

**PRACTICE ADVISORY<sup>1</sup>**  
May 2, 2013

***MONCRIEFFE V. HOLDER: IMPLICATIONS FOR DRUG CHARGES  
AND OTHER ISSUES INVOLVING THE CATEGORICAL APPROACH***

**INTRODUCTION**

Under the immigration laws as long interpreted by the courts, a noncitizen generally is not subject to removal or other negative immigration consequences based on a criminal conviction unless the conviction fits categorically within one of the criminal removal grounds. The “categorical approach” requires adjudicators to determine whether *all* of the conduct covered under the statute of conviction (or, under the “modified categorical approach,” the conduct covered under a divisible sub-portion of the statute) fits within the alleged criminal removal classification. If it does not, the person does not fit within the removal classification. Importantly, adjudicators may not consider the particular conduct underlying the defendant’s conviction. Application of the categorical approach follows upon Congress’ choice to require a conviction and thus to rely on the criminal process to determine immigration consequences of criminal conduct.

In recent years, however, in response to federal government efforts to cut back on the categorical approach, the Board of Immigration Appeals (BIA), the Attorney General and some federal courts have issued rulings that have chipped away at it. Examples include the following:

- The BIA and some federal courts decided that a noncitizen convicted under a state statute that covers non-deportable conduct may nevertheless be deemed deportable as long as the statute’s “elements” match up with those of the federal statute cross-referenced in the relevant deportation provision. *See, e.g., Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008); *Moncrieffe v. Holder*, 662 F.3d 387 (5th Cir. 2011).
- The BIA and some federal courts found that a noncitizen seeking relief from removal may be deemed convicted of a relief-barring offense if the record of conviction is inconclusive, based on the noncitizen’s statutory burden of proof in the relief eligibility context. *See, e.g., Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc).
- The BIA held that a criminal statute may be deemed divisible allowing application of a modified categorical approach (where the adjudicator reviews the record of

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<sup>1</sup> This Practice Advisory is intended for lawyers and is not a substitute for independent legal advice supplied by a lawyer familiar with a client’s case.

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conviction to determine under which portion of the statute a person was convicted) even where the different means of committing a violation are not enumerated in the statute as separate alternatives. *See Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

- Former Attorney General Mukasey ruled that the government may, in some cases, go beyond the categorical and modified categorical approach to look at evidence outside the record of conviction in order to determine removability under the crime involving moral turpitude ground. *See Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008).

On April 23, in *Moncrieffe v. Holder*, the Supreme Court, in unequivocal language, reaffirmed the traditional categorical approach for determining whether a conviction falls within a removal classification. Specifically, the Court held that a Georgia marijuana possession with intent to distribute conviction may not be deemed a drug trafficking aggravated felony for removability purposes when the statute of conviction covers some conduct (social sharing of marijuana) falling outside the aggravated felony drug trafficking definition at issue. The Court thus explicitly rejected *Matter of Aruna*'s deviation from the traditional categorical approach. The Court's analysis also significantly undermined the reasoning behind the other above-listed retreats from the categorical approach. *See Moncrieffe v. Holder*, No. 11-702, 569 U.S. \_\_\_\_, 2013 U.S. LEXIS 3313, 2013 WL 1729220 (April 23, 2013).

This practice advisory covers: (1) the holding in *Moncrieffe*; (2) the decision's potential broader implications; (3) strategies for noncitizen criminal defendants; and (4) steps that lawyers (or immigrants themselves) should take immediately in pending or already concluded removal proceedings affected by *Moncrieffe*.

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## TABLE OF CONTENTS

I.	THE SUPREME COURT’S SPECIFIC HOLDING IN <i>MONCRIEFFE</i> AND IMPLICATIONS FOR OTHER STATES’ MARIJUANA STATUTES.	4
	A. The <i>Moncrieffe</i> Holding	
	B. Implications for Other States’ Marijuana Statutes	
II.	THE DECISION’S POTENTIAL BROADER IMPLICATIONS.	7
	A. Burden of Proof for Relief	
	B. What Constitutes a Divisible Statute	
	C. Challenging <i>Matter of Silva-Trevino</i>	
	D. Minimum Conduct Approach	
	E. Rule of Lenity	
	F. No Deference to the Agency	
III.	ANALYZING CRIMINAL STATUTES AND STRATEGIES FOR CRIMINAL DEFENDANTS.	15
	A. State Court Strategies	
	B. Federal Court Strategies	
IV.	SUGGESTED STRATEGIES FOR NONCITIZENS WITH REMOVAL CASES AFFECTED BY <i>MONCRIEFFE</i> .	18
	A. Noncitizens with Pending Removal Cases	
	B. Noncitizens with Final Orders	
	C. Noncitizens Who Are Outside the United States	

## I. THE SUPREME COURT'S SPECIFIC HOLDING IN *MONCRIEFFE* AND IMPLICATIONS FOR OTHER STATES' MARIJUANA STATUTES.

### A. The *Moncrieffe* Holding

Adrian Moncrieffe, a long time permanent resident, pleaded guilty in 2007 to the Georgia offense of possession of marijuana with intent to distribute. The case arose when the police found 1.3 grams of marijuana in his car. The federal government sought to deport him for the conviction, arguing that it was punishable as a felony under the Controlled Substances Act (CSA) and thereby automatically an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). Adopting the government's argument, the immigration judge ordered Mr. Moncrieffe removed. Both the BIA and the Court of Appeals for the Fifth Circuit affirmed, rejecting Mr. Moncrieffe's reliance upon 21 U.S.C. § 841(b)(4), which makes distribution of a small amount of marijuana without remuneration punishable only as a misdemeanor. The Fifth Circuit's decision accorded with prior decisions from the Sixth and First Circuits, but conflicted with decisions from the Second and Third Circuits.<sup>2</sup> The U.S. Supreme Court granted certiorari to resolve the circuit split.

In a 7-2 decision, the Court reversed the Fifth Circuit. It held that when mere social sharing of marijuana is punishable under a state statute as "possession with intent to distribute," no convictions under such a statute would constitute an aggravated felony. *Op.* at 1.<sup>3</sup> In doing so, the Court unequivocally endorsed the categorical approach, reaffirmed that any exceptions to the approach are limited, and then found no such exceptions applicable here.

The Court began its analysis by affirming the strict application of the categorical approach to aggravated felony determinations:

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. [*Gonzales v. Duenas-Alvarez*, 549 U.S.183, 186 (2007)] (citing *Taylor v. United States*, 495 U.S. 575, 599-600 (1990)). . . . [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]." *Shepard v. United States*, 544 U.S. 13, 24 (2005) (plurality opinion) . . . .

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<sup>2</sup> Compare 662 F.3d 387 (5th Cir. 2011) (case below), *Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011) (is an aggravated felony), and *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008) (same), with *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008) (is not an aggravated felony), and *Wilson v. Ashcroft*, 350 F.3d 377 (3d Cir. 2003) (same).

<sup>3</sup> The citations to *Moncrieffe* used throughout this practice advisory (*Op.* at \_\_) refer to the slip opinion, available at [http://www.supremecourt.gov/opinions/12pdf/11-702\\_9p6b.pdf](http://www.supremecourt.gov/opinions/12pdf/11-702_9p6b.pdf).

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. *Johnson v. United States*, 559 U.S. 133, 137 (2010). . . .

The aggravated felony at issue here, “illicit trafficking in a controlled substance,” is a “generic crim[e].” *Nijhawan*, 557 U.S., at 37. So the categorical approach applies. *Ibid.*

Op. at 5-6.

Citing to *Lopez v. Gonzalez*, 549 U.S. 47 (2006), the Court explained that to qualify as an aggravated felony under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B), a state drug conviction “must meet two conditions. First, it must ‘necessarily’ proscribe conduct that is an offense under the CSA; and second, the CSA must ‘necessarily’ prescribe felony punishment for that conduct.” Op. at 6. The Court found that the Georgia offense satisfied the first condition, but not the second. Specifically, the Court observed that while the federal crime of possession with intent to distribute a controlled substance under 21 U.S.C. § 841(a)(1) may be punished as a felony, it also may be also be punished as a misdemeanor under § 841(b)(4) if only a small amount of marijuana is distributed for no remuneration. The Court concluded that because the conviction did not establish that it involved either remuneration or more than a small amount of marijuana, it did not qualify as an aggravated felony:

In Georgia, the statute of conviction does not reveal whether either remuneration or more than a small amount of marijuana was involved. It is possible neither was; we know that Georgia prosecutes this offense when a defendant possesses only a small amount of marijuana, *see, e.g., Taylor v. State*, 260 Ga. App. 890, 581 S.E.2d 386, 388 (2003) (6.6 grams), and that “distribution” does not require remuneration, *see, e.g., Hadden v. State*, 181 Ga. App. 628, 628–629, 353 S.E.2d 532, 533–534 (1987). So Moncrieffe’s 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.

Op. at 9.

Significantly, the Court flatly rejected the Board and Fifth Circuit’s conclusion that any marijuana distribution conviction is presumptively a felony because, *in practice*, “that is how federal criminal prosecutions for marijuana distribution operate.” Op. at 11-12. Rather, the Court reversed the presumption, reasoning “that ambiguity in criminal statutes referenced by the immigration statute must be construed in the noncitizen’s favor,” even if the result is that some offenders avoid aggravated felony status. Op. at 20-21. The Court also rebuffed the government’s reliance on *Nijhawan v. Holder*, 557 U.S. 29 (2009), in suggesting “the § 841(b)(4) factors are like the monetary threshold” at issue in that case and “thus similarly

amenable to the circumstance-specific inquiry” employed there. Op. at 17. The Court unequivocally clarified that drug trafficking is a generic removal ground to which the categorical approach applies, not a circumstance-specific one, so that there is no place for the government-proposed (and Board-endorsed) “minitrials,” in which noncitizens must demonstrate that their predicate marijuana distribution convictions involved only a small amount of marijuana.

The Court overruled the contrary precedent in the Fifth, First, and Sixth Circuits, *see, e.g., Garcia v. Holder*, 638 F.3d 511 (6th Cir. 2011); *Julce v. Mukasey*, 530 F.3d 30 (1st Cir. 2008), as well as the Board’s decisions in *Matter of Castro-Rodriguez*, 25 I&N Dec. 698 (BIA 2012) and *Matter of Aruna*, 24 I&N Dec. 452 (BIA 2008).

## **B. Implications for Other States’ Marijuana Statutes**

The Court’s holding in *Moncrieffe* means that many convictions for distribution of marijuana will no longer constitute an aggravated felony for drug trafficking under INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). (Note, however, that such convictions will continue to qualify as controlled substance offenses, which render a person removable under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i) and/or inadmissible under INA § 212(a)(2)(A)(i)(II), 8 U.S.C. § 1182(a)(2)(A)(i)(II).) Specific implications include:

- In states similar to Georgia, where the statute does not require remuneration or any minimum quantity of marijuana and where there is no separate offense for social sharing of marijuana, a conviction for marijuana distribution should not constitute an aggravated felony (though it may be necessary or at least helpful to point to state case law that makes clear that the statute would cover small amounts of marijuana and the exchange of drugs without remuneration). *See op.* at 6 (explaining “there must be ‘a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’”) (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). This is the case even for noncitizens whose underlying conduct may have consisted of transfer for remuneration, or a large amount of marijuana. Roughly half the states employ broad statutes that do not require remuneration or any minimum quantity of marijuana. Op. at 19.
- In other states, there may be a series of separate offenses, only one of which specifically covers social sharing of marijuana. *See, e.g.,* N.Y. Penal Law Ann. § 221.35 (West 2008) (“A person is guilty of criminal sale of marihuana in the fifth degree when he knowingly and unlawfully sells, without consideration, [marihuana] of an aggregate weight of two grams or less; or one cigarette containing marihuana.”). A conviction under such a statute would not constitute an aggravated felony. Thirteen states have similar statutes. Op. at 18 n.10. Whether a conviction under *another* marijuana distribution statute in one of these states is an aggravated felony would depend on whether or not the other statute also may cover distribution of a small amount of marijuana without remuneration. *See, e.g.,* N.Y. Penal Law Ann. § 221.40 (West 2008) (which covers distribution without remuneration of 2 to 25 grams of marijuana).

- Convictions under statutes that include an element of “selling” would seem to establish remuneration (unless case law specified otherwise) and would thus constitute an aggravated felony.
- Convictions under statutes that proscribe the distribution of more than a small amount of marijuana also would qualify as an aggravated felony. Neither the CSA nor *Moncrieffe* defines “small amount,” but the Court noted the Board’s suggestion of 30 grams as a “useful guidepost,” based on the exception in INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). Op. at 8 n.7 (citing *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 703 (2012)).

Section III provides additional discussion of arguments that certain distribution offenses may not qualify as aggravated felonies.

## II. THE DECISION’S POTENTIAL BROADER IMPLICATIONS.

The Supreme Court’s decision in *Moncrieffe* also has important broader implications for various challenges to government deviations from the categorical approach. This section presents a preliminary analysis of some of the potential implications and arguments.

### A. Burden of Proof for Relief

***Moncrieffe* supports the argument that the immigrant’s burden of proof in the relief eligibility context does not affect the legal determination of whether a particular conviction does or does not fall within a criminal bar category – use in challenges to *Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009)**

When a noncitizen applies for relief from removal, he or she has the burden of proof to demonstrate eligibility for that relief. See INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A). For many forms of relief, a person is not eligible if he or she has been convicted of specified crimes. For example, lawful permanent residents are ineligible for cancellation of removal if they have been convicted of an aggravated felony. See INA § 240A(a)(3), 8 U.S.C. § 1229b(a)(3). Likewise, individuals convicted of aggravated felonies are ineligible for asylum and naturalization.<sup>4</sup> The BIA and several courts have interpreted the burden of proof provision to

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<sup>4</sup> See INA § 208(b)(2)(A)(ii), 8 U.S.C. § 1158(b)(2)(A)(ii) (making a particularly serious crime a bar to asylum eligibility); INA § 208(b)(2)(B)(i), 8 U.S.C. § 1158(b)(2)(B)(i) (deeming an aggravated felony conviction to be a particularly serious crime); INA § 316(a)(3), 8 U.S.C. § 1427(a)(3) (requiring good moral character for naturalization); INA § 101(f)(8), 8 U.S.C. § 1101(f)(8) (deeming individuals convicted of an aggravated felony as not having good moral character). The good moral character bar to naturalization applies to murder convictions at any time and to other aggravated felony convictions on or after November 29, 1990. *Matter of Reyes*, 20 I&N Dec. 789 (BIA 1994).

mean that a noncitizen with a past conviction is ineligible for relief when the record of conviction is inconclusive as to whether the conviction falls within the criminal bar category. *See, e.g., Matter of Almanza-Arenas*, 24 I&N Dec. 771 (BIA 2009); *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (en banc); *Salem v. Holder*, 647 F.3d 111 (4th Cir. 2011); *Garcia v. Holder*, 584 F.3d 1288 (10th Cir. 2009). *But see Thomas v. Att’y Gen. of U.S.*, 625 F.3d 134 (3d Cir. 2010) (holding that inconclusive record is sufficient to establish that aggravated felony bar does not apply); *Martinez v. Mukasey*, 551 F.3d 113 (2d Cir. 2008)(same). *See also Berhe v. Gonzales*, 464 F.3d 74 (1st Cir. 2006).

The *Moncrieffe* Court’s analysis rejects the notion that a criminal bar classification, such as the aggravated felony inquiry at issue in the case, may be treated as a factual question to which a burden of proof provision would be relevant.<sup>5</sup> Throughout the decision, the Court treats the adjudication of whether a past conviction falls within the aggravated felony definition not as a factual question, but instead as a legal determination that looks at the language of the statute of conviction and then determines from the statutory language what the conviction “necessarily” involved. Thus, the Court states: “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.” Op. at 5.

The Court then explains: “Because we examine what the state conviction necessarily involves, not the facts underlying the case, we must *presume* that the conviction ‘rested upon [nothing] more than the least of th[e] acts’ criminalized, . . .” Op. at 5 (emphasis added). Nothing in the Court’s discussion suggests that this legal determination/presumption would change based on a burden of proof provision. In fact, the government’s regulations provide that the immigrant’s “preponderance of the evidence” burden with respect to an application for relief from removal is not even triggered unless the evidence indicates that a ground for denial may apply. *See* 8 C.F.R. § 1240.8(d). In any event, such a “preponderance of the evidence” burden is relevant to questions of a factual nature (e.g., other relief eligibility questions such as length of residence in the United States)<sup>6</sup> and not to the strict categorical approach legal inquiry the Supreme Court applies to a criminal classification question.

The following portions of the Court’s decision in *Moncrieffe* provide further support for challenging the government’s reliance on the noncitizen’s burden of proof in the relief eligibility context:

- The Supreme Court expressly states that the analysis of whether a noncitizen is “convicted” of an aggravated felony in the relief eligibility context – the context of its

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In addition, DHS can terminate asylum status if the person is convicted of an aggravated felony. INA § 208(c)(2), 8 U.S.C. § 1158(c)(2); 8 C.F.R. § 1208.24.

<sup>5</sup> In fact, on April 30, 2013, the Ninth Circuit ordered the parties in *Almanza-Arenas v. Holder*, No. 09-71415, to submit supplemental briefs addressing whether *Moncrieffe* overrules *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012).

<sup>6</sup> *See* 2 McCormick on Evidence § 339, at 484 (a “preponderance of the evidence” standard applies to factual questions).



earlier decision in *Carachuri-Rosendo v. Holder*, 560 U.S. \_\_\_ (2010) (concerning eligibility for cancellation of removal) – is “the same” as the analysis in the deportability context in which the issue arises in *Moncrieffe*. Op. at 6 n.4.

- The Court confirms this by pointedly observing that once an individual’s conviction is found not to be an aggravated felony for deportability purposes, the person will be eligible for relief: “At that point, having been found not to be an aggravated felon, the noncitizen may seek relief from removal such as asylum or cancellation of removal, assuming he satisfies the other eligibility criteria.” Op. at 19.<sup>7</sup>
- The Court rejects an approach that would require the submission of evidence at a post hoc minitrial in immigration court to determine whether a conviction fits within a criminal offense category, op. at 15-16, as would presumably be required if the crime classification question is treated as a case-specific factual question subject to a burden of proof provision.
- Further, the Court notes that the post hoc minitrial can result in different determinations relating to convictions of the same offense. As the Court explains, “two noncitizens, each ‘convicted of’ the same offense, might obtain different aggravated felony determinations depending on what evidence remains available or how it is perceived by an individual immigration judge.” Op. at 16. The categorical approach was designed to avoid the potential unfairness of such an outcome. *Id.* These kinds of disparities are an inevitable result of a rule that an inconclusive record of conviction cannot show relief eligibility, because noncitizens convicted of the same offense will be found eligible, or not, depending on what facts happen to appear in the record of conviction, or what the government happens to introduce in the case of a detained immigrant who cannot access criminal records herself. *See Young*, 697 F.3d at 992 (Fletcher, J., dissenting in part). The Court also observes that it is no answer to say that defense counsel in the criminal case could build an appropriate record when the facts are fresh because “there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts . . . that are irrelevant to the offense charged.” Op. at 18.

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<sup>7</sup> The conclusory fashion in which the Court finds that there is no bar to relief echoes the Second Circuit’s incredulity in *Martinez v. Mukasey* that the government even made the argument that the noncitizen had to prove that he or she was not convicted of an aggravated felony. *See Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (Calabresi, J.) (“The Government makes one additional and rather startling argument . . . This argument flies in the face of the categorical approach insofar as it requires any alien seeking cancellation of removal to prove the facts of his crime to the BIA.”).

## B. What Constitutes a Divisible Statute

***Moncrieffe* supports the understanding that a statute may only be deemed divisible and subject to the modified categorical approach when it describes different crimes separately – use in challenges to *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012); *U.S. v. Aguila-Montes de Oca*, 655 F.3d 915 (9th Cir. 2011) (en banc).**

The courts have stated that, when a statute of conviction is “divisible,” i.e., has at least one portion of the statute covering only conduct falling within the criminal classification at issue, the adjudicator may go beyond the statutory text to look at the record of conviction in order to determine if an individual’s conviction falls within that portion of the statute. There is a dispute, however, about what constitutes a divisible statute. Arguably, the alternative means of committing a violation must be separately described in the statute, such as by use of subsections, in order for the statute to be deemed divisible. The BIA has taken a broader view, finding divisibility in “all statutes of conviction, regardless of their structure, so long as they contain an element or elements that could be satisfied either by removable or non-removable conduct.” *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012).

*Moncrieffe* implicitly rejects the BIA’s broader view of divisibility. In describing when it has allowed a court to look beyond the language of the statute to the record of conviction, the Court speaks of “state statutes that contain several different crimes, each described separately . . . .” Op. at 5. Then, in analyzing the Georgia statute of conviction at issue in *Moncrieffe*, the Court applies such a view of divisibility to determine which of the following crimes, listed in the statute in the disjunctive, Mr. Moncrieffe was convicted of – “possess, have under [one’s] control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.” After looking to the record of conviction (the plea agreement) to find that Mr. Moncrieffe was convicted of the crime of possession with intent to distribute marijuana, op. at 7, the Court then goes on to consider whether this offense was “necessarily” an aggravated felony. Significantly, in doing so, the Court looked only at the statute of conviction without looking again at the record of conviction. Op. at 9. Thus, the Court indicated it did not consider the “possession with intent” prong further divisible as to the critical factors of amount of marijuana or the presence of remuneration – even though there is a broad range of conduct that may result in this conviction – given that the statute does not describe different crimes based on such factors. Op. at 9.

Practitioners should be aware that the Court has pending a criminal sentencing case that squarely raises the question of when a criminal statute may be deemed divisible. *Descamps v. U.S.*, No. 11-9540, argued on January 7, 2013. The Court’s upcoming decision in *Descamps* may provide further and more detailed guidance on when a criminal statute may be deemed divisible for immigration purposes.<sup>8</sup>

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<sup>8</sup> For further guidance on the possible significance of *Descamps* to immigration cases, see K. Brady & I. Wheeler, *Waiting for Descamps: How the Supreme Court Might Save Your Crim-Imm Case* (Feb. 2013), available at <http://immigrantdefenseproject.org/wp-content/uploads/2013/02/Descamps-advisory-final.pdf>.

### C. Challenging *Matter of Silva-Trevino*

***Moncrieffe* reaffirms the principle that the categorical approach looks only to the statute of conviction (and, where the statute is divisible, the record of conviction) and not extrinsic evidence – use in challenges to *Matter of Silva-Trevino*, 24 I&N Dec. 687 (AG 2008)**

In *Matter of Silva-Trevino*, former Attorney General Mukasey ruled that the government may go beyond the categorical and modified categorical approach to look at facts and extrinsic evidence outside the record of conviction to determine removability under the crime involving moral turpitude (“CIMT”) ground. 24 I&N Dec. 687 (AG 2008).

*Moncrieffe* provides many arguments to challenge *Silva-Trevino*. First, the decision refutes one of the government’s main arguments in defense of *Silva-Trevino*. The government argued in *Moncrieffe*, as it has in CIMT context, that the statute at issue requires a “circumstance-specific approach,” as was applied in *Nijhawan v. Holder*, 557 U.S. 29 (2009). In *Nijhawan*, the Court considered INA § 101(a)(43)(M)(i), 8 U.S.C. § 1101(a)(43)(M)(i) -- “an offense that involves fraud or deceit in which the loss to the victim or victims exceeds \$10,000” – and determined that the \$10,000 loss requirement was a case-specific circumstance to which the categorical approach does not apply.

But the Supreme Court in *Moncrieffe* found that applicability of the *Nijhawan* circumstance-specific approach was a rare exception to the general applicability of the categorical approach. It found that the circumstance-specific approach applies only when the “circumstance” itself is written into the immigration statute by a qualifying phrase, such as “in which,” describing a subset of offenses to which the removal ground applies. Op. at 17 (noting that the monetary threshold language at issue in *Nijhawan* triggered the circumstance-specific examination). By contrast, the provision at issue in *Moncrieffe* was a generic offense to which the categorical approach applies because the immigration statute prescribes no circumstantial limitations. Op. at 17; see also *id.* at 15 (“[N]o statutory authority for . . . case-specific factfinding in immigration court . . . is apparent in the INA.”). *Moncrieffe* thus supports the conclusion reached by several courts that the CIMT removal grounds do not permit “circumstance-specific” treatment under *Nijhawan* because they include no express directive to examine underlying conduct. See *Prudencio v. Holder*, 669 F.3d 472, 483 (4th Cir. 2012); *Fajardo v. U.S. Att’y Gen.*, 659 F.3d 1303, 1310 n.7 (11th Cir. 2011); *Jean-Louis v. Att’y Gen.*, 582 F.3d 462, 477 (3d Cir. 2009).

Further, *Moncrieffe* provides the following additional support for challenging *Matter of Silva-Trevino*:

- *Moncrieffe* cites with approval the long history of applying the categorical approach in immigration cases specifically addressing the CIMT removal grounds. The Court observes that the categorical approach “has a long pedigree in our Nation’s immigration law,” citing a scholarly article examining cases applying that approach as early as 1913 to the exclusion ground for CIMTs. Op. at 6 (citing Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. Rev. 1669 (2011)). The Court repeatedly cites those

early CIMT cases for the proposition that the immigration statute generally requires an analysis of the conduct necessary to offend the criminal statute, rather than the underlying facts of a particular case. Op. at 5, 6, 16.

- *Moncrieffe* holds that, “*post hoc* investigation into the facts of predicate offenses” conducted in “minitrials conducted long after the fact” yields arbitrary and unfair results, especially where respondents in removal proceedings are detained and/or unrepresented and lack meaningful access to evidence. Op. at 15, 16. The Court thus rejected a rule under which removal determinations hinge on the fortuity of “what evidence remains available” years later or “how it is perceived by an individual immigration judge.” Op. at 16. Further, the categorical approach ensures “that all defendants whose convictions establish the same facts will be treated consistently, and thus predictably, under federal law.” Op. at 20 n.11.
- *Moncrieffe* observes that the minitrials that the government proposed in that case “would be possible only if the noncitizen could locate witnesses years after the fact, notwithstanding that during removal proceedings noncitizens are not guaranteed legal representation and are often subject to mandatory detention . . . where they have little ability to collect evidence.” Op. at 16. This starkly contradicts claims that the government sometimes makes in defense of *Silva-Trevino*, namely, that it, rather than a detained noncitizen, is the only party prejudiced by re-trying long-past criminal conduct in a civil removal proceeding because it (sometimes) bears the burden of proof.
- Although *Moncrieffe* acknowledges that Sixth Amendment concerns about judicial fact-finding “do not apply in th[e] context” of removal proceedings, op. at 13, the Court reaffirms that the analytical limits imposed by Court decisions in the criminal context, such as in *Taylor v. U.S.*, 495 U.S. 575 (1990), and *Shepard v. U.S.*, 544 U.S. 13 (2005), still apply with full force in the immigration context. Op. at 5, 7, 16, 22. This undermines *Silva-Trevino*’s contention that the lack of Sixth Amendment concerns in removal proceedings justify the abandonment of the categorical approach. See *Silva-Trevino*, 24 I&N Dec. at 700-01.

#### **D. Minimum Conduct Approach**

***Moncrieffe* reaffirms the general principle that one must look to the minimum conduct covered under the statute of conviction – use in challenges to agency decisions that disregard or overlook non-removable conduct covered by the statute of conviction**

*Moncrieffe* reaffirms the general principle that, under the categorical approach, the adjudicator must look to the minimum conduct covered under the statute of conviction. The Court states: “Because we examine what the state conviction necessarily involves, 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.” Op. at 5.

The Court dismissed government concerns that application of such a minimum conduct test would lead to noncitizens escaping aggravated felony treatment. The Court stated: “[Some] offenders may avoid aggravated felony status by operation of the categorical approach. But the Government’s objection to that underinclusive result is little more than an attack on the categorical approach itself. We prefer this degree of imperfection to the heavy burden of relitigating old prosecutions.” Op. at 20.

The Court’s strong reaffirmation of the minimum conduct test will provide additional support for challenges to agency decisions that disregard or overlook that a statute of conviction covers conduct falling outside the removal ground. *See, e.g.*, agency decisions at issue in *Pascual v. Holder*, 707 F.3d 403 (2d Cir. 2013), *petition for rehearing pending* (agency found New York drug “sale” conviction to be drug trafficking aggravated felony even though the offense covers offer to sell conduct not covered under the federal “drug trafficking crime” definition referenced in the aggravated felony definition); *Rojas v. Attorney General*, No. 12-1227 (3d Cir.), *sua sponte rehearing en banc pending* (agency found Pennsylvania drug paraphernalia conviction to be controlled substance offense even though Pennsylvania defines “drug” more broadly than federal definition of “controlled substance”); *Matter of Mendez-Orellana*, 25 I&N Dec. 254, 255-56 (BIA 2010) (BIA treated a conviction under a firearm statute that included antique firearms as presumptively deportable even though the federal firearm statute referenced in the deportation statute excludes antique guns as an affirmative defense).

The Court, however, does identify two limitations on the minimum conduct test. First, the Court describes what has been called the modified categorical approach. It indicates that where the statute of conviction is divisible (such that it identifies at least one sub-crime whose minimal conduct does fall within the removal ground), the adjudicator may look to the record of conviction to “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.’” Op. at 5 (quoting *Nijhawan*, 557 U.S. at 35 (quoting *Shepard*, 544 U.S. at 26)).

Second, the Court states: “our focus on the minimum conduct criminalized by the state statute is not an invitation to apply ‘legal imagination’ to the state offense; there must be a ‘realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.’” Op. at 5-6 (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)). Later, the Court addresses the aggravated felony conviction under INA § 101(a)(43)(C), which refers to a federal firearms statute with an exception for antique firearms. *See* INA § 101(a)(43)(C), 8 U.S.C. § 1101(a)(43)(C) (referencing 18 U.S.C. § 921, which includes the exception at § 921(a)(3)). The Court states in dictum that, in order to establish that a conviction under a state firearms law that does not have an antique firearms exception is an aggravated felony, the “realistic probability” standard must be met, i.e., “a noncitizen would have to demonstrate that the State actually prosecutes the relevant offense in cases involving antique firearms.” Op. at 21.

One way a person may show that the state actually prosecutes the relevant offense is to cite state case law. Op. at 9 (citing Georgia court cases to show that Georgia does prosecute

the marijuana offense at issue in *Moncrieffe*). The realistic probability standard also may be satisfied, however, where the criminal statute expressly covers the conduct falling outside the removal category. See *Ramos v. U.S. Atty Gen.*, 709 F.3d 1066, 1072 (11th Cir. 2013) (finding that “realistic probability” is created where the statute’s language expressly demonstrates “that it will punish crimes that do qualify as theft offenses and crimes that do not.”); *U.S. v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (finding that because Oregon burglary statute explicitly covers vehicles and boats “that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of” burglary). See also *Kawashima v. Holder*, 132 S. Ct. 1166, 1175 (2012) (Court accepted the government’s argument that a federal tax evasion conviction was not categorically a “fraud or deceit” aggravated felony because the tax evasion provision covered certain non-deceitful conduct without citing a case that actually involved prosecution for such conduct and despite government concession at oral argument that such cases would be rare).

➤ Practice Tip

A practitioner should examine closely the notice to appear to determine if the statute of conviction necessarily satisfies the generic ground of deportability charged in the notice to appear. As discussed above, *Moncrieffe* highlighted the firearm aggravated felony definition as one such situation where a conviction may not satisfy the generic ground because the federal criminal statute (18 U.S.C. § 921) contains an exception for antique firearms. Op. at 21. This means that a person cannot be convicted for a federal firearm offense for having an antique gun or a gun that used antique ammunition.

The California Penal Code, unlike 18 U.S.C. § 921(a)(3), makes it crime to possess an antique firearm. P.C. § 25400(a); see *Gil v. Holder*, 651 F.3d 1000, 1005 (9th Cir. 2011) (holding that conviction under predecessor California statute met federal gun definition even though former statute included conviction for an antique firearm). Despite the fact that convictions under the California statute would seem to necessarily fail the categorical inquiry, the noncitizen convicted under this provision still must show a realistic probability that California would prosecute a defendant for having an antique weapon. See op. at 21 and discussion above regarding ways to meet the “reasonable probability” standard.

## E. Rule of Lenity

***Moncrieffe* reaffirms the applicability of the criminal rule of lenity in immigration cases involving interpretation of terms also used in criminal statutes – use in challenges to government interpretations of terms such as “drug trafficking crime,” “crime of violence,” “aggravated felony,” and “conviction.”**

In *Moncrieffe*, the Supreme Court reaffirms the applicability of the criminal rule of lenity in immigration cases that involve interpretation of terms contained in criminal statutes. The Court states: “[We] err on the side of underinclusiveness because ambiguity in criminal statutes referenced by the INA must be construed in the noncitizens’ favor.” Op. at 20-21 (citing *Carachuri-Rosendo v. Holder*, 560 U.S. \_\_, \_\_ (slip op. at 17) (2010); *Leocal v. Ashcroft*, 543 U.S. 1, 11, n.8 (2004)). Thus, practitioners should cite the criminal rule of lenity in support of

arguments relating to interpretation of criminal statutes cross-referenced in the Immigration and Nationality Act. *See, e.g.*, federal criminal code “drug trafficking crime” and “crime of violence” definitions referenced in INA §§ 101(a)(43)(B)&(F); 8 U.S.C. §§ 1101(a)(43)(B)&(F). Practitioners also should consider citing the criminal rule of lenity in support of arguments relating to the reach of terms in the immigration statute itself that have criminal law applications. *See, e.g.*, “aggravated felony” and “conviction” terms referenced in INA § 276(b), 8 U.S.C. § 1326(b) (INA criminal illegal reentry statute where these terms are used as defined in INA §§ 101(a)(43) and 101(a)(48)(A)).

#### **F. No Deference to the Agency**

***Moncrieffe* represents yet another criminal removal case where the Court does not discuss or even mention *Chevron* deference to the agency when determining how the categorical approach is applied – use in any challenges where the government seeks *Chevron* deference to its interpretation of how the categorical approach is applied**

*Moncrieffe* represents yet another criminal removal case where the Court rejects the immigration agency’s deviation from the categorical approach without considering or even mentioning deference to the agency under *Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984). *See also Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010); *Lopez v. Gonzales*, 549 U.S. 47 (2006); *Leocal v. Ashcroft*, 543 U.S. 1 (2004). This supports the notion that the categorical approach has been effectively incorporated into the statute as a result of its “long pedigree in our Nation’s immigration laws,” as recognized by the Court in *Moncrieffe*. Op. at 6 (citing Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U.L. Rev. 1669, 1668-1702, 1749-1752 (2011) (tracing judicial decisions back to 1913)). Practitioners should point to the Supreme Court’s history of not applying *Chevron* when the government seeks deference to its decisions cutting back on the categorical approach in immigration cases.

### **III. ANALYZING CRIMINAL STATUTES AND STRATEGIES FOR CRIMINAL DEFENDANTS.**

For criminal defendants, the *Moncrieffe* decision provides a possible roadmap for avoiding adverse immigration consequences. It is true that the prosecuting authorities control the scope and extent of charge bargaining and that no defendant has the right to any specific plea bargain. *See Lafler v. Cooper*, 132 S. Ct. 1376, 1387 (2012). Nevertheless, 94% of state criminal convictions are the result of plea bargains. *Missouri v. Frye*, 132 S. Ct. 1399, 1407 (2012). Moreover, effective plea bargaining is one approach to avoid adverse immigration consequences. *Padilla v. Kentucky*, 130 S. Ct. 1473, 1486 (2010).

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## A. State Court Strategies

### 1. Controlled Substances

The Court recognized fourteen states that had statutes which specifically proscribe § 841(b) conduct (i.e., distribution of a small amount of marijuana for no remuneration).<sup>9</sup> Thus, in at least every one of those states, criminal defense counsel can plead a client to a charge that would not be an aggravated felony. In some states, like Georgia, the statute defines a range of crimes. *Op.* at 7, 9. In others, like New York, the only crime defined under the statutory subsection involves distribution without remuneration. *Op.* at 14 (discussing N. Y. Penal Law Ann. §221.35(West 2008)). In Texas, there is a specific crime for distributing a quarter ounce or less of marijuana for no remuneration. V.T.C.A., Health & Safety Code § 481.120(b)(1). It is important to note, however, that § 841(b) only applies to marijuana and does not include other federally controlled substances. 21 U.S.C. § 841(b)(4). Distribution of other federally controlled substances is a felony regardless of whether there was remuneration. *See* 21 U.S.C. §§ 841-843 (providing that distribution of virtually any controlled substance other than marijuana is a felony under federal law without exception).

Furthermore, as the Court noted, with the exception of a single offense for simple possession for personal use of 30 grams or less of marijuana, a person with a conviction under one of these fourteen state statutes still will be deportable under the controlled substance ground of deportability. *Op.* at 19; INA § 237(a)(2)(B)(i), 8 U.S.C. §1227(a)(2)(B)(i).

#### ➤ Practice Tip

*Moncrieffe* may preclude the government from establishing that certain controlled substance distribution offenses are convictions for an aggravated felony even when a noncitizen has a conviction that does not specifically fall under a state’s counterpart to 21 U.S.C. § 841(b)(4). Florida’s controlled substance law presents one such situation.

The Controlled Substances Act (CSA) definition of the term “marihuana” includes “the resin extracted from any part of the plant.” 21 U.S.C. § 802(16)(d) (governing § 841(b)(4), the CSA misdemeanor marijuana distribution provision at issue in *Moncrieffe*). Unlike federal law, the Florida drug offense that is specific to non-remunerative transfer of marijuana does “not include the resin extracted from the plants of the genus *Cannabis*.” *Compare* Fla. Stat. § 893.13(2)(b)(3) (2010) *with* 21 U.S.C. § 802(d)(16). This means that a person with a Florida

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<sup>9</sup> *See* Cal. Health & Safety Code Ann. §11360(b) (West Supp. 2013); Colo. Rev. Stat. Ann. §18–18–406(5)(2012); Fla. Stat. §893.13(2)(b)(3) (2010); Ill. Comp. Stat., ch. 20, §§550/3,550/4, 550/6 (West 2010); Iowa Code §124.410 (2009); Minn. Stat. §152.027(4)(a) (2010); N.M. Stat. Ann. §30–31–22(E) (Supp. 2011); N.Y. Penal Law Ann. §221.35(West 2008) Ohio Rev. Code Ann. §2925.03(C)(3)(h) (Lexis 2012 Cum. Supp.); Ore. Rev. Stat. §475.860(3) (2011); Pa. Stat. Ann., Tit. 35, §780–113(a)(31)(Purdon Supp. 2012); S.D. Codified Laws §22–42–7 (Supp. 2012); Tex. Health & Safety Code Ann. §481.120(b)(1) (West 2010); W. Va. Code Ann. §60A–4–402(c) (Lexis 2010).



conviction for distributing cannabis resin, commonly known as “hashish,” could have been guilty of giving away a small amount of hashish, but the lack of remuneration would be legally irrelevant because the Florida statute does not require proof of remuneration.

Under the Court’s test in *Moncrieffe*, “not only must the state offense of conviction meet the ‘elements’” of the generic federal offense defined by the INA, but the CSA must punish that offense as a felony.” Op. at 5. Applying the *Moncrieffe* test to a Florida conviction for distribution of hashish reveals that the offense taken at its minimum includes the federal misdemeanor offense of giving away a small quantity of marijuana, including the resin (hashish). That Florida treats hashish distribution more seriously than the United States Code does not change the applicability of the categorical approach. As a result, anyone with a Florida conviction for distributing hashish should not have an aggravated felony conviction under the Court’s test because DHS will not be able to prove that the conviction was not for an offense punishable as a misdemeanor under federal law. The defendant’s alleged actual conduct is not part of the calculation because *Moncrieffe*’s central holding is that a factfinder must focus on the statute of conviction rather than the defendant’s conduct. See op. at 5-6.

Similarly, a conviction for distribution of a small amount of any unnamed controlled substance under Florida law should not be deemed an aggravated felony because the conviction could have been for distribution of a small amount of cannabis resin.

The Florida structure may exist in many other states. Practitioners should examine carefully any controlled substance aggravated felony charge to determine whether the statute of conviction taken at a minimum would necessarily result in a felony conviction under the federal controlled substance laws.

➤ Practice Tip

If a defendant is charged under a statute that covers marijuana and other controlled substances and the charging document is silent about the identity of the controlled substance, a defendant, if possible should not allocute to any other drug. See *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965) (holding that the government fails to meet its burden where the record of conviction fails to identify the substance). A plea of nolo contendere to a charging document that does not identify the controlled substance should protect the defendant from the harsh consequences of an aggravated felony charge because the Department of Homeland Security will not have evidence to prove conclusively that the offense would be punishable as a felony under federal law.

## **B. Federal Court Strategies**

### *1. Reentry Prosecutions*

A noncitizen charged with violating INA § 276, 8 U.S.C. § 1326, for illegally reentering the United States after having been deported faces both statutory and Guideline sentencing enhancements. INA § 276(b)(2), 8 U.S.C. § 1326(b)(2) (interpreted by *Almendarez-Torres v. United States*, 523 U.S. 224, 235 (1998) (holding that § 1326(b)(2) created an enhancement));

U.S.S.G §2L1.2(b)(1)(C). For example, a noncitizen convicted for illegal reentry can get an eight-level increase under the United States Sentencing Guidelines for having an aggravated felony conviction. *Id.* Federal criminal defense practitioners in pending cases should ensure that a defendant’s sentence does not include an enhancement for a conviction that is not an aggravated felony under *Moncrieffe*.

A federal criminal defendant can raise a collateral challenge to the lawfulness of a prior removal order in certain circumstances. *United States v. Mendoza-Lopez*, 481 U.S. 828, 839-40 (1987) (holding due process requires judicial review of underlying deportation proceedings); INA § 276(d), 8 U.S.C. § 1326(d) (setting out requirements for raising collateral challenges).

## 2. *Controlled Substances*

The Court noted that any federal marijuana distribution conviction will be a deportable offense under the controlled substance ground of deportability. *Op.* at 19. Nevertheless, it may be possible that a noncitizen defendant pleading guilty to an offense under 21 U.S.C. § 841(b)(4) could be eligible to expunge the offense so that she or he would not have any conviction for immigration purposes. This seemingly counterintuitive scenario is possible because the language in 21 U.S.C. § 841(b)(4) provides that a person be treated in accordance with 21 U.S.C. § 844 and 18 U.S.C. § 3607. Section 3607 of Title 18, in turn, provides a mechanism for a defendant to receive a disposition that is not a conviction for any purpose whatsoever.<sup>10</sup>

Although there may be some tension between the language in 18 U.S.C. § 3607 unequivocally stating that ameliorative treatment under the statute “shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime” and INA § 101(a)(48), 8 U.S.C. § 1101(a)(48), which defines a conviction for immigration purposes, the explicit command of 18 U.S.C. § 3607 would arguably include the consequence of having a conviction for immigration purposes. There is not a single published case since the law changed in 1996 interpreting whether a disposition expunged under 18 U.S.C. § 3607 is a conviction under 8 U.S.C. § 1101(a)(48). Nevertheless, the holding in *Moncrieffe* and the statutory text of 18 U.S.C. § 3607 suggest that any defendant with some leverage with the prosecutors might consider seeking to come under its ameliorative terms.<sup>11</sup>

## IV. SUGGESTED STRATEGIES FOR NONCITIZENS WITH REMOVAL CASES AFFECTED BY *MONCRIEFFE*.

This section offers strategies to consider for noncitizens whose removal cases are affected by *Moncrieffe*. Keep in mind, most individuals directly affected by *Moncrieffe* still are removable from the United States under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), for a

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<sup>10</sup> A disposition under subsection (a), or a conviction that is the subject of an expungement order under subsection (c), shall not be considered a conviction for the purpose of a disqualification or a disability imposed by law upon conviction of a crime, or for any other purpose. 18 U.S.C. § 3607(a) & (c).

<sup>11</sup> A defendant who is providing substantial assistance to a federal prosecution might be an example of someone who might have sufficient leverage to obtain such a favorable plea bargain.

controlled substance offense and, thus, likely only will pursue these strategies if they are eligible for a form of relief from removal.

For sample motions and other documents to help implement these strategies, please see *Sample Carachuri-Rosendo Motions* (June 21, 2010), at [http://www.nationalimmigrationproject.org/legalresources/practice\\_advisories/CARACHURI-ROSENDO.pdf](http://www.nationalimmigrationproject.org/legalresources/practice_advisories/CARACHURI-ROSENDO.pdf) and *Vartelas v. Holder: Implications for LPRs Who Take Brief Trips Abroad and Other Potential Favorable Impacts* (April 5, 2012) (beginning on page 15) at [http://www.legalactioncenter.org/sites/default/files/vartelas\\_practice\\_advisory\\_fin.pdf](http://www.legalactioncenter.org/sites/default/files/vartelas_practice_advisory_fin.pdf). Although these samples address different substantive law, they nonetheless may provide helpful guidance.

#### **A. Noncitizens with Pending Removal Cases**

Individuals who are in removal proceedings before the immigration court or on appeal at the BIA should bring *Moncrieffe* to the attention of the IJ or the BIA. If the aggravated felony charge was the only ground of removability on the Notice to Appear (NTA), he or she may file a motion to terminate. In this situation, DHS likely will seek to amend the charges on the NTA. See 8 C.F.R. § 1240.10(e); *Matter of Rangel*, 15 I&N Dec. 789 (BIA 1976). If the case is on appeal at the BIA, the individual may file a motion to terminate and/or remand to the Immigration Court for a hearing on relief from removal. By filing a remand motion *before* the BIA rules on the appeal, a person preserves his or her statutory right to file *one* motion to reconsider and reopen.

Individuals who are in administrative removal proceedings under INA § 238(b) should bring *Moncrieffe* to the attention of DHS. DHS has discretion to initiate administrative removal proceedings only against non-LPRs and individuals with conditional permanent residency who are convicted of an aggravated felony. Individuals in § 238(b) proceedings have the opportunity to rebut the charges of removability, INA § 238(b)(4)(C), 8 C.F.R. § 238.1, and should argue that DHS improperly initiated § 238(b) proceedings because they were not convicted of an aggravated felony. If the noncitizen has not been convicted of an aggravated felony, DHS must terminate proceedings. At this point, DHS may initiate removal proceedings under INA § 240 by issuing an NTA. 8 C.F.R. § 238.1(e).

#### **B. Noncitizens with Final Orders**

A person who filed a petition for review challenging a final order should consider pursuing *both* the suggested strategy for court of appeals cases and an administrative motion.

*Pending Petition for Review.* Individuals with pending petitions for review should consider filing a motion to remand the case to the BIA under *Moncrieffe*; the motion should explain the impact of *Moncrieffe* on removability and the person's prospects for relief. The Department of Justice attorney may consent to such a motion. If briefing is ongoing, the opening brief and/or the reply brief should address *Moncrieffe*. If briefing is complete, the petitioner may file a letter under Federal Rule of Appellate Procedure 28(j) ("28(j) Letter") informing the court of *Moncrieffe* and its relevance to the case.

*Denied Petition for Review.* If the court of appeals already denied a petition for review, and the court has not issued the mandate, a person may file a motion to stay the mandate. If the court has issued the mandate, the person may file a motion to recall (withdraw) the mandate. Through the motion, the person should ask the court to reconsider its prior decision in light of *Moncrieffe* and remand the case to the BIA. In addition, a person may file a petition for certiorari with the Supreme Court within 90 days of the issuance of the circuit court's judgment (not mandate). The petition should request the Court grant the petition, vacate the circuit court's judgment, and remand for further consideration in light of *Moncrieffe*.

*Administrative Motion to Reconsider or Reopen.* Regardless whether an individual sought judicial review, she or he may file a motion to reconsider or a motion to reopen with the BIA or the immigration court (whichever entity last had jurisdiction over the case) or with DHS if the person was in administrative removal proceedings under INA § 238(b).<sup>12</sup> As with all cases where a motion is filed, there may be some risk that DHS may arrest the individual (if the person is not detained). This risk may increase when the motion is untimely.

It generally is advisable to file the motion within 30 days of the removal order, or, if 30 days have passed, before the 90 day motion to reopen deadline. See INA §§ 240(c)(6)(B) and 240(c)(7)(C)(i); see also 8 C.F.R. § 103.5 (for individuals in administrative removal proceedings, providing 30 days for filing a motion to reopen or reconsider a DHS decision).<sup>13</sup> If the time for filing has elapsed, motions should be filed, if at all possible, within 30 (or 90) days of *Moncrieffe*, i.e., by May 23, 2013 or by July 22, 2013, respectively. Filing within this time period supports the argument that the statutory deadline should be equitably tolled. In order to show due diligence as required by the equitable tolling doctrine, individuals should file within 30 days after *Moncrieffe* and argue that the filing deadline was equitably tolled until the Supreme Court issued its decision or until some later date. If the individual is *inside the United States* (and has not departed since the issuance of a removal order) and the statutory deadline has elapsed, counsel may also wish to request *sua sponte* reopening in the alternative.<sup>14</sup>

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<sup>12</sup> There are strong arguments that fundamental changes in the law warrant reconsideration because they are “errors of law” in the prior decision. See INA § 240(c)(6)(C).

<sup>13</sup> One court suggested that a person may file a petition for review if DHS denies the motion. *Ponta-Garca v. Ashcroft*, 386 F.3d 341, 343 n.1 (1st Cir. 2004). *But see Tapia-Lemos v. Holder*, 696 F.3d 687, 690 (7th Cir. 2012) (dismissing petition for review of denial of motion to reopen under 8 C.F.R. § 103.5 for lack of jurisdiction).

<sup>14</sup> Note, however, that courts of appeals have held that they lack jurisdiction to judicially review the BIA's denial of a *sua sponte* motion. See *Luis v. INS*, 196 F.3d 36, 40 (1st Cir. 1999); *Ali v. Gonzales*, 448 F.3d 515, 518 (2d Cir. 2006); *Calle-Vujiles v. Ashcroft*, 320 F.3d 472, 474-75 (3d Cir. 2003); *Doh v. Gonzales*, 193 F. App'x 245, 246 (4th Cir. 2006) (per curiam) (unpublished); *Enriquez-Alvarado v. Ashcroft*, 371 F.3d 246, 248-50 (5th Cir. 2004); *Harchenko v. INS*, 379 F.3d 405, 410-11 (6th Cir. 2004); *Pilch v. Ashcroft*, 353 F.3d 585, 586 (7th Cir. 2003); *Tamenut v. Mukasey*, 521 F.3d 1000, 1003-04 (8th Cir. 2008) (en banc) (per curiam); *Ekimian v. INS*, 303 F.3d 1153, 1159 (9th Cir. 2002); *Belay-Gebbru v. INS*, 327 F.3d 998, 1000-01 (10th Cir. 2003); *Anin v. Reno*, 188 F.3d 1273, 1279 (11th Cir. 1999).

### C. Noncitizens Who Are Outside the United States

An individual's physical location outside the United States arguably should not present an obstacle to returning to the United States if the court of appeals grants the petition for review. Such individuals should be "afforded effective relief by facilitation of their return." See *Nken v. Holder*, 556 U.S. 418, 435 (2009). Thus, if the court of appeals grants a petition for review or grants a motion to stay or recall the mandate and then grants a petition for review, DHS should facilitate the petitioner's return to the United States.<sup>15</sup>

Noncitizens outside the United States who are considering filing administrative motions should consider whether the departure bar regulations, 8 C.F.R. §§ 1003.2(d) and 1003.23(b), will pose an additional obstacle to obtaining relief. Although the BIA interprets these regulations as depriving immigration judges and the BIA of jurisdiction to adjudicate post-departure motions, see *Matter of Armendaraz*, 24 I&N Dec. 646 (BIA 2008), the courts of appeals (except the First and Eighth Circuit, which have not decided the issue) have invalidated the bar. See *Luna v. Holder*, 637 F.3d 85 (2d Cir. 2011); *Prestol Espinal v. AG of the United States*, 653 F.3d 213 (3d Cir. 2011); *William v. Gonzales*, 499 F.3d 329 (4th Cir. 2007); *Carias v. Holder*, 697 F.3d 257 (5th Cir. 2012); *Pruidze v. Holder*, 632 F.3d 234 (6th Cir. 2011); *Marin-Rodriguez v. Holder*, 612 F.3d 591 (7th Cir. 2010); *Reyes-Torres v. Holder*, 645 F.3d 1073 (9th Cir. 2011); *Contreras-Bocanegra v. Holder*, 678 F.3d 811 (10th Cir. 2012) (en banc); *Jian Le Lin v. United States AG*, 681 F.3d 1236 (11th Cir. 2012). If filing a motion to reconsider or reopen in the First or Eighth Circuits, the BIA or immigration judge likely will refuse to adjudicate the motion for lack of jurisdiction based on the departure bar regulations.

It is important to note that the cases invalidating the departure bar regulation have done so by considering whether the regulation is unlawful in light of the motion to reopen or reconsider statute or impermissibly contracts the BIA's jurisdiction. Thus, it is advisable to make an argument that the motion qualifies under the motion statutes (INA §§ 240(c)(6) or 240(c)(7)), i.e., is timely filed or the filing deadline should be equitably tolled, and impermissibly contracts the agency's congressionally-delegated authority to adjudicate motions. Thus, for individuals who have been deported or who departed the United States, it may be advisable *not* to request *sua sponte* reopening because the departure bar litigation has not been as successful in the *sua sponte* context. See, e.g., *Ovalles v. Holder*, 577 F.3d 288, 295-96 (5th Cir. 2009); *Zhang v. Holder*, 617 F.3d 650 (2d Cir. 2010); *Desai v. AG of the United States*, 695 F.3d 267 (3d Cir. 2012). In addition, as stated above, some courts of appeals have held that they lack jurisdiction to review *sua sponte* motions.<sup>16</sup>

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<sup>15</sup> For more information about returning to the United States after prevailing in court or on an administrative motion, see the practice advisory, *Return to the United States After Prevailing on a Petition for Review or Motion to Reopen or Reconsider* (December 21, 2012) at [http://www.legalactioncenter.org/sites/default/files/return\\_to\\_the\\_united\\_states\\_after\\_prevailing\\_on\\_a\\_petition\\_for\\_review\\_or\\_motion\\_to\\_reopen\\_or\\_reconsider.pdf](http://www.legalactioncenter.org/sites/default/files/return_to_the_united_states_after_prevailing_on_a_petition_for_review_or_motion_to_reopen_or_reconsider.pdf).

<sup>16</sup> For additional information on the departure bar regulations, see the practice advisory, *Departure Bar to Motions to Reopen and Reconsider: Legal Overview and Related Issues*

If the BIA denies a motion to reconsider or reopen based on the departure bar regulations and/or the BIA's decision in *Matter of Armendarez*, please contact Trina Realmuto at [trina@nationalimmigrationproject.org](mailto:trina@nationalimmigrationproject.org) or Beth Werlin at [bwlerin@immcouncil.org](mailto:bwlerin@immcouncil.org).

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(March 14, 2012) at  
[http://www.legalactioncenter.org/sites/default/files/departure\\_bar\\_practice\\_advisory.pdf](http://www.legalactioncenter.org/sites/default/files/departure_bar_practice_advisory.pdf).