Immigration Law—Second Drug Offense Not Aggravated Felony Merely Because of Possible Felony Recidivist Prosecution—\textit{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.\footnote{1. 8 U.S.C. § 1227(a)(2)(A)(iii) (2006) (mandating deportation for any alien convicted of aggravated felony); \textit{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); \textit{see also infra note 17 and accompanying text (defining “drug trafficking crime”).}} 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).\footnote{2. \textit{See Lopez v. Gonzales}, 549 U.S. 47, 60 (2006) (holding state drug offense constitutes aggravated felony if analogous to felony under CSA); \textit{see also} 18 U.S.C. § 3559(a) (2006) (defining felony offense under CSA as any offense punishable by imprisonment exceeding one year); \textit{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. \textit{See Rashid v. Mukasey}, 531 F.3d 438, 443 (6th Cir. 2009) (noting \textit{Lopez} embraced “hypothetical federal felony” approach for state drug offenses in immigration context).} 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.\footnote{3. \textit{See} 21 U.S.C. § 844(a) (2000) (establishing federal recidivist provision).} In \textit{Alsol v. Mukasey},\footnote{4. 548 F.3d 207 (2d Cir. 2008).} 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 \textit{could} have been prosecuted as a recidivist offense.\footnote{5. \textit{Id.} at 211 (stating issue under consideration).} 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.\footnote{6. \textit{Id.} at 219 (summarizing court’s holding).}

The Second Circuit consolidated two cases involving aliens who appealed...
decisions of the Board of Immigration Appeals (BIA) ordering them removed as aggravated felons. 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. The state did not seek recidivism-based sentencing enhancement against Alsol and Powell for their second possession offenses.

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. 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. In October 2006, an immigration judge found that Alsol’s second possession conviction was not an aggravated felony for immigration purposes. The DHS appealed the decision to the BIA, which vacated the decision and ordered that Alsol be removed as an aggravated felon. 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.

An alien convicted of an aggravated felony faces adverse immigration consequences. 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.
“illicit trafficking in a controlled substance... including a drug trafficking crime” whether in violation of state or federal law. A “drug trafficking crime” is defined as any felony punishable under federal drug laws, including the CSA. The CSA defines a felony as any offense that carries a maximum term of imprisonment exceeding one year.

In Lopez v. Gonzales, 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. 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. If a court determines
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. 22 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.23 The BIA also declared it would apply this rule unless circuit precedent mandates otherwise.24

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.25 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.26 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.27 By contrast, the Fifth and Seventh Circuits assert that a second


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


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.


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. 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.

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. 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. 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. Instead, the court maintained that Lopez requires an actual conviction of a state offense punishable as a federal felony, not merely a potential conviction. The court also emphasized that its 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. at 211 (stating issue under consideration).

30. 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).

31. Id. at 214 (reasoning Lopez does not permit inquiry into hypothetical state charge punishable as federal felony).

32. 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. 34

The Second Circuit refused to deem Powell and Alsol aggravated felons when the state court neither litigated nor established their recidivist status. 35 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. 36 The court refused to qualify Powell and Alsol’s convictions as federal recidivist felonies when state prosecutors elected to forgo recidivist enhancement. 37 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. 38

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. 39 The court properly foreclosed hypothetical considerations of whether an alien’s conduct would have resulted in federal conviction. 40 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 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.41 Accordingly, the Fifth and Seventh Circuits’ approach improperly adds a second hypothetical to the “hypothetical federal felony” approach.42

The court sensibly mandated that recidivist sentence enhancement requires compliance with significant procedural safeguards.43 The safeguards ensure that the accused has proper pretrial notice of the charge and affords the accused the opportunity to challenge the prior conviction.44 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.45 The Fifth and Seventh Circuits’ approach raises grave constitutional risks, including relying on previous state convictions that could be procedurally or constitutionally unsound.46 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.47

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


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).


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 L. & 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. 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. 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.

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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