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Removal Defense and Florida Drug Crimes: Applying the Categorical Approach

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This practice advisory discusses defenses to removal for immigrants with convictions under common Florida drug statutes. This advisory assumes basic familiarity with the removal grounds in the Immigration and Nationality Act, the categorical approach, and the U.S. Supreme Court's decisions in *Moncrieffe v. Holder* and *Descamps v. United States*.[1] For additional background on these topics, you may wish to read the practice advisories on these cases authored by the National Immigration Project of the National Lawyers Guild, the Legal Action Center of American Immigration Council, and the Immigrant Defense Project.[2]

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[1] Moncrieffe v. Holder, 133 S.Ct. 1678 (2013); Descamps v. U.S., 133 S.Ct. 2276 (2013).

[2] *See, e.g.*, *Mellouli v. Lynch*: Further Support for a Strict Categorical Approach for Determining Removability Under Drug Deportation and Other Conviction-Based Removal Grounds, Practice Advisory (June 8, 2015), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Mellouli_Advisory_6-8-15.pdf; *Moncrieffe v. Holder: Implications for Drug Charges and Other Issues Involving the Categorical Approach*, Practice Advisory (May 2, 2013), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Moncrieffe%20v.%20Holder%205-2-

This advisory addresses the following topics:

- Whether differences between the Florida and federal drug schedules allow for arguments to prevent removal.

- Whether drug paraphernalia convictions under Florida law are drug offenses that "relate to" a controlled substance as defined by the federal drug schedules.

- Whether a conviction for drug trafficking under Florida State Statute § 893.135 is always a federal "drug trafficking" aggravated felony under immigration law.

- Whether the lack of a *mens rea* element in Florida drug statutes provides a defense to removability under the drug trafficking aggravated felony ground of deportation.

- Whether a conviction under Florida's drug trafficking statutes is always an "illicit trafficking" offense under the aggravated felony definition

- Whether certain offenses for drug distribution under Florida law fall outside the aggravated felony definition because the minimum conduct criminalized is distribution of a small amount of marijuana without remuneration, as analyzed in *Moncrieffe v. Holder*.

This advisory contains arguments that are not yet well accepted by either immigration adjudicators or the federal courts. People in removal proceedings who have already been convicted of a drug offense should consider making any relevant arguments outlined below. People considering whether to affirmatively apply for an immigration benefit (or naturalization) and people with pending drug cases in criminal court, however, should be more cautious in relying on the arguments in this advisory. Immigration authorities often aggressively pursue removal, even when there is a strong argument that a particular conviction falls outside a ground of deportation or inadmissibility. The strategies discussed in this advisory may, however, prove useful to people with pending criminal charges when a plea that clearly avoids immigration consequences is not available.

13.pdf.; *Descamps v. United States and the Modified Categorical Approach*, Practice Advisory (July 17, 2013), *available at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/pa_Descamps_Practice_Advisory_6-26-13.pdf.

A. Removal For Drug Related Offenses

A wide range of drug offenses triggers removal from the United States under the Immigration and Nationality Act's grounds of deportation and inadmissibility. Both types of removal grounds encompass state, federal, and foreign offenses "relating to a controlled substance (as defined in section 802 of title 21)."[3] Drug crimes that constitute "illicit trafficking in a controlled substance," including those that meet the federal definition of "drug trafficking," also qualify as "aggravated felonies." Aggravated felonies carry the most serious immigration consequences.[4] For example, a person with an aggravated felony conviction is ineligible for discretionary relief called cancellation of removal.[5]

B. Modified Categorical Approach

Under the categorical approach, the immigration judge or adjudicator compares the elements of a criminal statute to the immigration ground of removal. The conduct alleged to underlie the offense is irrelevant. Instead, the minimum conduct criminalized under the statute must trigger removal.[6] The modified categorical approach involves looking beyond the statute of conviction to the documents contained in the record of conviction. As has been recently clarified by both the U.S. Supreme Court and the Eleventh Circuit, an immigration judge or other adjudicator cannot automatically review the record of conviction under the modified categorical approach whenever there is ambiguity about whether a conviction falls within a removal ground. Review of the record of conviction is only proper when the statute is "divisible." The U.S. Supreme Court in *Descamps v. United States* suggested that divisibility occurs only when the statute contains alternative elements and that elements are facts about which jurors must agree to convict.[7] If jurors need not agree about certain alleged facts, then the facts

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[3] 8 U.S.C. § 1227(a)(2)(B)(i) (2012) (controlled substance ground of deportation); 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2013) (controlled substance ground of inadmissibility). The ground of deportation contains an exception for "a single offense involving possession for one's own use of 30 grams or less of marijuana."

[4] *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (aggravated felony ground of deportation); 8 U.S.C. § 1101(a)(43)(B) (2012) (definition of aggravated felony). There is no aggravated felony ground of inadmissibility. "Drug trafficking" in the aggravated felony definition is defined at 18 U.S.C. § 924(c)(2) (2012) and includes "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46." The federal drug schedule appears at 21 U.S.C. § 802(6) (2012) and 21 C.F.R. § 1308 (1985). An alphabetical list of federal drugs is also available at http://www.deadiversion.usdoj.gov/schedules/orangebook/a_sched_alpha.pdf.

[5] 8 U.S.C. § 1229b(a) (2012) (cancellation of removal for lawful permanent residents).

[6] The U.S. Supreme Court has stated that the minimum conduct must not be a product of "legal imagination" but must have a "realistic" possibility of being criminalized under the statute. Moncrieffe v. Holder, 133 S.Ct. 1678, 1684-85 (2013) (citing Gonzales v. Duenas-Alvarez, 127 S.Ct. 815, 822 (2007). This practice advisory does not include an analysis of the scope and meaning of this requirement.

[7] Descamps v. United States, 133 S. Ct. 2276, 2288 (2013). *See also* United States v. Fuertes, 805 F.3d 485 (4th Cir. 2015); Rendon v. Holder, 764 F.3d 1077 (9th Cir. 2014), *rehearing en banc denied*, 782 F.3d 466 (9th Cir. 2015), United States v.

are "means," not elements. "Means" are nonessential facts that describe the way in which a crime was committed. Some circuits, however, disagree with this reading of *Descamps* and have held that a statute's use of a list or "or" language definitively establishes divisibility, even if no juror agreement is needed.[8] The U.S. Attorney General has stayed and certified to herself the BIA's decision in *Chairez-Castrejon*, a decision adopting the juror agreement test for any circuit that had not held otherwise.[9]

The Eleventh Circuit has used the juror agreement test post-*Descamps*.[10] However, practitioners should proceed with caution in light of the U.S. Attorney General's stay and certification in *Chairez-Castrejon* and the fact that two circuits have rejected a reading of *Descamps* as requiring juror agreement. Assuming that the Eleventh Circuit will continue to follow the juror agreement test, practitioners must consult case law interpreting the state statute to determine whether juror agreement on a particular fact is required. For example, Florida's theft statute specifies that a taking can be temporary or permanent, but jurors need not agree that the taking was one or the other.[11] As a result, Florida theft is not a divisible statute and the record of conviction should never be consulted to determine whether the taking was permanent or temporary. On the other hand, it may be appropriate to consult the record of conviction in a case involving Florida Statute § 893.135 because that statute criminalizes both possession and sale of drugs and a jury must specifically find one or the other in order to convict.[12] It may be proper to review the record of conviction to resolve whether the conviction was for sale (an aggravated felony) or only possession.

Estrella, 758 F.3d 1239, 1246 (11th Cir. 2014) (following juror agreement test).

[8] United States v. Trent, 767 F.3d 1046 (10th Cir. 2014); United States v. Ozier, 796 F.3d 597 (6th Cir. 2015); United States v. Madrid, No. 14-2159, 2015 WL 6647060 (10th Cir. Nov. 2, 2015).

[9] Chairez-Castrejon, 26 I. & N. Dec. 349, 353 (B.I.A. 2014), *partially vacated by* Chairez-Castrejon, 26 I. & N. Dec. 478 (B.I.A. 2015), *vacated by Chairez-Castrejon*, 26 I. & N. Dec. 686 (2015).

[10] *See* United States v. Estrella, 758 F.3d 1239, 1246 (11th Cir. 2014) ("The Supreme Court's effort to distinguish divisible and indivisible statutes makes clear that we should ask ourselves the following question when confronted with a statute that purports to list elements in the alternative: If a defendant charged with violating the statute went to trial, would the jurors typically be required to agree that their decision to convict is based on one of the alternative elements? If that is true, then the statute is divisible").

[11] *See* Daniels v. State, 587 So.2d 460, 462 (Fla. 1991) ("[b]y adding the phrase 'either permanently or temporarily' to subsection 812.014(1), the legislature has expressed its intent in this area, and we hold that the specific intent to commit [theft] is the intent to steal, i.e., to deprive an owner of property either permanently or temporarily.")

[12] *See e.g.*, Fla. Stat. § 893.135(1)(a) (2013) ("any person" who "knowingly sells, *purchases*, manufactures, delivers, or brings into [the] state" or who "knowingly is in actual or constructive *possession of*" enumerated amounts of specified drugs commits various levels of felony offenses (emphasis added)). When determining the elements of an offense, it is helpful to review the standard jury instructions. The standard jury instruction for Fla. Stat. § 893.135 specifies that, to convict, a jury must specify whether the defendant sold, purchased, manufactured, delivered, brought into Florida, or possessed the controlled substance.

Attorneys counseling immigrant defendants about safe pleas should be conservative in their advice. It is still commonplace for immigration judges and other adjudicators to review the record of conviction, even when the statute is not divisible.

C. The Arguments

This advisory discusses five arguments that might be available to contest removability for a drug offense or to challenge the designation of an offense as an aggravated felony. For ease of reference, the table below shows which arguments might be available in relation to the following common Florida drug statutes: the general drug offense statute, § 893.13 (which includes both possession, delivery, and sale), the "drug trafficking" statute, § 893.135 (which involves larger amounts of drugs but also includes possession only), and the drug paraphernalia statute, § 893.147.

TABLE OF ARGUMENTS

FLORIDA STATUTE	**Argument #1** **Florida vs. Federal Drug Schedules Removal Defense (*Mellouli*, *Matter of Paulus*)**	**Argument #2** **Possession of Large Amount Not Aggravated Felony**	**Argument #3** **Lack of *Mens Rea* Means Not Aggravated Felony (*Donawa*)**	**Argument #4** **Not "Illicit Trafficking" Because No Commercial Element (distinguishing *L-G-H-*)**	**Argument #5** **Small Amount of Social Distribution Is Not Aggravated Felony (*Moncrieffe*)**
§ 893.13 "Prohibited Acts" Relating to Drugs (including possession, delivery, sale)	Yes	N/A	Yes	Yes	Yes
§ 893.135 "Drug Trafficking" (including possession, delivery, sale of large amount)	Yes	Yes	Yes	Yes	No
§ 893.147 "Drug Paraphernalia"	Yes	N/A	N/A	N/A	N/A

1. Florida Versus Federal Drug Schedules: Arguments Under *Mellouli v Lynch*

Individuals facing removal based on a Florida drug offense may be able to defend against removal if the drug of conviction is not on the federal schedules *or* if the record of conviction is ambiguous on this point.[13] The plain language of the controlled substance deportation and inadmissibility grounds limits removability to offenses involving controlled substances "as defined in section 802 of title 21."[14] Section 802 of title 21, which is part of the Controlled Substances Act (CSA), defines "controlled substances" as drugs included in the federal drug schedules at 21 U.S.C. § 802(6).

In *Mellouli v. Lynch*, 135 S.Ct. 1980 (2015), the U.S. Supreme Court held that a noncitizen convicted of a state drug offense was not deportable as having a conviction "relating to" a controlled substance (as defined by federal law) because the government had not established that the conviction related to a substance listed in the federal controlled substance schedules. The conviction at issue in *Mellouli* was a Kansas conviction for possession of drug paraphernalia. The record of conviction did not specify the controlled substance alleged to have been related to the paraphernalia, and Kansas law outlawed several controlled substances that are not on the federal schedule. The court's decision overruled the BIA's 2009 decision in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009), which had held that a paraphernalia conviction need not to relate to a federal schedule drug in order to "relate to" a controlled substance. For a specific discussion of paraphernalia convictions, see the next section.

The *Mellouli* decision is consistent with the BIA decision in *Matter of Paulus* and several circuit decisions that recognize that the substance underlying a state drug conviction must be listed in the federal drug schedules. In the 1965 decision *Matter of Paulus,* the BIA held that the government had failed to meet its burden of proving deportability under a prior version of the controlled substance ground of deportation because it could not establish that the "narcotic" that was the subject of the state criminal conviction was a "narcotic" under federal law.[15] Because the record of conviction did not identify the drug, the BIA reasoned that the conviction could have related to peyote or other drug that was criminalized by California law but not federal law.[16] Although *Matter of Paulus* was interpreting the drug deportation statute before it was amended, courts have applied the same reasoning to the current statute.[17]

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[13] The Eleventh Circuit Court of Appeals has referred to the "record of conviction" as including "documents involving the charge, plea agreement, or sentence." *Donawa,* 735 F.3d 1275, 1280 (11th Cir. 2013) (citing Ramos v. U.S. Attorney Gen.*,* 709 F.3d 1066, 1069 (11th Cir. 2013); Shepard v. United States*,* 125 S.Ct. 1254,1263 (2005)). The record of conviction does not include the arrest report.

[14] 21 U.S.C. § 802 (2012).

[15] Matter of Paulus, 11 I. & N. Dec. 274, 276 (BIA 1965). The conviction at issue was a California conviction relating to sale and delivery of "a narcotic.

[16] Federal law now criminalizes peyote.

[17] *See* Rojas v. Attorney Gen. of U.S.*,* 728 F.3d 203, 209 (3d Cir. 2013) (holding that "to establish removability the Department must show that 'a controlled substance' included in the definition of substances in section 802 of Title 21 was

The Florida definition of a "controlled substance" is "any substance named or described in Schedules I-V" of Florida Statute § 893.03. A comparison of the Florida and federal schedules reveals that the Florida list contains drugs not listed on the federal schedules.[18]

Because the Florida drug schedule includes nonfederal drugs, certain Florida drug offenses should not result in removal. Any Florida drug offense involving a nonfederal drug cannot form the basis of a removal order. In addition, any record of conviction that uses a general term like "narcotic" or that is otherwise ambiguous about the involved drug should not support a finding of removability, as the record of conviction will not show that the conviction was for a drug that is on both the Florida and federal schedules. Ambiguity can be created in ways other than the use of a general term like "narcotic." For example, a record of conviction could be ambiguous if the statute of conviction is different from the statute charged initially. In such a case, even if the charging document specifies a particular drug, it should not form part of the record of conviction because the conviction was under a different statute.[19]

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involved in the crime of conviction at issue"); Ruiz-Vidal v. Gonzalez, 473 F.3d 1072 (9th Cir. 2007), *abrogated on other grounds by* Cardozo–Arias v. Holder, 495 Fed.Appx. 790, 792 n.l (9th Cir. 2012) (holding that "in order to prove removability, the government must show that Ruiz-Vidal's criminal conviction was for possession of a substance that is not only listed under California law, but also contained in the federal schedules of the CSA"); Desai v. Mukasey, 520 F.3d 762, 766 (7th Cir. 2008) (recognizing that a state conviction will only be a "controlled substance offense under 8 USC § 1182(a)(2)(A)(i)(II) if it is related to a controlled substance *listed in the federal CSA"*) (emphasis added).

[18] Both the Florida and federal drug schedules are lengthy, difficult to interpret, and often changing. At the time of this practice advisory, the following are two examples of drugs that do not appear to be listed on the federal drug schedule: methoxymethcathinone and methylethcathinone. A thorough comparison of the schedules might reveal other examples. The relevant Florida drug schedule is the one that was in place at the time the defendant was convicted. *See* Mellouli, 135 S.Ct. at 1982; *see also* Rojas, 778 F.3d at 206. The Supreme Court requires that there be a "realistic possibility" that a non-federal drug would be prosecuted in Florida. Gonzalez v. Duenas-Alvarez, 549 U.S. 183,193 (2007). The Eleventh Circuit has held that the plain language of a criminal statute is sufficient to establish that the state would prosecute a violation of the statute. Ramos v. U.S. Atty. Gen., 709 F.3d 1066, 1071-72 (11th Cir. 2013) ("*Duenas–Alvarez* does not require this [the realistic probability showing] when the statutory language itself, rather than 'the application of legal imagination' to that language, creates the 'realistic probability' that a state would apply the statute to conduct beyond the generic definition."). However, in an abundance of caution, practitioners may wish to file with the court evidence demonstrating that the state would prosecute an offense involving a non-federal drug. *See* Matter of Ferreira, 26 I&N Dec. 415 (2014); *see generally Practice Advisory: The Realistic Probability Standard: Fighting Government Efforts to Use It to Undermine the Categorical Approach* (Nov. 2014), *available at* http://immigrantdefenseproject.org/wp-content/uploads/2014/11/realistic-probability-advisory.pdf.

[19] Evanson v. U.S. Attorney General, 550 F.3d 284, 293 (3d Cir. 2008) ("a court applying the modified categorical approach may only consider the charging document to the extent that the petitioner was actually convicted of the charges"); *Ruiz-Vidal*, 473 F.3d at 1079, *abrogated on other grounds by Cardozo–Arias*, 495 Fed.Appx. at 792 n.l (citing Martinez-Perez

a. Drug Paraphernalia

Florida law criminalizes the use, possession, manufacture, delivery, transportation, advertisement, or retail sale of drug paraphernalia.[20] Under *Mellouli*, litigants can argue that a paraphernalia conviction must be definitively tied to a controlled substance criminalized under the federal statute in order to qualify as a deportable drug offense. As mentioned above, *Mellouli* overruled the BIA's 2009 decision in *Matter of Martinez-Espinoza*, 25 I&N Dec. 118 (BIA 2009), which had held that a paraphernalia conviction did *not* need to relate to a federal schedule drug in order to "relate to" a controlled substance.

Mellouli also appears to overrule Eleventh Circuit precedent relating to drug paraphernalia convictions. In *Alvarez Acosta v. U.S. Attorney General*, the Eleventh Circuit ruled that a Florida conviction for possession of drug paraphernalia triggered removal under the controlled substance deportation ground.[21] The court considered whether the conviction was an offense "relating to a controlled substance" under the drug ground of inadmissibility.[22] The petitioner had argued "that possession of drug paraphernalia is not a criminal violation 'relating to a controlled substance,' because he could have used the drug paraphernalia he possessed with *any* controlled substance, not '*a*' specific controlled substance."[23] The court rejected this

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v. Gonzales, 417 F.3d 1022 (9th Cir. 2005)) (Finding that the charging document is not part of record of conviction when defendant did not plead guilty to the charge).

[20] Fla. Stat. § 893.147 (2013). Drug paraphernalia is defined under Florida law as "all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, transporting, injecting, ingesting, inhaling, otherwise introducing into the human body a controlled substance" as defined in the Florida drug schedule *or* in violation of section 877.111. Fla. Stat. § 893.145 (2013). Section 877.111 expands the list of relevant substances well beyond the Florida drug schedule to include a host of common household products. It states: "It is unlawful for any person to inhale or ingest, or to possess with intent to breathe, inhale, or drink, any compound, liquid, or chemical containing toluol, hexane, trichoroeothylene, acetone, toluene, ethyl acetate . . . ." Fla. Stat. § 893.111(1) (2013). A broad range of objects can qualify as "drug paraphernalia" under Florida law, including everyday objects like balloons, hoses, tubes, 2-liter-type soda bottles, and duct tape if they are "used, intended for use, or designed for use in ingesting, inhaling, or otherwise introducing" drugs into a person's body. Fla. Stat. § 893.145 (2013). Also included are "[b]lenders, bowls, containers, spoons, and mixing devices used, intended for use, or designed for use in compounding controlled substances," "[c]apsules, balloons, containers, spoons and mixing devices used, intended for use, or designed for use in packaging small quantities of controlled substances," and "[c]ontainers and other objects used, intended for use, or designed for use in storing, concealing, or transporting controlled substances," as well as other objects. *Id.*

[21] Alvarez Acosta v. U.S. Attorney Gen., 524 F.3d 1191 (11th Cir. 2008).

[22] 8 U.S.C. § 1182(a)(2)(A)(i)(II) (2012).

[23] Alvarez Acosta, 524 F.3d at 1196.

argument with brief reasoning, stating that the ground of inadmissibility "speaks in broad strokes."[24] It does not appear that the Eleventh Circuit's decision can survive *Mellouli*, which establishes that paraphernalia convictions must be tethered to a federally defined controlled substance.

Arguably, *no* conviction under Florida's drug paraphernalia statute triggers removal as a controlled substance violation because the Florida drug schedule is more expansive than the federal one. In Florida, a state prosecutor need not prove the type of drug involved in the paraphernalia charge as an element of the crime.[25] For example, a criminal charging document, known in Florida as an information, could state that the paraphernalia was a crack pipe with crack residue. But the jury could convict based on a theory that the involved drug was another one listed on the Florida drug schedule. Because jurors need not agree on the type of drug involved, the identity of the drug is a means rather than an element.[26] The statute should not be considered divisible therefore an immigration adjudicator should not be able to consult the record of conviction under the modified categorical approach. If the identity of the drug is not an element, no conviction under Florida's drug paraphernalia statute should count as a conviction that triggers removal because the Florida drug schedule contains drugs that are not on the federal schedule, as discussed above.

2. Possession of a Large Amount—Aggravated Felony Analysis

Not all convictions under Florida's drug trafficking statute constitute "illicit trafficking" crimes under the federal aggravated felony definition. Crimes can qualify as "illicit trafficking" in two ways. First, any crime that falls within the federal definition of "drug trafficking" qualifies as "illicit trafficking."[27] The federal definition of "drug trafficking" requires that the offense be one that would have been punishable as a felony under federal law.[28] Because federal law punishes simple possession of any amount of drugs as a misdemeanor, it does not qualify as "drug trafficking."[29] The second way that a crime might qualify as an

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[24] *Id*.

[25] Florida jury instructions do not require proof of the identity of the drug. Florida Standard Jury Instructions in Criminal Cases, § 25.14. While the prosecutor must have evidence linking the paraphernalia to a controlled substance (usually through proof of residue), nothing requires that the jurors agree on what drug was linked to the paraphernalia. M.M. v. State of Florida, 152 So.3d 121 (2014) (requiring link between paraphernalia and a controlled substance); Nixon v. State, 680 So.2d 506 (1996) (dismissal warranted where state failed to prove that defendant intended to use paraphernalia to ingest a controlled substance because there was no residue or other evidence of the defendant's intent).

[26] *See* discussion *supra* at 4 for a discussion of the state of the law on the means versus elements test for a divisible statute.

[27] *See supra* note 4.

[28] A "[D]rug trafficking crime" is defined at 18 U.S.C. § 924(c)(2) (2012) and includes "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or chapter 705 of title 46."

[29] 21 U.S.C. § 844(a) (2012) (stating that convictions under this provision are punishable up to a year).

"illicit trafficking" offense is if it involves an element of "unlawful trading or dealing in a controlled substance."[30] Simple possession does not involve such an element.

Florida statute § 893.135 states that "any person" who "knowingly sells, *purchases*, *manufactures*, delivers, or brings into [the] state" or who "knowingly is in actual or constructive *possession of*" enumerated amounts of specified drugs commits various levels of felony offenses (emphasis added). A person can violate the statute without engaging in distribution of a drug. For example, a person could have possessed or purchased the drug (or manufactured for one's own use) and still have violated the statute.[31]

Because the statute includes possession, purchase, or manufacture of controlled substances without any element of distribution, not all convictions under this statute constitute "drug trafficking" crimes under the federal aggravated felony definition. Convictions under the Florida statute for possession, purchase, or manufacture for one's own use (or that are ambiguous on this point) should not qualify as aggravated felonies. In *Lopez v. Gonzalez*, the U.S. Supreme Court recognized that possession of even a very large amount of drugs does not constitute drug trafficking within the federal definition.[32] The Third Circuit has stated that not every manufacturing conviction involves trading or dealing.[33] In an August 2013 unpublished decision, the BIA found that possession of more than 25 pounds of cannabis under the statute was not an "illicit trafficking" aggravated felony.[34]

People charged with a drug trafficking crime who cannot negotiate a completely safe plea might consider pleading to "possession" of a large amount of drugs under § 893.135 in order to preserve the argument that they are not aggravated felons under the federal drug trafficking definition. This strategy might hold particular appeal for individuals who would meet the requirements for cancellation of removal if found not to have an aggravated felony conviction.[35]

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[30] *See* discussion *infra* notes 43-48 and accompanying text.

[31] As discussed *infra* notes 33 and 48, not every manufacturing conviction involves commercial dealing.

[32] Lopez v. Gonzalez, 127 S.Ct. 625, 633 (2006) (acknowledging that a person "convicted by a State of possessing large quantities of drugs would escape the aggravated felony designation simply for want of a federal felony defined as possessing a substantial amount").

[33] Jeune v. Attorney Gen. of U.S., 476 F.3d 199, 204 (3d Cir. 2007) ("Manufacturing marijuana for personal use would arguably not be an aggravated felony."); Garcia v. Attorney Gen. of U.S., 462 F.3d 287, 293 n. 9 (3d Cir. 2006) ("[I]t is not clear that every violation of the manufacturing provision involves trading or dealing. For example, there may be circumstances in which a defendant simply manufactured drugs for his own personal use.").

[34] On file with the author.

[35] 8 U.S.C. § 1229b(a) (2012) (cancellation of removal for lawful permanent residents).

For individuals already convicted under § 893.135, the record of conviction must be examined to determine if it specifies a portion of the statute involving sale or delivery.[36] If the record specifies possession or purchase (or possibly manufacture), or if the language is ambiguous, the conviction should not be found to be an aggravated felony.

3. Lack of Knowledge of Illicit Nature of Drug—Aggravated Felony Analysis

In *Donawa v. U.S. Attorney General*, the Eleventh Circuit held that a conviction under Fla. Stat. § 893.13(1)(a)(2) for possession of cannabis with the intent to sell or deliver is not a "drug trafficking" aggravated felony because the statute lacks an element of knowledge of the illicit nature of the drug.[37] The court, however, left open the possibility that Florida offenses could qualify as aggravated felonies under the general "illicit trafficking" prong of the aggravated felony definition (see discussion below).[38]

As discussed above, to qualify as a "drug trafficking" aggravated felony, a drug offense must be "punishable" as a felony under federal law. Federal law requires knowledge of the illicit nature of the drug for a conviction.[39] In contrast, Florida law since May 13, 2002 has not required that a defendant "knew of the illicit nature of a controlled substance found in his or her actual or constructive possession."[40] Applying the categorical approach, the Eleventh Circuit held that this mismatch of elements means that Florida convictions under post-May 13, 2002 law are not "punishable" as federal felonies.[41]

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[36] *See supra* note 12 for a discussion regarding how this statute may be divisible.

[37] Donawa v. U.S. Attorney General*,* 735 F.3d 1275 (11th Cir. 2013).

[38] *Id*. at 1280.

[39] The analogous federal criminal statute is 21 U.S.C. § 841(a)(1) (2012). To convict under this statute, the government must establish beyond a reasonable doubt that the defendant had knowledge of the nature of the substance in his possession. *See* United States v. Sanders, 668 F.3d 1298, 1309 (11th Cir. 2012).

[40] Fla. Stat. § 893.101 (2002) This statute on legislative intent was enacted on May 13, 2002 after the Florida Supreme Court had ruled in Scott v. State, 808 So.2d 166 (Fla. 2002), and Chicone v. State, 684 So.2d 736 (Fla. 1996), that "the state must prove that the defendant knew of the illicit nature of a controlled substance found in his or her actual or constructive possession." Any Florida convictions under § 893.101 dated *after* the statute was amended on May 13, 2002 to specify that the *mens rea* requirement does not require knowledge of the illicit nature are clearly included within the scope of the *Donawa* decision. The Florida Supreme Court has upheld § 893.101 as constitutional. State v. Adkins*,* 96 So.3d 412, 415 (Fla. 2012). The author has not researched the state of Florida law on the *mens rea* issue before the Florida Supreme Court's 1996 decision in *Chicone*.

[41] Donawa*,* 735 F.3d at 1275. The *Donawa* decision only addresses whether a Florida drug conviction falls within the meaning of the phrase "drug trafficking crime (as defined in section 924(c) of title 18)" in the aggravated felony definition.

Although *Donawa* addressed a particular Florida drug statute, the reasoning of the decision applies to any post-May 13, 2002 Florida drug conviction being charged as an aggravated felony. In Florida, a criminal prosecutor is never required to prove that the defendant was aware of the illicit nature of the drug.[42]

The Eleventh Circuit, however, remanded to the BIA for a determination of whether the offense could nonetheless qualify as an "illicit trafficking" aggravated felony under the general part of the definition. The aggravated felony ground includes any conviction for "illicit trafficking in a controlled substance (as defined in section 802 of title 21), including a drug trafficking crime (as defined in section 924 (c) of title 18)."[43] The Eleventh Circuit's decision only interprets the requirements of the second part of the definition, "including a drug trafficking crime (as defined in section 924 (c) of title 18)." **Thus, in order to prevail, litigants who invoke the *Donowa* argument must also prevail in the argument that their convictions do not meet the general "illicit trafficking" prong of the aggravated felony definition (see the next section).**

4. "Illicit Trafficking" Argument Distinguishing *L-G-H-*—Aggravated Felony Analysis

The BIA in *L-G-H-* addressed the issue left open in *Donowa*—namely what constitutes "illicit trafficking" under the general part of the aggravated felony definition.[44] The respondent in *L-G-H-* had been convicted of selling cocaine in violation of section 893.13(1)(a) of the Florida Statutes. The BIA found that the conviction for sale qualified as "illicit trafficking," finding that illicit trafficking is an offense that 1) contains a trafficking element (any unlawful trading or dealing); 2) involves a controlled substance as defined by federal law; and 3) is a felony under state, federal, or qualified foreign law. The BIA rejected an argument that knowledge of the illicit nature of the controlled substance is necessary in order for a conviction to qualify as "illicit trafficking."

In a footnote, the BIA stated that trafficking involves a commercial transaction or the passing of goods from one person to another for money or other consideration.[45] The BIA cited to *Matter of Davis*, 20 I&N Dec. 536, 540-41 (BIA 1992), which defined "illicit trafficking" as any conviction with an element of "unlawful trading or dealing in a controlled substance."[46] The U.S. Supreme Court has suggested that "illicit trafficking" involves an element of "commercial dealing."[47]

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[42] Under Fla. Stat. § 893.101 (2002), "knowledge of the illicit nature of a controlled substance is not an element *of any offense* under this chapter (emphasis added)." Lack of knowledge, however, is an affirmative defense. *Id*. The Eleventh Circuit held that an affirmative defense is not part of the elements of the crime. Donawa*,* 735 F.3d at 1282.

[43] *See* 8 U.S.C. § 1227(a)(2)(A)(iii) (2012) (aggravated felony ground of deportation); 8 U.S.C. § 1101(a)(43) (2012) (definition of aggravated felony).

[44] Matter of L-G-H-, 26 I&N Dec. 365 (BIA 2014).

[45] *Id.* at footnote 9.

[46] Matter of Davis, 20 I. & N. Dec. 536, 541 (BIA 1992)); *see also* Evanson v. Attorney Gen. of U.S., 550 F.3d 284, 289 (3d Cir. 2008) ("To contain a trafficking element, a state felony must involve 'the unlawful trading or dealing of a controlled substance.'") (citing Jeune v. Attorney Gen. of U.S.*,* 476 F.3d 199, 202 (3d Cir. 2007)) (internal quotations and citation

As noted above, the Florida drug statutes are divisible. Not all convictions qualify as "illicit trafficking" because they do not necessarily involve commercial dealing. For example, delivery includes social sharing without consideration and manufacture does not necessarily involve commercial dealing.[48] If a client is convicted under the delivery or manufacture prongs (or if the record of conviction is ambiguous), he or she should not be found to have been convicted of an aggravated felony under the "illicit trafficking" prong of the definition.

Because neither the Eleventh Circuit nor the U.S. Supreme Court has decided whether knowledge of the illicit nature of the conviction is required under the general "illicit trafficking" definition, a litigant can also argue that *L-G-H-* was wrongly decided on this point. Other grounds for challenging *L-G-H-* may exist (see the 2014 Practice Advisory on *L-G-H-* and *Donawa* authored by Mary Kramer).

5. Arguments Based on U.S. Supreme Court's Decision in *Moncrieffe*

In *Moncrieffe*, the U.S. Supreme Court applied the categorical approach to hold that a state felony conviction for distribution of a small amount of drugs does not qualify as an aggravated felony "drug trafficking" offense unless the statute establishes that the offense was *not* for social sharing of marijuana (i.e., distribution of a small amount without remuneration).[49] The Court held that "not only must the state offense of conviction meet the 'elements' of the generic federal offense defined by the INA, but the [Controlled Substance Act] CSA must punish that offense as a felony."[50] Under federal law, distribution without remuneration of a small amount of marijuana is a misdemeanor.[51]

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omitted); Kuhali v. Reno, 266 F.3d 93 (2d Cir. 2001) (endorsing the definition of "trafficking" in *Matter of Davis)*; Steele v. Blackman*,* 236 F.3d 130, 135 (3d Cir. 2001) ("Essential to the concept of 'trading or dealing' is activity of a business or merchant nature, thus excluding simple possession or transfer without consideration.") (citing Matter of Davis, 20 I. & N. Dec. at 541) (internal quotation marks omitted)).

[47] Lopez v. Gonzalez, 127 S.Ct. 625, 633 (2006) ("[O]rdinarily 'trafficking' means some sort of commercial dealing.") (citing Black's Law Dictionary 1534 (8th ed. 2004)).

[48] The Third Circuit has stated that not every manufacturing conviction involves trading or dealing because a drug could be manufactured for one's own use. *See* Jeune*,* 476 F.3d at 204 ("Manufacturing marijuana for personal use would arguably not be an aggravated felony").

[49] Moncrieffe v. Holder, 133 S.Ct. 1678, 1686 n.7 (2013) (suggesting that a small amount is 30 grams or less) (citing Matter of Castro Rodriguez*,* 25 I. & N. Dec., 698, 703 (BIA 2012) and 8 U.S.C. § 1227(a)(2)(B)(i) (2012)). It is unclear what a small amount of cannabis resin (hashish) would be. Presumably it would be the cannabis resin equivalent to 30 grams of cannabis leaves.

[50] Moncrieffe, 133 S.Ct. at 1687.

[51] 21 U.S.C. § 841(b)(4) (2012).

Florida has a statute that criminalizes as a misdemeanor the offense of social distribution of marijuana without remuneration.[52] Any conviction under this provision is a misdemeanor under Florida law and would be treated as a misdemeanor under federal law. Such a conviction is straightforwardly not an aggravated felony.

Social sharing of cannabis resin (hashish) is a Florida felony but is not an aggravated felony because it is not punishable as a federal felony. Unlike the federal government, Florida does not include cannabis resin in its social sharing misdemeanor statute and instead punishes it as a felony.[53] As a result, a defendant in Florida could be convicted of a felony for the social sharing of cannabis under Florida's general drug delivery statute when, under federal law, the offense would have been a misdemeanor.[54] Thus, any conviction for social sharing of cannabis should also fall outside the aggravated felony definition.

But the reach of *Moncrieffe* extends well beyond these two scenarios to include *any* offense where the minimum conduct punishable under the statute includes social distribution of marijuana, including cannabis resin.[55] A Florida felony drug offense is punishable as a federal misdemeanor and therefore not an aggravated felony if the record of conviction: 1) lacks an element of sale (for example, where the record specifies only "delivery" or is ambiguous); 2) specifies cannabis (marijuana), cannabis resin, or is ambiguous; and 3) specifies a small amount of drugs (30 grams or less) or is ambiguous regarding the amount.

To avoid an aggravated felony conviction using *Moncrieffe*, defendants charged with sale or delivery of a small amount of drugs should first try to plead to simple possession. If this is not possible, defendants should consider pleading to "delivery"

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[52] Fla. Stat. § 893.13(3) (2013) ("Any person who delivers, without consideration, not more than 20 grams of cannabis, as defined in this chapter, commits a misdemeanor of the first degree.").

[53] *Compare* Fla. Stat. § 893.13(3) (2013) (The term "cannabis" does "not include the resin extracted from the plants of the genus Cannabis or any manufacture, salt, derivative, mixture, or preparation of such resin"), *with* 21 U.S.C. 802(d)(16) (2012) ("The term 'marihuana' means all parts of the plant Cannabis sativa L., whether growing or not; the seeds thereof; the resin extracted from any part of such plant; and every compound, manufacture, salt, derivative, mixture, or preparation of such plant, its seeds or resin. Such term does not include the mature stalks of such plant, fiber produced from such stalks, oil or cake made from the seeds of such plant, any other compound, manufacture, salt, derivative, mixture, or preparation of such mature stalks (except the resin extracted therefrom), fiber, oil, or cake, or the sterilized seed of such plant which is incapable of germination.").

[54] Florida's general statute prohibiting drug distribution is Fla. Stat. § 893.13(1)(a) (2013) (making it illegal to "sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance").

[55] Under the categorical approach, the statute is judged by the minimum conduct needed to violate it. *See* Donawa v. U.S. Attorney Gen., 735 F.3d 1275, 1281 (11th Cir. 2013) (characterizing the test as whether the "least of the acts criminalized" by a statute "necessarily violate" the analogous federal crime).

(rather than "sale") of a small amount of cannabis (or cannabis resin).[56] If pleading to delivery of a small amount of cannabis or cannabis resin is not possible, pleading to a criminal charging document that does not specify the type of drug distributed is the next safest option. Such a plea permits the argument that the conviction is not punishable as a federal felony because the small amount of drug delivered could have been cannabis or cannabis resin.[57]

[56] As discussed *supra* note 49, the U.S. Supreme Court has suggested that a small amount is 30 grams or less of marijuana. It is unclear what a small amount of cannabis resin (hashish) would be. Presumably it would be the cannabis resin equivalent to 30 grams of cannabis leaves.

[57] As discussed above, a record of conviction that is ambiguous about whether a federal drug was involved provides the additional argument that the person is not removable under the controlled substance removal grounds.