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Analyzing Washington Drug Delivery Crimes (RCW 69.50.401), and Marijuana Possession under 40 Grams (RCW 69.50.4014) After *Moncrieffe* and *Descamps*

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NOTE TO IMMIGRATION COUNSEL:

This analysis is intended to complement the extensive summary on these decisions provided in the practice advisories published jointly by the National Immigration Project, the Immigrant Defense Project, and the Immigrant Legal Resource Center. This overview presumes immigration counsel is familiar with these advisories which are available at:

- *Moncrieffe v. Holder* Advisory: http://www.ilrc.org/files/documents/moncrieffe_ninth_cir_defenses_final_5.28.pdf

- *Descamps v. United States* Advisory: http://immigrantdefenseproject.org/wp-content/uploads/2013/06/Descamps-advisory-7-17-FINAL.pdf

I. Challenging Removal & Relief Ineligibility Due to Convictions: The New and Improved Landscape

PRACTICE HIGHLIGHT: The Supreme Court and 9th Circuit decisions outlined here significantly expand the basis to vigorously contest removal and relief bars in many cases and immigration counsel should be doing so whenever possible.

A. The Categorical Approach Re-Calibrated to its Original, Traditional Principles

1. Minimum Conduct Test Lives Again!

The categorical and modified categorical approach constitute the legal framework used by immigration judges (IJs) to determine whether a state conviction triggers a conviction-related ground of removability, inadmissibility, or bars relief from removal. In recent years both BIA and Ninth Circuit decisions had significantly compromised the integrity of this framework and eroded its core principles, causing countless unwarranted removals. See, *e.g.*, *United States v. Aguila-Montes De Oca*, 655 F.3d 915 (9th Circuit 2011) (*en banc)* and *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012). In *Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013), and in *Descamps v. United States*, 133 S.Ct. 2276 (2013), the U.S. Supreme Court overruled these decisions, and re-established the strict limitations that govern the categorical approach.

These decisions make clear that the categorical approach is an elements-based test, not an evidence (facts)-based test. In other words, it doesn't matter what happened that dark & stormy night; it only matters what happened that day in criminal court. Under this approach, the relevant inquiry is whether the statute of conviction *necessarily*, in every case, requires that the State prove elements that match the elements of the generic immigration offense. **Traditionally, this was known as the "minimum conduct" test: does the minimum conduct necessary to violate the statute match the generic immigration definition at issue?** If there is no

match, that is the end of the inquiry – period – and the conviction cannot trigger the conviction-based removal ground at issue.

EXAMPLE – ASSAULT 4th Degree: Because the minimum conduct necessary for a conviction under RCW §9A.36.041 includes placing someone in apprehension of harm which does not even include touching, a conviction for this offense can never match the elements of the generic definitions relating to crimes of violence, crimes involving moral turpitude or crimes against children and can, thus, categorically never trigger these grounds. No resort to the documents in the record of conviction is necessary or permitted – it does not matter what the actual conduct of conviction was. *See* discussion, *infra*, §II.A.

2. Significant Limitations Re-Imposed on Using the Modified Categorical Approach

While the BIA and Ninth Circuit had sanctioned continuing on to the modified categorical ("mod-cat") approach in almost all cases (*see*, *Lanferman*, *supra*), the *Moncrieffe* and *Descamps* Courts made clear that the mod-cat approach (which permits the examination of a limited number of specific documents from the record of conviction (ROC[1])) was reserved only for statutes which set forth multiple, separately defined offenses, one of which would trigger the generic immigration definition. *Descamps*, 133 S.Ct. at 2286. "[A]pproved extra-statutory documents [can be reviewed] only when a statute defines burglary not (as here) over broadly, but instead alternatively, with one statutory phrase corresponding to the generic crime and another not." Moreover, even where it is used, consultation of the ROC under the mod-cat approach is strictly limited to narrowing the record to identify the specific statutory provision related to the crime of conviction; the defendant's particular conduct or the underlying facts remain irrelevant.

EXAMPLE Assault Third Degree: Like, Descamps, Washington's Assault in the 3rd degree, RCW § 9A.36.031, sets forth 10 separately defined offenses, some of which can match generic immigration definitions and some which do not. The IJ is permitted to consult the ROC for the exclusive purpose of identifying which of the 10 provisions is the subject of respondent's conviction

Missing Element Statutes. Where the statute of conviction is missing an element of the generic immigration definition it can never be a match. The IJ is not permitted to consult the ROC to determine whether specific facts and/or conduct could supply it.

EXAMPLE: Since none of Washington's general assault statutes (RCW §§ 9A.36.011-41) require that the victim be a minor child, a conviction for any of these offenses will no longer risk triggering INA 237(a)(2)(E)(i). Regardless of whether the ROC indicates that the victim was, in fact, a minor, a general assault conviction is categorically missing an essential element of the BIA's generic definition of what constitutes a crime of child abuse set forth in *Matter of Velasquez-Herrera*, 24 I&N Dec. 503 (BIA 2008).[2] *See*, discussion, *infra*, II.A.

3. Underlying Rationale: Upholding the Defendant's Benefit of the Bargain

Moncreiffe and *Descamps* go a long way to righting the categorical approach "ship" (which had been dangerously listing). However, ensuring their full implementation by immigration courts will take strong, vigilant advocacy from immigration counsel. A foundational argument for pushing forward in the application of these

[1] Under the modified categorical approach, the IJ can review the charging document and jury instructions, or in cases where the Respondent pleaded guilty, "the statement of factual basis for the charge [ ] shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact adopted by the defendant upon entering the plea." *Shepard v. U.S.*, 544 U.S. 13, 20-21 (2005).

[2] Note, however, that a conviction for Assault of a child under RCW 9A.36.120-140 do have the victim's minor status as an element will sufficiently match the generic definition of a crime of child abuse and trigger this ground of deportation.

cases is the primary rationale that *Descamps* cited in overturning *Aguila-Montes de Oca*, namely the benefit of the bargain.[3]

Ninety-four percent of state convictions are the result of guilty pleas. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Plea bargaining is not an act of grace by the State, but a contractual agreement where both sides obtain a benefit. *See, e.g., United States v. Franco-Lopez*, 312 F.3d 984, 989 (9th Cir.2002) ("Plea agreements are contractual by nature and are measured by contract law standards."). Just as the defendant chooses rationally to avoid the risk of conviction at trial, the prosecution avoids testing its evidence before a jury. As the U.S. Supreme Court has explained, "[t]he potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties." *Frye*, 132 S. Ct. at 1407.

The courts have long recognized that honoring a plea bargain is a core concern in the application of the two-step categorical approach. In its seminal decision, *Taylor v. United States*, 495 U.S. 575 (1990), outlining this analytical framework, the Supreme Court stated, "in cases where the defendant pleaded guilty, there often is no record of the underlying facts. Even if the Government were able to prove those facts, if a guilty plea to a lesser, non-burglary offense was the result of a plea bargain, it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty to burglary." *Id.* at 602.

The Ninth Circuit has also made clear that protecting a defendant's benefit from the plea bargain is a critical rationale underpinning the use of the modified categorical approach in determining whether immigration consequences attach to a conviction. In *Sanchez-Avalos v. Holder*, 693 F.3d 1011 (9th Cir. 2012), the court found that the respondent's conviction for sexual battery was not an aggravated felony sexual abuse of a minor, despite the fact that it was committed against a victim who was thirteen at the time of the offense. The circuit explained that it could not consider the victim's date of birth, which was stated in the information, because "limitations on the reach of modified categorical analysis are necessary to protect defendants from procedural unfairness." *Id.* at 1018. The circuit explained

> "Sanchez pled guilty to the sexual battery charge in exchange for the dismissal of all of the child- and minor-specific charges against him. He may have expected that this deal would spare him from the consequences of conviction for a child sex crime. To conclude that we may nevertheless penalize him based on the date of birth allegation would risk undoing the bargain he struck with the state prosecutor." *Id.*

This Board has also recognized the importance of preserving the benefit of the bargain for plea agreements when applying the modified categorical approach in *Matter of Ahortalejo-Guzman*, 25 I&N Dec. 465, 465 (BIA 2011).[4]

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[3] The *Descamps* Court stated:

> Still worse, the *Aguila–Montes* approach will deprive some defendants of the benefits of their negotiated plea deals. Assume (as happens every day) that a defendant surrenders his right to trial in exchange for the government's agreement that he plead guilty to a less serious crime, whose elements do not match an ACCA offense. Under the Ninth Circuit's view, a later sentencing court could still treat the defendant as though he had pleaded to an ACCA predicate, based on legally extraneous statements found in the old record. *Taylor* recognized the problem: "[I]f a guilty plea to a lesser, nonburglary offense was the result of a plea bargain," the Court stated, "it would seem unfair to impose a sentence enhancement as if the defendant had pleaded guilty" to generic burglary.495 U.S., at 601–602, 110 S.Ct. 2143. That way of proceeding, on top of everything else, would allow a later sentencing court to rewrite the parties' bargain.

Descamps v. U.S. 133 S.Ct. 2276, 2289 (2013)

[4] "[T]he hierarchical approach serves the important function of recognizing and preserving the results of a plea bargain, where the parties, with the consent of a trial judge, agree to allow the defendant to plead to a less serious crime. By recognizing that the evaluation of a crime involving moral turpitude is not an invitation to relitigate a conviction, *Matter of Silva-Trevino* indicates that it does not intend to allow Immigration Judges to undermine plea

In cases involving noncitizen defendants, the benefit of a plea bargain also includes avoiding the immigration consequences of convictions. The Supreme Court has explained that, "deportation is an integral part—indeed, sometimes the most important part—of the penalty that may be imposed on noncitizen defendants who plead guilty to specified crimes." *Padilla v. Kentucky*, 130 S.Ct. 1473, 1480 (2010). Moreover, "[p]reserving the client's right to remain in the United States may be more important to the client than any potential jail sentence." *Id.* at 1483 (citing *INS v. St. Cyr*, 533 U.S. 289, 323 (2001)). "There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of the immigration consequences of their convictions." *St. Cyr*, 533 U.S. at 322. To prevent against deportation, the Supreme Court recognized that "[c]ounsel who possess the most rudimentary understanding of the deportation consequences of a particular criminal offense may be able to plea bargain creatively with the prosecutor in order to craft a conviction and sentence that reduce the likelihood of deportation, as by avoiding a conviction for an offense that automatically triggers the removal consequence." *Padilla*, 130 S.Ct. at 1486.

4. CIMT Analysis: *Matter of Silva-Trevino* Overruled & Categorical Approach Controls

Although *Moncreiffe* and *Descamps* did not directly involve analysis of whether a conviction constitutes a crime involving moral turpitude (CIMT), the reinvigorated categorical analysis framework they set out also controls whether state convictions meet the relevant generic CIMT definition.[5] In its recent decision in *Olivas-Motta v. Holder*, 716 F.3d 1199 (9th Cir. 2013), the Ninth Circuit rejected *Matter of Silva-Trevino*, 24 I&N Dec. 687 (A.G. 2008). Thus, in the Ninth Circuit, IJ's are no longer permitted to conduct an additional third step of analysis under *Silva-Trevino*, which let IJs look at "any additional evidence deemed necessary" *outside* of the record of conviction, to determine if a conviction was for a CIMT, when the traditional categorical and modified categorical steps were "inconclusive." Consequently, CIMT determinations are now again subject to the strict limitations set forth in *Moncrieffe* & *Descamps*.

> **EXAMPLE:** both the BIA and Ninth Circuit have held that for a theft offense to constitute a CIMT, it must contain these two elements: 1. a taking, 2. with the intent to permanently deprive. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973). Since intent to permanently deprive is NOT an element of Washington theft offenses (*State v. Komok*, 133 Wash 810 (Wash. 1989)), a theft conviction under any degree (RCW §§ 9A.56.030-050) is categorically not a CIMT - period. The analysis ends here and the IJ is not permitted to consult the ROC or any other documents since the facts or conduct involved in respondent's conviction is not relevant to the analysis since the statute does not set forth multiple, separately defined offenses.

B. How Do I Apply this Reinvigorated Categorical Approach to My Case? The Four Key Questions.

To determine whether a Washington (or other state) conviction triggers a conviction-based ground of deportation or inadmissibility, or bars relief from removal, immigration counsel should apply the categorical and modified categorical approach by using the following four questions.

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agreements by going behind a conviction to use sources outside the record of conviction to determine that an alien was convicted of a more serious turpitudinous offense.

[5] While *Silva-Trevino* added a third step to the two step categorical approach, it reaffirmed the use of the first two steps, recognized by *Taylor* and *Shepard* in determining whether a conviction is a CIMT: "(1) look first to the statute of conviction under the categorical inquiry set forth in this opinion and recently applied by the Supreme Court in *Duenas-Alvarez*; (2) if the categorical inquiry does not resolve the question, look to the alien's record of conviction, including documents such as the indictment, the judgment of conviction, jury instructions, a signed guilty plea, and the plea transcript." *Matter of Silva-Trevino*, 24 I&N Dec. at 704. Since this approach has been refined by the Supreme Court, the current approach should apply.

NOTE: The categorical approach only applies to conviction-based inadmissibility and deportation grounds. The categorical approach **does not apply to conduct-based grounds** (e.g., INA § 212(a)(2)(C)'s 'reason to believe" involvement in drug trafficking). The categorical approach **also does not apply to** the limited universe of crime-related immigration provisions that are deemed to be "**circumstance specific**" under *Nijhawan v. Holder*, 129 S.Ct. 2294, 2301 (2009).[6].

1. What is the generic definition of the immigration provision at issue?

The generic definition is the legal standard to which your client's conviction will be compared. The INA, Supreme Court, Circuit Courts and the BIA create generic definitions. Some are well-defined while others are not. For example, both the BIA and Ninth Circuit have held that for a theft offense to constitute a CIMT, it must contain these two elements: 1. a taking, 2. with the intent to permanently deprive. *See Castillo-Cruz v. Holder*, 581 F.3d 1154 (9th Cir. 2009); *Matter of Grazley*, 14 I&N Dec. 330 (BIA 1973).

2. Do the elements in the statue of conviction categorically match the generic definition?

Counsel's task here is to identify the elements necessary to obtain a conviction under the state statute that is the subject of your client's conviction by consulting the statute and caselaw interpreting it, and compare those elements to the elements of the generic definition of the immigration provision at issue. The inquiry is not what a defendant's actual conduct was, but whether the "minimum conduct" that satisfies the elements of the conviction statue also satisfies the generic immigration definition. As the Supreme Court explained in *Moncrieffe*, "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction 'rested upon [nothing] more than the least of th[e] acts' criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Moncrieffe*, 133 S.Ct. at 1684.

Indivisible Statutes. If the state statute sets out just one unitary offense, it is indivisible. An indivisible statute is a categorical match with a generic immigration offense only if the elements that must be proved by the State to obtain a conviction match the elements of the generic offense. An element is a fact or finding *required* for conviction. In other words, a state offense is a categorical match only if it "'necessarily' involved . . . facts equating to [the] generic [federal offense]." *Moncrieffe*, 133 S.Ct. at 1684 (internal citations omitted). As the *Moncrieffe* Court noted, "whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" *Id.*

If all convictions under the state statute match the federal generic definition, then the conviction categorically matches (and triggers) the immigration consequence. However, if someone could be convicted under the statute for conduct that does not match the federal generic definition, or, where the state statute is missing an element of the generic definition, as it was in *Descamps*, it can NEVER be a categorical match to the generic definition. When this happens, *the analysis stops there*, *regardless of information in the record* since "overbroad" statutes can no longer be deemed to be categorical matches to the generic definitions and, thus, no resort to the modified categorical approach is permitted. In short, game over, respondent prevails.

Realistic Probability Test. It is important to note that there must be a "realistic probability" that the minimum conduct that *could* be prosecuted under the statute actually will be/has been. Applying "legal imagination to a state statute's language" is not enough. *Gonzalez v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007). In *Gonzalez v. Duenas-Alvarez*, the Supreme Court dismissed an argument that a theft offense was broader than an aggravated felony, due to a non-statutory theory of liability. The Court held that "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

[6] Under the circumstance specific approach, IJs are allowed to consider evidence outside the record of conviction related to the conviction to determine whether there is a match. The monetary threshold of $10,000 associated with the fraud aggravated felony under INA §101(a)(43)(M)(i), for example, requires a circumstance specific approach. For more analysis of this issue see *The Impact of Nijhawan v. Holder on Application of the Categorical Approach to Aggravated Felony Determinations*, available at www.nationalimmigrationproject.org.

the crime.'" *Id.* In *Moncrieffe*, the Supreme Court cited examples of Georgia state caselaw demonstrating that social sharing of small amounts of marijuana without remuneration is prosecuted under the statute Mr. Moncrieffe had been convicted under. *See Moncrieffe*, 133 S.Ct. at 1686. However, the Ninth Circuit has held that statutory language alone is sufficient to meet the "reasonable probability" test if it expressly reaches the conduct in question. *See U.S. v. Grisel*, 488 F.3d 844 (9th Cir. 2007). Citing to state caselaw, where available, is always a useful precaution.

3. May the IJ go on to the modified categorical approach, and if so, for what purpose?

Divisible Statutes. An IJ may review the record of conviction *only* if the statute is divisible. A statute is "divisible" where the state statute "contain[s] several different crimes, each described separately." *Moncrieffe*, 133 S.Ct. at 1684. A divisible statute "sets out one or more elements of the offense in the alternative—for example, stating that burglary involves entry into a building *or* an automobile." *Descamps*, 133 S.Ct. at 2281. Thus, divisible here means that there are multiple, distinct crimes in one statute.

Layers of Divisibility. Sometimes statutes may have multiple layers of divisibility. The first layer is the statute as a whole, which contains multiple, separately described offenses. For example, in *Moncrieffe*, the respondent was convicted under a divisible Georgia statute which criminalized the possession, manufacture, delivery, distribution, possession with intent to distribute, etc. of marijuana. *Moncrieffe*, 133 S.Ct. at 1685. The Court consulted the record of conviction, specifically the plea agreement, to determine that Mr. Moncrieffe was convicted of possession with intent to deliver marijuana. *Id.* The second layer is whether this prong of the statute is itself divisible. In Georgia, one could be convicted under the "possession with intent to deliver marijuana" prong for social sharing of a small amount of marijuana without remuneration. Therefore the Court found that it was overbroad – but not further divisible. It did not examine any additional conviction records to determine what the respondent's particular circumstances were, finding that "ambiguity on this point means that the conviction did not 'necessarily' involve facts that correspond to" the generic offense. *Id.* at 1687.

Means v. Elements. Immigration counsel should be alert to the not-always-clear distinction between statutory elements and the alternate *means* of committing the offense. The means of commission are not "elements." One test for an element may be if jury unanimity is required to find it and if the finding increases the maximum possible sentence that may be imposed. For example, the three prongs of the common law definition of "assault" in Washington are not different elements of an assault; rather, they are different means or ways of committing an assault. A jury need not unanimously decide which way the defendant committed the assault. *See*, discussion, *infra* at § II.A.

For What Purpose? The *sole purpose* of the modified categorical approach is to identify which statutory offense in a divisible statute was the subject of the conviction. "If one alternative (say, a building) matches an element in the generic [burglary] offense, but the other (say, an automobile) does not, the modified categorical approach permits [the IJ] . . . to determine which alternative formed the basis of the defendant's prior conviction." *Descamps*, 133 S.Ct. at 2281. Because the *Descamps* Court expressly overruled *Aguila-Montes*' evidence-based approach and reaffirmed the elements-based approach, IJ's are no longer required or permitted to review the conviction record to determine whether the facts of respondent's conviction can be made to match the generic definition at issue.

4. If the modified categorical approach applies, which documents can an IJ review?

In applying the modified categorical approach to determine which of the separately described offenses the Respondent was convicted of, the IJ can review the charging document and jury instructions, or in cases where the Respondent pleaded guilty, "the statement of factual basis for the charge [ ] shown by a transcript of plea colloquy or by written plea agreement presented to the court, or by a record of comparable findings of fact

adopted by the defendant upon entering the plea." *Shepard v. U.S.*, 544 U.S. 13, 20-21 (2005). Documents such as police reports and the certification for determining probable cause may be considered only if specifically stipulated or assented to by the defendant as providing the factual basis for the plea. *See e.g., Suazo Perez v. Mukasey*, 512 F.3d 1222 (9th Cir. 2008) (permitting consideration of police reports and a statement of probable cause because the documents were specifically incorporated into the guilty plea when the respondent checked a box indicating that the Court could review those documents to establish a factual basis for the plea). Additionally, after *Olivas-Motta*, the IJ cannot review evidence outside of the record of conviction to determine whether a state conviction constitutes a CIMT offense.

C. Advocating for Your Client in Light of These Changes

1. Contesting Removal Charges

PRACTICE STRATEGY: The cases outlined above have dramatically altered the landscape for contesting removability for numerous Washington crimes that were previously thought to trigger certain grounds of removability. In order to provide your client with effective assistance, where s/he is facing removal for a criminal conviction, immigration counsel must conduct an analysis pursuant to the framework set forth above to determine what, if any, arguments are available to contest removability for the conviction-based removal charges at issue.

2. Advocating For Relief Eligibility: *Young v. Holder* Currently Under 9th Circuit Review

PRACTICE STRATEGY: Use the four-step analysis in Sec. I.B above to determine whether your client's conviction triggers conviction-based deportation/inadmissibility bars. Where it does not, counsel should be advocating to the Court that *Moncrieffe* and *Descamps* overruled *Young* and establish why, under the reconfigured categorical approach, the conviction does not preclude your client from establishing prima facie eligibility for relief. As of this writing, the Ninth Circuit panel reviewing the BIA's decision in *Almanza-Arenas* has requested briefing from the parties regarding the impact of *Moncrieffe* & *Descamps* on relief eligibility determinations. This supplemental briefing in *Almanza-Arenas is available at*:

- http://www.ilrc.org/files/documents/almanza_arenas_moncrieffe_and_young_brief.pdf

Since 2012, applicants for relief from removal in the Ninth Circuit have been laboring under the weight of *Young v Holder*, 697 F.3d 976 (9th Cir.2012), which required respondents to bear the burden of establishing by a preponderance of the evidence that a conviction *does not* trigger conviction-related deportability/inadmissibility (e.g., is *not* an aggravated felony). Under *Young*, the inquiry is treated as a factual investigation and also requires the respondent to produce all conviction records. Importantly, the applicant can never establish statutory eligibility for the relief sought if the legal record is "inconclusive." *See Almanza-Arenas v. Holder*, Nos. 09-71415, 10-73715; *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009).

Young appears to be wholly incompatible with *Moncrieffe* and *Descamps.* Even if *Young* is not entirely overturned, after reversal of *Aguila-Montes de Oca* and *Silva-Trevino* the universe of "inconclusive" conviction records to which *Young* could apply shrinks considerably to only those where two truly separate, statutory alternatives cannot be narrowed – a very uncommon occurrence in reality. For example, a controlled substance conviction under RCW 69.50.401 criminalizes manufacture, delivery or possession with intent to deliver a controlled substance, and is thus divisible. If the information and the plea agreement both said "manufacture *or* possess with intent to deliver marijuana" the record of conviction would be "inconclusive" because it could not be narrowed to one or the other. Given the specificity of plea agreements that is generally required under Washington law and practiced in Washington courts, these scenarios are likely to be rare. Additionally, as the *Moncrieffe* Court pointed out, "ambiguity in criminal statutes referenced by the INA must be construed in the noncitizen's favor." *Moncrieffe*, 133 S.Ct. at 1693.

II. Analysis of Washington Drug Trafficking Crimes Under RCW 69.50.401

A. All Convictions under RCW this Statute Will Constitute Controlled Substance Violations

Even if a conviction for delivery or possession with intent to deliver (PWID) marijuana (MJ) avoids aggravated felony classification as outlined below, it, along with all other convictions under this statute will trigger inadmissibility and deportation ground as crimes relating to a controlled substance.

B. "Reason To Believe" Engaged in Illicit Trafficking of Drugs

Moncrieffe and *Descamps* will not enable you to contest the inadmissibility ground which applies to a noncitizen whom the government "knows or has reason to believe" has been an illicit drug trafficker or a knowing aider and abettor is permanently inadmissible.[7] This is a conduct-based ground that is not subject to the categorical approach. ground requires that noncitizen must have been a knowing and conscious participant or conduit in the transfer, passage, or delivery of narcotic drugs.[8] The DHS must demonstrate that it has substantial and probative evidence that the noncitizen was engaged in the business of selling or dealing in controlled substances.[9]

This ground of inadmissibility and removal does not require a conviction but a conviction is usually enough. The government can try to use an original or dropped charge, police report or certificate of probable cause to try meet the "reason to believe" ground. A permanent resident who travels outside the United States while inadmissible under this ground may become deportable upon return. Therefore, it will be impossible to avoid triggering this ground unless it is possible to factually controvert an allegation of trafficking (unlikely if a conviction under this statute).

C. Will a Conviction under RCW 69.50.401 Constitute a Drug Trafficking Aggravated Felony?

As outlined below, only convictions under RCW 60.50.401(2)(c) that expressly indicate that the drug was marijuana (or in the rare circumstance fail to identify which Schedule I drug) will benefit directly from *Moncrieffe* and *Descamps*. All other convictions under this statute will be upheld as drug trafficking aggravated felonies under 8 USA 1101(a)(43)(B) – unless the defendant obtained an *In Re Barr* plea (see § III.B below).

1. The Generic Definition of a Drug Trafficking Aggravated Felony

The definition of an "illicit trafficking in a controlled substance" crime has two parts:

- actual "illicit trafficking" in general, requiring a commercial element such as sale; or
- a "drug-trafficking crime as defined in 18 USC 924(c)."[10] The latter includes any "felony punishable under" the Controlled Substances Act (CSA).[11] Under the CSA, distributing a small amount of marijuana

[7] INA 212(a)(2)(C); 8 USC 1182(a)(2)(C).
[8] See, e.g., *Matter of Rico*, *supra* at 186 (1977) (finding that the petitioner was a "knowing and conscious participant" in an attempt to smuggle drugs into the United States which "brings him within the provisions of section 212(a)(23) of the Act relating to 'illicit trafficker'"); *Matter of Favela*, 16 I&N Dec. 753, 755 (1979) (upholding the IJ's finding that the alien was a "conscious participant" in an attempt to smuggle drugs into the United States and thereby excludable under section 212(a)(23)). See *Rojas-Garcia v. Ashcroft*, 339 F.3d 814, 823 (9th Cir. 2003)
[9] *Lopez–Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir.2004); *Alarcon–Serrano v. INS*, 220 F.3d 1116, 1119 (9th Cir.2000).
[10] INA 101(a)(43)(B); 8 USC 1101(a)(43)(B)
[11] *Matter of Davis*, 20 I. & N. Dec. 536 (BIA 1992); INA 101(a)(43)(B); See *Carachuri–Rosendo v. Holder*, 130 S.Ct. 2577 (2010).

for no remuneration is, like simple possession, a federal misdemeanor. [12]

The Supreme Court held that "illicit trafficking in a controlled substance" is a generic crim[e] to which the categorical approach applies, not a circumstance-specific provision"[13] Under *Moncrieffe* a state offense is a categorical match to the definition only if a *conviction* for the state offense requires facts equivalent to those required by the federal offense incorporated into the generic definition. The only facts that count are the minimum the statute requires for conviction. "Whether the noncitizen's actual conduct involved such facts 'is quite irrelevant.'" [14]

The Court rejected the argument that an IJ can consult the record to see if the conviction involved conduct beyond the minimum required by state law. The *Moncrieffe* Court did not look at the record of conviction to see whether Mr. Moncrieffe's actual conduct or conduct outlined in his plea involved distribution of a small amount or remuneration as required by the CSA. It looked at the record of conviction *for the sole purpose* of identifying the crime of conviction. Once it did so, the Court determined that the minimum conduct associated with the conviction qualified as a misdemeanor under the CSA. Thus, the Georgia state statute of conviction did not match the drug trafficking aggravated felony definition, and could not be further narrowed to include multiple separately described offenses, and further reference to the record of conviction served no further purpose.[15]

Moncrieffe held that a conviction under a state statute prohibiting distribution of marijuana without regard to amount or remuneration *never* analytically constitutes a conviction for more than giving away "a small amount" of marijuana, which is the minimum conduct. [16]

No Separate Burden of Proof Regarding Relief Eligibility. The Court treated establishing eligibility for relief as a pure legal inquiry to which burden of proof has no relevance. "[T]here is no reason to believe that state courts will regularly or uniformly admit evidence going to facts, such as remuneration, that are irrelevant to the offense charged."[17] *Moncrieffe* may have partly overruled *Young v. Holder* or at least severely undermines it. See § I.C.2, above.

2. Washington's Drug Trafficking Statute RCW 69.50.401 Is Divisible

a. Divisibility Layer #1 RCW 69.50.401(1): "Which type of crime"?

RCW 69.50.401(1) describes three separate controlled substance crimes:

- Manufacture of a controlled substance;
- Possession with intent to deliver (PWID) a controlled substance; and
- Delivery of a controlled substance.

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[12] 21 USC 841(b)(4).

[13] *Moncrieffe* at 1691.

[14] *Id.* at 1684, citing to *Guarino v. Uhl,* 107 F.2d 399, 400 (2nd Cir. 1939) (L. Hand, J.).

[15] Our cases have addressed state statutes that contain several different crimes, each described separately, and we have held that a court may determine which particular offense the noncitizen was convicted of by examining the charging document and jury instructions, or in the case of a guilty plea, the plea agreement, plea colloquy, or " 'some comparable judicial record' of the factual basis for the plea." *Moncrieffe* at 1684 (citations omitted)

[16] [T]he fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved. . . . Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony. *Moncrieffe v. Holder* 133 S.Ct. 1678, 1686 -1687 (2013)

[17] *See Moncrieffe* at 1692.

The immigration court will be permitted to consult the record of conviction for the purpose of identifying which of the three crimes was the subject of respondent's conviction. Any conviction for manufacture of any controlled substance, including marijuana, is classed as a felony under the CSA and, thus, constitutes an aggravated felony.[18]

b. Divisibility Layer #2 RCW 69.50.401(2): "Which type of drug"?

RCW 69.50.401(2) has five separate subsections that divide up penalties for a conviction under the statute depending upon which type of drug was involved (and in some cases the amount). Washington controlled substances are set forth in five drug schedule statutes – I through V.

The immigration court can consult the record of conviction to determine which type of drug was involved in the conviction. However, **only the crime of delivery or PWID of marijuana benefits unquestionably from *Moncrieffe* by no longer being an aggravated felony.** Delivery of the other schedule II or III drugs will be classed as aggravated felonies.

c. Divisibility Layer #3: Confirming that the conviction involves marijuana

Marijuana is a Schedule I drug. The statutory offense is properly identified as "**delivery [or possession with intent to deliver (PWID)] of a non-narcotic Schedule I controlled substance.**" Since the statutory text does not list specific drugs but includes all Schedule I drugs that are not "narcotic drugs"[19] or flunitrazepam, where the record of conviction does not specify that the Schedule I drug is marijuana, immigration counsel may need to clarify this for the immigration court (and the record).

What legally distinguishes PWID marijuana from PWID of all other *Schedule I non-narcotics* such as LSD, is the lower sentencing range for marijuana.[20] The Washington Supreme Court ruled that "the identity of a controlled substance is an element of the offense where it aggravates the maximum sentence with which the court may sentence a defendant."[21] Under *Matter of Martinez-Zapata* such a fact is treated "as an element of the underlying offense" and a conviction involving a fact found beyond a reasonable doubt is therefore a 'conviction' for the enhanced offense."[22] This is a strong argument that marijuana is an element, and that PWID of marijuana is a separate offense, despite the statutory language which does not describe a separate crime.

d. Where conviction involves a *non-narcotic Schedule I drug* other than marijuana

If the client was convicted under RCW 69.50.401(2)(c) of Delivery or PWID of a non-narcotic Schedule I controlled substance *not* named as marijuana (e.g., ecstasy/MMDA, or LSD) immigration counsel can argue defensively, despite the above, that the offense is not further divisible since specific schedule I drugs are not *statutory* elements.[23] Since this is a risky, untested argument it should not be relied on in crafting a plea, if there

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[18] Assuming no other argument can be made. Note that the definition of "manufacture" in RCW 69.50.101(r) is facially broader in one respect than in 21 USC 802(15)(the CSA): the RCW definition includes "conversion" and the CSA does not.

[19] "Narcotic" drug at RCW 69.50.101(x) covers opiates, opiate derivates and cocaine. The only "narcotic drugs" in Schedule I are certain opiates and opium derivatives, delivery of which is a separate, Class B felony. Cocaine is a Schedule II "Narcotic drug."

[20] RCW 9.94A.518; see RCW 9.94A.517. The difference on the drug sentencing grid between Level I and Level II is the difference between 0-6 months and 12-20 months.

[21] *State v. Goodman* 150 Wash.2d 774, 785-786, 83 P.3d 410, 415 - 416 (Wash.,2004)

[22] *Matter of Martinez-Zapata* 24 I&N Dec. 424 (BIA 2007)

[23] A sketch of the argument is that length of state sentence is not an element of the generic definition of drug-trafficking, and that delivery of MJ is just one way of committing the crime of delivery of a [non-narcotic] controlled substance classified in Schedule I. RCW 69.50.401(2)(c), which covers PWID MJ, is explicitly disjunctive only as to "[a]ny other controlled substance classified in Schedule I, II, *or* III." It is *statutorily* divisible only into the separately-described offenses of a non-narcotic from Schedule I, II, or III. (MJ is in Schedule I.) Compared to the abstract, generic definition of an AF neither the

is any other way to avoid an AF, such as an *In re Barr* plea to delivery of marijuana. **Please contact the WDAIP if you are going to assert this argument in immigration court**.

3. Under *Moncrieff*, Delivery or Possession with Intent to Deliver Marijuana Is Not an Aggravated Felony

PWID of marijuana in Washington does not make commercial delivery of MJ, as opposed to non-remunerative transfer of a small amount, into separate offenses. But only the former could be a felony under the Controlled Substances Act (CSA), which does separate the two. The CSA makes it unlawful to manufacture, distribute, or dispense, or possess with intent, a controlled substance. But a person who violates it by distributing "a small amount of marihuana for no remuneration shall be treated as" a simple possessor, which is a federal misdemeanor.[24]

The Washington statute is like the Georgia state statute under which Mr. Moncrieffe was convicted in that it does not make these into separate offenses. Therefore

> the fact of a conviction for possession with intent to distribute marijuana, standing alone, does not reveal whether either remuneration or more than a small amount of marijuana was involved. . . . [A] conviction could correspond to either the CSA felony or the CSA misdemeanor. Ambiguity on this point means that the conviction did not "necessarily" involve facts that correspond to an offense punishable as a felony under the CSA. Under the categorical approach, then, Moncrieffe was not convicted of an aggravated felony.[25]

Once the specific offense of conviction was identified as PWID marijuana, the Court applied a categorical approach without further subdividing the offense or engaging in a factual inquiry. It didn't matter what Mr. Moncrieffe did; it only mattered of what statutory offense he was convicted.

Delivery or PWID of marijuana is not a categorical match to the aggravated felony definition.

- A conviction for delivery or possession with intent to deliver (PWID) marijuana under RCW 69.50.401(c) does not require remuneration or a minimum quantity. There is no separate carve-out for 'social sharing' of marijuana.

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fact of MJ nor the fact of mescaline or ecstasy are necessary for conviction, even if distinguishing them is necessary under *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Blakely v. Washington*, 542 U.S. 296 (2004) for sentencing.

> The courts considered which "provision ... states a complete crime upon the fewest *facts*,"[ ] which was significant after *Apprendi* to identify what a jury had to find before a defendant could receive § 841(b)(1)(D)'s maximum 5–year sentence. **But those concerns do not apply in this context.** Here we consider a "generic" federal offense in the abstract, not an actual federal offense being prosecuted before a jury. **Our concern is only which facts the CSA relies upon to distinguish between felonies and misdemeanors, not which facts must be found by a jury as opposed to a judge[ ]**

Moncrieffe at 1688 -1689 (emphasis added). Note that for immigration purposes the maximum possible sentence for a crime relies on the statutory maximum, not the maximum possible sentence under *Blakely.* See *Mendez-Mendez v. Mukasey* 525 F.3d 828, 833-834 (9th Cir.2008); *Mejia-Rodriguez v. Holder* 558 F.3d 46, 48 (2st Cir.2009). Although *Martinez-Zapata* cited both *Apprendi* and *Blakely*, the enhancement in question raised the statutory maximum from 180 (class B misdemeanor) days to 365 (class A misdemeanor), and was not merely a sentencing range factor.

[24] Compare 21 USC §§ 841(a)(1) and (b)(1)(4); 21 USC § 844(simple possession); *Moncrieffe* at 1685-1687.

[25] *Moncrieffe* at 1686 -1687.

- The definition of delivery is simply a transfer from one person to another. [26]

Consequently, like the Georgia statute at issue in *Moncrieffe*, a conviction under RCW 69.50.401(2)(c) for PWID or delivery of marijuana should never be classified as an aggravated felony, regardless of the actual conduct involved in the conviction.

Applying the Reasonable Probability Test . In *Gonzales v. Duenas-Alvarez* the Supreme Court dismissed a non-statutory theory of liability for a theft offense that would make the crime broader than the definition of an aggravated felony.[27] The court said that applying "legal imagination to a state statute's language" was not enough and that 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."[28] To do so there must be a case showing that the statute was applied in the special manner being argued. *Moncrieffe* seems to require the application of the "reasonable probability" test, since Justice Sotomayor referred to it and, at a different place in the text, offered Georgia case examples of prosecution for social sharing.

In Washington the "reasonable probability" test can be met with case examples:

- **EXAMPLE #1**:

"RCW 69.50.401 criminalizes possession and distribution of the drug even if for religious purposes. [ ] RCW 69.50.401 proscribes marijuana use and distribution." *State v. Balzer* 91 Wash.App. 44, 55, 954 P.2d 931, 937 (Wash.App. Div. 2,1998) *rev denied, State v. Balzer*, 136 Wash.2d 1022, 969 P.2d 1063 (Wash. Nov 12, 1998).

- **EXAMPLE #2:**

Petitioner Anderson was convicted in Cowlitz County Superior Court of violation of RCW 69.50.401(a), the proof showing tha**t he gave a small amount of marijuana** to a police agent. . . . Washington's statute makes possession of over 40 grams of marijuana or **delivery of any amount** punishable by a nonmandatory maximum of 5 years' imprisonment. *State v. Smith* 93 Wash.2d 329, 332, 343-344 (Wash., 1980).[29] See also *State v. Anderson* 16 Wash.App. 553, 554, 558 P.2d 307, 308 (Wash.App.,1976).[30]

In the 9th Circuit the plain text of a statute can establish "reasonable probability." The offense of delivery of marijuana explicitly defines the state crime as broader than the generic definition. "Legal imagination" is not needed. Even without case examples, under the 9th Circuit's rule for the reasonable probability test, **case examples are not required where a statute expressly extends to the conduct in question.** See *U.S.*

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[26] See RCW 69.50.101(f), and WPIC 50.07 Deliver—Definition. Deliver or delivery means the *[actual][or][constructive][or][attempted]* transfer of a *[controlled substance][legend drug]* from one person to another.

[27] *Gonzales v. Duenas-Alvarez* 549 U.S. 183, 193, 127 S.Ct. 815, 822 (2007)

[28] *Id.*

[29] Where the Legislature has defined a range only by reference to one end of a range, we do not generally consider it to have contemplated the particular features of crimes which may occur at the undefined [minimum amount] end of the range. *State v. Alexander* 125 Wash.2d 717, 726 (Wash.,1995)

[30] "Defendant [ ] **produced a small jar containing marijuana and indicated that the agent could make a cigarette for himself.** . . . [I]t it is clear that the agent left the house with at least a portion of the cigarette. He then returned with a search warrant and Longview Police officers, who seized a few fragments of marijuana in the execution of the search warrant. The cigarette and seized fragments constituted less than 40 grams of marijuana. **Defendant was charged and convicted of violating RCW 69.50.401(a), delivery of marijuana,** and RCW 69.50.401(d), possession of less than 40 grams of marijuana." *State v. Anderson* 16 Wash.App. 553, 554, 558 P.2d 307, 308 (Wash.App.,1976)

v. Grisel, where "[t]he state statute's greater breadth is evident from its text."[31] In *Moncrieffe* obvious case examples were at hand to show that the Georgia offense includes social sharing, and the Court did not need to rely on the degree of explicitness of the statute to reach the question that *Grisel* answered. Therefore, although it should be unnecessary to argue, *Grisel*'s holding is arguably unaffected by *Moncrieffe.*

III. Advising Criminal Defenders

PRACTICE TIP: WDAIP exists to assist public defenders and the criminal defense bar navigate the immigration consequences of criminal convictions. AILA-WA members are encouraged to contact WDA prior to advising criminal defense counsel.

Remember:

- **There is no case law yet applying *Moncrieffe* to PWID marijuana in Washington.**
- **Anything other than delivery or PWID marijuana will be charged as an aggravated felony.**

A. Careful Crafting of Record of Conviction Still Required

When negotiating to a marijuana conviction under RCW 69.50.401(2)(c), it is still important to keep the record of conviction for immigration purposes as minimal as possible and to avoid incorporating police reports as the factual basis for the plea. Caselaw is in a state of rapid flux and there are many unanswered questions. This means that the plea statement and other documents used to establish the factual basis for a conviction should not stipulate or admit to other drugs, large amounts of marijuana or to intent to sell.

B. Defense Advice in Pleas Under RCW 69.50.401(2)(c)

1. Solicitation under RCW 9A.28.03 Remains Safest Option

Solicitation convictions under Washington's anticipatory offenses statute do not constitute either a drug trafficking aggravated felony or a conviction for a crime relating to a controlled substance, even if the substantive offense was a drug crime. **This is limited to the Ninth Circuit only** and noncitizens with solicitation convictions must be warned not to travel outside the nine states of the Ninth Circuit, or the US.[32]

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[31] "Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no "legal imagination," *Duenas-Alvarez,* 127 S.Ct. at 822, is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text." *U.S. v. Grisel* 488 F.3d 844, 850 (9th Cir.,2007) *cert. denied by Grisel v. U.S.*, 552 U.S. 970 (2007); *U.S. v. Vidal* 504 F.3d 1072, 1082 (9th Cir.2007). *See also Ramos v. U.S. Atty. Gen.* 709 F.3d 1066, 1071 -1072 (11th Cir.2013). The *Grisel* rule serves to distinguish a test for the actual reach of a statute from a perusal of the exercise of prosecutorial discretion.

[32] In the Ninth Circuit only solicitation is not a *deportable* drug offense. (There is not a published case extending it to the drug ground of inadmissibility although it has been applied that way and the language is parallel.) *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) (conviction under A.R.S. 13-1002 for solicitation is not an offense "relating to" controlled substances even where offense solicited involves controlled substances, disapproving *Matter of Beltran*, 20 I&N Dec. 521(BIA 1992) (solicitation under Arizona statute is an offense "relating to" controlled substances)); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (same conviction not an aggravated felony, under same reasoning). Defense counsel should try to make some record of reliance on these cases, in giving up the right to trial.

Solicitation to deliver can (and likely will) still provide "reason to believe" a person is inadmissible as a trafficker under INA § 212(a)(2)(C), particularly where there are police reports and other evidence of involvement in drug trafficking. So solicitation convictions are likely to still trigger significant immigration consequences where a noncitizen is subject to the grounds of inadmissibility.

2. Specify Drug Involved as Marijuana

If it is possible to specify PWID marijuana, as opposed to of another drug, do so and **contest deportability as an AF, because the Washington law criminalizes delivery of a small amount for no remuneration**. If client is charged with manufacture, plead instead to delivery or PWID. If that is impossible pleading only to the statutory language as a whole in the disjunctive, to "manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance," preserves an argument that an AF cannot be established. If you get the case and the Information or plea statement says marijuana "manufacture" only, see if prosecutor agrees to alter language to delivery as a scrivener's error or deviation from intent of plea agreement.

3. Using *In Re Barr* Pleas when Drugs other than Marijuana Are at Issue

Using pleas under *In re Barr* and *State v. Zhao* in non-marijuana cases can be an important tool for defense counsel to negotiate a plea to PWID marijuana in cases that did not involve marijuana but involve other types of drugs. *In re Barr* 102 Wn.2d 265, 684 P.2d 712 (1984); *State v. Zhao* 157 Wash.2d 188, 137 P.3d 835 (Wash., 2006). We recommend that you review the WDA's Immigration Project resources at our website (www.defensenet.org) and consult with us if you are advising defense counsel to pursue this strategy.

What is an *Barr/Zhao* plea? *In Re Barr*, and its companion case *State v. Zhao*, allow a defendant to plead to a substitute charge that is a legal fiction in order to receive the benefit of a plea bargain. **The substitute charge is a legal fiction because there is no factual basis for the plea, or the factual basis is insufficient.** The key to such a plea is that it must be knowing and voluntary. The defendant must acknowledge that there is a realistic risk of conviction of the original charge. The court must find that enough of a factual basis exists for the *original dismissed charge*, that the risk was significant enough to validate pleading guilty to something else. A *Barr/Zhao* plea is not the same as an *Alford* (*Newton*) plea because the defendant is not explicitly asserting actual innocence to a charge *to which she pleads*; rather she just pleads guilty to an alternative charge.

Before *Descamps*, (certain) local IJs had erroneously ruled that a *Barr* plea equals a conviction for the dismissed charge. After *Moncrieffe* and *Descamps*, since it is once again the minimum conduct of the offense of conviction that controls, there is no plausible argument that a *Barr/Zhao* plea for PWID marijuana (or any other crime) can constitute a conviction for the original charges, regardless of what they were. The original charges are completely irrelevant to the categorical approach.

4. Legend Drug Pleas under RCW § 69.41.030

A *Barr/Zhao* to delivery or possession with intent to deliver **a legend drug** under RCW § 69.41.030 (B felony) without specifying a controlled substance (CS) would avoid being either a removable drug crime or an AF.[33]

5. Not Identifying the Schedule I Controlled Substance

If it is not possible to specifically plead to PWID marijuana, or do a *Barr/Zhao* plea to this offense, a plea to only "PWID a non-narcotic Schedule I drug" preserves an argument that such a conviction is not an AF. Not naming the specific controlled substance involved is very unusual in a Washington drug plea, but is legally sound if the plea was knowing, intelligent and voluntary, and defendant was adequately apprised of charges.[34]

[33] *But see*, RCW 9A.41.072

[34] See, e.g., *State v. Kjorsvik* 117 Wash.2d 93, 103, 812 P.2d 86, 91 (Wash.,1991)

If the drug is unnamed there is a *Matter of Paulus* argument.[35] The BIA held that if a state CS definition is broader than the federal one in the CSA, and the CS is not identified, the conviction is not necessarily for a drug crime under the INA. The Ninth Circuit applied this to California in *Ruiz-Vidal*.[36] It found that the California definition is broader than the federal schedules and identified non-matching substances. **There is no such case on the Washington drug law, and we have not found divergences between the federal and Washington State drug schedules.** However, if defendant obtained such a non-specific disposition and the burden is on the government to prove that the conviction constitutes a controlled substance violation or drug trafficking aggravated felony, immigration counsel can use this *Paulus* argument defensively to force the government to prove that, unlike *Ruiz-Vidal*, there are no differences between the drug schedules. **This is a last resort strategy.**

IV. Marijuana Possession Under 40 Grams Is Still a Crime in Washington, under RCW 69.50.4014

If charged it is still necessary to plead to and specify 30 grams or less as the amount to fall within this exception to the controlled substances deportation ground and qualify for the inadmissibility exception.[37] To prove deportability, the burden is on the government to show by clear and convincing evidence that the marijuana offense was *not* for a single offense involving possession of 30 grams or less.[38]

Circumstance-Specific. In *Matter of Davey*, the BIA held that the entire phrase "a single offense involving possession for one's own use of thirty grams or less of marijuana" requires a circumstance-specific inquiry into conduct on a single occasion, not a categorical inquiry into the elements of a statutory crime.[39] There is support for *Davey* in *Moncrieffe* as far as the amount issue. The Court referred to the $10,000 loss amount portion of the fraud or deceit AF definition, which is "circumstance-specific," and noted that the loss amount:

> is a limitation, written into the INA itself[.] And the monetary threshold is set off by the words "in which," which calls for a circumstance-specific examination of "the conduct involved ' *in* ' the commission of the offense of conviction." Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings.[40]

Since the 30 grams or less is a limitation on the scope of the drug conviction ground written into the INA, *Moncrieffe* by analogy supports making the amount of marijuana circumstance-specific, which the Board has done.[41] This should help some people with marijuana convictions, but under *Matter of Davey* the government may defeat an otherwise well-crafted plea by pointing to evidence of quantity outside of the record of conviction.

Just as in *Nijhawan*, when dealing with the controlled substances deportation ground there is both a generic portion (the controlled substance violation) and, where the possession conviction involved marijuana, a circumstance-specific portion (amount of marijuana involved). **Immigration counsel should argue that *only the amount* of marijuana possessed is circumstance-specific, and that the rest of the marijuana exception provision is categorical,** requiring only a conviction with the elements of simple possession. The exception is in a provision based on removability for a conviction, not for conduct. The deportability exception is conviction-based and analyzed categorically and therefore conduct, police reports, and dropped charges cannot be reviewed,

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[35] *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965).
[36] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Circuit 2007).
[37] RCW 69.50.4014; See INA 237(a)(2)(B)(i) and INA 212(h).
[38] See *Medina v. Ashcroft*, 393 F.3d 1063 (9th Cir. 2005). The court held that the government was limited to the record of conviction. However, *Medina* predates case law on "circumstance-specific" provisions.
[39] *Matter of Jennifer Adassa Davey*, 26 I. & N. Dec. 37 (BIA 2012); see NIP Practice Advisory *on Matter of Davey & the Categorical Approach* at http://www.nationalimmigrationproject.org/publications.htm
[40] *Moncrieffe v. Holder* 133 S.Ct. 1678, 1691 (2013), citing to *Nijhawan v Holder*, 557 U.S.29, 39 (2009). *Moncreiffe* refers in the same way to the family member exception to the passport fraud AF at INA 101 (a)(43)(P) , as being "provided in the INA itself" and says that "a circumstance-specific inquiry would apply to that provision." *Id* at 1693.
[41] "[I]n which" of course, may be more circumstance-specific than the phrase "convicted of [an] offense involving."

other than for the amount. "[P]ossession for one's own use" means a conviction for possession that is NOT possession with intent to deliver, sell or share, and so is part of categorical portion of the deportation ground.