proceedings. Applying the categorical approach, the Fourth Circuit rejected the government's argument:

> The fact that [the defendant] *could have* had his second sentence extended under New Jersey law, however, does not mean [the defendant's] conviction was an offense 'for which the maximum term of imprisonment of ten years or more is prescribed by law.' The New Jersey sentencing statute includes procedural safeguards that must be considered before an enhanced term can be imposed. Absent exercise of these procedural safeguards, [the defendant] could not have been subject to the enhanced sentence and the maximum term of imprisonment prescribed by law for his crimes is five years. There are at least three procedural safeguards that must be considered before [the defendant] could be subject to an enhanced sentence [including an application by the prosecutor for an enhanced punishment]. . . . To subject [the defendant] to an enhancement now, based upon a sentence that he could have received only after the exercise of procedural safeguards, would compromise not only [the defendant's] statutory rights, but his due process rights as well.

*Id.* at 539-40 (internal citations omitted; emphasis in the original). The fact that a longer maximum sentence *could have been* obtained at the time—if additional statutory requirements had been pleaded to or proved—will not enhance the maximum sentence actually available for predicate offense purposes. Under the categorical approach, courts analyzing the impact of a defendant's criminal convictions are limited to the maximum sentence of the conviction actually proven; they are not free to suggest, after the fact, that other offenses with greater sentences could have been charged.

(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 prior conviction enhancement under 21 U.S.C. § 851(a), a fact that both the opinion and the dissent, filed for other reasons, also noted. Id.

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 re-sentencing where it was unclear whether the defendant fully "appreciated his ability to challenge the prior conviction for sentencing purposes" under § 851); United States v. Levay, 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 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").

The case law makes clear that a federal recidivist possession conviction is not possible in the absence of compliance with the notice and proof requirements of 21 U.S.C. §§ 844(a) and 851 prior to plea or trial. 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 possession conviction simply cannot correspond to a federal recidivist possession felony where the state criminal proceeding did not establish—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 basis for a felony enhancement under federal law as aggravated felons, a result clearly in conflict with Congressional intent.**

The conclusion that a state drug possession conviction preceded by another such conviction may not automatically be deemed to correspond to conviction of a federal recidivist felony 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 felony 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 possession convictions that 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. See supra Point I.A.2. Nevertheless, the DHS' position that any state drug possession conviction where facts outside the record of conviction in question indicate a prior drug conviction should be treated as corresponding to a federal recidivist 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 low-level drug possession convictions may suffer from inadequacies that would lead to their invalidation under the federal requirements of § 851. This is true in both the state and federal systems. For example, 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. <u>See</u> Mary Warner, <u>The Trials and Tribulations of Petty Offenses in the Federal Courts</u>, 79 N.Y.U. L. REV. 2417, 2417 (2004). Courts have recognized that the use of such summary procedures can lead to invalid convictions. <u>See</u> <u>Dean v. United States</u>, 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 low-level possession offenses in state courts raises similar concerns. 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 as a result of the quick and often careless procedures for processing them.

Misdemeanor or lesser possession offenses in particular are often processed by means of rapid procedures that may give rise to constitutional or other violations. In New York State, 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, 2006). Most misdemeanants are arraigned, plead guilty and are sentenced all on the same day. <u>See</u> 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. <u>See</u> Daniel Wise, <u>Caseloads Skyrocket in Brooklyn Courts: Upswing Linked to NYPD Narcotics</u>

Investigation, N.Y.L.J., May 22, 2000, at 1. Outside of New York City, many misdemeanor or lesser cases 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 Comm'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 rapid procedures used to dispose of such misdemeanor or lesser arrests under these circumstances can lead to substantial constitutional violations, such as deprivation of the right to counsel. See, e.g., People v. White, 436 N.E.2d 507 (N.Y. 1982) (vacating defendant's guilty plea to non-criminal violation for marihuana possession due to trial judge's failure to ascertain adequately if defendant's waiver of right to counsel was knowing and intelligent, particularly in light of trial judge's statements seemingly downplaying consequences of pleading guilty to a marihuana violation).

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 dispositions. Many states classify most possession offenses as felonies, 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), 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. As a result, such state felony drug possession convictions may similarly involve procedural defects that would, upon challenge under 21 U.S.C. § 851 or other appellate or collateral challenge process, prevent their use as the basis for a federal felony conviction. For example, in Florida, where virtually all possession offenses are felonies, see, e.g., Fla. Stat. § 893.13 (classifying

almost all simple possession offenses as felonies), many convictions are invalid because judges fail to follow required procedures for advising defendants that a guilty plea could lead to deportation if they are not citizens. See, e.g., Pikwrah v. State, 829 So.2d 402 (Fl. 2002) (applying Florida R. Crim. P. Rule 3.172(c)(8)); Elharda v. State, 775 So.2d 321 (Fl. 2000)(same); Sanders v. State, 685 So.2d 1385 (Fl. 1997)(same).

Thus, many individuals with prior drug possession convictions, both felonies and misdemeanors, or lesser violations, may have experienced procedural deficiencies that would, upon challenge, lead to a determination that their prior dispositions were invalid. However, in state prosecutions that do not have any notice and proof requirements, much less meet the federal requirements of notice and proof, there is no assurance that a prior conviction was valid. The DHS' approach forces respondent and others in a similar position to face the vast, negative consequences of an "aggravated felony" designation even where the prior conviction may have been invalid, 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. The Board now has the opportunity to address whether minor and possibly invalid convictions such as these may be treated as if they would have necessarily been found to be a valid basis for serious federal recidivist possession felony convictions.

**C. The DHS' position would further require the absurd results that many federal misdemeanor possession convictions, 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 federal law urged by the DHS here would create precisely such absurd, clearly unintended results.

If a state misdemeanor possession conviction may be considered sufficiently analogous to a recidivist possession felony under the Controlled Substances Act to constitute an aggravated felony despite failure to meet the federal requirements for such a recidivist conviction, then a federal misdemeanor possession conviction failing to meet these requirements could also be considered an aggravated felony despite the fact that such a conviction is clearly not a felony under federal law. Similarly, under the DHS' argument, even in states that have a recidivist statute that may correspond to the federal recidivist possession felony statute, a second state possession offense could be considered an aggravated felony even when state prosecutors declined to charge the offense under that state's recidivist statute.[6]

The absurdity of this result is confirmed by the fact that, in the absence of other more serious past convictions or charges, most federal drug possession arrests preceded by prior possession convictions are not actually prosecuted as recidivist felonies under federal law. That is, in actual federal practice, the recidivist enhancement in §§ 844(a) and 851 is rarely, if ever, used to elevate to felony recidivist status a defendant with only misdemeanor possession

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[6] Some states have recidivist possession statutes, although they may or may not correspond to the strict requirements for the federal recidivist possession felony. For example, Texas law provides enhanced penalties for repeat misdemeanor offenders, although it does not require that the prior conviction be a drug conviction. See Tex. Penal Code § 12.43 (2007). Notably, the respondent here could have been prosecuted under this Texas recidivist statute in his second drug misdemeanor case but the Texas prosecutors apparently chose not to seek such enhancement, which would have required the prosecutors to prove the prior conviction "on the trial" of the second case. See id. Therefore, whether a conviction and sentencing under such a recidivist enhancement provision would correspond to a federal recidivist possession felony conviction is not at issue and this question need not be reached by the Board here.

convictions on his or her record.[7] 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 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

[7] 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 offense based on a prior misdemeanor simple drug possession conviction. The ALLFEDS 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").

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 supra Point 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



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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 such 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. Indeed, despite the fact that federal prosecutors generally find it appropriate to apply a recidivist possession enhancement only in cases where there are serious prior or contemporaneous 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 if there is any evidence of a prior drug disposition, which may have also been a non-criminal disposition. See In re: Conrad O'Neil Minto, 2005 WL 1104172 (BIA Mar. 21 2005) (discussed, infra, Point II). To automatically treat all such state possession dispositions as "drug trafficking crime" aggravated felonies or predicates 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 DHS' OVERLY BROAD PROPOSED APPROACH CONFLICTS WITH CONGRESS' GRADUATED SCHEME OF CONSEQUENCES FOR DRUG-RELATED CONDUCT.

As discussed in Point I above, limiting application of the drug trafficking aggravated felony category to those circumstances in which the conviction meets federal standards comports with the proper interpretation of the specific statutory provisions at issue. In addition, limiting

application to drug trafficking crimes as strictly set forth in federal law is consistent with the overall federal policy reflected in those standards. In contrast, the DHS' proposed approach sweeps overly broadly in a way that conflicts with Congress' graduated scheme of consequences for penalizing drug-related conduct.

**A. Other cases pending before the Board demonstrate the sweeping breadth of the DHS' position.**

The DHS' position that any state drug possession offense where the DHS submits evidence of a prior drug conviction may be treated as corresponding to a serious federal recidivist felony will lead to minor state possession offenses, some of which are not even crimes under state law, being deemed aggravated felonies. For example, in this and other pending Board cases where amicus has appeared, the DHS argues that low-level misdemeanor possession offenses are sufficient to trigger aggravated felony classification. See In Re Powell, A17 560 142; In re Arias, A18 663 104. The DHS has even 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), may trigger an aggravated felony designation. See In re: Conrad O'Neil Minto, 2005 WL 1104172 (BIA Mar. 21 2005) (unpublished disposition decided pre-Lopez). Thus aggravated felony consequences, under the DHS' approach, would apply to non-criminal dispositions 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. See, supra, Point I.B.

Moreover, cases pending before the Board show that those affected are often long-time lawful permanent residents who can demonstrate positive factors that outweigh the low-level

criminal record represented by these relatively minor possession offenses. For example, in the four cases currently or recently pending before the Board in which amicus curiae has submitted briefs on this issue, In re Santos, A35 572 054; In re Powell, A 17 560 142; In re Arias, A 18 663 104, and Matter of Yanez-Garcia, A91 334 042, each of the respondents is a long-time lawful permanent resident. Mr. Arias has been a lawful permanent resident since 1969; Mr. Powell and Mr. Santos have been lawful permanent residents since 1977, and Mr. Yanez-Garcia has been a lawful permanent resident since 1989. In fact, in Mr. Powell's case, in which an immigration judge rejected DHS' effort to have the misdemeanor conviction at issue classified as an aggravated felony and held a hearing on cancellation of removal, the judge evaluated the testimony and documentary submissions and concluded that the equities counseled in favor of an award of cancellation.

These cases show that Board adoption of the DHS' position would affect lawful permanent residents who arrived legally and have been residents for decades, whose possession convictions were treated as lesser offenses by the state courts, and who may be able to demonstrate positive factors outweighing the negative factors and warranting relief from removal in the interests of the United States. As demonstrated below, barring relief for such individuals conflicts with Congress' graduated scheme for penalizing drug-related conduct.

**B. The DHS' proposed approach conflicts with the Congressional graduated scheme of consequences for drug-related conduct.**

The Immigration and Nationality Act ("INA") contains a range of provisions on drug offenders that demonstrate that the federal interest is not to remove the maximum number of drug offenders, but rather to apply a graduated system of consequences with the maximum consequence of deportability without the possibility of relief applying only to "trafficking" offenses. Under the INA, drug possession, other than one time use of a small quantity of

marijuana, is a deportable offense. See INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). In addition, the INA makes being a drug abuser or addict—necessarily a person who has more than one incident of possession—a deportable offense. See INA § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii). Being deportable under either of these grounds will subject an individual to removal proceedings, but still permit an immigration judge to consider the individual's eligibility for limited forms of relief from removal. In contrast, it is only serious convictions that strictly fit within the statutory definition of a drug *trafficking* aggravated felony, see INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), that are deemed so serious as to tie the hands of immigration judges and prevent relief for those who are otherwise qualified. See, e.g., INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3)(barring cancellation of removal for lawful permanent residents convicted of an aggravated felony). Requiring that application of this aggravated felony category be limited to those circumstances in which the conviction at issue meets federal standards vindicates the federal policy as reflected in those standards.

## III. THE DHS' PROPOSED APPROACH HAS ALREADY BEEN REJECTED BY SEVERAL FEDERAL CIRCUIT COURTS AND WOULD, IF ADOPTED, UNDERMINE UNIFORMITY.

At least three federal circuit courts have already rejected the government's position in this case. Indeed, a review of the case law shows that any effort by the Board to craft a national rule must account for case law in these circuits and others that have evaluated the requirements of the federal felony standard adopted by Lopez and that have rejected the DHS' arguments. In addition, recent actions by the circuits that issued decisions in two sentencing cases that have sometimes been relied upon by the DHS to support its contrary position show these circuits consider these decisions no longer to be binding and that the government itself has conceded that they must be re-examined in light of Lopez.

### A. Binding immigration precedents in at least three circuits have specifically found contrary to the DHS' position.

Each of the federal circuit courts that have carefully applied the federal felony standard to the issue of second or subsequent state possession offenses in the immigration context have already 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 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 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 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.

One of the cases before the Board in which amicus appeared and presented arguments about the proper application of Lopez arose in the First Circuit. In Arias, the Board had dismissed the respondent's appeal in January 2007. Mr. Arias moved for reconsideration pro se and amicus submitted a full brief explaining how Lopez does not permit automatic treatment of second or subsequent state possession convictions as corresponding categorically to recidivist federal felonies. The DHS did not oppose this motion. In an unpublished opinion, the Board

granted the motion and remanded for a cancellation hearing. Board member Edward Grant's unpublished opinion admonished the government for failing to bring the "binding and adverse" precedent in Berhe to the attention of the Board. (A copy of the Arias opinion is attached).

In addition to the First Circuit, the Third Circuit has specifically held that a petitioner's 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 the prior 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 conviction 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 proceeding.

In addition, the Ninth Circuit, applying the federal standard but adopting different reasoning, has flatly ruled out the possibility of treating a second or 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 holdings of the First, Third, and Ninth Circuits reflect a general trend among the federal courts toward findings that multiple possession convictions do not automatically mean that an individual has been convicted of an aggravated felony. Examples of this trend are also provided by the Fifth, Sixth and Eighth Circuits. See Tostado v. Carlson, 481 F.3d 1012 (8th Cir. 2007) ("[W]e hold, in accordance with Lopez, that Tostado's [convictions for unlawful possession of cocaine and unlawful possession of cannabis] do not constitute 'drug trafficking crimes,' as they are not punishable as felonies under the CSA."); U.S. v. Arevalo-Sanchez, 2006 WL 870362 (5th Cir. Mar. 21, 2007) (unpublished) ("In light of Lopez, Arevalo-Sanchez's argument [that his 1993 and 1995 convictions for simple possession of a controlled substance should not have been treated as aggravated felonies] has merit."); Smith v. Gonzales, 468 F.3d 272 (5th Cir. 2006) ("[The first] conviction was not final at the time the [second] offense was committed and therefore the recidivist provision has no application."); United States v. Palacios-Suarez, 418 F.3d 692, 700 (6th Cir. 2005) (rejected a government claim that an individual's second possession conviction could be treated as an aggravated felony as his second drug offense occurred prior to his first conviction becoming final, "[a]ccordingly, he could not be charged under the recidivist provision of the federal statute").

Unlike decisions that have sometimes been cited by the government to support its position, see infra Point III.B, Berhe and Steele and other decisions cited above were decisions of circuits whose federal felony approach to these issues was upheld by the Supreme Court in Lopez. Moreover, as discussed infra, the reasoning of these decisions is buttressed by the Supreme Court's analysis in Lopez. See supra, Point I.A.1. Thus, as Board member Grant found in the Arias case with respect to the Berhe precedent in the First Circuit, the decisions of those circuits that have applied the federal felony standard to find that second or subsequent possession



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offenses may not automatically be deemed aggravated felonies for immigration purposes are binding precedents that must be followed post-Lopez.

**B. Cases that the DHS has relied upon are non-immigration decisions that come from two circuits where the circuits and government counsel have already recognized that Lopez requires a reevaluation of these decisions.**

The only two cases that the DHS has cited (in other cases) that specifically address whether a second or subsequent state possession offense may be deemed an aggravated felony were pre-Lopez decisions that applied a *state or federal felony* approach that Lopez rejected. See U.S. v. Simpson, 319 F.3d 81 (2d Cir. 2002) (offense is an "aggravated felony" when it "can be classified as a felony under either state or federal law"), and U.S. v. Sanchez-Villalobos, 412 F.3d 572, 576 (5th Cir. 2005) (offense must "be a felony under either state *or* federal law"). In addition, both Simpson and Sanchez-Villalobos reached their determinations on the two possession issue in the criminal sentencing context in a cursory and conclusory way, unlike the more thorough and complete analysis undertaken in Berhe and Steele in the immigration context.

In any event, Fifth Circuit case law no longer, if it ever did, supports the DHS' position. Even before Lopez, the Fifth Circuit questioned the significance of its alternative holding in Sanchez-Villalobos that a second state possession offense could be an aggravated felony under the federal standard. Smith at 276 n.3 (("The effect of Part B [the alternative basis for affirmance] in Sanchez-Villalobos is uncertain"). In addition, after Lopez was decided, the Fifth Circuit rejected a government motion to dismiss that argued that Lopez requires that all subsequent possession convictions be treated as aggravated felonies. See Semedo v. Gonzales, Dkt. No. 06-61102 (5th Cir. 2007) (copy of Pacer docket attached). In fact, despite Sanchez-Villalobos, the Fifth Circuit not only rejected this request but it granted the petitioner a stay of removal. Moreover, more recently, after the government switched tactics and moved for remand

in another Fifth Circuit case involving an unpublished Board decision that had relied on Sanchez-Villalobos, the Fifth Circuit ordered remand to the Board for reconsideration in light of Lopez. See Bharti v. Gonzales, No. 06-60383 (5th Cir. 2007). In this case, the government itself had taken the position that the Fifth Circuit has not addressed the issue at hand in this case. The government's papers to the Fifth Circuit stated:

> [T]he Board should be permitted, in the first instance, to apply its expertise to this case in light of the Supreme Court's analysis. In particular, remand is appropriate for the Board to determine whether in order for Petitioner's second possession offense to qualify as an aggravated felony, he needed to have been charged under a recidivist statute, or the first conviction needed to have been charged or proven during the criminal proceedings for the subsequent offense. See 21 U.S.C. § 851; Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006). That question has been raised by Petitioner here in his opening brief (as well as in the brief of amici curiae), but does not appear to have been addressed by either the Board or this Court in the context of immigration proceedings.

Respondents' Opposition To Motion of Amici Curiae For Leave to Submit Amicus Brief, Bharti v. Gonzales (copy of Respondents' Opposition attached). Finally, despite Sanchez-Villalobos, the Fifth Circuit has also recently remanded even a criminal illegal reentry case involving two prior possession convictions for reconsideration of an aggravated felony sentence enhancement in light of Lopez. See U.S. v. Arevalo-Sanchez, 2006 WL 870362 (5th Cir. Mar. 21, 2007) (unpublished) ("In light of Lopez, Arevalo-Sanchez's argument has merit").

Likewise, Second Circuit case law no longer supports the DHS' position, if it ever did. Even before Lopez, the Second Circuit did not treat Simpson as binding precedent on the multiple possession 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"), and the Second Circuit explicitly chose not to resolve "this complex issue" in a pro se immigration case lacking full briefing. See 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)



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("We are reluctant to adjudicate this complex issue without the benefit of full briefing . . . . Accordingly, we do not address [the issue]"). More recently, in Powell, one of the cases in which amicus has appeared before the Board, the government sought remand post-Lopez in a case in which the Board in an unpublished opinion had relied on Simpson. The Second Circuit's remand order, stipulated to by the government, does not even mention Simpson, but instead remands the case to the Board for consideration "in light of Lopez," suggesting that the Board consider the fact that the immigrant "was not charged under a recidivist statute." See Powell v. Gonzales, Dkt. No. 06-5315-ag (2d Cir. Feb. 7, 2007) (copy of Order attached). Even more recently, the Second Circuit remanded yet another multiple conviction case at the government's request "to provide the agency with an opportunity to reconsider its decision in light of Lopez"). See Martinez v. Ridge, Dkt. No. 05-3189-ag (2d Cir. May 8, 2007) (copy of Order attached).

Thus, far from supporting the DHS' position in this case, the circuit case law is either in flux or supports the position of the respondent in this case. There is no longer any precedent supporting the government's position that, especially after Lopez, is still deemed binding by any circuit court.

**C. Adoption of the DHS' proposed approach would undermine uniformity.**

The existing circuit case law applying the federal felony approach makes clear that a ruling in favor of the government's position will only govern in some circuits and therefore will not achieve uniformity. In fact, the government's approach undermines uniformity as it substitutes harshness of results for uniform application of the federal rule.

As explained in Point III.A above, courts that have applied the federal felony approach have already rejected the DHS' arguments. As a result, if the Board were to adopt the DHS' position, there would immediately be disuniformity between the rule announced by the Board



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and the rule that the Board would be required to apply in those circuits that have rejected the DHS' position. Cf. Matter of Yanez-Garcia, 23 I&N Dec. 390 (BIA 2002) (announcing rule that would apply only in circuits that had not ruled otherwise). And since the issue of proper application of federal criminal definitions referenced in the aggravated felony definition is an issue on which the courts apply de novo review, the contrary position of the Board would not be reason for any shift in precedent by the courts. See Lopez 127 S. Ct. 625 (analyzing government's argument that all state possession felonies are necessarily aggravated felony drug trafficking offenses without regard to the position of the Board as announced in Yanez). Thus, adoption of the government's position will generate greater variation in application of the law rather than greater uniformity.

Moreover, strict conformity with the federal felony standard, as called for in Lopez, is the only way to ensure true uniformity. As the Supreme Court stated when addressing the government's argument in Lopez that the aggravated felony determination should turn on how the state classifies the offense rather than on a federal standard: "[T]he government's reading would render the law of alien removal . . . dependent on varying state criminal classifications even when Congress has apparently pegged the immigration statutes to the classifications Congress itself chose." Lopez, 127 S. Ct. at 632. Here, the government's reading would simply make virtually everyone with more than one possession conviction into an aggravated felon, regardless of the federal standard limiting what second possession offenses may be deemed an aggravated felony. This directly conflicts with the Supreme Court's judgment that "it is just not plausible that Congress meant to authorize a State to overrule its judgment about the consequences of federal offenses to which its immigration law expressly refers." Id. at 633.

The government's main concern appears to be that there will be some states that might

not prosecute cases in a way that matches the federal standards for transmuting a second possession into a drug trafficking crime. But this is a standard consequence of the categorical approach. For example, with respect to convictions for the passing of bad checks, a conviction obtained under one state scheme may never meet the federal requirements for falling into the crime involving moral turpitude removal ground because of the way that state constructed its criminal laws. Compare Matter of Balao, 20 I&N Dec. 440 (BIA 1992) (since intent to defraud is not an essential element of the crime of passing bad checks under Pennsylvania law, a conviction under Pennsylvania law is not for a crime involving moral turpitude) with Matter of Khalik, 17 I&N Dec. 518 (BIA 1980) (since the Michigan offense of issuance of a check without sufficient funds includes the element of intent to defraud, such a conviction constitutes a conviction for a crime involving moral turpitude). As this Board's precedents make clear, these disparities are a natural result of an immigration removal system that does not retry facts but instead relies on state prosecutions and records of conviction to determine whether federal standards have been met. The Supreme Court itself made this point in Lopez. When dismissing the government's comparable complaint about the analogous non-uniform anomaly created by not treating possession of a large quantity of a controlled substance as comparable to a federal possession with intent to distribute felony because a state chose not to penalize or prosecute the offense as possession with intent to distribute, the Supreme Court stated: "After all, Congress knows that any resort to state law will implicate some disuniformity in state misdemeanor-felony classifications, but that is no reason to think Congress meant to allow the States to supplant its own classifications when it specifically constructed its immigration law to turn on them." Lopez, 127 S. Ct. at 633; see also infra Point I.A.1.

## IV. SHOULD THE BOARD 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 BOARD 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 Board finds that there is any lingering ambiguity as to whether a second 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 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 "[w]e 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 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." (citation omitted)); 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.").

The nature of a "drug trafficking crime" aggravated felony determination particularly counsels in favor of application of rules 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, and asylum. 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. 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 Board 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 clear statutory language directing such a result.

## CONCLUSION

For the aforementioned reasons, amicus curiae respectfully urges the Board to hold, consistent with the reasoning in Lopez and the circuit precedents, that a simple drug possession offense may not be deemed an aggravated felony as corresponding to a federal recidivist felony where the state criminal proceeding did not establish—or offer an opportunity equivalent to that under federal law to challenge—the fact, finality, and validity of the prior conviction.

Dated: New York, New York
July 3, 2007

Respectfully submitted,

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**Name: ARIAS, DAMIAN FLORENCIO** **A18-663-104**

**Date of this notice: 04/18/2007**

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
GRANT, EDWARD R.

archibap

File: A18 663 104 - San Juan

Date: APR 18 2007

In re: DAMIAN FLORENCIO ARIAS

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se[1]

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)]
Controlled substance violation

APPLICATION: Reconsideration

ORDER:

PER CURIAM. By decision dated January 16, 2007, the Board dismissed the respondent's appeal from the August 1, 2005, decision of the Immigration Judge, which had denied the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1220b(a). The respondent has now filed a motion for reconsideration of our September 6, 2005, decision. The motion will be granted and the case will be remanded.

Upon review of the record, we will vacate our January 16, 2007, decision in which we found that the respondent's multiple misdemeanor convictions for possession of a controlled substance in violation of New York Penal Law § 220.03 equated to aggravated felonies. In reaching this conclusion, we note the United States Court of Appeals for the First Circuit's ("Circuit Court") holding in *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), in which it was determined that the Board erred in concluding the alien's conviction was an aggravated felony where the record of conviction contained no reference to prior convictions, or to any other factor that would hypothetically convert the state misdemeanor conviction, upon which the Board relied, into a felony under federal law. In reaching this conclusion, the Circuit Court cited to their holding in *Conteh v. Gonzales*, 461 F.3d 45 (1st Cir. 2006), in which they "outlined the contours of the 'record of conviction" and in pertinent part indicated that "[T]he record of conviction cannot encompass after-the-fact statements made in a separate and subsequent proceeding." The conviction documents of record in this case consist of a criminal indictment relating to the September 1998 conviction and four Certificates of Disposition reflecting convictions on September 18, 1998, February 16, 1999, March 15, 2000, and June 20, 2000, none of latter which reference any of the prior convictions. In light of the above, because none of the earlier convictions are part of the record of conviction for the latter convictions, the record

[1] We acknowledge with appreciation the thoughtful arguments raised in the amicus curiae's brief.

does not establish that the respondent was convicted of an aggravated felony based upon multiple misdemeanor convictions. *See Berhe, supra* at 85. In view of these circumstances, we will remand this case to the Immigration Judge for consideration of the respondent's application for cancellation of removal[2].

Accordingly, the record is remanded to the Immigration Judge for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

[2] We note with regret the failure of government counsel to bring to the attention of this Board the binding and adverse (to the government's position) decision of the First Circuit in *Behre, supra.* Prompt disclosure of adverse precedent is a fundamental obligation of counsel.

No. 06-60383

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

KIREN KUMAR BHARTI,
A75 780 661,
Petitioner,

v.

ALBERTO R. GONZALES, Attorney General,

Respondent.

# RESPONDENT'S OPPOSITION TO MOTION OF AMICI CURIAE FOR LEAVE TO SUBMIT A BRIEF

Respondent's motion to remand this case is currently pending before the Court. Respondent hereby opposes the motion of Amici Curiae, The National Association of Criminal Defense Lawyers and the New York State Defenders Association, for leave to submit a brief.

Respondent opposes this motion on the basis that this case should first be remanded to the Board of Immigration Appeals ("Board") in order for the Board to apply the recent Supreme Court decision in Lopez v. Gonzales, 127 S. Ct. 625 (2006) to Petitioner's case. The Board's decision in this case predates the decision in Lopez; thus, as set forth in Respondent's motion to remand, the Board

should be permitted, in the first instance, to apply its expertise to this case in light of the Supreme Court's analysis. In particular, remand is appropriate for the Board to determine whether in order for Petitioner's second possession offense to qualify as an aggravated felony, he needed to have been charged under a recidivist statute, or the first conviction needed to have been charged or proven during the criminal proceedings for the subsequent offense. See 21 U.S.C. § 851; Berhe v. Gonzales, 464 F.3d 74 (1st Cir. 2006). That question has been raised by Petitioner here in his opening brief (as well as in the brief of amici curiae), but does not appear to have been addressed by either the Board or this Court in the context of immigration proceedings. See, e.g. United States v. Arevalo-Sanchez, 2006 WL 870362 (5th Cir. March 21, 2007) (unpublished) (remanding a criminal case for resentencing in light of Lopez, supra).

If a remand is granted, amici curiae could request permission to file a brief with the Board. See 8 C.F.R. § 1292.1(d) (the Board may grant permission to an amicus curiae to appear, on a case-by-case basis, if the public interest will be served thereby). Further, if remand is granted and if a new petition for review is filed after the Board's decision on remand, Respondent does not anticipate that he would oppose a renewed motion for leave to submit a brief as amici curiae.

Respectfully Submitted,

PETER D. KEISLER
Assistant Attorney General

LINDA S. WENDTLAND
Assistant Director

______________________________

JOHN S. HOGAN
Attorney
Office of Immigration Litigation
Civil Division, U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0189

Dated: April 6, 2007

Attorneys for Respondent

## CERTIFICATE OF SERVICE

I hereby certify that on this 6th day of April 2007, one copy of the foregoing "**RESPONDENT'S OPPOSITION TO MOTION OF AMICI CURIAE FOR LEAVE TO SUBMIT A BRIEF**" was served on counsel for Petitioner, as well as counsel for amici curiae, by overnight express mail via Federal Express, addressed to:

Thomas P. Adams, Esq.
631 St. Charles Ave.
New Orleans, LA 70130

and

Professor Nancy B. Morawetz
Immigration Rights Clinic
Washington Square Legal Services
245 Sullivan Street, 5th Floor
New York, NY 10012

______________________________
JOHN S. HOGAN
Attorney
Office of Immigration Litigation
Civil Division, U.S. Department of Justice
P.O. Box 878, Ben Franklin Station
Washington, D.C. 20044
(202) 305-0189

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

POWELL v. GONZALES

STIPULATION AND ORDER

Dkt. No. 06-5315-ag

UNITED STATES COURT OF APPEALS
FILED
FEB 07 2007
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

WHEREAS, Petitioner Donald Overton Powell ("Petitioner"), a native and citizen of Jamaica, filed the above-captioned petition for review challenging an October 20, 2006 decision of the Board of Immigration Appeals ("BIA"), which found Petitioner statutorily ineligible for cancellation of removal based on two misdemeanor convictions for possession of a controlled substance;

WHEREAS, the BIA found that Petitioner's convictions rendered him removable as an aggravated felon;

WHEREAS, the U.S. Supreme Court recently held that a state drug conviction is a "drug trafficking crime" under the Controlled Substances Act only if the conduct is a felony punishable under the Act. See Lopez v. Gonzales, 127 S. Ct. 625, 630 n.6, 633 (2006);

IT IS STIPULATED AND AGREED, by and between undersigned counsel for the parties, that:

1. The above-captioned petition for review is hereby withdrawn without costs or attorney's fees, and remanded to the Board for it to reconsider its October 20, 2006 decision in light of Lopez. Specifically, in light of Lopez, the Board should consider the facts that Powell was convicted of two misdemeanors and was not charged under a state recidivist statute.

2. By operation of law, Powell will not be subject to a final order of removal pending the Board's disposition on remand.

A17 560 142



A TRUE COPY
Thomas W. Asreen, Acting Clerk
by DEPUTY CLERK

CERTIFIED: 2/7/07

3. The Government does not, by entering into this Stipulation, make any representation or admission concerning the merits of the instant petition.

Dated: February 2, 2007

MAGGIE T. DUTEAU
Attorney for Petitioner
1841 Broadway, Suite 909
New York, NY 10023
(212) 587-8505

Dated: February 2, 2007

PETER D. KESSLER
Assistant Attorney General
Civil Division

LINDA S. WERNERY
Assistant Director

ANGELA N. LIANG
Trial Attorney
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(202) 353-4028
Angela.Liang2@usdoj.gov

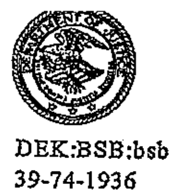
So Ordered

FOR THE COURT
Thomas Asreen, Acting Clerk of Court
By
Lisa J. Greenberg, Staff Counsel

A17 560 142



TOTAL P.09



U.S. Department of Justice
Civil Division
Office of Immigration Litigation
P.O. Box 878 Ben Franklin Station

DEK:BSB:bsb
39-74-1936

Bryan S. Beier
Telephone: (202) 514-4115

*Washington, D.C. 20044*

February 7, 2007

VIA FACSIMILE

Charles R. Fulbruge III, Clerk
United States Court of Appeals for the Fifth Circuit
600 S. Maestri Place
New Orleans, LA 70130-3408

Re: No. 03-41492, *Salazar-Regino v. Trominski*
USDC No. 1:03-CV-2 and related cases

Dear Mr. Fulbruge:

I write in response to the Court's letter, dated January 19, 2007, inquiring as to what action in these cases is warranted in view of the Supreme Court's order vacating this Court's judgment in the above-referenced matter, and remanding for further consideration in view of *Lopez v. Gonzales*, 127 S.Ct. 625 (2006).

In its prior decision in this case, the Court held that (1) the deferred adjudication orders entered by the state courts constituted convictions for immigration purposes, in accordance with *Moosa v. INS*, 171 F.3d 994 (5th Cir. 1999); and (2) under *United States v. Hernandez-Arevalos*, 251 F.3d 505 (5th Cir. 2001), Salazar-Reginos and Rangel-Rivera both must be viewed as having been convicted of aggravated felony offenses. The Court also rejected a retroactivity challenge.

In view of *Lopez*, we suggest that the Court remand each of these cases, except for 1:02-CV-198 (Oviedo-Sifuentes), to the Board of Immigration Appeals for its further consideration. *Lopez* establishes an authoritative interpretation of the statute that was not applied by the Board in the decisions before the Court, and should be applied by the Board in the first instance. *See Gonzales v. Thomas*, 126 S. Ct. 1613, 1615 (2006) (per curiam) (explaining that a reviewing court should remand to agency

because "deciding whether the facts as found fall within a statutory term" is the agency's province); *Xue Ren v. Gonzales*, 440 F.3d 446, 448-49 (7th Cir. 2006) (court should grant respondent's request for remand without considering correctness of Board decision). On remand, the Board should be permitted to revisit such issues as it deems appropriate, and to take such action as it deems appropriate, for the disposition of each case.

In particular, with respect to 1:02-CV-228 (Rodriguez-Castro), who was convicted of possessing illegal drugs in 1984 and 1999, 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. *See Matter of Yanez-Garcia*, 23 I. & N. Dec. 390, 391-92 (BIA 2002). The Board should be permitted to address that issue on remand. With respect to 1:02-CV-114 (Cantu-Delgadillo), the Board administratively closed the case pending a decision whether to "re-paper" the case, *i.e.*, terminate the deportation proceeding and re-commence it as a removal proceeding so as to permit him to apply for cancellation of removal, and the Board should be permitted to revisit that issue.

With respect to 1:02-CV-198 (Oviedo-Sifuentes), we do not believe that a remand is warranted, and suggest that the Court issue a briefing schedule to address any remaining issues in that case that were not resolved by the Court's *Salazar-Regino* opinion.

Sincerely,

Senior Litigation Counsel
Counsel for Respondent

cc: Lisa Brodyaga, Esq.

# General Docket

## US Court of Appeals for the Fifth Circuit

Court of Appeals Docket #: 06-61102 Filed: 11/30/06
Nsuit: 0
Semedo v. Gonzales
Appeal from: Board of Immigration Appeals

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Lower court information:

District: 053L-2 : A72 177 916
Date Filed: **/**/**
Date order/judgment: 10/31/06
Date NOA filed: **/**/**

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Fee status: Paid

- - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - - -

Prior cases:
None
Current cases:
None



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CARLOS MONTEIRO SEMEDO
Petitioner

Joshua L Goldstein
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617-722-0005
[LD NTC phv]
Law Offices of Joshua L
Goldstein PC
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v.

ALBERTO R GONZALES, U S
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Respondent

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Field Office Director
1250 Poydras Street
Attn: Carl Perry
New Orleans, LA 70113



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06-61102 Semedo v. Gonzales

CARLOS MONTEIRO SEMEDO

Petitioner

v.

ALBERTO R GONZALES, U S ATTORNEY GENERAL

Respondent



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06-61102 Semedo v. Gonzales

11/30/06 Agency case docketed. Petition for review filed by Petitioner Carlos Monteiro Semedo. [06-61102] ROA due on 1/9/07. (cmb)

11/30/06 Motion filed by Petitioner Carlos Monteiro Semedo for stay of deportation [5616215-1] Response/Opposition due on 12/14/06. Date of COS: 11/29/06 Sufficient [Y/N]: y [06-61102] (cmb)

11/30/06 Motion filed by Petitioner Carlos Monteiro Semedo to appear pro hac vice [5616296-1]. Response/Opposition due on

12/14/06. Date of COS: 11/29/06 Sufficient [Y/N]:
y
[06-61102] (cmb)

12/1/06 Notice filed by Respondent Alberto R Gonzales advising
that
deportation officer John Lyle does not anticipate
removal of
petitioner within the next 30 days. However, removal
potentially could be scheduled in the future. [06-
61102]
(cmb)

12/14/06 Motion filed by Respondent Alberto R Gonzales to
dismiss
petition for review for lack of jurisdiction [5630507-
1],
to extend time to file record on appeal until 45 days
after
disposition of motion to dismiss. [5630507-2]
Response/Opposition due on 12/29/06. Date of COS:
12/13/06
Sufficient [Y/N]: y [06-61102] (cmb)

12/14/06 Response/opposition filed by Respondent Alberto R
Gonzales
to motion for stay of deportation [5616215-1] by
Petitioner
Carlos Monteiro Semedo Response/Opposition ddl
satisfied.
Reply to Resp/Opp due on 12/26/06. Date of COS:
12/13/06
Sufficient [Y/N]: y [5630510-1] [06-61102]
(INCORPORATED IN
MOTION TO DISMISS) (cmb)

12/14/06 Appearance form filed by Claire L Workman for
Respondent
Alberto R Gonzales, Linda Susan Wendtland for
Respondent
Alberto R Gonzales. [06-61102] (No. of forms filed: 2)
(cmb)

12/29/06 Reply filed by Petitioner Carlos Monteiro Semedo to
response/opposition [5630510-1] to motion for stay of
deportation [5616215-1]. Reply to Resp/Opp due ddl
satisfied. Sufficient [Y/N]: y [5639565-1] [06-61102]
(agl)

12/29/06 Response/opposition filed by Petitioner Carlos
Monteiro
Semedo to motion to dismiss for lack of jurisdiction
[5630507-1] by Respondent Alberto R Gonzales, motion
extend
time to file Administrative Record [5630507-2] by
Respondent Alberto R Gonzales (incorporated in reply
to

response to motion for stay). Response/Opposition ddl satisfied. Reply to Resp/Opp due on 1/11/07. Date of COS:

12/28/06 Sufficient [Y/N]: y [5639567-1] [06-61102]

(agl)



12/29/06 Motion filed by Petitioner Carlos Monteiro Semedo to remand

case [5639571-1] (incorporated in reply to response to motion for stay). Response/Opposition due on 1/16/07. Date

of COS: 12/28/06 Sufficient [Y/N]: y [06-61102] (agl)

1/11/07 Response/opposition filed by Respondent Alberto R Gonzales

to motion to remand case [5639571-1] by Petitioner Carlos

Monteiro Semedo. Response/Opposition ddl satisfied. Reply

to Resp/Opp due on 1/22/07. Date of COS: 1/10/07 Sufficient [Y/N]: y [5647730-1] [06-61102] (agl)

2/7/07 COURT Order filed carrying with case motion to remand case

[5639571-1], denying motion to dismiss petition for review

for lack of jurisdiction [5630507-1], granting motion to

extend time to file the Administrative Record until 45 days

after disposition of motion to dismiss petition [5630507-2]

ROA ddl updated to 3/26/07, granting motion for stay of

deportation [5616215-1], granting motion to proceed pro hac

vice [5616296-1] (JES,JLW,PRO) Copies to all counsel. [06-61102] (cmb)

2/28/07 Record on appeal filed. Electronic Pleadings: 1. [06-61102]

ROA ddl satisfied. (pac)

3/1/07 Briefing notice issued. [06-61102] A/Pet's Brief due on

4/10/07 for Carlos Monteiro Semedo. (cmb)

4/5/07 Phone extension confirmed for Petitioner Carlos Monteiro

Semedo for filing brief. Extension granted to and

including 4/25/07. [06-61102] A/Pet's Brief ddl updated to 4/25/07 for Carlos Monteiro Semedo. (cmb)

4/20/07 Unopposed motion filed by Petitioner Carlos Monteiro Semedo to extend time to file petitioner's brief for 60 days until 6/24/07 [5731923-1]. Date of COS: 4/19/07 Sufficient [Y/N]: y [06-61102] (agl)

4/20/07 CLERK Order filed granting in part petitioner's unopposed motion to extend time to file petitioner's Brief [5731923-1] Pet's Brief ddl updated to 5/25/07 for Carlos Monteiro Semedo. Copies to all counsel. [06-61102] (ksa)



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| 05/09/2007 12:36:12 | | | |
| **PACER Login:** | ws0800 | **Client Code:** | |
| **Description:** | dkt report | **Case Number:** | 06-61102 |
| **Billable Pages:** | 5 | **Cost:** | 0.40 |

Martinez v. Ridge
No. 05-3189

**UNITED STATES COURT OF APPEALS**
**FOR THE SECOND CIRCUIT**

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the day of two thousand and seven.

Present:

Hon. Amalya L. Kearse,
Hon. Pierre N. Leval,
Hon. Guido Calabresi,
*Circuit Judges.*

UNITED STATES COURT OF APPEALS
FILED
MAY 8 2007
Thomas Asreen, Acting Clerk
SECOND CIRCUIT

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ELVIS MARTINEZ,
*Petitioner,*
v.
Docket No. 05-3189-ag

THOMAS RIDGE,
*Respondent.*

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**ORDER**

The government moves for a remand to the Board of Immigration Appeals ("BIA"), to allow the BIA to reconsider its decision, *In re Elvis Martinez*, No. A42-092-988 (B.I.A. March 19, 2004), *aff'g* No. A42-092-988 (Immig. Ct. Batavia, N.Y. Oct. 24, 2003), in light of the Supreme Court's opinion in *Lopez v. Gonzales*, 549 U.S. ____ (2006), 127 S.Ct. 625 (Dec. 5, 2006).

The motion is granted. We remand to provide the agency with an opportunity to reconsider its decision in light of *Lopez v. Gonzales*, 549 U.S. ____ (2006), 127 S.Ct. 625 (Dec. 5, 2006). Any new petition for review will be calendared before a panel of this court in due course.

FOR THE COURT:
Thomas Asreen, Acting Clerk
By: Lucille Carr