No. 07-1245

IN THE

United States Court of Appeals for the Fourth Circuit

CROCE LOPICCOLO,
Petitioner,
v.

ALBERTO R. GONZALES, Attorney General,
Respondent.

ON PETITION FOR REVIEW OF A FINAL DECISION OF
THE BOARD OF IMMIGRATION APPEALS

BRIEF OF AMICUS CURIAE NYSDA IMMIGRANT DEFENSE PROJECT IN SUPPORT OF REVERSAL

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STATEMENT OF INTEREST

Amicus curiae submit this proposed brief pursuant to Fed. R. App. P. 29 and pending permission of this Court. Petitioner has consented to the filing of this brief and Respondent has no objection.

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

NYSDA and its Immigration Defense Project are concerned that, if adopted by this Court, the position of the Department of Homeland Security ("DHS") in this case will result in significant consequences, unintended by Congress, for the many immigrants who have similar or even lesser non-trafficking convictions. If this Court finds the second or subsequent possession offenses can categorically be

deemed drug trafficking aggravated felonies, lawful permanent resident immigrants and other non-citizens with such non-trafficking convictions will be at permanent risk of removal without any opportunity to apply for relief—regardless of their individual equities—if they seek to naturalize, travel abroad, or have any other contact with DHS.

Federal courts, including the Supreme Court, have accepted and at times relied upon amicus curiae briefs submitted by NYSDA's Immigrant Defense Project in important cases involving application of the immigration laws to criminal dispositions. *See, e.g.*, Brief of Amici Curiae NYSDA Immigrant Defense Project, et al., in *Lopez v. Gonzales*, 127 S. Ct. 625 (2006); Brief of Amici Curiae National Association of Criminal Defense Lawyers, NYSDA, et al., in *Leocal v. Aschcroft*, 543 U.S. 1 (2004); Brief of Amici Curiae National Association of Criminal Defense Lawyers, NYSDA, et al., in *INS v. St. Cyr*, 533 U.S. 289 (2001) (brief cited at n.50). NYSDA has already submitted several amicus briefs addressing the issue in this case to various other federal circuit courts. *See* Briefs of Amicus Curiae NYSDA 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 *Martinez v. Ridge*, Dkt. No. 05-3189, and to the Fifth Circuit in *Bharti v. Gonzales*, Dkt. No. 06-60383.

STATUTORY BACKGROUND

Under the statutory scheme created by Congress, immigrants "convicted of any aggravated felony" are ineligible for "cancellation of removal," a form of relief from deportation. 8 U.S.C. § 1229b(a). Congress defined "aggravated felony" as "illicit trafficking in a controlled substance (as defined in section 802 of Title 21), including a drug trafficking crime (as defined in section 924(c) of Title 18)." 8 U.S.C. § 1101(a)(43)(B).[1] "'[D]rug trafficking crime' means any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.)." 18 U.S.C. § 924(c)(2). Thus, an immigrant is ineligible for cancellation of removal if he or she has been convicted of a felony punishable under the Controlled Substances Act ("CSA").[2]

Under the CSA, simple possession is punishable as a misdemeanor. "Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year." 21 U.S.C. § 844(a). That section also provides for a recidivist enhancement where an individual is convicted of simple possession and the prosecutor satisfies additional requirements. *See id.* A conviction for recidivist possession results in a sentence of not less than 15 days but not more than 2 years.

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[1] The Board of Immigration Appeals ("BIA") conceded that Mr. Lopiccolo's offenses were not illicit trafficking offenses. *In re Croce Lopiccolo*, 2007 WL 1192360 (Mar. 7, 2007).

[2] "[F]or purposes of § 924(c)(2) the crimes the CSA defines as 'felonies' are those crimes to which it assigns a punishment exceeding one year's imprisonment." *Lopez v. Gonzales*, 127 S. Ct. 625, 631 n.7 (2006).

SUMMARY OF ARGUMENT

In *Lopez v. Gonzales*, the Supreme Court held that a state drug possession offense constitutes a drug trafficking aggravated felony under the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1101(a)(43)(B), "only if it proscribes conduct punishable as a felony under" the Controlled Substances Act ("CSA"). 127 S. Ct. 625, 633 (2006). Mr. Lopiccolo was twice convicted of simple drug possession under Virginia state law. Each conviction was pursuant to the same Virginia statute. The conduct proscribed by that statute—knowing and intentional possession of controlled substance—is not punishable as a felony under the CSA, which instead treats simple possession as a misdemeanor. 21 U.S.C. § 844(a).

Section 844(a) includes a provision that allows prosecutors to charge some defendants with recidivist possession. A conviction under that provision of the CSA is punishable as a felony. However, Mr. Lopiccolo was never charged with or convicted of recidivist possession. Rather, he was separately charged with and convicted of simple possession twice. The Supreme Court's decision in *Lopez* and CSA statutory requirements preclude treating a second conviction for simple possession as if it were a conviction for recidivist possession.

First, to determine what federal offense is comparable to a state conviction, the strict federal approach required by *Lopez* and Supreme Court and Fourth Circuit precedent limits courts to consideration of only the requirements necessary

for defendant's *actual* conviction. That is, the reviewing court cannot consider the conduct underlying that conviction, let alone other offenses the defendant *could have been*—but was not—charged with at that time. Nonetheless, the DHS insists that at the time of Mr. Lopiccolo's second possession conviction, he *could have been* charged with and prosecuted for recidivist possession and so for federal purposes should be treated as having been convicted of recidivist possession. Even if the factual premise were correct, the conclusion is wrong because under the requisite strict federal approach it is irrelevant that a federal offense is comparable to a state offense of which a defendant *could have been*—but was in fact *not*—convicted. Only the actual offense of conviction matters. Mr. Lopiccolo was convicted of simple possession pursuant to § 18.2-250 of the Virginia Code. Only the requirements of that offense are presumptively met by virtue of that conviction. Therefore, only those requirements factor into a court's consideration of what federal offense is comparable, i.e., misdemeanor simple possession under § 844(a). *See* Part I *infra*.

Second, DHS's insistence that Mr. Lopiccolo could have been convicted under the recidivist provision is incorrect. In its eagerness to exploit the heightened negative immigration consequences of the recidivist possession provision, DHS ignores the heightened requirements necessary for conviction under the recidivist possession provision. Sections 844(a) and 851 explicitly create

additional requirements beyond the existence of prior convictions that must be met before a recidivist conviction can be obtained. Any prior conviction must be final before it will serve as a predicate offense. The prosecutor must file an information stating an intent to use a prior conviction, and must specify *which* prior conviction if there is more than one. The defendant must have the opportunity, in a hearing before the court, to challenge the fact, finality and validity of the predicate conviction. The recidivist provision is inapplicable unless all of these requirements are met. Mr. Lopiccolo's second conviction did not meet *any* of these requirements. Accordingly, he could not have been convicted under the recidivist provision. *See* Part II *infra.*

Third, DHS ignores the statutory structure created by Congress when it enacted the INA. Based upon the seriousness of an offense, that structure made some offenses non-deportable, others deportable and still others deportable without the possibility of cancellation of removal. Automatically treating all second simple possession convictions as aggravated felonies would efface the distinctions drawn by Congress. *See* Part III *infra*. Finally, even if this Court were to conclude that some ambiguity remained regarding interpretation of the CSA recidivist possession provision where none of the safeguards required by §§ 844(a) and 851 have been met, this Court should apply the rule of lenity and hold in favor of the interpretation that imposes the least hardship on the defendant. *See* Part IV *infra*.

Amicus respectfully urges the Court to find that a second simple possession conviction cannot automatically be treated as a recidivist offense.

ARGUMENT

I. FEDERAL COURTS MUST RELY EXCLUSIVELY ON THE REQUIREMENTS OF A POSSESSION CONVICTION TO DETERMINE WHETHER THAT CONVICTION IS COMPARABLE TO A FEDERAL RECIDIVIST CONVICTION

DHS and the BIA insist that conduct they claim *could have* been charged as recidivist possession but *in fact* resulted only in a conviction for simple possession should nonetheless constitute a recidivist possession conviction for purposes of federal immigration law. This ignores controlling case law of both this Court and the Supreme Court. The decision of the BIA should be reversed.

A. *Lopez* Re-Affirmed The Supreme Court's Insistence On Using The State Conviction Requirements, Rather Than Defendant's Actual Conduct, To Determine Whether That State Conviction Is Analogous To A Federal Offense

The Supreme Court has previously explained that federal courts must look to the statutory requirements necessary for a state law conviction to determine what, if any, federal offense is comparable. Under this "categorical approach," reviewing courts should look "only to the statutory definitions of the prior offenses, and not to the particular facts underlying those convictions." *Taylor v. United States*, 495 U.S. 575, 600 (1990); *Garcia v. Gonzales*, 455 F.3d 465, 468 (4th Cir. 2006) ("Under this approach, to determine whether a [state law] crime fits under [the federal statute's] definition, we look to the intrinsic nature of the crime,

not to the facts of each individual commission of the offense." (internal citation omitted)).[3] The categorical approach has been consistently used to determine whether state convictions fall within the scope of one of the deportable offenses listed under the INA. *See Gonzales v. Duenas-Alvarez*, 127 S. Ct. 815, 818 (2007); *Soliman v. Gonzales*, 419 F.3d 276, 284 (4th Cir. 2005) ("In assessing whether Soliman's Virginia state court conviction was for a theft offense, we are obliged to utilize the categorical analysis approach spelled out in *Taylor*.").

Lopez v. Gonzales re-affirmed use of the categorical approach. "[A] state offense constitutes a 'felony punishable under the Controlled Substances Act' only if it [the state offense] proscribes conduct punishable as a felony under that federal law." 127 S. Ct. 625, 633 (2006). The actual conduct of the defendant underlying the original state conviction is irrelevant to a court's determination of whether the state offense itself constitutes a felony punishable under the CSA. Since the

[3] The sole exception occurs where the statute of conviction is broader than the federal statute, and the requirements sufficient for a conviction under the state statute may or may not suffice for a conviction under the federal statute. In such cases, the court can look at the indictment or information to determine if the defendant pleaded to or was convicted of conduct that would in fact meet the requirements of the federal offense. *See Taylor*, 495 U.S. at 602; *Soliman*, 419 F.3d at 284. This exception is irrelevant here, as the state statute under which Mr. Lopiccolo was convicted for simple possession is no broader than the federal statute criminalizing simple possession. *Compare* Virginia Code Ann. § 18.2-250 ("It is unlawful for any person knowingly or intentionally to possess a controlled substance") with 21 U.S.C. § 844 ("It shall be unlawful for any person knowingly or intentionally to possess a controlled substance").

defendant's actual conduct is irrelevant, the BIA cannot rely on it to conclude the defendant *could have been* charged with and convicted of other state offenses.

The Supreme Court explained this distinction between actually determined guilt and hypothetical liability in its discussion of simple possession versus possession with intent to distribute. *Lopez*, 127 S. Ct. at 633. The Supreme Court explained 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 leaves it open to charge the felony of possession with intent to distribute when the amount is large)." *Id.* A defendant with a large quantity of drugs might be charged with a state felony for simple possession (a misdemeanor under federal law) or possession with intent to distribute (a felony under federal law), but under the categorical approach only the *actual* conviction and its statutory proscriptions matter.

The fact that a federal prosecutor *could have charged* a defendant with possession with intent to distribute even though the state charged and prosecuted the defendant for simple possession will not convert the simple possession conviction into a possession with intent to distribute conviction for federal purposes. The requirements of that alternate and hypothetical offense were never litigated. The Supreme Court acknowledged that in such cases, a defendant "convicted by the State of possessing large quantities of drugs would escape the

aggravated felony designation" because the state conviction does not constitute a felony under federal law. *Lopez*, 127 S. Ct. at 633.

This precludes the argument relied upon by the BIA and DHS here. Even if Mr. Lopiccolo could have been charged with recidivist possession at the time of his second conviction, the approach required by the Supreme Court to determine whether that conviction was a felony punishable under the CSA considers only the *actual* conviction. Indeed, aggravated felony analysis has always been limited to the actual state conviction as charged and proven. The relevant removability provision, 8 U.S.C. § 1227(a)(2)(A)(iii), and the statutory bar to cancellation, 8 U.S.C. 1229b(a)(3), both require the court to determine whether the defendant was "convicted" of an aggravated felony, and not whether he *could have been charged* with an aggravated felony. It simply does not matter what the BIA thinks a prosecutor could have charged. In substituting its judgment for that of the state prosecutor, the BIA disregarded the analysis required by the Supreme Court and so committed reversible error.

B. This Court Has Held The Categorical Approach Requires Consideration Only Of The Conduct Proscribed By The Conviction And Not The Actual Conduct Underlying That Conviction

This Court, in a pre-*Lopez*, non-immigration case involving state drug convictions, previously held that even where a prior conviction *could have been* enhanced under a recidivist provision, it cannot retroactively be treated *as if it were*

in fact enhanced where unmet 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." The statute defines "serious drug offenses" as those "for which a maximum term of imprisonment of ten years or more is prescribed by law." 18 U.S.C. § 924(e)(2)(A). The defendant conceded 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 a serious drug offense under the statute.

This Court examined those state convictions under the categorical approach to determine whether they qualified as the additional required predicate offenses. *Williams*, 326 F.3d at 538 (citing *Taylor*, 495 U.S. at 600). Recognizing that the state statutes of conviction could be violated in a number of ways, the Court considered the indictment for the limited purpose of determining whether the defendant was charged with a crime that satisfied the federal requirements. *Id.* This Court determined that the maximum term of imprisonment for each offense actually charged and proven was only five years, and was thus insufficient to constitute a predicate offense necessary under § 924(e)(2)(A).

Under New Jersey state law, however, a defendant convicted of such offenses who had been "previously convicted of manufacturing, distributing, dispensing, or possessing with intent to distribute [a controlled substance] shall upon application of the prosecuting attorney be sentenced by the court to an extended term" of *ten* years. *Williams*, 326 F.3d at 539 (citing N.J.S. §§ 2C:43-6f, 2C:43-7a(4)). The government argued that the prior North Carolina offense constituted a prior conviction that rendered the subsequent New Jersey convictions punishable by a sentence up to a maximum of ten years, and thus the New Jersey convictions could serve as predicate offenses for purposes of the § 924(e) enhancement.

The district court agreed with the government. This Court acknowledged that the "North Carolina conviction could serve as a predicate offense to [the] New Jersey offenses." *Williams*, 326 F.3d at 539. But it specifically rejected the government's position and vacated the sentence:

> 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 539-540 (internal citations omitted; emphasis in the original). In other words, 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 affect the maximum sentence *actually* available for predicate offense purposes. Subsequent courts are limited to the maximum sentence of the actual conviction; they are not free to suggest, after the fact, that other offenses with greater maximum sentences could have been charged and treat a defendant as having been convicted of a different offense.

Williams raised and answered the precise question at issue here. According to the BIA, Mr. Lopiccolo is automatically an aggravated felon because Mr. Lopiccolo *could have been charged* with recidivist possession at the time of his second conviction. *Lopiccolo*, 2007 WL 1192360. *Williams* rejected this analysis. Under the categorical approach required by the Supreme Court and applied by this Court, other convictions a prosecutor *might* have obtained are irrelevant. The correct analysis starts and ends with the conviction actually obtained.

II. A STATE DRUG POSSESSION CONVICTION CANNOT BE TRANSFORMED INTO A "DRUG TRAFFICKING" AGGRAVATED FELONY BASED ON A PRIOR CONVICTION WHERE THE STATE PROSECUTOR DID NOT PROVE OR OFFER THE DEFENDANT THE OPPORTUNITY TO CHALLENGE THE FACT, FINALITY AND VALIDITY OF THE ALLEGED PRIOR CONVICTION

Under the CSA, a defendant cannot be convicted of recidivist drug possession unless the prosecutor provides notice of an intention to rely upon prior convictions for that purpose, proof of the prior conviction and an opportunity for the defendant to challenge the fact, finality and validity of the prior conviction. 21 U.S.C. §§ 844(a), 851. Congress explicitly requires the government to file an information prior to trial or guilty plea that specifies upon *which* prior conviction the government relies. *Id.* § 851(a). Where, for immigration purposes, DHS seeks to label a drug possession conviction as an aggravated felony on the basis of a prior drug conviction, DHS must demonstrate that the prosecutor raised the issue of the prior conviction and provided the defendant with the requisite notice and opportunity to challenge the predicate conviction prior to his or her allegedly "recidivist" conviction.

Based on Mr. Lopiccolo's second drug possession conviction, DHS cannot demonstrate that he received the required notice, proof and opportunity to challenge the prior conviction. His second drug possession conviction did not meet the requisite federal standards for a recidivist possession conviction and so

cannot qualify as a federal felony conviction. Therefore, the BIA erred in concluding Mr. Lopiccolo was convicted of an aggravated felony.

A. Sections 844(a) And 851 Preclude Retroactively Transforming A Simple Possession Conviction Into A Recidivist Possession Conviction Where The Defendant, At The Time Of The Conviction At Issue, Did Not Have Proof, Notice And The Opportunity To Challenge The Fact, Finality And Validity Of The Alleged Predicate Conviction

Under the CSA, a conviction for recidivist possession requires more than just a predicate possession conviction. The prosecutor must satisfy the requirements enumerated in §§ 844(a) and 851. Those requirements include proof of a particular final and valid prior conviction, notice of the government's intent to rely on that conviction and an opportunity for the defendant to challenge the fact, finality and validity of that prior conviction. Failure to satisfy any of these requirements results in a conviction for simple, rather than recidivist, possession. Here, none of those requirements were met at the time of Mr. Lopiccolo's second conviction. Given the existence of these requirements, DHS cannot now retroactively transform what was *at the time* merely a conviction for simple possession into a conviction for "recidivist" possession.

First, the CSA requires the "prior conviction" must be "final." 21 U.S.C. § 844(a). It further requires the government to give notice to the defendant, prior to trial or guilty plea for possession, that it intends to seek a conviction for

recidivist possession, and inform the defendant upon *which* prior conviction, if there is more than one, it intends to rely:

> No person who stands convicted of an offense under this part shall be sentenced to increased punishment by reason of one or more prior convictions, unless before trial, or before entry of a plea of guilty, the United States attorney files an information with the court (and serves a copy of such information on the person or counsel for the person) stating in writing the previous convictions to be relied upon.

Id. § 851(a)(1). Failure to file an information with the court prior to trial or a guilty plea denies the defendant the opportunity to raise possible defenses, as this Court has previously recognized: "The purpose of the section 851 information is to give the person convicted and about to be sentenced as a second offender an opportunity to show that he is not the person previously convicted." *United States v. Campbell*, 980 F.2d 245, 252 (4th Cir. 1992) (internal quotation marks omitted).

The CSA also requires that the defendant be provided with the opportunity to challenge the fact, finality and validity of the alleged predicate conviction. Section 851(b) requires the court to determine whether the defendant contests the prior conviction, and to make clear that failure to challenge that conviction prior to sentencing will waive the right to do so. 21 U.S.C. § 851(b). "This procedure provides the defendant with a full and fair opportunity to establish that he is not the previously convicted individual or that the conviction is an inappropriate basis for enhancement . . . . Section 851(b) also allows the defendant to preserve for appeal

his objections to the prior conviction." *Campbell*, 980 F.2d at 252. If the defendant chooses to challenge the fact, finality or validity of the prior conviction, the CSA establishes a statutory right to file a written response and a hearing before the court to resolve the issue. 21 U.S.C. § 851(c).

> The purpose of § 851 is to allow the defendant *an opportunity to contest the validity of the prior convictions used to enhance his sentence.* The § 851 notice must contain sufficient information to enable the defendant to identify the prior conviction upon which enhancement is based and make an informed decision regarding whether to challenge the information.

United States v. Houser, 147 Fed. Appx. 357, 359 (4th Cir. 2005) (emphasis added; internal citations omitted).

As this Court found in *Williams*, *see supra* Part I.B., disregarding these requirements violates Mr. Lopiccolo's statutory rights under the CSA and contravenes fundamental principles of due process. Like the New Jersey sentencing statute in that case, §§ 844(a) and 851 include "safeguards that must be considered before an enhanced term can be imposed." *Williams*, 326 F.3d at 539. Courts cannot automatically treat any second or subsequent possession offense as a recidivist possession conviction without first considering whether the requirements of 21 U.S.C. §§ 844(a) and 851 have been met. Ignoring those requirements not only flouts Congressional intent but disobeys both the Supreme Court's and this

Court's demand for strict compliance with those "unequivocal" requirements. *See infra* Part II.B.

Mr. Lopiccolo was convicted under § 18.2-250, which states in relevant part that "[i]t is unlawful for any person knowingly or intentionally to possess a controlled substance." Va. Code. Ann. § 18.2-250. The requirements of the offense are: (1) knowing or intentional (2) possession of (3) a controlled substance (including cocaine). Under the CSA, those requirements suffice for a conviction of simple possession under 21 U.S.C. § 844(a). They do not, however, suffice for a conviction of recidivist possession, which additionally requires notice, proof and the opportunity to challenge a prior convictions. Since those requirements are *not* necessary for a conviction under § 18.2-250, proof of a conviction under that statute cannot guarantee those requirements were met.

B. The Supreme Court And This Court Have Previously Recognized That The CSA Requirements For Recidivism Are Mandatory

Ignoring the mandatory requirements imposed under the CSA means the second or subsequent conviction remains at most a conviction for simple, rather than recidivist, possession. The Supreme Court has explicitly held that a conviction for recidivist possession is unavailable where the government fails to file an information or the defendant lacks the right to challenge the fact, finality and validity of a prior conviction—even where the higher sentence would otherwise be available:

> [I]mposition of an enhanced penalty is not automatic. Such a penalty may not be imposed unless the Government files an information notifying the defendant in advance of trial (or prior to the acceptance of a plea) that it will rely on that defendant's prior convictions to seek a penalty enhancement. 21 U.S.C. § 851(a)(1). If the Government does not file such notice, however, the lower sentencing range will be applied even though the defendant may otherwise be eligible for the increased penalty.

United States v. LaBonte, 520 U.S. 751, 754 n.1 (1997).[4] Thus, if the government seeks to transform a simple possession misdemeanor into a recidivist possession felony under the CSA, it must demonstrate that the criminal proceeding at issue met the requirements of 21 U.S.C. §§ 844 and 851 establishing—or offering an opportunity equivalent to that under federal law to challenge—the fact, finality and validity of any prior conviction.

In particular, the Supreme Court held in *Price v. United States*, 537 U.S. 1152 (2003) that where the government fails to provide the required notice pursuant to 21 U.S.C. § 851(a), it cannot treat a second simple possession offense as a felony. In that case, the Fifth Circuit justified a prison sentence of more than a year on the grounds that the defendant had two prior drug convictions, concluding he was therefore eligible for the sentence enhancement under 21 U.S.C. § 844(a).

[4] *See id.* at 759-760 ("The statutory scheme, however, obviously contemplates two distinct categories of repeat offenders for each possible crime. . . . [F]or defendants who have received the notice under § 851(a)(1) . . . the maximum term authorized is the enhanced term. For defendants who did not receive the notice, the unenhanced maximum applies." (internal quotation marks omitted)).

"In the Fifth Circuit's view, this rendered petitioner's § 844(a) offense a felony, see 18 U.S.C. § 3559(a) . . . ." *Id.* at 1156 (Scalia, J., dissenting). A majority of the Supreme Court vacated and remanded the sentence because the Fifth Circuit erred in concluding that a conviction for simple possession could qualify as a predicate felony under 18 U.S.C. § 924(c) where the government had failed to satisfy the requirements of §§ 844 and 851. *Id.* at 1152. The dissent agreed, but would have upheld the judgment of the Fifth Circuit on other grounds. *Id.* at 1152-1153. Indeed, even the government conceded that the drug possession offense could not be treated as a felony because it had failed to file a notice and thus denied the defendant opportunity to challenge the predicate conviction. *Id.* at 1156-1157. Thus, the Supreme Court has held these requirements essential to a recidivist possession conviction.

This Court has also held that the statutory requirements necessary for recidivist possession under the CSA are mandatory. "Section 851(a)(1) certainly states in unequivocal language that the government must file an information prior to entry of a guilty plea when it seeks to increase a defendant's sentence on the basis of a prior conviction." *United States v. Foster*, 68 F.3d 86, 89 (4th Cir. 1995). Moreover, this Court has previously recognized the need for *strict* compliance with the statutory language of the CSA. "Our colleagues in both the Fifth and the Eleventh Circuits have generally insisted upon 'strict,' rather than

'substantial,' compliance with the requirements of section 851." *Campbell*, 980 F.2d at 252 n.13.

C. Other Circuits Require Prior State Convictions To Conform To Federal Safeguards Where DHS Seeks To Treat A State Possession Conviction As A Federal Recidivist Conviction

An immigration court must consider whether a state criminal conviction complied with 21 U.S.C. §§ 844(a) and 851 safeguards when DHS argues that a conviction constitutes an aggravated felony as a "recidivist" offense. In *Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006), Mr. Berhe was convicted in a municipal court for possession of crack cocaine. Years later, he pleaded guilty to possession of crack cocaine in state court. *Id.* at 78. The state did *not* charge him with recidivist possession. *Id.* DHS subsequently argued that Mr. Berhe's second misdemeanor conviction nonetheless constituted an "aggravated felony" because of his prior drug conviction. *Id.* at 79. The BIA concluded the second offense "was punishable under federal law as a felony because his prior drug possession offense converted his subsequent possession conviction into a felony." *Id.*

On appeal, Mr. Berhe argued his second conviction for possession was not a felony punishable under the CSA and thus not an aggravated felony for INA purposes because his prior conviction was neither charged nor proven during the later proceeding. 464 F.3d at 85. The First Circuit agreed. It found that Mr. Berhe's guilty plea to the second state conviction for simple possession made no

reference to the earlier conviction for possession. Therefore, under federal law, the second conviction was for simple possession, not recidivist possession. "Because the record of conviction here contains no reference to Berhe's prior conviction, or to any other factor that would hypothetically convert his [second] state misdemeanor conviction into a felony under federal law, the Board erred by concluding that his [second] conviction was an aggravated felony under 8 U.S.C. § 1101(a)(43)." *Id.*

Similarly, the defendant in *Steele v. Blackman*, 236 F.3d 130 (3d Cir. 2001), had two prior convictions for criminal sale of marijuana and one conviction for criminal possession of marijuana. *Id.* at 131. Under New York law, all three were misdemeanors. *Id.* The district court relied on the § 844 recidivism provision to find that the defendant's second conviction was for an offense punishable as a felony under the CSA. It therefore concluded the defendant had been convicted of an aggravated felony and was ineligible for cancellation of removal.

The Third Circuit reversed. As in *Berhe*, the court recognized that 21 U.S.C. § 851 requires the government to prove, or offer the immigrant the opportunity to dispute, the fact, finality and validity of the earlier conviction upon which his or her removal rests. "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." 236 F.3d at 137. The Third Circuit explained that the defendant's prior conviction status was never litigated in a criminal proceeding. "That status was not an element of the crime charged in the second misdemeanor proceeding against him. As a result, the record evidences no judicial determination that that status existed at the relevant time. . . . [T]he record simply does not demonstrate that the prior conviction was at issue." *Id.* at 137-138. Because the prior conviction was never at issue in the state criminal proceeding, the Third Circuit recognized it could not hold that the conviction corresponded to a federal recidivist felony. *See Gerbier v. Holmes*, 280 F.3d 297, 317 (3d Cir. 2002) ("We concluded [in *Steele*] that in order for a state drug conviction to constitute a hypothetical federal felony under § 844(a) based on the prior drug conviction enhancement, we must be satisfied that the state adjudication possessed procedural safeguards equivalent to the procedural safeguards that would have accompanied the enhancement in federal court. More specifically, if the crime were prosecuted in federal court, the Government would have had to file an information under 21 U.S.C. § 851 and would have had to prove the prior conviction. At that time, the defendant would have had the opportunity to attack the prior conviction as unlawfully obtained.").[5]

[5] *See also Tostado v. Carlson*, 481 F.3d 1012, 1015 (8th Cir. 2007) (holding defendant's convictions for possession of cocaine and possession of cannabis were not punishable as felonies under the CSA and so did not constitute drug trafficking

D. Federal, Not State, Classifications Control The Law Of Immigrant Removal

The Supreme Court recognized in *Lopez* that Congress intended the law of immigrant removal to turn on federal, rather than state, classifications. "[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. Congress enacted the strict requirements of § 851 in part to ensure that federal simple possession convictions would not be used as the basis for federal recidivist possession convictions until they had withstood collateral attack on their validity. The government's position ignores the priority both Congress and the Supreme Court assigned the federal classifications. Under DHS's position, any second or subsequent state conviction can be used as a recidivist felony, even those whose requirements lack the protections required for federal classification as a recidivist felony.

For example, defendant convicted in federal court for two counts of simple drug possession is not eligible for enhanced sentencing under the recidivism

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crimes); *Smith v. Gonzales*, 468 F.3d 272, 277 (5th Cir. 2006) (rejecting DHS's claim that the defendant's two prior state convictions for sale of marijuana automatically constituted a recidivist conviction where the CSA finality requirement had not been met); *United States v. Palacios-Suarez*, 418 F.3d 692, 700 (6th Cir. 2005) ("In order to be eligible for the enhanced punishment, the defendant's second offense must occur after the prior drug conviction has become final.").

language of § 844(a) *unless* the government gave notice and proved the existence of the former conviction. However, if that same defendant were convicted in a state court, DHS's position requires treating the second conviction as a recidivist possession conviction under § 844(a) *whether or not* the defendant had by law both notice and the opportunity to challenge the fact, validity and finality of the prior conviction. Contrary to *Lopez*, this would substitute state classifications for federal classifications for purposes of immigrant removal. Furthermore, that same position would treat even a second *federal* drug offense prosecuted as a federal *misdemeanor* as a recidivist possession *felony* under § 844(a) despite actually only being a misdemeanor—usurping the actual federal classification of that offense and running directly contrary to the statutory language.

III. CONGRESS DID NOT INTEND TO TREAT NON-TRAFFICKING DRUG POSSESSION CONVICTIONS AS EQUIVALENT TO DRUG TRAFFICKING FELONIES UNDER THE INA

The INA's statutory scheme manifests an unmistakable intent to not treat all classes of drug offenses equally. As this Court has recognized, "[d]istribution of drugs is a greater threat to society than is mere use of drugs." *United States v. Brandon*, 247 F.3d 186, 192 (4th Cir. 2001). Congress intended to punish less serious drug offenses, like possession, less severely than more dangerous offenses like trafficking. DHS's position undermines the structure chosen by Congress, and

imposes a "one size fits all" approach to immigration consequences for those convicted of drug offenses.

The INA contains a range of provisions regarding drug offenders that demonstrates the federal interest is not to remove the maximum number of drug offenders, but rather to apply a graduated system of immigration consequences. Drug possession, other than one time use of a small quantity of marijuana, is a deportable offense. 8 U.S.C. § 1227(a)(2)(B)(i). The INA makes being a drug abuser or addict—necessarily a person who has more than one incident of possession—a deportable offense. *Id.* § 1227(a)(2)(B)(ii). Being deportable under either of these provisions will subject an individual to removal proceedings, but still permit an immigration judge to consider the individual's eligibility for limited forms of relief.

In contrast, the maximum penalty of deportability without the possibility of relief applies only to "trafficking" offenses. Only convictions that fit within the statutory definition of a drug trafficking aggravated felony are deemed serious enough to preclude the possibility of relief for those who are otherwise qualified. 8 U.S.C. § 1101(a)(43)(B). Only by strictly limiting application of this aggravated felony to those circumstances in which the record of conviction meets all necessary federal requirements will this Court vindicate the federal interest intended by Congress and avoid undermining the INA's statutory scheme.

IV. THE RULE OF LENITY REQUIRES ADOPTION OF THE INTERPRETATION THAT RESOLVES ANY AMBIGUITY IN FAVOR OF THE IMMIGRANT

A second 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. To the extent, however, the Court finds any lingering ambiguity remains where those federal requirements have not been met, the rule of lenity requires resolving that ambiguity in favor of the immigrant.

In both criminal and immigration law, rules of lenity demand that all else being equal, the adjudicator should adopt the interpretation that encroaches least on the immigrant's liberty. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004) (noting that ambiguities in criminal statutes must be construed in favor of the immigrant in deportation proceedings); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987) (applying the deportation rule of lenity to interpret a deportation statute). Lenity is especially appropriate here, where the Supreme Court specifically noted that treating possession as a "trafficking" offense for purposes of determining whether conduct constitutes an aggravated felony already strains the plain meaning. *Lopez*, 127 S. Ct. at 629-630 & n.6. In the context of deportation, where the stakes are high for the defendant, the Supreme Court indicated it would 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." *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948).

Other Circuits have also recognized that the rule of lenity is appropriate when dealing with crimes that are not intrinsically felonies. In *Steele*, 236 F.3d at 137, the Court noted that distribution of marijuana without remuneration under federal law is "not inherently a felony," but only takes on such attributes where the defendant has prior convictions. *Id.* The Court concluded that "the only alternative to [regarding distribution of marijuana without remuneration as a felony] consistent with the rule of lenity would be to treat any § 844 offense in this context as a misdemeanor." *Id.* Simple possession is not an intrinsic felony under § 844. Application of the rule of lenity requires treating such simple possession convictions in this context as misdemeanors as well.

CONCLUSION

For the reasons set out above, amicus curiae respectfully urge the Court to reverse the decision of the BIA below and hold that a second or subsequent state possession offense may not be deemed a "drug trafficking" aggravated felony where the state criminal proceeding did not 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.

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Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that on July 6, 2007, I filed with the Clerk's Office of the United States Court of Appeals for the Fourth Circuit the original and eight copies of the Amicus Brief of the New York State Defenders Association Immigrant Defense Project by dispatching said documents to a commercial carrier for delivery within three calendar days to the Clerk of the Court at the following address:

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