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NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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CARACHURI-ROSENDO *v.* HOLDER, ATTORNEY
GENERALCERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FIFTH CIRCUIT

No. 09–60. Argued March 31, 2010—Decided June 14, 2010

Petitioner, a lawful permanent resident of the United States, faced deportation after committing two misdemeanor drug offenses in Texas. For the first, possession of a small amount of marijuana, he received 20 days in jail. For the second, possession without a prescription of one antianxiety tablet, he received 10 days. Texas law, like federal law, authorized a sentencing enhancement if the State proved that petitioner had been previously convicted of a similar offense, but Texas did not seek such an enhancement here. After the second conviction, the Federal Government initiated removal proceedings. Petitioner conceded that he was removable, but claimed that he was eligible for discretionary cancellation of removal under the Immigration and Nationality Act (INA) because he had not been convicted of any “aggravated felony,” 8 U. S. C. §1229b(a)(3). Section 1101(a)(43)(B) defines that term to include, *inter alia*, “illicit trafficking in a controlled substance . . . including a drug trafficking crime” as defined in 18 U. S. C. §924(c), which, in turn, defines a “drug trafficking crime” as a “felony punishable under,” *inter alia*, “the Controlled Substances Act (21 U. S. C. 801 et seq.).” A felony is a crime for which the “maximum term of imprisonment authorized” is “more than one year.” §3559(a). Simple possession offenses are ordinarily misdemeanors punishable with shorter sentences, but a conviction “after a prior conviction under this subchapter [or] the law of any State . . . has become final”—a “recidivist” simple possession offense—is “punishable” as a “felony” under §924(c)(2) and subject to a 2-year sentence. Only this “recidivist” simple possession category might be an “aggravated felony” under 8 U. S. C. §1101(a)(43). A prosecutor must charge the existence of the prior conviction. See 21 U. S. C.

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§851(a)(1). Notice and an opportunity to challenge its validity, §§851(b)–(c), are mandatory prerequisites to obtaining a punishment based on the fact of the prior conviction and necessary prerequisites to “authorize” a felony punishment, 18 U. S. C. §3559(a), for the simple possession offense at issue.

Here, the Immigration Judge held that petitioner’s second simple possession conviction was an “aggravated felony” that made him ineligible for cancellation of removal. The Board of Immigration Appeals and Fifth Circuit affirmed. Relying on the holding in *Lopez v. Gonzales*, 549 U. S. 47, 56—that to be an “aggravated felony” for immigration law purposes, a state drug conviction must be punishable as a felony under federal law—the court used a “hypothetical approach,” concluding that because petitioner’s “conduct” could have been prosecuted as a recidivist simple possession under state law, it could have also been punished as a felony under federal law.

Held: Second or subsequent simple possession offenses are not aggravated felonies under §1101(a)(43) when, as in this case, the state conviction is not based on the fact of a prior conviction. Pp. 9–19.

(a) Considering the disputed provisions’ terms and their “common-sense conception,” *Lopez*, 549 U. S., at 53, it would be counterintuitive and “unorthodox” to apply an “aggravated felony” or “illicit trafficking” label to petitioner’s recidivist possession, see *id.*, at 54. The same is true for his penalty. One does not usually think of a 10-day sentence for unauthorized possession of one prescription pill as an “aggravated felony.” This Court must be very wary in this case because the Government seeks a result that “the English language tells [the Court] not to expect.” *Ibid.* Pp. 9–11.

(b) The Government’s position—that “conduct punishable as a felony” should be treated as the equivalent of a felony conviction when the underlying conduct could have been a felony under federal law—is unpersuasive. First, it ignores the INA’s text, which limits the Attorney General’s cancellation power only when, *inter alia*, a noncitizen “has . . . been convicted of a[n] aggravated felony.” 8 U. S. C. §1229b(a)(3). Thus, the conviction itself is the starting place, not what might have or could have been charged. Under the Controlled Substances Act, simple possession offenses carry only a 1-year sentence unless a prosecutor elects to charge the defendant as a recidivist and the defendant receives notice and an opportunity to defend against that charge. Here, petitioner’s record of conviction contains no finding of the fact of his prior drug offense. An immigration court cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty. The Government contends that had petitioner been prosecuted in federal court under identical circumstances, he would have committed an “aggra-

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vated felony” for immigration law purposes. But his circumstances were not identical to the Government’s hypothesis. And the Government’s approach cannot be reconciled with 8 U. S. C. §1229b(a)(3), which requires an “aggravated felony” conviction—not that the non-citizen merely could have been convicted of a felony but was not. Second, the Government’s position fails to effectuate 21 U. S. C. §851’s mandatory notice and process requirements, which have great practical significance with respect to the conviction itself and are integral to the structure and design of federal drug laws. They authorize prosecutors to exercise discretion when electing whether to pursue a recidivist enhancement. So do many state criminal codes, including Texas’. Permitting an immigration judge to apply his own recidivist enhancement after the fact would denigrate state prosecutors’ independent judgment to execute such laws. Third, the Fifth Circuit misread *Lopez*. This Court never used a “hypothetical approach” in its analysis. By focusing on facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment, the Circuit’s approach introduces a level of conjecture that has no basis in *Lopez*. Fourth, the Government’s argument is inconsistent with common practice in the federal courts, for it is quite unlikely that petitioner’s conduct would have been punished as a felony in federal court. Finally, as the Court noted in *Leocal v. Ashcroft*, 543 U. S. 1, 11, n. 8, ambiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen’s favor. Notably, here, the question whether petitioner has committed an “aggravated felony” is relevant to the type of relief he may obtain from a removal order, but not to whether he is in fact removable. Thus, any relief he may obtain still depends on the Attorney General’s discretion. Pp. 11–18.

570 F. 3d 263, reversed.

STEVENS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and KENNEDY, GINSBURG, BREYER, ALITO, and SOTOMAYOR, JJ., joined. SCALIA, J., and THOMAS, J., filed opinions concurring in the judgment.