Ann Benson, Directing Attorney, abenson@defensenet.org (360) 385-2538
Enoka Herat, Staff Attorney, enoka@defensenet.org (206) 623-4321, x105
Jonathan Moore, Immigration Specialist, jonathan@defensenet.org (206) 623-4321, x104

Washington Defender Association's Immigration Project
110 Prefontaine Place S., Suite 610, Seattle, Washington 98104
www.defensenet.org/immigrationproject

Washington State & the Antique Firearms Deportation Exception— Post-*Moncrieffe* & *Descamps* Arguments. (March 2014)

I. The Antique Firearms Exception to the Firearms (FA) Deportation Ground

Under the Immigration Act (INA) virtually any conviction "under any law" involving a "firearm or destructive device" is a deportable offense.[1] The definition of a "firearm"(FA) used for immigration purposes at 18 USC 921(a) says specifically that "[s]uch term does not include an antique firearm."[2] Washington does not have such a statutory exception: an antique firearm is a firearm.[3]

In federal criminal trials the antique firearm exception is treated procedurally as an affirmative defense.[4] The Board of Immigration Appeals (BIA) ruled in 2010 that the burden is on a respondent to prove that a FA was an antique, in a manner similar to that of an affirmative defense in a criminal case.[5]

II. *Moncrieffe* & *Descamps* – The Revitalization of the Categorical Approach[6]

The method used to fit a conviction to a removal ground is the "categorical approach." It compares the language of the criminal statute, taken at its minimum, to the INA removal ground. Under this approach the actual conduct is irrelevant; all that matters is if the statute of conviction necessarily, in every case, *requires* a finding of conduct that triggers deportation. If not, the ground is not triggered. In Washington the minimum conduct for a FA conviction would involve only an antique FA.

Moncrieffe and its companion case *Descamps v. U.S.* make clear that conviction documents are only examined to determine removability when a statute is "divisible."[7] They are used to identify the offense of conviction -- not the actual alleged conduct. A divisible statute contains multiple or separately defined crimes with alternative elements.[8] It is divisible for these purposes if at least one alternate offense listed is not a match to the generic definition.

Moncrieffe held that a state conviction for marijuana (MJ) delivery is not an aggravated felony (AF) drug-trafficking crime if it includes social sharing of a small amount. A crime is a drug AF if it corresponds to a "felony punishable under" the Controlled Substances Act (CSA). The CSA contains a mitigating sentencing exception: delivery of a small amount of MJ for free is a federal misdemeanor.[9] In federal criminal proceedings the burden is on the defendant to show that it is a small amount of MJ for sharing, as it is to show that a FA was an antique. In

---

[1] 8 USC 1227(a)(2)(C), INA 237(a)(2)(C)(deportable firearm crimes). There is no similar ground of inadmissibility.

[2] 18 USC 921(a)(3): "The term 'firearm' means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm."

[3] See RCW 9.41.010(1), (9) "'Firearm' means a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." Washington had a past limited exception for bona fide collectors. RCW 9.41.150

[4] *Gil v. Holder* 651 F.3d 1000, 1005 -1006, n3 (9th Cir.2011). *Gil* should be held overturned by *Moncrieffe v. Holder* 133 S.Ct. 1678 (U.S.2013) insofar as it holds that because a statutory exception is *treated* as an affirmative defense it cannot define the elements or minimum conduct of a statute for immigration purposes. *Cf. Alvarado v. Gonzales* 176 Fed.Appx. 887, 888-889, 2006 WL 1049742, 1 (9th Cir.2006)

[5] *Matter of Mendez-Orellana* 25 I. & N. Dec. 254 (BIA 2010) *Mendez-Orellana* is arguably overturned by *Moncrieffe.*

[6] For more analysis see "*Moncrieffe* & *Descamps* Analysis for Immigration Attorneys" at the Immigration Project Resources page of the WDA website – www.defensenet.org.

[7] *Moncrieffe v. Holder, supra; Descamps v. U.S.* 133 S.Ct. 2276 (2013)

[8] *Moncrieffe,* 133 S.Ct. at 1684; *Descamps,* 133 S.Ct. at 2281 -2282. *Moncrieffe* also overturned *Matter of Castro Rodriguez,* 25 I. & N. Dec. 698 (2012)(respondent. has factual burden to show MJ delivery not an aggravated felony)

[9] 21 USC §841(b)(4)

Moncrieffe the Court analyzed a "generic" offense in the abstract, "not an actual federal offense being prosecuted."[10] Burden-shifting in the underlying statute of conviction-- in the case of the exception in *Moncrieffe* or the antique firearms exception-- does not apply to the categorical approach.[11] If a state statute reaches conduct outside the generic definition, it is not a categorical match. Regardless of whether conduct is established by the defendant or the prosecutor in a federal prosecution, the exception defines the minimum conduct under the statute as social sharing of marijuana, or use of an antique FA, and therefore the statute is categorically broader than the AF or firearm definition.

In *Moncrieffe* the antique FA exception was addressed: "the Government suggests that our holding will frustrate the enforcement of other aggravated felony provisions . . . which refer . . . to a federal firearms statute that contains an exception for 'antique firearm[s],'[ ]. The Government fears that a conviction under any state firearms law that lacks such an exception will be deemed to fail the categorical inquiry." The Court cited its case-law which requires "that there 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.' . . . To defeat the categorical comparison in this manner, a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms."[12]

II. Antique Firearms Exception: Strategy to Contest Deportation

The holding and analysis in *Moncrieffe* and *Descamps* brings new life to the argument that Washington FA offenses are not a categorical match to the INA definition of a deportable FA crime, especially if it can be shown that Washington "actually prosecutes … cases involving antique firearms." Immigration counsel can move to terminate a charge of deportability under 237(a)(2)(C) for a firearms crime, arguing that *Mendez-Orellana* no longer controls and that Washington's FA offense definition is broader than the generic federal definition of a deportable FA, and, thus, is categorically not a deportable conviction under 237(a)(2)(C). Washington offenses that use the firearms definition at RCW 9.41.010(9) are *indivisible* in regards to antique vs. non-antique FAs. Washington has "alternate means" offenses, with distinct ways to commit the same crime, but means are not separate elements.[13] Washington statutes and jury instructions do not make an antique FA an alternate means, much less an element.[14]

III. Washington Cases That Would Meet the "Reasonable Probability" Test Re: Antique Firearms

- *State v. Releford* (2009) 148 Wash.App. 478, 200 P.3d 729, rev. denied 166 Wash.2d 1028, 217 P.3d 336. (Unlawful Possession of a Firearm (UPFA); antique *replica* flintlock pistol).
- *State v. Willis* 122 Wash.App. 1048, Not Reported in P.3d, 2004 WL 1775676 1-2 (Wash.App. Div. 1,2004)
- *State v. Marshall* 2009 WL 3184866, 6 (Wash.App. Div. 2,2009) (firearms enhancement; antique pistol);
- *State v. Spiers* 119 Wash.App. 85, 95, 79 P.3d 30, 35 (Wash.App. Div. 2,2003)(UPFA)
- *State v. Pendleton* 2007 WL 4099372, 1 -2 (Wash.App. Div. 1,2007) (UPFA; antique Japanese rifle);
- *State v. Richmond* 2005 WL 2420396, 2 (Wash.App. Div. 1,2005)(Theft of a firearm);
- *State v. Harp* 13 Wash.App. 239, 244, 534 P.2d 842, 845 (Wash.App.1975) (convicted of violent crime with possession of a pistol; not exempt under former RCW 9.41.150 because not held as collector's items).

---

[10] *Moncrieffe* 133 S.Ct. at 1689.

[11] *id.* See n.9. (21 USC 885(a)(1) defense's trial burden for CSA exceptions did not alter categorical approach to INA.)

[12] *id*. at 1693, citing *Gonzales v Duenas-Alvarez* 127 S.Ct. 815, 822 (2007). Any prosecution under a statute with an FA element where an antique was used is enough to meet the test, even an acquittal. The 9th Circuit's view of the *Duenas-Alvarez* "reasonable probability" test prior to *Moncrieffe* was that "[w]here . . .a state statute explicitly defines a crime more broadly than the generic definition, no 'legal imagination,' . . . 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). This should still apply, especially where a term is expressly used in the criminal statute and is a core part of the definition of the offense.

[13] *State v. Smith*, 159 Wash.2d 778, 783-784, 154 P.3d 873 (2007). *See Schad v Arizona* 111 S.Ct 2491, 2499 (1991) ("If a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." *id.*). See e.g., unpublished BIA case *In Re Forvilus* A071 552 965 * 2(BIA Jan.28, 2014)(In spite of Florida theft statute's disjunctive phrasing, alternate means were not elements under state law, citing *Schad, supra*.)

[14] See e.g.; 11 Wash. Prac., Pattern Jury Instr. Crim. WPIC 2.10; 11 WAPRAC WPIC 2.10.01