U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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DHS/ICE Office of Chief Counsel - SDC
146 CCA Road, P.O.Box 248
Lumpkin, GA 31815

Name: GARCIA OLVERA, MIGUEL

A 091-983-344

Date of this notice: 3/25/2015

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Geller, Joan B

Userteam: Docket

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A091-983-344
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DHS/ICE Office of Chief Counsel - SDC
146 CCA Road, P.O.Box 248
Lumpkin, GA 31815

Name: GARCIA OLVERA, MIGUEL **A 091-983-344**

Date of this notice: 3/25/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Geller, Joan B

Userteam:

File: A091 983 344 – Lumpkin, GA

Date: MAR 25 2015

In re: MIGUEL GARCIA OLVERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael Christian Urbina-Pabon, Esquire

ON BEHALF OF DHS: Fayaz Habib
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

The respondent appeals from an Immigration Judge's December 3, 2014, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the removal proceedings will be terminated.

The respondent is a native and citizen of Mexico and a lawful permanent resident of the United States. In 1999 the respondent was convicted in North Carolina of possessing marijuana with intent to manufacture, sell, or deliver, a felony violation of section 90-95(a)(1) of the North Carolina General Statutes (hereinafter "§ 90-95(a)(1)") for which he was sentenced to an indeterminate term of imprisonment of 4-6 months. The question on appeal is whether that conviction renders the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony." Upon de novo review, we conclude that it does not.

The term "aggravated felony" is defined to include "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)." Section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). The phrase "illicit trafficking" refers to "any state, federal, or qualified foreign felony conviction involving the unlawful trading or dealing" in a controlled substance as defined by Federal law. *Matter of L-G-H-*, 26 I&N Dec. 365, 368 (BIA 2014) (citations omitted). However, an offense that does not involve unlawful "trading or dealing" within the meaning of the "illicit trafficking" concept may nonetheless qualify as an aggravated felony if it is a "drug trafficking crime" under 18 U.S.C. § 924(c); that is, a felony punishable under the Federal Controlled Substances Act ("CSA"), 21 U.S.C. § 802 et seq. A state drug offense qualifies as a "drug trafficking crime" only if it corresponds categorically to an offense punishable by a maximum term of imprisonment of more than 1 year under the CSA. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683 (2013).

In 1999, when the respondent committed his offense and sustained his conviction, § 90-95(a)(1) provided that "it is unlawful for any person … [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." According to the North Carolina Supreme Court, § 90-95(a)(1) establishes three distinct offenses: "(1) manufacture of a controlled substance, (2) transfer of a controlled substance by sale or delivery, and (3) possession with intent to manufacture, sell or deliver a controlled substance." *State v. Moore*, 395 S.E.2d 124, 126 (N.C. 1990). A "sale" is defined as "a transfer of property for a specified price payable in money" while a delivery is "the actual [sic] constructive, or attempted transfer from one person to another of a controlled substance[.]" *Id.* at 382, 395 S.E.2d at 127 (citations and quotations omitted).

In 1999, violations of § 90-95(a)(1) carried different maximum sentences depending upon the identity of the substance involved and the nature of the underlying offense conduct. A violation of § 90-95(a)(1) involving a remunerative "sale" of marijuana (a schedule VI controlled substance under North Carolina law) was punishable as a class H felony while a violation involving manufacture or non-remunerative "delivery" of marijuana was punishable as a class I felony, *unless* the violation involved "[t]he transfer of less than 5 grams of marijuana for no remuneration," in which case it was not to be treated as a "delivery" at all. N.C. Gen. Stat. § 90-95(b)(2) (1999). Finally, offenses involving the manufacture, sale, delivery, or possession of more than 10 pounds of marijuana were chargeable as discrete offenses under § 90-95(h) and were punished more severely than violations of § 90-95(a)(1).

To determine whether a violation of § 90-95(a)(1) qualifies as a categorical aggravated felony under section 101(a)(43)(B), we ask whether the "minimum conduct" that has a "realistic probability" of being successfully prosecuted under the statute corresponds to the "illicit trafficking" or "drug trafficking crime" definitions. *See Moncrieffe v. Holder, supra*, at 1684-85. The "minimum conduct" punishable under § 90-95(a) is possession of 5 grams of marijuana with intent to "deliver" without remuneration. The Immigration Judge found that § 90-95(a)(1) defines a categorical "drug trafficking crime" under 18 U.S.C. § 924(c) because possession of 5 grams of marijuana with the intent to deliver corresponds to conduct punishable by up to 5 years in prison under 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D). We respectfully disagree.

As the *Moncrieffe* Court determined, and as the Immigration Judge acknowledged, possession of a "small amount" of marijuana for "no remuneration" is punishable as a federal misdemeanor under 21 U.S.C. § 841(b)(4). In *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 703 (BIA 2012), we noted that the phrase "small amount" was not statutorily defined but concluded that 30 grams was a "useful guidepost" for immigration cases because Congress has employed that quantity throughout the Act as a threshold for identifying which marijuana offenses should give rise to immigration consequences and which should not. According to the Immigration Judge, the 30-gram guidepost discussed in *Matter of Castro Rodriguez* was merely advisory rather than "dispositive," and thus he elected to invoke North Carolina's 5-gram threshold instead. We reverse.

It is true that the 30-gram threshold described in *Castro Rodriguez* is a guidepost rather than an inflexible standard. As federal courts interpreting 21 U.S.C. § 841(b)(4) have recognized,

whether a quantity of marijuana is "small" can depend upon context—i.e., 5 grams of marijuana may not be a "small amount" if it is delivered in a prison or to a child. *See, e.g., United States v. Carmichael*, 155 F.3d 561 (4th Cir. 1998) (Table) (upholding district court's determination that 1.256 grams of marijuana is not a "small amount" under 21 U.S.C. § 841(b)(4) when distributed in a prison). Thus, we do not discount the possibility that some cases may present principled reasons for departing from *Castro Rodriguez*'s 30-gram threshold. However, the Immigration Judge identified no such principled reasons here, and thus we disagree with his decision to treat 5 grams of marijuana as a non-"small" amount.[1]

The language of § 90-95(a)(1) leaves open the possibility that defendants may be convicted for possessing 30 grams or less of marijuana with the intent to deliver without remuneration. That possibility is not dispositive of the aggravated felony question, however, because the categorical approach is concerned *not* with the minimum conduct that could theoretically be prosecuted under the statute of conviction, but rather with the minimum conduct that has a "realistic probability" of actually being successfully prosecuted thereunder. *See Moncrieffe v. Holder, supra*, at 1684-85 (explaining that "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'") (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

To demonstrate the requisite "realistic probability" here, the evidence must reflect that North Carolina actually prosecutes defendants under § 90-95(a)(1) for possessing 30 grams or less of marijuana with intent to deliver. *Accord Moncrieffe v. Holder, supra*, at 1693; *Gonzales v. Duenas-Alvarez, supra*, at 193. The respondent has carried his burden of proof in that regard because in *State v. Blackburn*, 239 S.E.2d 626, 629-30 (N.C. Ct. App. 1977), the North Carolina Court of Appeals upheld a § 90-95(a)(1) conviction in which the jury found that the defendant possessed 14 grams of marijuana with intent to deliver. As the minimum conduct that has a realistic probability of being successfully prosecuted under § 90-95(a)(1) is possession of less than 30 grams of marijuana with the intent to deliver without remuneration, that offense corresponds categorically to the federal misdemeanor offense described in 21 U.S.C. § 841(b)(4),

[1] Although *Moncrieffe* did not adopt a test for evaluating whether or not a particular amount of marijuana is "small" within the meaning of 21 U.S.C. § 841(b)(4), the Supreme Court's decision does provide some guidance on the question. Specifically, in support of its determination that Mr. Moncrieffe's statute of conviction—Ga. Code § 16-13-30(j)(1)—encompassed the distribution of "small amounts" of marijuana, the Court relied upon *Taylor v. State*, 581 S.E.2d 386, 388 (Ga. App. Ct. 2003), in which a defendant was convicted for possessing 6.6 grams of marijuana with intent to distribute. *See Moncrieffe v. Holder, supra*, at 1686. The *Moncrieffe* Court's determination that 6.6 grams of marijuana is a "small amount" is irreconcilable with the Immigration Judge's determination that 5 grams is not.

which in turn means that it is not a categorical aggravated felony.[2] The Immigration Judge's contrary determination will be reversed.

Having determined that § 90-95(a)(1) does not define a categorical aggravated felony under section 101(a)(43)(B) of the Act, we now turn to the separate question whether § 90-95(a)(1) is "divisible" vis-à-vis the aggravated felony definition, such that the Immigration Judge may conduct a "modified categorical" inquiry into the respondent's conviction records to determine whether his particular conviction was for possession of more than 30 grams of marijuana with intent to deliver. According to the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, "a divisible statute is one that 'sets out one or more elements of the offense in the alternative'" and in which at least one (but not all) of those alternative elements (or sets of elements) categorically matches the "generic" federal offense to which it must correspond. *United States v. Estrella*, 758 F.3d 1239, 1244-45 (11th Cir. 2014) (quoting in part *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013)).

Section 90-95(a)(1) is phrased in the disjunctive, defining three discrete offenses: (1) manufacture of a controlled substance, (2) transfer of a controlled substance by sale or delivery, and (3) possession with intent to manufacture, sell or deliver a controlled substance. *State v. Moore*, 395 S.E.2d 124, 126 (N.C. 1990). The first alternative defined by § 90-95(a)(1), i.e., "manufacturing" a controlled substance, may well correspond categorically to the analogous federal felony offense defined under 21 U.S.C. § 841(a)(1). However, the second and third alternatives defined by § 90-95(a)(1) do not correspond categorically to federal felonies because of their potential applicability to offenses involving distribution (or possession with intent to distribute) small amounts of marijuana for no remuneration. Under the circumstances, we conclude that it would be permissible for the Immigration Judge to conduct a modified categorical inquiry in order to determine which of the three alternative offenses the respondent was convicted of committing. As it is undisputed that the respondent was convicted of possession of marijuana with intent to deliver rather than manufacturing, such a modified categorical inquiry would not establish the respondent's removability.

Section 90-95(b)(2) also contains language which arguably makes § 90-95(a)(1) divisible. Specifically, by establishing that a transfer of less than 5 grams of marijuana for no remuneration does not qualify as a "delivery," § 90-95(b)(2) could be viewed as effectively adding a minimum quantity "element" to any marijuana "delivery" charge; that is, a North Carolina prosecutor who charges a defendant with violating § 90-95(a)(1) on the basis of a non-remunerative "delivery" of marijuana would need to prove to the jury beyond a reasonable doubt that the transfer involved 5 grams or more of marijuana. *See State v. Land*, 733 S.E.2d 588, 592 (N.C. Ct. App. 2012), *aff'd*, 742 S.E.2d 803 (2013) (explaining that "the State can, under … § 90–95(b)(2), prove

[2] As § 90-95(a) encompasses the non-remunerative delivery of marijuana, moreover, it is not an "illicit trafficking" offense under section 101(a)(43)(B). *See Matter of L-G-H-, supra*, at 371-72 & n. 9 (explaining that "to meet the definition of 'illicit trafficking under the Act, the offense must involve a commercial transaction," i.e., a "passing of goods from one person to another for money or other consideration.")

delivery of marijuana by presenting evidence *either* (1) of a transfer of five or more grams of marijuana, or (2) of a transfer of less than five grams of marijuana for remuneration.").

The existence of such a minimum quantity element would not make § 90-95(a)(1) divisible vis-à-vis section 101(a)(43)(B), however, because for the reasons stated in *Moncrieffe* not all offenses involving possession of 5 grams or more of marijuana with intent to deliver would correspond to federal felonies under the CSA. Although a North Carolina jury may sometimes need to agree that a defendant delivered 5 grams or more of marijuana, it would never need to agree about the extent to which the amount exceeded 5 grams, nor would it need to find that the amount exceeded 30 grams—the default "small amount" threshold for immigration cases.

In view of the foregoing, we conclude that § 90-95(a)(1) is neither a categorical aggravated felony under section 101(a)(43)(B) nor divisible in any manner which would serve to support the respondent's removability. Accordingly, the removal charge under section 237(a)(2)(A)(iii) of the Act will be dismissed. The DHS has not lodged any other removal charges against the respondent, moreover, and therefore the removal proceedings will be terminated.

ORDER: The appeal is sustained and the removal proceedings are terminated.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
LUMPKIN, GEORGIA

File: A091-983-344 December 3, 2014

In the Matter of

MIGUEL GARCIA OLVERA	)	IN REMOVAL PROCEEDINGS
RESPONDENT	)	

CHARGES: Section 237(a)(2)(A)(iii), aggravated felony trafficking in a controlled substance.

APPLICATIONS: Motion to terminate.

EXHIBITIS: 1. Notice to Appear.

2. Record of respondent's 6 July 1999 conviction for possession with intent to manufacture, sale, or deliver marijuana (12 pages).

ON BEHALF OF RESPONDENT: MICHAEL C. URBINA-PABON

ON BEHALF OF DHS: FAYAZ HABIB

ORAL DECISION OF THE IMMIGRATION JUDGE

Findings of Fact and Conclusions of Law

Exhibit 1 was served on respondent on 23 September, 2014.

On 15 October, 2014, respondent admitted allegations 1 through 4 in

Exhibit 1, and respondent denied allegation 5 and the charge in Exhibit 1~~2~~.

On 3 December, 2014, in accordance with respondent's pleas and the evidence in the file, I sustained allegations 1 through 4 in Exhibit 1; and contrary to respondent's plea, I sustained allegation 5 in Exhibit 1. I find by clear and convincing evidence that respondent is removable as charged in Exhibit 1. Mexico was designated as the country of removal.

Exhibit 2 shows that on 6 July, 1999, respondent was convicted of possession with intent to manufacture, sell, or deliver marijuana committed on 6 March, 1999, in violation of North Carolina General Statute Section 90-95(a)(1). Respondent was found guilty and the court sentenced respondent, among other punishments, to be imprisoned in the custody of the North Carolina Department of Corrections for a minimum term of four months and a maximum term of six months. Respondent's sentence was suspended in favor of probation for ~~a 24 months period~~.

To determine whether a respondent was convicted of an aggravated felony, a court just first employ a categorical approach, wherein it compares the elements of the statue forming the basis of the respondent's conviction with the elements of the "generic" crime~~, M.~~, i.e., the offense as commonly understood. See Descamps v. U.S., 133 S. Ct. 2275, 2281 (2013); see also Gonzales v. Duenas-Alvarez, 549 U.S. 183 (2007); see also Taylor v. U.S., 495 U.S. 575, 598 (1990). The conviction qualifies as a categorical offense only if the state statutes elements are the same as, or narrower than, those of the generic offense. In other words, a court must presume that the conviction rests upon nothing more than the least of the Acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense. See Moncrieffe v. Holder, 133 S. Ct. 1678, 1684 (2013). However, if the relevant statute is divisible, meaning that the statute lists potential offense elements in the

alternative, "render[ing] opaque which element played a part in the defendant's conviction[,]" a court may employ the modified categorical approach and look to the record of conviction, including documents such as the indictment, judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript. See Descamps v. U.S., 133 S. Ct. at 2283; see also Shepard v. U.S., 544 U.S. 13, 26 (2005). A court's finding that a prior conviction constitutes an "aggravated felony" must be supported by "clear, unequivocal, and convincing evidence." See Woodby v. INS, 385 U.S. 276, 286 (1966); see also, INA Section 240(c)(3)(A).

In particular, for a marijuana distribution conviction, the Supreme Court has held that such a conviction is for an aggravated felony under the INA if it establishes that the offense involved either remuneration or more than a small amount of marijuana. See Moncrieffe, 133 S. Ct. at 1693-94.

North Carolina General Statute Annotated (NCGSA) Section 90-95 (1999) provides that:

> (a) Except as authorized by this article, it is unlawful for any person:
>
> (1) to manufacture, sell~~,~~ or deliver, or possess with intent to manufacture, sell~~,~~ or deliver, a controlled substance;
>
> . . .
>
> (b) . . . [A]ny person who violates G.S. 90-95(a)(1) with respect to:
>
> . . .
>
> (2) a controlled substance classified in Schedule 3, 4, 5, or 6 shall be punished as a Class 1 felon, except that the sale of a controlled substance classified in Schedule 3, 4, 5, or 6 shall be punished as a Class H felon. The transfer of less than five grams of marijuana for no remuneration shall not constitute a delivery in violation of G.S. 90-95(a)(1).

Employing the categorical approach, the language of NCGSA Section 90-95(a)(1) is analogous to that of 21 U.S.C. Section 841(a)(1). In addition, the exception for less than five grams of marijuana for no remuneration under NCGSA Section 90-95(b)(2) is analogous to the exception for a small amount of marijuana for remuneration under 21 U.S.C. Section 841(b)(4), which drove the Supreme Court's decision in Moncrieffe.

Under the categorical approach and Moncrieffe, respondent's conviction establishes that the offense involved "either remuneration or more than a small amount of marijuana." See Moncrieffe, 133 S. Ct. at 1963-94. Contrary to the arguments in respondent's brief in support of denial of the current removability charge, NCGSA Section 90-95(a)(1), by operation of the section (b)(2) exception, necessarily proscribes conduct that is a felony under the federal Controlled Substances Act. See id.

The Court notes that the Moncrieffe court declined to define "small amount" under 21 U.S.C. Section 841(b)(4), but observed that the Board of Immigration Appeals identified 30 grams as a "useful guidepost." See Moncrieffe, 133 S. Ct. at 678 n.7 (quoting Matter of Castro-Rodriguez, 25 I&N Dec. 698, 703 (BIA 2012)). Because the Board of Immigration Appeals has only suggested this as a guidepost, it is not dispositive in this case, and the Court finds that the language of the North Carolina statute establishes that respondent's conviction involved ~~:~~ "either remuneration or more than a small amount of marijuana."

Therefore, because NCGSA Section 90-95(a)(1) is analogous to 21 U.S.C. Section 841(a)(1) and the North Carolina statute necessarily punishes conduct that is a felony under the federal Controlled Substances Act, respondent's conviction for a marijuana distribution offense constitutes a "drug trafficking" aggravated felony under INS Section 101(a)(43)(B). See Moncrieffe, 133 S. Ct. at 1963; see also Matter of L-G-

H-, 26 I&N Dec. 365 (BIA 2014).

In the alternative, assuming for the sake of argument that the Court was unable to determine that respondent's conviction is an aggravated felony by using the categorical approach, the Court would find that respondent's conviction is an aggravated felony by using the modified categorical approach. As respondent's counsel points out in his brief, one could argue that the NCGSA Section 841(a)(1) is divisible. The Court finds it compelling that the North Carolina Supreme Court has parsed this statute into three offenses: (1) manufacture of a controlled substance, (2) transfer of a controlled substance by sale or delivery, and (3) possession with intent to manufacture, sell, or deliver a controlled substance." State v. Moore, 327 N.C. 378, 381 (1990). In an earlier case, the North Carolina Supreme Court even seemed to treat possession with intent to sell or deliver as separate from possession with intent to manufacture, when it was considering an issue of jury unanimity. See State v. Creason, 313 N.C. 122 (1985). Therefore, under the modified categorical approach, this Court would be permitted to go beyond the primary conviction record and look to the charging document in evidence and see that respondent was charged with possessing one pound of marijuana with the intent to sell and deliver a controlled substance. See Descamps, 133 S. Ct. at 2284; see also U.S. v. Estrella, 758 F.3d 1239, 1246 (11th Cir. 2014). Therefore, even with the Board of Immigration Appeals' 30-gram guidepost, respondent's conviction is for an aggravated felony under Moncrieffe.

Accordingly, respondent's motion to terminate removal proceedings is denied.

Respondent requested no relief.

ORDER

Respondent will be removed from the United States to Mexico.

A written order reflecting the above decision will be provided separately and made part of the record.

Please see the next page for electronic signature

DAN TRIMBLE
Immigration Judge

//s//

Immigration Judge DAN TRIMBLE

trimbled on February 2, 2015 at 12:40 PM GMT