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Immigration Case Notes for Massachusetts Criminal Defense Attorneys April - June 2013

- **APRIL 2013**

Moncrieffe v. Holder, 569 U.S. __, 133 S. Ct. 1678 (2013)

In *Moncrieffe*, the Supreme Court concluded that a non-divisible state marijuana distribution statute that covers both distribution of a small amount of marijuana for no remuneration as well as distribution of larger amounts of marijuana and/or for remuneration, cannot be an aggravated felony, because the offense does not "necessarily" match the aggravated felony definition for a drug trafficking crime.

For more on this decision, see attached Practice Advisory on Marijuana Distribution and Immigration Consequences: The Impact of the U.S. Supreme Court's Moncrieffe Decision in Massachusetts in Light of the SJC's Decision in Jackson (June 24, 2013).

- **MAY 2013**

There were no significant criminal-immigration cases for Massachusetts criminal defense attorneys in May 2013.

- **JUNE 2013**

U.S. Supreme Court

***Descamps v. United States*, 570 U.S. __, 133 S. Ct. 2276 (2013)**

While not arising from an immigration case, this decision, which considers the application of sentencing enhancements under the Armed Career Criminal Act (ACCA), has significant impact on immigration law because of the analysis of the categorical approach. As discussed in the attached *Moncrieffe* advisory, the categorical approach is used to determine whether a particular state criminal conviction matches the federal criminal grounds of deportability (such as the definition of aggravated felony). The categorical approach is also used to determine whether a federal defendant has a prior conviction that qualifies for a sentencing enhancement under the ACCA.

Under the categorical approach, an attorney considering the consequences of a state crime lines up the elements of the federal and state offenses to see if the state offense includes each federal element. When applying the categorical approach, immigration courts are not concerned with what the defendant actually did, only with the statutory offense. In certain limited circumstances courts may look beyond the statute to the record of conviction (a limited class of documents, such as a complaint or indictment and a docket sheet, but *not* the police report) to determine the specific offense for which the individual was convicted. This secondary approach is called the modified categorical approach.

The question in *Descamps* is when courts should apply the modified categorical approach. The Supreme Court clarified that courts may only employ the modified categorical approach where a statute is "divisible." A statute is divisible if it "sets out one or more elements of the offense in the alternative." Courts may not apply the modified categorical approach to indivisible statutes, even if those statutes "criminalize a broader swath of conduct than the relevant generic offense." Therefore, such an over-broad statute cannot match the generic federal definition, because it criminalizes conduct that falls both within and outside of the generic federal definition under the categorical approach.

Practice Tip

This decision may significantly impact which Massachusetts criminal offenses fall into the various categories of inadmissible and deportable offenses. However, it will take some time to determine the precise impact on noncitizen defendants in immigration proceedings. Once its impact becomes clearer, the IIU will distribute additional information. In the meantime, defense counsel should continue to seek expert assistance from either the IIU or other immigration experts regarding the specific immigration consequences of their individual cases.

Some examples of Massachusetts criminal offenses whose immigration consequences may have been altered by *Descamps*:

- Indecent A&B on a person over 14 (G.L. ch. 265, § 13H) should not be considered sexual abuse of a minor (an aggravated felony), because this broad statute covers sexual abuse of both minors and non-minors (under immigration law, a minor is anyone under 18);
- ABDW (G.L. ch. 265, § 15A(b)), to wit a firearm, should not be considered a firearms offense (a ground of deportability), because this broad, non-divisible statute covers all types of dangerous weapons, some of which would meet the federal definition of "firearm" and some of which would not.

Massachusetts Appeals Court (unpublished)

The appeals court issued two noteworthy unpublished decisions in June that address post-conviction motions under *Padilla*:

Commonwealth v. Ganiu Ibiloye, 2013 Mass. App. Unpub. LEXIS 679 (June 21, 2013)

The appeals court reversed the trial court's grant of a motion for new trial, based solely on the fact that the trial judge did not hold an evidentiary hearing. The appeals court asserted that the record was insufficient to justify a grant (without discussing the evidence in any detail) and remanded saying:

> While we do not comment on the substantive issues, we anticipate that the judge will hear testimony from the defendant's trial counsel regarding the nature and extent of her advice

on the issue of immigration and the defendant's trial strategy concerning the motion to suppress [which was not litigated].

Practice Tip

Post-conviction counsel should be prepared to create a complete and thorough record for the trial judge, so that remand becomes unnecessary.

Commonwealth v. Dexter Lamotte, 2013 Mass. App. Unpub. LEXIS 626 (June 5, 2013)

The appeals court reversed and remanded the denial of a new trial motion, where trial counsel had not asked the defendant whether he was a U.S. citizen and merely provided him with the statutory warnings under G.L. ch. 278, § 29D. These warnings were insufficient, the court held, because the defendant was convicted of an aggravated felony (possession with intent to distribute class A), which not only made him deportable but also ineligible for any relief from deportation.

The court remanded the case to the trial judge to consider the issue of prejudice. The court returned the case to the trial judge to determine in the first instance whether it would have been reasonable to reject the plea, either because a better plea could have been negotiated or because of special circumstances such that the defendant placed particular emphasis on the immigration consequences (there is no discussion of a viable defense). The court noted that even though trial counsel had stated on the record that the Commonwealth would not "budge" on a better deal, "at the time of the plea agreement, the record is undisputed that neither defense counsel nor the prosecutor knew of the immigration consequences and therefore could not take immigration consequences into consideration."

Practice Tip

This case provides added authority that alien warnings are not sufficient to satisfy defense counsel's obligation under *Padilla*. It may also be used by trial counsel to support the argument that the Commonwealth should consider immigration consequences when negotiating a plea.

Board of Immigration Appeals

Matter of V-X-, 26 I. & N. Dec. 147 (BIA 2013)

In this case, the Board of Immigration Appeals (BIA) addressed two issues: (1) whether a grant of asylum is considered a lawful "admission" under immigration law and (2) whether the Michigan "youthful trainee" adjudication is a "conviction" under immigration law.

The noncitizen in this case was "paroled" into the U.S. in 2003, which means that he was allowed to enter the U.S. without being legally admitted. In 2004, he was granted asylum. He was subsequently placed in removal proceedings after receiving a "youthful trainee" adjudication for delivering marijuana under Michigan law. In February 2012, an immigration judge found that he was inadmissible and ineligible for relief based on his youthful trainee adjudication. The non-citizen appealed the removal order, arguing that the grant of asylum in 2004 was an admission, so that he would only be subject to the grounds of deportability and not the grounds of inadmissibility, and that his youthful trainee adjudication was not a conviction.

The BIA first determined that the grant of asylum was not a lawful "admission" under immigration law, as defined at 8 U.S.C. § 1101(a)(13)(A). In so holding, the BIA distinguished case law addressing non-citizens who are admitted as refugees and those who adjust their status to lawful permanent residents (i.e. people who become green card holders after entering the U.S.). Therefore, the noncitizen could be removed based on grounds of inadmissibility.

The BIA then determined, as the U.S. Court of Appeals for the Sixth Circuit had already held in *Uritsky v. Gonzales*, 399 F.3d 728 (6th Cir. 2005), that the Michigan "youthful trainee" adjudication is a conviction under immigration law. The BIA explained that while the term "conviction" under immigration law does not include a determination of juvenile delinquency under the Federal Juvenile Delinquency Act (FJDA), a state youthful offender disposition is only analogous to the FJDA if it is "civil in nature" and could never ripen into a conviction. By contrast, the Michigan "youthful trainee" law provides that, following an admission of guilt, the sentencing court defers adjudication of his guilt and orders the defendant to serve a period of probation. If probation is completed successfully, the charges are dismissed, but if not completed successfully the defendant is convicted. Such a disposition constitutes a conviction under immigration law.

Practice Tip

When interviewing a client, it is important to question the client in detail about how he or she entered the U.S. If the documents still exist, ask the client to bring in his passport and any other documentation he received from immigration at his entry. As discussed above, a client may have lawfully entered the U.S. but still never have been legally "admitted," and therefore could be removed based on grounds of inadmissibility (whereas someone who was lawfully admitted could only be removed for grounds of deportability).

There is no case law regarding whether the Massachusetts youthful offender statute constitutes a conviction for immigration purposes. Unlike the Michigan statute, the Massachusetts YO statute is civil in nature and cannot ripen into a conviction at any time. Nevertheless, the MA YO statute differs from the FJDA, in that it allows a court to impose an adult sentence despite the lack of adult criminal proceedings. For this reason, a MA YO may still be considered a conviction under immigration law.

Matter of Flores-Aguirre, 26 I. & N. Dec. 155 (BIA 2013)

In this case the BIA considered whether the federal offense of traveling in interstate commerce with the intent to distribute the proceeds of an unlawful drug business, under 18 U.S.C. § 1952(a)(1)(A), is an aggravated felony as an "illicit trafficking" offense under 8 U.S.C. § 1101(a)(43)(B).[1] An offense is considered illicit trafficking *either* (a) if it would be punishable as a felony under the federal Controlled Substances Act or several other federal controlled substance acts *or* (b) the offense involves "unlawful trading or dealing" in federally controlled substances.

The BIA noted that the offense did not satisfy the first prong of the illicit trafficking definition, because it was not punishable as a felony under any of the federal controlled substance statutes. The BIA further concluded that it did not satisfy the second prong, "because it does not involve 'unlawful trading or dealing' in federally controlled substances . . . , but rather involves conduct engaged in *after* such

[1] There was no dispute that the offense was a controlled substance deportable offense under 8 U.S.C. § 1227(a)(2)(B)(i).

unlawful trading or dealing has been consummated." Therefore, the offense could not constitute an aggravated felony as an illicit trafficking offense.

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Practice Advisory on Marijuana Distribution and Immigration Consequences: The Impact of the U.S. Supreme Court's *Moncrieffe* Decision in Massachusetts in Light of the SJC's Decision in *Jackson*
June 24, 2013

I. Introduction: How to Determine If a State Drug Conviction Is an Aggravated Felony.

Under immigration law, an aggravated felony conviction is often the worst of the worst, making a non-citizen client subject to nearly automatic deportation, permanent exile from the U.S. and barred from almost every form of relief from deportation. Included in the long list of aggravated felonies, enumerated at 8 U.S.C. § 1101(a)(43), is "illicit trafficking in a controlled substance . . . including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code)." A "drug trafficking crime" is any felony punishable under the federal Controlled Substances Act, which includes any drug offense with a distribution element and any simple possession charged as a subsequent offense. There is one exception, however, for a person who "distribut[es] a small amount of marijuana for no remuneration."

While the aggravated felony for drug trafficking is defined by federal law, state drug convictions that match the federal definition are also considered aggravated felonies. The test for determining whether a state offense "matches" a federal drug trafficking crime is called the categorical approach. Under this approach, an attorney considering the immigration consequences of a state crime lines up the elements of the federal and state offenses to see if the state offense includes each federal element. Where the state statute is divisible, meaning the statute covers a multitude of separately described criminal offenses (e.g. M.G.L ch. 272, sec. 53), some of which match the federal aggravated felony definition and some of which do not, courts apply a modified categorical approach. Under this test, immigration officials look to certain designated documents from the record of conviction (notably, this does not include the police report, unless incorporated into the plea colloquy) to determine the specific offense for which the individual was convicted.

The question presented to the U.S. Supreme Court in *Moncrieffe v. Holder*, 569 U.S. __, 2013 U.S. LEXIS 3313 (Apr. 23, 2013) was how to evaluate whether a conviction involving distribution of marijuana is an aggravated felony, in light of the federal exception for distribution of a small amount for no remuneration.

II. *Moncrieffe* Decision

In *Moncrieffe*, the Supreme Court concluded that a non-divisible[1] state marijuana distribution statute that covers both distribution of a small amount[2] of marijuana for no remuneration as well as distribution of larger amounts of marijuana and/or for remuneration, cannot be an aggravated felony, because the offense does not "necessarily" match the aggravated felony definition. In so holding, the Supreme Court rejected the government's argument that non-citizens should have the burden of establishing that their actual conduct fell into the small amount/no renumeration exception. The Court emphasized the importance of the categorical approach in immigration law and explained:

> Under this approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the "generic" federal definition of a corresponding aggravated felony. By "generic," we mean the offenses must be viewed in the abstract, to see whether the state statute shares the nature of the federal offense that serves as a point of comparison. Accordingly, a state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense. Whether the noncitizen's actual conduct involved such facts is quite irrelevant.

Moncrieffe, slip op. at 5 (internal citations and punctuation omitted). The Court concluded that where there was ambiguity (in this case, because the statute covered both aggravated felony conduct and non-aggravated felony conduct), the statute could not "necessarily" match the federal offense and therefore could not be an aggravated felony. *Id.* at 9.

For a more thorough analysis of the *Moncrieffe* decision, see the attached practice advisory prepared by Legal Action Center for the American Immigration Council, the National Immigration Project, and the Immigrant Defense Project.

III. Impact of *Moncrieffe* for Massachusetts Criminal Defense Attorneys: How does the *Jackson* decision affect the impact of *Moncrieffe*?

The *Moncrieffe* decision, in its strong endorsement of the categorical approach, has potentially broad implications for immigration attorneys and persons in removal proceedings due to a wide

[1] A statute is divisible only where it includes different crimes "each described separately." *Moncrieffe*, slip op. at 5. Therefore a broad statute or statutory phrase that does not identify separate crimes would not be considered divisible, even though it covers a wide range of conduct.

[2] The Supreme Court did not define "small amount," but appeared to accept the general rule that 30 grams or less is a "small amount."

range of criminal convictions. For more details, please see the attached advisory from the Legal Action Center, et al. This advisory focuses mainly on the impact to non-citizen defendants with Massachusetts convictions for possession with intent to distribute marijuana in both criminal and immigration proceedings.

A. *Jackson* Limits the Impact of *Moncrieffe*

The direct impact of *Moncrieffe* may be limited because of the Supreme Judicial Court's decision in *Commonwealth v. Kiiyan Jackson*, 464 Mass. 758 (2013). In *Jackson*, the SJC held that the social sharing of one ounce or less of marijuana "is akin to simple possession" and therefore "does not violate the distribution statute [M.G.L. ch. 94C, §32C(a)]." *Id.* at 758, 764-65. After *Jackson*, it will be more difficult to argue that the Massachusetts distribution statute punishes distribution of a small amount of marijuana for no renumeration; therefore, non-citizens with Massachusetts convictions for possession with intent to distribute and distribution of marijuana may not benefit from *Moncrieffe*, because the Massachusetts statute may be found to match the federal aggravated felony definition. **Massachusetts criminal defense attorneys** should assume that marijuana distribution offenses will be considered aggravated felonies.

B. *Moncrieffe* May Still Benefit Non-Citizens with Massachusetts Marijuana Distribution Convictions in Immigration Proceedings

There remains an argument that the Massachusetts marijuana distribution statutes still cover the distribution of a small amount of marijuana for no renumeration, because *Jackson* merely carved out a small exception for passing a marijuana cigarette. In *Jackson*, the SJC did not address the gifting of small amounts of marijuana (as opposed to social sharing). In fact, the *Jackson* court cited *Commonwealth v. Johnson*, 413 Mass. 598 (1992) with approval. In *Johnson*, the SJC found the following jury instruction to be proper: "The word distribute includes all forms of physical transfer. It is unlawful for a person to even make a gift of a controlled substance." The SJC noted that the term "deliver" is defined broadly by Massachusetts statute to mean "'to transfer, whether by actual or constructive transfer, a controlled substance from one person to another, whether or not there is an agency relationship.'" *Johnson*, 413 Mass. at 605 (quoting M.G.L. ch. 94C, sec. 1). "Thus, to purchase the substance, even with friends' money, intending to transfer it to them, constitutes distribution within the meaning of the trafficking statute." *Id.* There is only a small exception, when the defendant and another person "simultaneously acquire possession at the outset for their own use." *Id.* (citing *United States v. Rush*, 738 F.2d 427, 514 (1st Cir. 1984).

Jackson did not overrule *Johnson*.[3] Instead, the *Jackson* decision arguably created a more narrow exception for the passing of a marijuana joint, so that the Commonwealth may still be able to pursue a distribution prosecution of a person who gifts a small bag of marijuana after purchase.[4]

[3] That *Johnson* involved cocaine should not be dispositive, because it interpreted the distribution statute that applies to all controlled substances, including marijuana.

[4] The SJC has made clear that the offenses of possession with intent to distribute and distribution still apply to small amounts of marijuana. *Commonwealth v. Keefner*, 461 Mass. 507 (Mass. 2012) ("We conclude that the passage of G. L. c. 94C, § 32L, did not repeal the offense of

Therefore, **immigration attorneys** can continue to argue that the Massachusetts marijuana distribution statutes still cover conduct that would not constitute an aggravated felony, and so should not be considered an aggravated felony under federal immigration law. In contrast, **criminal defense attorneys** should assert that distribution of a small amount of marijuana for no renumeration is no longer a criminal offense in Massachusetts, pursuant to *Jackson*, and thus attempt to avoid distribution convictions for their clients.

In addition, and at a minimum, **immigration attorneys** whose clients have convictions for possession with intent and distribution of marijuana prior to April 5, 2013 (the date of the *Jackson* decision) should argue that prior to *Jackson* the Massachusetts statute covered distribution of small amounts of marijuana for no renumeration and so those old convictions cannot be aggravated felony convictions. *See Commonwealth v. Lawrence*, 69 Mass. App. Ct. 596, 602-603 (2007) (holding that social sharing of marijuana constituted distribution).

IV. Conclusion

A conviction for possession with intent to distribute and distribution of marijuana under Massachusetts law may still be considered an aggravated felony and should be avoided if at all possible. Nevertheless, there remain arguments that distribution and possession with intent to distribute marijuana under Massachusetts law are not aggravated felonies.

It is important to remember, however, that even if the Massachusetts offenses of possession with intent and distribution of marijuana are not considered aggravated felonies, convictions on those offenses will still render a non-citizen deportable, 8 U.S.C. § 1227(a)(2)(B), and inadmissible, 8 U.S.C. § 1182(a)(2)(A)(II).

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possession of marijuana with intent to distribute, in violation of G. L. c. 94C, § 32C (a), where the amount of marijuana possessed is one ounce or less.").