

**Immigration Law—Second Drug Offense Not Aggravated Felony Merely Because of Possible Felony Recidivist Prosecution—*Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008)**

Under the Immigration and Nationality Act (INA), an alien is subject to deportation if convicted of any aggravated felony.<sup>1</sup> A state misdemeanor drug offense is an aggravated felony if that offense would constitute a felony had it been charged under the Federal Controlled Substance Act (CSA).<sup>2</sup> The recidivist provision of the CSA extends the maximum allowable imprisonment for an alien who commits a second drug possession offense to two years, thus rendering the alien a felon under the CSA.<sup>3</sup> In *Alsol v. Mukasey*,<sup>4</sup> the United States Court of Appeals for the Second Circuit considered whether a second state drug possession conviction constitutes a felony under the CSA because it *could* have been prosecuted as a recidivist offense.<sup>5</sup> The Second Circuit held that a second possession offense is not automatically a recidivist offense and therefore not an aggravated felony subject to immigration consequences.<sup>6</sup>

The Second Circuit consolidated two cases involving aliens who appealed

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1. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (mandating deportation for any alien convicted of aggravated felony); *see also* 8 U.S.C. § 1101(a)(43) (2006) (defining conduct punishable as aggravated felony under immigration law). The INA designates illicit trafficking in a controlled substance, including a drug trafficking crime, as an aggravated felony. § 1101(a)(43)(b); *see also infra* note 17 and accompanying text (defining “drug trafficking crime”).

2. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (holding state drug offense constitutes aggravated felony if analogous to felony under CSA); *see also* 18 U.S.C. § 3559(a) (2006) (defining felony offense under CSA as any offense punishable by imprisonment exceeding one year); *infra* notes 15-17 and accompanying text (explaining offense punishable under CSA renders alien aggravated felon). Courts have termed this rule the “hypothetical federal felony” approach because an alien may become an aggravated felon without an actual federal felony conviction. *See Rashid v. Mukasey*, 531 F.3d 438, 443 (6th Cir. 2009) (noting *Lopez* embraced “hypothetical federal felony” approach for state drug offenses in immigration context).

3. *See* 21 U.S.C. § 844(a) (2000) (establishing federal recidivist provision). The CSA provides that courts may sentence an alien to incarceration not exceeding two years if the alien commits a possession offense after a prior drug conviction becomes final. *Id.* If the government successfully prosecutes an alien as a recidivist, the alien is deemed a felon under the CSA because the maximum allowable term of imprisonment would exceed one year. *See* 18 U.S.C. § 3559(a) (designating felony under CSA as offense punishable by incarceration exceeding one year). Recidivism-based sentencing enhancements are not automatically applied upon an alien’s second sentencing. *See* 21 U.S.C. § 851(a)(1) (2000) (indicating increased sentence not automatic). The federal recidivist statute requires the United States Attorney to file information with the court and serve a copy of such information on the alien or his counsel. *Id.* After filing the information, the government must ask the accused whether he or she affirms or denies the previous conviction. 21 U.S.C. § 851(b) (2000). If the accused denies the prior conviction, the government must prove its existence beyond a reasonable doubt. 21 U.S.C. § 851(c)(1) (2000). The accused has a limited right to collaterally attack the validity of the prior conviction. 21 U.S.C. § 851(c)(2) (2000).

4. 548 F.3d 207 (2d Cir. 2008).

5. *Id.* at 211 (stating issue under consideration).

6. *Id.* at 219 (summarizing court’s holding).

decisions of the Board of Immigration Appeals (BIA) ordering them removed as aggravated felons.<sup>7</sup> Petitioners Karen Nicola Alsol and Donald Overton Powell were each convicted of criminal possession of a controlled substance in violation of New York Penal Law on two separate occasions.<sup>8</sup> The state did not seek recidivism-based sentencing enhancement against Alsol and Powell for their second possession offenses.<sup>9</sup>

In October 2004, an immigration judge found that Powell was not an aggravated felon because the state did not prosecute him as a recidivist drug offender.<sup>10</sup> The Department of Homeland Security (DHS) appealed the decision and the BIA sustained its appeal, ordering Powell removed as an aggravated felon because the state could have prosecuted him as a recidivist.<sup>11</sup> In October 2006, an immigration judge found that Alsol's second possession conviction was not an aggravated felony for immigration purposes.<sup>12</sup> The DHS appealed the decision to the BIA, which vacated the decision and ordered that Alsol be removed as an aggravated felon.<sup>13</sup> On petition for review, the Second Circuit vacated both BIA decisions and held that a second state possession offense is not an aggravated felony merely because the state *could* have prosecuted it as a recidivist offense.<sup>14</sup>

An alien convicted of an aggravated felony faces adverse immigration consequences.<sup>15</sup> The INA defines an aggravated felony, in pertinent part, as

7. *Id.* at 208-10 (considering issue of removability for Alsol and Powell).

8. 548 F.3d at 209-10 (reviewing Alsol and Powell's New York criminal drug possession convictions); *see also* NEW YORK PENAL LAW § 220.03 (McKinney 2008) (setting forth elements of criminal possession of controlled substance). The misdemeanor of criminal possession of a controlled substance occurs if an individual knowingly and unlawfully possesses a controlled substance. § 220.03.

9. 548 F.3d at 208, 210 (indicating Alsol and Powell prosecuted only as criminal possession offenders and not recidivists).

10. *Id.* at 210 (reasoning Powell only charged with simple drug possession and not as recidivist offender).

11. *Id.* at 210 (sustaining DHS's appeal and ordering Powell removed).

12. *Id.* at 208 (noting immigration judge found second offense did not implicate CSA).

13. 548 F.3d at 209 (stating BIA designated Alsol aggravated felon subject to deportation). On May 15, 2007, Alsol filed a motion to reopen and reconsider her case with the BIA, which the BIA denied. *Id.*

14. *Id.* at 209-10 (stating Alsol and Powell appealed to Second Circuit for review). The Second Circuit vacated the BIA decisions and held that neither Alsol nor Powell was an aggravated felon. *Id.* at 219

15. *See supra* note 1 and accompanying text (noting aggravated felon deportable under INA). An alien labeled as an aggravated felon faces extensive immigration consequences. *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (providing alien deportable if convicted of aggravated felony); 8 U.S.C. § 1228(c) (2006) (indicating aggravated felon presumed removable); 8 U.S.C. § 1252(a)(2)(C) (2006) (precluding aggravated felon from seeking review of removal order); 8 U.S.C. § 1229b (2006) (barring aggravated felon from seeking cancellation of removal); 8 U.S.C. § 1158(b)(2) (2006) (stating aggravated felon not eligible for asylum). Further, an aggravated felon is barred from returning to the United States without permission from the attorney general. *See* 8 U.S.C. § 1182(a)(9)(A)(i), (iii) (2006) (requiring special permission for re-entry). Applicants for naturalization must demonstrate good moral character. 8 C.F.R. § 316.10(a)(1) (2006). If an alien was or is convicted of an aggravated felony on or after November 29, 1990, the alien automatically lacks good moral character for naturalization purposes. 8 C.F.R. § 316.10(b)(1)(ii) (2006); *see also* Nancy Morawetz, *Rethinking Drug Inadmissibility*, 50 WM. & MARY L. REV. 163, 188 (2008) (noting immigration consequences for drug offenses); Natalie Liem, Note, *Mean What You Say, Say What You Mean: Defining the Aggravated Felony Deportation Grounds to Target More Than Aggravated Felonies*, 59 FLA. L. REV. 1071, 1079 (2007) (discussing adverse consequences of aggravated felony designation). *See generally* Mary E. Kramer,

“illicit trafficking in a controlled substance . . . including a drug trafficking crime” whether in violation of state or federal law.<sup>16</sup> A “drug trafficking crime” is defined as any felony punishable under federal drug laws, including the CSA.<sup>17</sup> The CSA defines a felony as any offense that carries a maximum term of imprisonment exceeding one year.<sup>18</sup>

In *Lopez v. Gonzales*,<sup>19</sup> the United States Supreme Court held that a state drug offense constitutes a felony for CSA purposes only if the offender’s conduct is a felony under federal law.<sup>20</sup> While a simple possession offense generally proscribes conduct punishable as a federal misdemeanor, the government may seek recidivism-based sentencing enhancement against an alien charged with a second misdemeanor drug offense.<sup>21</sup> If a court determines

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IMMIGRATION CONSEQUENCES OF CRIMINAL ACTIVITY: A GUIDE TO REPRESENTING FOREIGN BORN DEFENDANTS (Richard J. Link ed., American Immigration Lawyers Association 2008) (discussing immigration consequences of criminal convictions amounting to aggravated felonies). Importantly, the INA imposes such adverse consequences for an actual conviction. See 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (rendering deportable alien “convicted” of aggravated felony); Gertsenshteyn v. U.S. Dep’t of Justice, 544 F.3d 137, 145 (2d Cir. 2008) (stressing INA uses word “convicted” thus basing removability on formal conviction). The BIA recently noted that “[f]or nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a ‘conviction’ for a particular type of crime, the focus on the immigration authorities must be on the crime of which the alien was convicted.” *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (B.I.A. 2008).

16. 8 U.S.C. § 1101(a)(43)(B) (2006) (designating illicit drug trafficking as conduct punishable as aggravated felony). The INA itself does not define the term “illicit trafficking.” *Id.* An offense that constitutes “illicit trafficking” under the INA is a “drug trafficking crime” under federal law. *Id.* While the term “trafficking” generally corresponds to commercial dealing, the Supreme Court has noted that Congress defines some possession offenses as “illicit trafficking.” *Lopez v. Gonzales*, 549 U.S. 47, 55 n.6 (2006) (acknowledging Congress defines certain possession offenses as “illicit trafficking”).

17. 18 U.S.C. § 924(c)(2) (2006) (defining “drug trafficking crime”). In addition to the CSA, Title 18 provides that a “drug trafficking crime” includes any felony punishable under the Controlled Substance Import and Export Act or the Maritime Drug Law Enforcement Act. *Id.*; see also Brent E. Newton, *Lopez v. Gonzales: A Window on the Shortcomings of the Federal Appellate Process*, 9 J. APP. PRAC. & PROCESS 143, 145-48 (2007) (providing comprehensive definition of “drug trafficking crime” as aggravated felony).

18. 18 U.S.C. § 3559(a) (2006) (defining felony as any offense punishable by incarceration exceeding one year). Simple drug possession, by contrast, constitutes a misdemeanor under the CSA and consequently is not an aggravated felony. See 21 U.S.C. § 844(a) (2006) (punishing drug possession by incarceration not exceeding one year); *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006) (stating mere possession not felony under CSA).

19. 549 U.S. 47 (2006).

20. See *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (holding state offense punishable as felony under CSA constitutes felony under federal law); *supra* note 2 and accompanying text (explaining state offense punishable under CSA amounts to aggravated felony); see also Fernando A. Nunez, *Collateral Consequences of Criminal Convictions to Noncitizens*, 41 MD. B. J. 40, 43 (2008) (discussing *Lopez* holding); Linda Greenhouse, *Court Rejects Interpretation of Immigration Drug Law*, N.Y. TIMES, Dec. 6, 2006, at A22 (stressing *Lopez* Court defined aggravated felony as any offense punishable as felony under federal law).

21. See *supra* note 3 and accompanying text (detailing recidivist-based sentencing enhancement). *Lopez* acknowledged that certain state possession crimes corresponding to felony violations of the CSA—including recidivist possession—constitute aggravated felonies. *Lopez v. Gonzales*, 549 U.S. 47, 55 n.6 (2006). Courts disagree on whether *Lopez* dictates that a hypothetical recidivist conviction may qualify as an aggravated felony. See *United States v. Pacheco-Diaz*, 513 F.3d 776, 779 (7th Cir. 2008) (reasoning *Lopez* allows purely hypothetical recidivist conviction to support aggravated felony designation). The BIA and the Sixth Circuit, by contrast, assert that *Lopez* does not prescribe that a purely hypothetical recidivist conviction corresponds to an

that an alien is a recidivist offender, that alien is considered an aggravated felon because the increased sentence exceeding one year would render the alien a felon under federal law.<sup>22</sup> The BIA determined that this increased sentence is only applicable if an alien admits or a judge or jury determines that the alien is a recidivist offender.<sup>23</sup> The BIA also declared it would apply this rule unless circuit precedent mandates otherwise.<sup>24</sup>

The circuit courts are split on whether a second simple possession conviction constitutes an aggravated felony for immigration purposes when the government *could* have, but did not, prosecute it as a recidivist offense.<sup>25</sup> The First, Third, and Sixth Circuits agree with the BIA that a second possession offense is not automatically a recidivist offense and therefore not an aggravated felony for immigration purposes.<sup>26</sup> These circuits maintain that an alien is not a recidivist offender unless the record establishes that the alien admitted to recidivist possession or that the judge or jury convicted the alien of recidivist possession.<sup>27</sup> By contrast, the Fifth and Seventh Circuits assert that a second

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aggravated felony. See *Rashid v. Mukasey*, 531 F.3d 438, 445-46 (6th Cir. 2008) (rejecting Fifth and Seventh Circuits' interpretation of *Lopez*); *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 390 (B.I.A. 2007), *review denied* by 570 F.3d 263 (5th Cir. 2009) (reasoning *Lopez* merely notes some state possession offenses correspond to felony recidivist possession).

22. See *supra* note 3 and accompanying text (explaining offense carrying imprisonment term exceeding one year renders alien aggravated felon).

23. See *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 394 (B.I.A. 2007) *review denied* by 570 F.3d 263 (5th Cir. 2009) (holding second conviction not aggravated felony unless alien admits or charged as recidivist offender).

24. See *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 391 (B.I.A. 2007) *review denied* by 570 F.3d 263 (5th Cir. 2009) (clarifying holding applies only absent differing circuit precedent). In *In re Carachuri-Rosendo*, the BIA determined that controlling precedent from the United States Court of Appeals for the Fifth Circuit required that the alien's second possession offense constituted an aggravated felony on the basis of recidivism, regardless of whether the government successfully prosecuted him as a recidivist offender. *Id.* at 386-89. Absent controlling precedent, however, the Board held an alien's second possession offense would not be considered an aggravated felony merely because that alien would have been eligible for recidivism-based enhancement had the alien been federally prosecuted. *Id.* at 394.

25. See *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 385-86 (B.I.A. 2007) *review denied* by 570 F.3d 263 (5th Cir. 2009) (noting circuit split on whether second possession offense automatically renders alien aggravated felon); see also *Current Circuit Splits*, 4 SETON HALL CIR. REV. 399, 404 (2008) (noting circuit split concerning applicability of recidivist provision to state possession offenses). Petitioner Jose Angel Carachuri-Rosendo has filed a petition for a writ of certiorari to the United States Supreme Court to resolve the circuit split. *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3058 (U.S. July 15, 2009) (No. 09-60). Carachuri-Rosendo seeks review of the Fifth Circuit's judgment designating him an aggravated felon for potential recidivist possession. *Petition for Writ of Certiorari* at \*17, *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) (No. 09-60).

26. See *Rashid v. Mukasey*, 531 F.3d 438, 442-48 (6th Cir. 2008) (requiring state court actually convict alien under recidivist state statute for enhanced punishment purposes); *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006) (maintaining government attorney must successfully obtain recidivism-based enhancement against alien); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3d Cir. 2001) (reasoning court must actually determine alien's status as recidivist offender for sentence enhancement to apply). In *Berhe*, the First Circuit reasoned that a second state possession offense does not correspond to federal recidivist possession if the state fails to prove that the court relied upon the previous conviction for the sentence enhancement as § 851(a)(1) requires. *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006).

27. See *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008) (opining courts must look to crime alien

possession offense may constitute an aggravated felony regardless of whether an alien is charged or convicted as a recidivist offender.<sup>28</sup> The Fifth and Seventh Circuits reason that a second possession offender is an aggravated felon because an alien would have been subject to enhanced sentencing had the alien been federally charged.<sup>29</sup>

In *Alsol v. Mukasey*, the Second Circuit considered whether a second state possession conviction constitutes a felony under the CSA where the government *could* have prosecuted it as a recidivist offense.<sup>30</sup> The court rejected the Fifth and Seventh Circuits' positions that an alien is an aggravated felon if the prosecution could have charged the alien as a recidivist.<sup>31</sup> The court asserted that *Lopez* does not automatically qualify two state possession convictions as a felony recidivist conviction merely because the state could have pursued recidivist charges.<sup>32</sup> Instead, the court maintained that *Lopez* requires an actual conviction of a state offense punishable as a federal felony, not merely a potential conviction.<sup>33</sup> The court also emphasized that its

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actually committed when determining recidivist status); *Berhe v. Gonzales*, 464 F.3d 74, 85-86 (1st Cir. 2006) (asserting alien not recidivist offender without admission of recidivist possession or conviction); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3d Cir. 2001) (maintaining alien cannot be labeled recidivist offender without record establishing alien's status as recidivist). The Sixth Circuit reasoned that the "hypothetical federal felony" approach requires that courts determine whether the alien's conviction would actually constitute a felony under federal law. *Rashid v. Mukasey*, 531 F.3d 438, 445 (6th Cir. 2008). The Sixth Circuit cautioned against allowing the government to make ex-post determinations of hypothetical federal charges when recidivist-based sentence enhancements were never litigated. *Id.*; see also DAN KESSELBRENNER & LARRY ROSENBERG, NAT'L IMMIGR. PROJECT OF THE NAT'L LAWYERS GUILD, IMMIGR. LAW AND CRIMES § 7:26 (West 2009) (opining prosecutor must charge and prove conviction before labeling alien aggravated felon). See generally Rebecca Sharpless, *Toward a True Elements Test: Taylor and the Categorical Analysis of Crimes in Immigration Law* 62 U. MIAMI L. REV. 979, 1024 (2008) (arguing courts should determine legal effect of criminal conviction based on its elements).

28. See *United States v. Cepeda-Rios*, 530 F.3d 333, 334-36 (5th Cir. 2008) (holding second simple possession offense automatically qualifies alien as aggravated felon); *United States v. Pacheco-Diaz*, 513 F.3d 776, 778-79 (7th Cir. 2008) (holding alien aggravated felon if alien would have faced recidivist sentence enhancement when federally charged).

29. See *United States v. Cepeda-Rios*, 530 F.3d 333, 334-36 (5th Cir. 2008) (determining hypothetical recidivist status renders alien aggravated felon). The Seventh Circuit reasoned enhancement was appropriate because an alien's second simple possession conviction would constitute a felony if prosecuted under the CSA. *Id.*; *United States v. Pacheco-Diaz*, 513 F.3d 776, 778 (7th Cir. 2008) (asserting courts must determine whether alien's conduct constitutes federal felony regardless of state recidivism conviction). The Seventh Circuit reasoned that, in *Lopez*, the Supreme Court clarified that when state and federal crimes are defined differently, federal courts must determine whether an alien's conduct is a federal felony regardless of the state conviction. *United States v. Pacheco-Diaz*, 513 F.3d 776, 778 (7th Cir. 2008). Consequently, the Seventh Circuit concluded that an alien's multiple simple possession offenses combine to constitute a recidivist felony. *Id.*

30. 548 F.3d at 211 (stating issue under consideration).

31. *Id.* at 214 (refusing aggravated felony designation for potential recidivist prosecution); see also *supra* notes 28-29 and accompanying text (highlighting Fifth and Seventh Circuits' contrary position).

32. 548 F.3d at 212 (reasoning *Lopez* does not permit inquiry into hypothetical state charge punishable as federal felony).

33. *Id.* at 214 (maintaining *Lopez* focuses on actual state conviction not hypothetical conviction). The Second Circuit reiterated that in *Lopez* the Court focused solely on whether the underlying conviction would constitute a felony. *Id.* at 215. (noting *Lopez* considers whether actual underlying state offense corresponds to federal felony); see also *Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (holding state offense constitutes

conviction requirement is consistent with the INA, which determines removability based on actual—not hypothetical—convictions.<sup>34</sup>

The Second Circuit refused to deem Powell and Alsol aggravated felons when the state court neither litigated nor established their recidivist status.<sup>35</sup> The court stressed that recidivist sentence enhancement requires the government to file notice of the prior conviction and, if contested, prove its existence beyond a reasonable doubt.<sup>36</sup> The court refused to qualify Powell and Alsol's convictions as federal recidivist felonies when state prosecutors elected to forgo recidivist enhancement.<sup>37</sup> Further, the court warned against combining state offenses for the first time in removal proceedings because an alien has no right to challenge the validity of his prior conviction in removal proceedings.<sup>38</sup>

The Second Circuit, in refusing to label Alsol and Powell as aggravated felons merely because the state could have prosecuted them as recidivists, correctly concluded that the ruling body must base an alien's status as an aggravated felon on an actual conviction.<sup>39</sup> The court properly foreclosed hypothetical considerations of whether an alien's conduct would have resulted in federal conviction.<sup>40</sup> Such an approach affords immigration judges too much discretion to inquire into an alien's criminal history, combine offenses for the first time in removal proceedings, and then determine hypothetically that

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aggravated felony if it prohibits conduct punishable as federal felony). Accordingly, the court reasoned that an alien's record must contain a state-law conviction corresponding to federal recidivist possession to label that alien as an aggravated felon. 548 F.3d at 217 (elucidating alien's state conviction must correspond with federal felony for aggravated felony designation).

34. *Id.* at 215 (emphasizing INA bases removability on alien's actual conviction).

35. *Id.* at 217 (declining aggravated felony designation unless alien admission or state obtains recidivist enhancement); *see also supra* note 3 (explaining state must actively pursue recidivist enhancement).

36. 548 F.3d at 211, 216 n.7 (discussing various procedural safeguards afforded to accused with recidivist charge). The court reasoned that unless an alien either admits to recidivist status or a court or jury determines it, an alien is not an aggravated felon for purposes of potential recidivist enhancement. *Id.* at 217.

37. *Id.* (concluding lack of state conviction corresponding to federal recidivism precludes aggravated felony designation). The court stressed the importance of prosecutorial discretion when making charging decisions. *Id.* This outcome, according to the court, also interferes with a prosecutor's ability to obtain plea agreements with defendants. *Id.*

38. *Id.* The court noted that immigration law precludes an alien from collaterally attacking a state court conviction in removal proceedings or when reviewing BIA decisions. *Id.*; *see also Taylor v. United States*, 396 F.3d 1322, 1330 (11th Cir. 2005) (stressing alien cannot challenge state conviction in removal proceedings). Further, the court emphasized that immigration judges lack proficiency in criminal law and thus should not determine recidivist status for the first time in removal proceedings. 548 F.3d at 217.

39. 548 F.3d at 217 (holding hypothetical recidivist status does not render alien aggravated felon); *see also Lopez v. Gonzales*, 549 U.S. 47, 60 (2006) (premising aggravated felony status on alien's underlying conviction); *Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008) (requiring actual conviction corresponding with federal recidivism for aggravated felony purposes); *supra* note 15 (stating INA removes alien for aggravated felony "conviction"). *But see supra* notes 28-29 and accompanying text (indicating Fifth and Seventh Circuits' contrary position).

40. 548 F.3d at 214 (emphasizing *Lopez* limits inquiry to alien's actual conviction); *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 394 (B.I.A. 2007) *review denied* by 570 F.3d 263 (5th Cir. 2009) (noting alien not aggravated felon unless recidivist status admitted or prosecuted); *see also Rashid v. Mukasey*, 531 F.3d 438, 448 (6th Cir. 2008) (limiting court's consideration to alien's actual conviction).

the government could charge the alien with a federal felony.<sup>41</sup> Accordingly, the Fifth and Seventh Circuits' approach improperly adds a second hypothetical to the "hypothetical federal felony" approach.<sup>42</sup>

The court sensibly mandated that recidivist sentence enhancement requires compliance with significant procedural safeguards.<sup>43</sup> The safeguards ensure that the accused has proper pretrial notice of the charge and affords the accused the opportunity to challenge the prior conviction.<sup>44</sup> Under the Fifth and Seventh Circuits' approach, an alien convicted of two separate possession offenses would automatically be an aggravated felon despite the government's failure to pursue recidivist status.<sup>45</sup> The Fifth and Seventh Circuits' approach raises grave constitutional risks, including relying on previous state convictions that could be procedurally or constitutionally unsound.<sup>46</sup> Indeed, the Third and Sixth Circuits have warned against relying on a prior conviction when the convicted party has not had an opportunity to challenge the constitutional integrity of the conviction.<sup>47</sup>

The Supreme Court should address the current circuit split enabling non-uniform application of immigration consequences to criminal behavior.<sup>48</sup> An

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41. See *Rashid v. Mukasey*, 531 F.3d 438, 445 (6th Cir. 2008) (warning against ex-post determinations of hypothetical convictions); see also *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 393 (B.I.A. 2007) *review denied* by 570 F.3d 263 (5th Cir. 2009) (highlighting problems associated with purely hypothetical approach).

42. See *Fernandez v. Mukasey* 544 F.3d 862, 877 (7th Cir. 2008) (Rovner, J., dissenting) (warning assuming hypothetical state recidivism is "big if"); *Rashid v. Mukasey*, 531 F.3d 438, 445 (6th Cir. 2008) (opining consideration of facts outside conviction adds forbidden second hypothetical to hypothetical federal felony approach).

43. See 21 U.S.C. § 851(a)(1)-(c)(2) (2006) (setting forth procedural requirements of recidivist sentencing enhancement); *supra* note 3 and accompanying text (explaining various procedural safeguards associated with recidivist enhancement).

44. See *supra* note 3 (noting federal recidivist statute affords accused notice of charge and ability to challenge prior conviction).

45. See 548 F.3d at 216 (opining recidivist statutes offer accused various important safeguards); *supra* notes 28-29 (noting Fifth and Seventh Circuits deem alien aggravated felon if possibility of recidivist prosecution exists); see also *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 391 (B.I.A. 2007) *review denied* by 570 F.3d 263 (5th Cir. 2009) (refusing aggravated felon status by virtue of recidivism unless alien admits or court convicts alien thereof); Brief of Amicus Curiae in Support of Petitioner at \*10-18, *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (No. 08-1112-ag) (arguing fundamentally unfair to allow aggravated felony designation if state never prosecutes under recidivist laws).

46. See *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008) (explaining danger associated with relying on prior misdemeanor convictions); *Steele v. Blackman*, 236 F.3d 130, 137-38 (3d Cir. 2001) (stressing danger of constitutionally impaired prior conviction). The Sixth Circuit acknowledged many misdemeanor convictions "are processed under questionable circumstances and may be found invalid if challenged." *Rashid v. Mukasey*, 531 F.3d 438, 447 (6th Cir. 2008); see also Brief of Amicus Curiae in Support of Petitioner at \*26, *Alsol v. Mukasey*, 548 F.3d 207 (2d Cir. 2008) (No. 08-1112-ag) (maintaining reliance on previous conviction raises significant due process concerns); Sharpless, *supra* note 27, at 1024 (warning reliance on previous conduct not litigated subsequently risks violating right to trial by jury).

47. See *supra* note 46 and accompanying text (noting Third and Sixth Circuits' constitutional concerns regarding reliance on prior convictions).

48. See *Petition for Writ of Certiorari* at \*1, *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) (No. 09-60) (seeking Supreme Court's review of divisive circuit split); *Current Circuit Splits*, *supra* note 25, at 404 (noting circuit split concerning potential recidivist status); *supra* note 25 and accompanying text (indicating

alien deemed an aggravated felon for potential recidivist enhancement faces various immigration disabilities including mandatory removal from the United States in the Fifth and Seventh Circuits.<sup>49</sup> By contrast, an identically situated alien in the First, Second, Third and Sixth Circuits may seek cancellation of removal and potentially remain in the United States.<sup>50</sup> The Supreme Court should promulgate a uniform national resolution terminating the circuit courts' inconsistent treatment of aliens who the government could have prosecuted as recidivists.<sup>51</sup>

In *Alsol v. Mukasey*, the Second Circuit considered whether a second drug possession conviction under state law is a felony under the CSA where the government could have prosecuted the crime as a recidivist offense. By rejecting the Fifth and Seventh Circuit's designation of aggravated felony status based on a purely hypothetical conviction, the court sensibly concluded that an alien's status as an aggravated felon must be based on an actual conviction. The court also precluded the DHS from relying on prior convictions without litigating an alien's recidivist status, thereby requiring compliance with significant procedural safeguards. Without resolution from the Supreme Court, this divisive circuit split will continue to subject aliens to inconsistent immigration treatment based solely on the federal circuit in which they reside.

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circuit split on aggravated felon designation for potential recidivist prosecution); *see also supra* note 1 and accompanying text (noting aggravated felon subject to immigration consequences including deportation); Morawetz, *supra* note 15, at 188 (noting jurisdictions differ sharply regarding immigration consequences for drug offenses). The BIA has emphasized that "we strive for as consistent a nationwide application of the immigration laws as possible." *In re Carachuri-Rosendo*, 24 I. & N. Dec. 382, 388 (B.I.A. 2007) *review denied* by 570 F.3d 263 (5th Cir. 2009).

49. *See supra* notes 28-29 and accompanying text (noting Fifth and Seventh Circuits label potential recidivist offender as aggravated felon); *supra* notes 1 & 15 and accompanying text (mandating deportation for alien labeled as aggravated felon).

50. *See supra* notes 26-27 and accompanying text (explaining potential recidivist offender not aggravated felon in First, Third, and Sixth Circuits); *supra* note 6 and accompanying text (indicating Second Circuit refuses aggravated felony designation for potential recidivism); *supra* notes 23-24 and accompanying text (indicating BIA will apply majority rule unless circuit precedent compels otherwise).

51. *See* Petition for Writ of Certiorari at \*13, *Carachuri-Rosendo v. Holder*, 570 F.3d 263 (5th Cir. 2009) (No. 09-60) (arguing no justification for circuits' inconsistent treatment of aggravated felon); *see also supra* notes 26-29 and accompanying text (explaining circuit split enabling non-uniform treatment of aggravated felon).