No. 11-702

IN THE

Supreme Court of the United States

ADRIAN MONCRIEFFE,

Petitioner,

v.

ERIC H. HOLDER, JR.,
U.S. ATTORNEY GENERAL,

Respondent.

On a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

A non-citizen "convicted" of a "felony punishable under the Controlled Substances Act" (CSA) is subject to mandatory deportation. Under the CSA, some convictions for the distribution of marijuana are punishable as felonies; others are instead merely misdemeanors.

The "categorical approach" determines whether a drug conviction is a felony punishable under the CSA. The relevant question is whether the conviction itself "necessarily" corresponds to the federal felony. The facts of the offense are irrelevant.

The Question Presented is:

Did the Fifth Circuit err in holding that every conviction for marijuana distribution is a felony that triggers mandatory deportation unless immigration authorities find, based on facts outside the conviction, that the offense corresponds to the misdemeanor?

PARTIES TO THE PROCEEDINGS BELOW

The caption identifies all the parties to the proceedings below.

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BRIEF FOR THE PETITIONER

Petitioner Adrian Moncrieffe respectfully requests that this Court reverse the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The court of appeals' opinion, Pet. App. 1a-9a, is published at 662 F.3d 387. The opinions of the immigration judge, Pet. App. 14a-18a, and the Board of Immigration Appeals, *id.* 10a-13a, are unreported.

JURISDICTION

The Fifth Circuit issued its decision on November 8, 2011. Pet. App. 1a. Petitioner timely filed a petition for a writ of certiorari on December 8, 2011. This Court granted the petition on April 2, 2012. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant statutory provisions are reproduced in the Appendix to this brief.

STATEMENT OF THE CASE

A non-citizen "convicted" of a "felony punishable under the Controlled Substances Act" (CSA) is subject to mandatory deportation. Under the CSA, some convictions for the distribution of marijuana are punishable as felonies; others are instead merely misdemeanors.

The "categorical approach" determines whether a drug conviction is a felony punishable under the CSA. The relevant question is whether the conviction itself

"necessarily" corresponds – *i.e.*, equates – to the federal felony. The facts of the offense are irrelevant.

The Fifth Circuit held in this case that every marijuana distribution conviction is a felony requiring mandatory deportation, unless immigration authorities find, based on facts outside the conviction, that the offense corresponds to the misdemeanor.

I. Statutory Background

1. In the Immigration and Nationality Act (INA), Congress provided that a conviction for a marijuana-related offense may trigger three distinct immigration consequences, depending on its seriousness. First, a single conviction for possessing thirty grams or less of marijuana for personal use renders a non-citizen inadmissible, 8 U.S.C. § 1182(a)(2)(A)(i)(II), but has no deportation consequences, *id.* § 1127(a)(2)(B)(i).

Second, a conviction for an ordinary violation of a state or federal drug law is a "controlled substance" offense. *Id.* The non-citizen is removable, but if he is a long-time U.S. resident the Attorney General retains the discretion to "cancel" the order of removal. *Id*. § 1229b(a).

Third, a conviction for "illicit trafficking in a controlled substance" is an "aggravated felony." *Id*. § 1101(a)(43)(B). Illicit trafficking includes a "felony punishable under the Controlled Substances Act." 21 U.S.C. § 924(c)(2). The non-citizen convicted of such an offense is subject to the "harshest deportation consequences." *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2580 (2010). In contrast to a controlled substances offense, the non-citizen is categorically

ineligible for cancellation of removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3).

Under this scheme, Congress provided that many marijuana-related convictions do not trigger mandatory deportation because they do not correspond to a felony under the Controlled Substances Act. As noted, possession of thirty grams or less for personal use does not have any deportation consequences at all. The CSA also includes two marijuana-related misdemeanors: first-time simple marijuana possession, 21 U.S.C. § 844; and distribution of a small amount for no remuneration, which Congress provided "shall be treated" as simple possession, *id.* § 841(b)(4). Other marijuana-related convictions are felonies. *Id.* § 841(b)(1)(A)-(E).

2. The INA applies as well to drug convictions under statutes other than the CSA, including state laws. *See* 8 U.S.C. § 1101(a)(43) (penultimate sentence). Whether a state conviction is an "aggravated felony" and is therefore subject to mandatory deportation depends on whether it corresponds to a felony "under the [CSA]"; the state-law penalty is not relevant. *Lopez v. Gonzales*, 549 U.S. 47, 53-57 (2006).

That correspondence is resolved under the "categorical approach." *See* BIO 6. The operative phrase in the INA – "illicit trafficking" – is a "generic" offense that refers to how the federal crime is ordinarily committed, not to the facts of the individual offense. *Carachuri-Rosendo*, 130 S. Ct. at 2580-81, 2586 n.11; *see Nijhawan v. Holder*, 557 U.S. 29, 37 (2009). So the predicate "conviction" must itself include all of the findings that "*necessarily*" establish the correspondence to the federal offense,

Shepard v. United States, 544 U.S. 13, 24 (2005) (emphasis added) – here, a "felony punishable under the Controlled Substances Act." *See Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012). The facts of the particular offense are not relevant. *Taylor v. United States*, 495 U.S. 575, 599-600 (1990).

This Court's decision in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010), is illustrative. There, the non-citizen was convicted of drug possession under state law. It was indisputably his second offense, and recidivist drug possession (as opposed to a first offense) is a "felony punishable under the [CSA]." *See* 21 U.S.C. §§ 844, 851. But the conviction *itself* included no finding of recidivism. The Fifth Circuit held that the conviction was a felony because in a "hypothetical" federal prosecution under the CSA the court could have made a finding of recidivism. *Carachuri-Rosendo v. Holder*, 570 F.3d 263, 267 (5th Cir. 2009) (Jones, C.J.). But this Court reversed. It held that under the categorical approach, the conviction itself must include each of the findings necessary to render the conviction punishable as a felony under the CSA. The court of appeals accordingly erred in permitting further fact-finding outside the conviction to determine that the non-citizen was a recidivist. *See Carachuri-Rosendo*, 130 S. Ct. at 2586-87.

II. Factual And Procedural History

1. Petitioner's family legally entered the United States from Jamaica in 1984, when he was three years old. Petitioner grew up, went to school, worked in several fields, married, and had two children, all in the United States. All the members of his immediate

family are U.S. citizens, and he has almost no remaining ties to Jamaica.

In 2009, while driving with an acquaintance to see his daughter, petitioner was pulled over by local police officers in Georgia. The car contained 1.3 grams of marijuana, equivalent to two-and-a-half marijuana cigarettes. *See* U.S. Sentencing Guidelines Manual § 2D1.1 cmt. 11 (2011) (stating that the "typical weight" of a single marijuana cigarette is 0.5 grams).

The State charged petitioner with possession of marijuana with intent to distribute under Ga. Code § 16-13-30(j)(1). That statute criminalizes a broad range of conduct, including both the social sharing of small amounts of the drug for no remuneration and also the distribution of larger amounts. *See infra* at 18-19. Georgia separately criminalizes the distribution of large drug quantities (more than ten pounds) as "trafficking." Ga. Code § 16-13-31(c).[1]

Under a statute governing first-time drug offenders like petitioner, Georgia courts may withhold entering a judgment of conviction or imposing any term of imprisonment. So long as the

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[1] The Georgia statute under which petitioner was convicted makes it a crime for the defendant to "possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana." Ga. Code § 16-13-30(j)(1). The parties agree that petitioner's conviction was for "possession with intent to distribute." *See Johnson v. United States*, 130 S. Ct. 1265, 1273 (2010) (holding that courts may consult a plea agreement to determine "which statutory phrase was the basis for the conviction"); App., *infra*, at 11.

defendant successfully completes a term of probation, the charges are expunged altogether. *See* Ga. Code §§ 16-13-2, 42-8-60. Petitioner accepted a plea agreement with those terms, *see* App., *infra*, at 11-12, and in the interim has complied with all the conditions of his probation.

2. Two years after petitioner's plea, federal immigration officials jailed him and sought to deport him, alleging that his Georgia conviction was either a "controlled substances" offense or an "aggravated felony."[2]

The immigration judge held that petitioner's case was controlled by the holding of the Board of Immigration Appeals (B.I.A.) that every marijuana distribution conviction is *ipso facto* an "aggravated felony." Pet. App. 18a (citing *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008)). The B.I.A. affirmed on the same basis in a brief opinion. *Id.* 10a.

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[2] Although petitioner's prosecution was suspended, he has not argued that the absence of a state judgment of conviction meant that he was not "convicted" at all for purposes of the INA, *cf.* BIO 3 n.1, so that issue is not presented by this case.

For its part, the Government has not argued that the misdemeanor provision of Section 841(b)(4) does not apply here because petitioner was convicted of "possession with intent to distribute," rather than "distribution." The Board of Immigration Appeals and the federal courts of appeals agree that, by deeming both "possession" and "distribution" of marijuana to be misdemeanors, Congress necessarily intended to also include "the more inchoate offense of possession with intent to distribute that drug." *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 699 n.2 (B.I.A. 2012). That question is not presented by this case either.

3. The Fifth Circuit denied petitioner's petition for review. Pet. App. 1a (Jones, C.J.). The court acknowledged that the Second and Third Circuits have held that a conviction like petitioner's – *i.e.*, one for marijuana distribution that contains no finding of either drug quantity or remuneration – is not an "aggravated felony," so that the non-citizen is eligible for cancellation of removal. *E.g.*, *Martinez v. Mukasey*, 551 F.3d 113, 120-21 (2d Cir. 2008); *Evanson v. Attorney General*, 550 F.3d 284, 291 (3d Cir. 2008). Applying the categorical approach, those courts reason that the conviction is not an aggravated felony because the findings established by the conviction do not "necessarily" correspond to a felony. Rather, the conviction is also consistent with the non-remunerative sharing of a small amount of marijuana, a misdemeanor under 21 U.S.C. § 841(b)(4).

But the Fifth Circuit rejected those decisions. It reasoned that under the categorical approach petitioner's conviction established that he had possessed marijuana with the intent to distribute, but (because drug quantity is irrelevant under the statute of conviction) left "indeterminate" the quantity of marijuana. Pet. App. 7a. The indeterminacy should be resolved against the non-citizen, the court opined, because in a criminal prosecution the defendant has the burden to prove that his conviction is only a misdemeanor. *Id.* 8a.

The court of appeals found its decision "compel[led]" by its prior precedent addressing the burden of proof in federal marijuana distribution prosecutions. *Id.* 7a. According to those decisions, a conviction for marijuana distribution corresponds "by

default" to the felony of distributing less than fifty kilograms of marijuana under 21 U.S.C. § 841(b)(1)(D). Pet. App. 6a. By contrast, the provision addressing the distribution of a small amount for no remuneration, Section 841(b)(4), is a "mitigating" exception. Pet. App. 7a. On that reading, because the felony provision does not increase the defendant's maximum sentence, the Sixth Amendment does not require the Government to prove that the misdemeanor provision does not apply. *Id.* (citing *United States v. Walker*, 302 F.3d 322, 324 (5th Cir. 2002)) (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)). For that reason, if the quantity of marijuana is ultimately "indeterminate" in a federal prosecution, the conviction is a felony. Pet. App. 7a-8a.

Extending that Sixth-Amendment-based rule to the INA, the Fifth Circuit held that all marijuana distribution convictions that are silent with respect to either drug quantity or remuneration correspond to a felony. But whereas the B.I.A. had applied a categorical rule that all such convictions are "aggravated felonies," the court of appeals indicated that immigration authorities could conduct further fact-finding under which (as in a criminal prosecution) the non-citizen bears the burden to prove that his offense instead corresponds to the misdemeanor. *Id.* 9a. The court held that petitioner had waived that opportunity, however, by not introducing evidence of the facts of his case in the administrative proceedings. *Id.* 9a n.4.

4. After the Fifth Circuit issued its decision, the B.I.A. modified its precedent to adopt the same rule as the court of appeals. It held that immigration

officials should conduct fact-finding on whether the offense corresponds to the CSA's misdemeanor provision, with the burden of proof on the non-citizen. *See In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 701-02 (B.I.A. 2012). In that further proceeding, "any probative evidence" is relevant, without regard to whether it was considered in the predicate criminal proceedings. *Id.*

5. This Court granted certiorari. 132 S. Ct. 1857 (2012).

SUMMARY OF THE ARGUMENT

The Government alleges, and the Fifth Circuit agreed, that petitioner was convicted of the aggravated felony of illicit trafficking in a controlled substance. As the Solicitor General recognizes, that determination is governed by the "categorical approach." The dispositive question is whether petitioner's conviction "necessarily" corresponds to a "felony punishable under the Controlled Substances Act."

It does not. Congress provided that a marijuana-related conviction may or may not be a felony, depending on the amount of marijuana involved and whether the defendant received any remuneration. In this case, because of the breadth of the state statute under which he was charged, petitioner's conviction is consistent with either a misdemeanor or a felony under the CSA. The conviction establishes only two facts: that petitioner possessed marijuana, and that he had the intent to distribute. But those features are shared by both the felony defined by Section 841(b)(1)(D) of the CSA and also the misdemeanor under Section 841(b)(4).

The conviction does not establish either of the facts that would preclude misdemeanor treatment: that petitioner possessed more than a small quantity of marijuana, or that he received remuneration. It therefore does not "necessarily" correspond to a felony. Indeed, considering the features of petitioner's conviction – *e.g.*, that he possessed only 1.3 grams of marijuana, and was sentenced only to probation – the phrases "illicit trafficking" and "aggravated felony" are strikingly inapt.

That does not mean that petitioner is *ineligible* for deportation. Even minor controlled substances offenses are grounds for removal. The critical difference is that in such cases the Attorney General has the discretion whether to cancel removal. That discretionary authority ensures that the straight-forward application of the categorical approach presents no threat to the Government's authority to deport serious drug offenders.

The Fifth Circuit's contrary ruling repeats the error that court recently made in *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577 (2010). In both cases, the court of appeals refused to limit its analysis to the facts established by the non-citizen's conviction, looking instead to whether the offense could be deemed a felony in a hypothetical federal prosecution. Here, the Fifth Circuit found dispositive that in a federal prosecution for marijuana distribution in which the amount of marijuana is "indeterminate," the offense is a felony. But as this Court held in *Carachuri-Rosendo*, the "categorical approach" is limited to the facts established by the conviction itself, which must establish that the conviction necessarily corresponds to a felony. Any

indeterminacy is thus resolved in the non-citizen's favor.

The ruling below also contravenes Congress's obvious intent to account for the misdemeanor defined by Section 841(b)(4) in immigration cases. The misdemeanor plays an important role under the INA: it both specifies a "controlled substances" offense that renders the non-citizen removable, and also ensures that minor marijuana distribution offenses – including, for example, the simple sharing of a marijuana cigarette among friends – do not result in automatic removal.

The Fifth Circuit's apparent view that Congress intended to account only for Sixth Amendment offense "elements," not sentencing factors like the misdemeanor provision, conflicts with the INA's text, and cannot be reconciled with its history. The INA asks whether the non-citizen was "convicted" of a "felony." It makes no difference whether the distinguishing factor between a felony and a misdemeanor conviction is labeled an "element" or a "sentencing factor." The INA directs the courts to consider that distinction in determining the seriousness of the non-citizen's offense. Congress never limited the inquiry to elements, and it would have made no sense to do so, because at the time that Congress enacted the relevant provision of the INA, *all* of the penalty provisions of Section 841(b) – including both the felony and the misdemeanor applicable to marijuana distribution – were regarded as sentencing factors. So even on the illogical assumption that Congress intended the Sixth Amendment to guide the INA's application, it would

not have understood the provisions at issue here to be distinguishable on that basis.

The Fifth Circuit compounded the conflict with this Court's decisions by indicating that immigration authorities should conduct fact-finding to determine whether the non-citizen's offense corresponds to a misdemeanor. The essential feature of the categorical approach, as this Court reiterated in recently reversing the Fifth Circuit in *Carachuri-Rosendo*, is that the "conviction" is dispositive; additional facts that might later be found by an immigration officer are irrelevant.

The primary purpose of the categorical approach is to avoid collateral litigation – mini-trials over the facts of the prior offense. But the Fifth Circuit's rule will require precisely that. Immigration authorities must attempt to determine, based on cold records, often years old and assembled by myriad state and local governments, whether a non-citizen possessed more than a small amount of marijuana, and received remuneration for distributing it. Many records will not contain this information, because those facts were not germane to the offense of conviction. The record indeed may include almost no facts at all, as such cases are often resolved by a quick plea agreement in which, as in this case, the proceedings are deferred and the defendant receives no jail time.

The categorical approach also seeks to avoid imposing an unfair burden on individuals who may be subject to the harsh sanction of deportation. The ruling below, however, fails to account for the special difficulties faced both by non-citizens facing deportation and immigration officials. The individual will often be detained in immigration facilities far

from the jurisdiction in which he was convicted. He frequently will have no lawyer, and no access to a computer or telephone. Immigration judges are already grossly overburdened. And other immigration authorities will have little to no capacity to develop the facts contemplated by the court of appeals, because they often make "aggravated felony" determinations without any adversarial proceeding at all. Inevitably, vast administrative and judicial resources will be squandered, and many immigrants who in fact committed only minor marijuana offenses will be unjustly deported as the system nevertheless fails to reveal the facts underlying their convictions.

At the certiorari stage, the Solicitor General advanced the still-broader theory that only offense "elements" are relevant under the categorical approach. On that view, the misdemeanor under Section 841(b)(4) is "irrelevant." The logical consequence of that position is that a conviction for the "misdemeanor" of distributing a small amount of marijuana for no remuneration would always be deemed an "aggravated felony." That argument defeats itself. It would mean, for example, that someone convicted in a federal prosecution of a Section 841(b)(4) misdemeanor is nonetheless treated as an aggravated felon for immigration purposes, which makes no sense.

The Government made the identical "elements" argument in *Carachuri-Rosendo*, and lost. This Court explained that the categorical approach must account for sentencing factors – in that case, recidivism – which must be established by the conviction. Here, because petitioner's conviction does not necessarily establish that petitioner was

convicted of a felony rather than a misdemeanor under the Controlled Substances Act, his conviction was not an "aggravated felony."

ARGUMENT

Petitioner, a first-time drug offender, was arrested with 1.3 grams of marijuana while driving with another individual. He pleaded guilty to a state offense of possessing marijuana with intent to distribute. No conviction was entered, he received probation, and the charges will soon be expunged altogether. The United States nonetheless arrested petitioner, jailed him for eight months, and then permanently deported him without any inquiry into whether his circumstances warrant cancellation of removal. For this first offense, involving marijuana weighing the equivalent of half a penny, the Government has permanently separated petitioner from his family and the life that he had built in this country over the previous quarter-century.

That result cannot be reconciled with either the applicable statutes or common sense. The laws enacted by Congress and state governments alike treat such first-time, minor marijuana convictions leniently. The CSA and Georgia law both provide that such offenses do not merit even a formal conviction, much less jail time. The INA provides that the simple possession of substantially *more* marijuana has no deportation consequences *at all*.

The Government nonetheless argued, and the court of appeals agreed, that petitioner's conviction was so grave that it constituted the "aggravated felony" of drug "trafficking," such that Congress stripped the Attorney General of the discretion even

to consider whether petitioner should be granted cancellation of removal. That conclusion lacks merit. The case should be remanded for the B.I.A. to consider the Government's claim that petitioner's conviction is a "controlled substances" offense and, if so, whether petitioner should be granted discretionary cancellation of removal.

I. Under The Categorical Approach, Petitioner's Plea Does Not Establish That He Was Convicted Of A Felony, Rather Than A Misdemeanor, Under The Controlled Substances Act.

A. The Categorical Approach Looks To Whether The Conviction Necessarily Corresponds To A Federal Felony.

The Fifth Circuit held that petitioner was convicted of "illicit trafficking in a controlled substance." This Court has recognized that the INA's "illicit trafficking" provision is a "generic" offense. *Carachuri-Rosendo v. Holder*, 130 S. Ct. 2577, 2586 n.11 (2010); *Nijhawan v. Holder*, 557 U.S. 129, 137 (2009). The correspondence between a predicate conviction and a generic federal offense is determined by the "categorical approach," in contrast to a "circumstance-specific" inquiry that turns on the particular facts of the case. *See, e.g.*, *Carachuri-Rosendo*, 130 S. Ct. at 2586 n.11. The Government acknowledges that the categorical approach governs this case. BIO 6.

The categorical approach imposes on the Government "the *demanding* requirement" that the conviction "'necessarily' involved (and a prior plea necessarily admitted) facts equating to" the federal

felony. *Shepard v. United States*, 544 U.S. 13, 24 (2005) (emphasis added). That requirement is met "[o]nly" if the court in entering the conviction "necessarily had to find" the features of the federal offense. *Id.* at 17 (quoting *Taylor v. United States*, 495 U.S. 575, 602 (1990)). The conviction itself must thus "establish" and "necessarily entail" that the non-citizen committed the corresponding federal crime. *Kawashima v. Holder*, 132 S. Ct. 1166, 1172-73 (2012).

For example, in *Carachuri-Rosendo*, the non-citizen was convicted of drug possession. That was indisputably his second possession offense, and recidivist drug possession is an "aggravated felony." *See* 21 U.S.C. §§ 844(a), 924(c)(2). But the "conviction" itself included no finding of recidivism. 130 S. Ct. at 2586. As a consequence, it was impossible to determine from the fact of conviction alone whether the conviction corresponded to a felony under the CSA. Applying the categorical approach, this Court held that the conviction corresponded to *non*-recidivist simple possession, which is a misdemeanor under the CSA. *See id.* at 2586-87; 21 U.S.C. § 844(a). It made no difference that the immigration judge could find as a matter of fact that the non-citizen was a recidivist, because that fact was not established by the "conviction." 130 S. Ct. at 2587.

These defining features of the categorical approach – the refusal to consider evidence outside the conviction, and the requirement that the conviction itself necessarily establish that the conviction corresponds to the federal offense, so that any ambiguity is resolved in the non-citizen's favor –

are well-established features of federal immigration law. By 1945, the B.I.A. considered the categorical approach to be a "settled judicial principle[]," *Matter of S-*, 2 I. & N. Dec. 353, 357 (B.I.A. 1945), and had "repeatedly explained the basis for this rule as respecting the limits of agency power and the need for fixed and efficient standards in the administration of immigration law," Alina Das, *The Immigration Penalties of Criminal Convictions: Resurrecting Categorical Analysis in Immigration Law*, 86 N.Y.U. L. Rev. 1669, 1697 (2011). Courts took the same view. In *United States ex rel. Robinson v. Day*, for example, Judge Learned Hand concluded, with respect to the "crime of moral turpitude" ground for deportation, that "[w]hen by its definition [the predicate crime] does not necessarily involve moral turpitude, the alien cannot be deported because in the particular instance his conduct was immoral." 51 F.2d 1022, 1022-23 (2d Cir. 1931). *See also, e.g.*, *United States ex rel. Guarino v. Uhl*, 107 F.2d 399, 400 (2d Cir. 1939) (finding a state conviction could not trigger deportation unless it was "necessarily" or "inherently" immoral).

The demanding requirements of the categorical approach parallel the law's equally longstanding tradition of construing ambiguity in favor of those upon whom the Government seeks to impose the harsh sanction of deportation. *See*, *e.g.*, *INS v. Cardoza-Fonesca*, 480 U.S. 421 (1987) (noting the "longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien"); *Fong Haw Tan v. Phelan*, 333 U.S. 6, 10 (1948) ("To construe this statutory provision less generously to the alien might find support in logic.

But since the stakes are considerable for the individual, we will not assume that Congress meant to trench on his freedom beyond that which is required by the narrowest of several possible meanings of the words used."). That rule of construction is particularly appropriate when, as in this case, removability turns on the interpretation of a criminal statute. *Carachuri-Rosendo*, 130 S. Ct. at 2589 ("[A]mbiguities in criminal statutes referenced in immigration laws should be construed in the noncitizen's favor." (citing *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004))).

B. Petitioner Was Not Convicted Of An Aggravated Felony Because His Plea May Correspond To Either A Misdemeanor Or A Felony Under The Controlled Substances Act.

1. In the INA, Congress specified that marijuana-related offenses may give rise to three different immigration consequences, depending on the seriousness of the conviction. The non-citizen may face no deportation consequences at all (for first-time simple possession of thirty grams or less); possible deportation, with the right to seek cancellation of removal (for a conviction that does not correspond to a "felony under the Controlled Substances Act"); or mandatory deportation (for a conviction that corresponds to such a felony). *See supra* at 2-3.

The Fifth Circuit held that petitioner's Georgia plea falls within the last of these three categories, subjecting him to the harshest immigration consequences. That was error. Under the categorical

approach, petitioner's conviction does not necessarily correspond to a felony violation of the CSA, as opposed to a provision triggering a lesser immigration sanction.

Petitioner's conviction is silent on the quantity of drugs in his offense and whether he received remuneration, because those facts are irrelevant under the statute of conviction. The statute applies to violations involving larger amounts (though presumably less than the ten pounds that constitutes "trafficking" under Georgia law), amounts that are indeterminate, and very small amounts (as in petitioner's own case). Further, no remuneration is required. To "distribute" is merely "to deliver a controlled substance, other than by administering or dispensing it." Ga. Code § 16-13-21(11). The offense occurs so long as the defendant did not merely "intend[] to use the [drugs] himself." *Florence v. State*, 637 S.E.2d 779, 782 (Ga. App. 2006). Sharing among friends is sufficient. *See Hadden v. State*, 353 S.E.2d 532, 534 (Ga. App. 1987) (giving marijuana away is "distribution," because it involves "the actual or constructive delivery of a controlled substance").

Petitioner's guilty plea accordingly establishes only two facts: that petitioner possessed some amount of marijuana, and that he had the intent to provide it to some other person. *See* BIO 7. Those findings could be consistent with *either* a felony or a misdemeanor under the CSA. *See* 21 U.S.C. §§ 841(b)(1)(D), 841(b)(4).

When a conviction may encompass an array of conduct, only some of which corresponds to the relevant offense, the categorical approach provides that the conviction "rested upon . . . the least of these

acts." *Johnson v. United States*, 130 S. Ct. 1265, 1269 (2010). Here, the least of the acts covered by the statute of conviction – possession of a small amount of marijuana with intent to distribute for no remuneration – is a misdemeanor. And when there is "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," *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007), the federal offense – here, the felony under Section 841(b)(1)(D) – has not been established.

Many non-citizens subject to the Fifth Circuit's holding unquestionably will have engaged in precisely the social sharing of marijuana that Congress decided should *not* trigger mandatory deportation. There is no basis for the Fifth Circuit's assumption that a conviction is a felony, when it "could have been for precisely the sort of nonremunerative transfer of small quantities of marihuana that is only a federal misdemeanor under 21 U.S.C. § 841(b)(4)." *Martinez v. Mukasey*, 551 F.3d 113, 120 (2d Cir. 2008). In fact, the misdemeanor provision directly incorporates the simple possession provision that this Court held in *Carachuri-Rosendo* is not an "aggravated felony." 130 S. Ct. at 2581; *see* 21 U.S.C. §§ 841(b)(4), 844.

2. The Government's contrary arguments are inconsistent with how the relevant provisions of the CSA function. The Solicitor General asserts that "the CSA authorizes a felony sentence without regard to that paragraph [Section 841(b)(4)]." BIO 9. That is a gross misreading of the felony provision, which by its terms is inapplicable to a conviction subject to the misdemeanor provision. The applicable felony

provision, Section 841(b)(1)(D), applies "*except* as provided in paragraph[] (4) . . . of this subsection" (emphasis added) – *i.e.*, the misdemeanor provision. In turn, the misdemeanor provision, Section 841(b)(4), provides that a conviction for the distribution of a small amount of marijuana for no remuneration "shall be treated as" a misdemeanor, "*[n]otwithstanding* paragraph (1)(D)" (emphasis added) – *i.e.*, the felony provision. *See also* BIO I (when the requirements of Section 841(b)(4) are met, "the offense is treated as a misdemeanor"). Thus, a conviction "necessarily" corresponds to a felony only if it includes findings that preclude the application of the misdemeanor provision and, thereby, trigger application of the felony.

For the same reason, the Government is mistaken in asserting that "the 'minimum criminal conduct' sufficient to obtain a conviction under Georgia law also *suffices* to obtain a felony conviction under the CSA." BIO 17 (emphasis added). The Georgia statute is violated by the social sharing of very small amounts of marijuana. Even the Fifth Circuit recognized that "distribution of 'a small amount of marijuana for no remuneration' falls under the Georgia provision but is only a misdemeanor under 21 U.S.C. § 841(b)(4)." Pet. App. 3a. Such a conviction corresponds to the federal misdemeanor, and hence is not an "aggravated felony" that triggers mandatory deportation.

3. The straightforward application of the categorical approach is confirmed by a "commonsense" reading of the relevant statutory terms. *See Carachuri-Rosendo*, 130 S. Ct. at 2585 (citing *Lopez v. Gonzales*, 549 U.S. 47, 53 (2006)). It

would be highly anomalous for Congress to deem a conviction like petitioner's to be so serious that the Attorney General must be stripped of his authority even to *consider* whether to grant petitioner cancellation of removal.

"[O]rdinarily 'trafficking' means some sort of commercial dealing," *Carachuri-Rosendo*, 130 S. Ct. at 2585 (citing *Lopez*, 549 U.S. at 53-54), generally reflected in "significant amounts" of drugs, *Black's Law Dictionary* 1635 (9th ed. 2009). Georgia and many other states have "trafficking" offenses which reflect that understanding. *See* Ga. Code § 16-13-31(c) (offenses of greater than ten pounds are "trafficking").[3] In this case, petitioner possessed only 1.3 grams of marijuana. The fact that petitioner's conviction does not conform to that "everyday understanding of 'trafficking' should count for a lot." *Lopez*, 549 U.S. at 53.

Also, an "aggravated felony" is generally a grave offense. In *Carachuri-Rosendo*, the Court seriously doubted that label applied to the petitioner's offense, given that he received only ten days' imprisonment. 130 S. Ct. at 1585. Here, petitioner's sentence of probation was even lighter. Under Georgia law, like

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[3] *See* Ala. Code 13A-12-231(1); Ark. Stat. § 5-64-440(b)(5); Fla. Stat. 893.135(1)(a);; Idaho Code 37-2732B(a)(1); 720 Ill. Comp. Stat. 550/5.1; Mass. Gen. Laws ch. 94C, § 32E(a); Mo. Stat. § 195.222(7); *id.* § 195.223(7)-(8); Nev. Rev. Stat. § 453.339; N.C. Gen. Stat. § 90-95(h)(1); Okla. Stat. tit. 63, § 2-415(C)(1); 18 Pa. Cons. Stat. § 7508(a)(1); S.C. Code § 44-53-370(e)(1); Vt. Stat. tit. 18, § 4230(c) (all requiring a minimum amount of marijuana); Mich. Comp. Laws § 777.45(1)(g), (2)(c); Miss. Code. § 41-29-139(g) (both requiring ongoing transactions).

the CSA, a first-time drug offender receives no imprisonment, and if he complies with the terms of probation the charges are expunged altogether. *See* Ga. Code § 16-13-2(a); 21 U.S.C. § 841(b)(4); 18 U.S.C. § 3607.

The Government inevitably will argue that under petitioner's position some individuals who engaged in substantial marijuana transactions could avoid *automatic* deportation if convicted under a statute like Georgia's. But offenses involving larger marijuana quantities or commercial sales will often result in convictions under separate provisions criminalizing drug "trafficking," which is a "felony punishable under the Controlled Substances Act" because it establishes that the non-citizen distributed more than a small amount. *See, e.g.*, *supra* at 22 & n.3. But even when that is not so, as this Court explained in rejecting an indistinguishable argument in *Carachuri-Rosendo*, deeming drug convictions to be "controlled substances" offenses rather than aggravated felonies has only a "limited" effect on "policing our nation's borders," because the non-citizen's entitlement to cancellation of removal "depends on the discretion of the Attorney General." 130 S. Ct. at 2589.

In any event, the Government's argument amounts to an attack on the categorical approach itself, which looks to the statute of conviction, not the facts of the particular offense. This Court has consistently rejected similar arguments about the resulting underinclusiveness of the categorical approach, which are "as much a menace" to, and "a call to ease away from," the categorical approach altogether as "a justification for an expansive

approach to showing whether a guilty plea admitted the generic crime." *Shepard*, 544 U.S. at 22-23. The Court "cannot have" the categorical approach "and the Government's position both." *Id.* at 23.

II. The Rationale Of The Fifth Circuit And The Government's Alternative "Elements" Theory Both Lack Merit.

A. The Fifth Circuit's Decision Reinstates The Hypothetical Approach That This Court Rejected In *Carachuri-Rosendo*.

1. The only plausible factual distinction between this case and *Carachuri-Rosendo* is the burden of proof in hypothetical criminal prosecutions of the non-citizens. Both cases involve convictions under state drug statutes that encompass both some conduct that is a federal misdemeanor and other conduct that is a federal felony. The simple possession considered in *Carachuri-Rosendo* is a misdemeanor, but a felony if the Government properly proves the defendant is a recidivist. 21 U.S.C. §§ 844, 851. In this case, distribution of marijuana is a felony, but a misdemeanor if the defendant proves he distributed only a small amount for no remuneration. *Id.* §§ 841(b)(1)(D), 841(b)(4).

The Fifth Circuit found that distinction to be dispositive. It reasoned that, in a criminal case, "the default punishment for any possession of marijuana with intent to distribute is equivalent to a felony under the CSA." Pet. App. 8a. Because the Sixth Amendment requires the Government to prove only those facts that increase the maximum sentence for a crime, *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), it is the defendant who bears "the burden to

prove that he was convicted of only misdemeanor conduct. Otherwise, as is true for federal defendants charged under 21 U.S.C. § 841, his crime is equivalent to a federal felony." Pet. App. 9a (citation and footnote omitted).

The Fifth Circuit held that it should treat marijuana distribution the same "for immigration purposes as for sentencing purposes." *Id*. 8a. The court of appeals reasoned that under the categorical approach the only findings established by petitioner's conviction were that he possessed marijuana and had the intent to distribute. By contrast, the conviction left "indeterminate" the quantity of marijuana, because quantity is not relevant under the statute of conviction. *Id*. 13a. As in a criminal prosecution, the court construed that indeterminacy against the defendant. As the Government puts it, "[i]f petitioner had been charged in federal court, he could not have invoked the one-year statutory maximum unless he carried the burden of showing that his offense involved only a small amount of marijuana and no remuneration." BIO 13.

2. The classification of petitioner's state conviction is governed by the long-established categorical approach – which requires the *Government* to establish *all* the facts necessary to show that the non-citizen committed the equivalent of the federal felony, based *solely* on the record of conviction – not by Sixth Amendment principles that constrain the allocation of burdens of proof in a criminal trial. Thus, the root flaw in the Fifth Circuit's reasoning is that the categorical approach does not ask what would result if the non-citizen were hypothetically tried in federal court based on

the findings established by the predicate state conviction. Rather, the question is whether the state conviction "necessarily" establishes that the conviction corresponds to the federal offense – here, a felony under the CSA rather than a misdemeanor. That is a "demanding" standard, *Shepard*, 544 U.S. at 24, and it is not met here. Under the categorical approach, the indeterminacy regarding the amount of marijuana petitioner possessed means that the conviction is not "necessarily" a felony rather than a misdemeanor.

The Fifth Circuit's contrary reasoning repeats precisely the error that this Court identified in *Carachuri-Rosendo*. The predicate conviction in that case established that the defendant had possessed drugs. The conviction included no finding of recidivism, but neither did it negate the fact that the non-citizen had a prior drug conviction – as here, it left the matter "indeterminate." The court of appeals resolved that indeterminacy by holding that further fact-finding beyond the categorical approach was appropriate to determine whether the non-citizen could have been found to be a recidivist in a "hypothetical" federal prosecution. *Carachuri-Rosendo v. Holder*, 570 F.3d 264, 266 (5th Cir. 2009).

This Court reversed, reaffirming its commitment to "the more focused, categorical inquiry," 130 S. Ct. at 2588, under which the findings established by the conviction must necessarily establish the federal felony. The Court explained that the Fifth Circuit's hypothetical analysis "ignores the text of the INA, which limits the Attorney General's cancellation power only when, *inter alia*, a noncitizen 'has . . . been *convicted* of a[n] aggravated felony.' 8 U.S.C.

§ 1229b(a)(3) (emphasis added)." 130 S. Ct. at 2586. "The term 'conviction' means, with respect to an alien, a formal judgment of guilt of the alien entered by a court." 8 U.S.C. § 1101(a)(48)(A). By contrast, the Fifth Circuit's analysis "focuses on facts known to the immigration court that could have *but did not* serve as the basis for the state conviction and punishment." 130 S. Ct. at 2588 (emphasis in original). Under the categorical approach, an immigration judge "cannot, *ex post*, enhance the state offense of record just because facts known to it would have authorized a greater penalty under . . . federal law." *Id.* at 2586-87.

The Fifth Circuit relied in this case on the fact that in a hypothetical criminal prosecution in federal court petitioner would have had the "burden to prove" that his state conviction was punishable under 21 U.S.C. § 841(b)(4). Pet. App. 9a. But that reasoning fails to recognize that the "very basis of the categorical approach is that the *sole* ground for determining whether an immigrant was convicted of an aggravated felony is the minimum criminal conduct necessary to sustain a conviction." *Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008) (emphasis in original). Here, because the findings established by petitioner's plea agreement are equally consistent with a federal misdemeanor, petitioner was not "convicted" of an "aggravated felony."

In *Carachuri-Rosendo*, this Court also recognized that the Fifth Circuit's "hypothetical" approach was "misleading as well as speculative, in that [the non-citizen's] federal-court counterpart would *not*, in actuality, have faced any felony charge," because his

Guidelines sentence "would not have exceeded one year, and very likely would have been less than 6 months." *Id.* at 2589. The results of the hypothetical prosecution imagined by the Fifth Circuit in this case are no less misleading. A conviction for the distribution of a small amount of marijuana for no remuneration is subject to a misdemeanor charge with a sentence of probation, after which the charges are expunged. *See* 21 U.S.C. § 841(b)(4) (incorporating 18 U.S.C. § 3607). Petitioner's own Guidelines sentence could not have exceeded twelve months, and likely would have been zero to six months. *See* U.S. Sentencing Guidelines Manual § 2D2.1 (base offense level 4); *id.* ch. 5, pt. A (sentencing table).

3. There are also other reasons why Congress could not have intended to exclude Section 841(b)(4)'s misdemeanor provision from the categorical inquiry. Congress's clear judgment that the misdemeanor offense was less serious and should trigger more lenient immigration sanctions obviously must be considered in the determination whether a conviction is an "aggravated felony." By contrast, the characteristic on which the Fifth Circuit seized – whether a provision of the CSA states a "mitigating" exception under the Sixth Amendment, so the burden of proof is on the defendant – bears no relationship to the offense's seriousness.

Whether a conviction was a misdemeanor under Section 841(b)(4), and hence only a "controlled substances" offense, is thus critical to the application of the INA to a marijuana-related conviction, and a plethora of immigration consequences hinge on whether the non-citizen commits a misdemeanor or a

felony. If the conviction is a felony, and therefore an aggravated felony for immigration purposes, it triggers mandatory deportation because the offender is ineligible for cancellation of removal. 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1229b(a)(3). The non-citizen is moreover foreclosed from seeking readmission to the United States, *id.* § 1182(a)(9)(A)(ii); unable to apply for asylum, *id.* § 1158(b)(2)(A)(ii), (B)(i); and prohibited from demonstrating the "good moral character" needed for naturalization, *id.* § 1101(f)(8); 8 C.F.R. § 316.2(7). Further, "the Federal [Sentencing] Guidelines attach special significance to the 'aggravated felony' designation: a conviction of unlawfully entering or remaining in the United States receives an eight-level increase for a prior aggravated felony conviction, but only four levels for 'any other felony.'" *Lopez v. Gonzales*, 549 U.S. 47, 51 (2006).

For marijuana distribution offenses, Section 841(b)(4) is thus the provision that determines whether the "conviction" is a felony – triggering all those harsh consequences – or instead a "misdemeanor." As the Government argued with respect to recidivism in *Carachuri-Rosendo*, Section 841(b)(4), "a statutory sentencing prerequisite (made relevant because of the word 'punishable'), rather than offense elements, is what [determines whether a marijuana distribution offense is] punishable as a felony." U.S. *Carachuri-Rosendo* Br. 25 n.11.

Nor is there any other feature of the felony defined by Section 841(d)(1)(D) that suggests Congress would have wanted that provision, but *not* the misdemeanor provision of Section 841(b)(4), considered in determining whether a conviction

should trigger mandatory removal. Both provisions establish a sentencing range depending on features of the offense: drug type (marijuana); and quantity (small amounts and less than fifty kilograms). Under Section 841(b), those features of a conviction can dictate a maximum sentence of anywhere from one year (Section 841(b)(4)) to life imprisonment (Section 841(b)(1)(A)). Although the misdemeanor provision refers to remuneration, that is a common element of criminal statutes. *See, e.g.*, 18 U.S.C. § 1958 (murder-for-hire); 18 U.S.C. § 1384 (prostitution near a military or naval installation); 17 U.S.C. § 506(a)(1)(A) (copyright infringement is criminal when done "for purposes of commercial advantage or private financial gain"); 15 U.S.C. § 377(a)(2)(B)(i) (evasion of cigarette distribution laws by a common carrier is criminal if done for pecuniary gain).

Even putting the categorical rule to the side, Congress could not have intended to enact the Fifth Circuit's distinction between those provisions of the CSA that state Sixth Amendment "elements" and those (like Section 841(b)(4)) that do not. At the time the provision in question was adopted, that distinction *did not exist*. Congress adopted the relevant statutory language – providing that "aggravated felony" includes "a drug trafficking crime (as defined in section 924(c) of Title 18)," 8 U.S.C. § 1101(a)(43)(B) – in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, § 7342 (1988). At that time, all but one of the courts of appeals to have considered the question deemed all of Section 841(b) – including both the felony provision of Section 841(b)(1)(D) and the misdemeanor provision of Section 841(b)(4) – to be *sentencing factors*. *See,*

e.g., *United States v. Campuzano*, 905 F.2d 677, 679 (2d Cir. 1990) (adopting the "clear majority" view). That did not change until twelve years later, when this Court held in its path-marking decision in *Apprendi* that under the Sixth Amendment facts that increase the maximum punishment are "elements" that must be proved to the jury beyond a reasonable doubt. *See, e.g.*, *United States v. Soto-Beniquez*, 356 F.3d 1, 45-46 (1st Cir. 2004) (explaining that under *Apprendi*, whenever a defendant is sentenced to more than the "default" maximum of 5 years for a first-time offender, additional facts, including drug type and quantity, must first be found by the jury).

B. The Fifth Circuit's Decision Requires The Fact-Finding That The Categorical Approach Forbids.

1. The court of appeals compounded its failure to follow this Court's precedents by reverting to the fact-specific inquiry that the categorical approach rejects. According to the court of appeals, a "conviction" like petitioner's establishes only the possession of marijuana and the intent to distribute. But the court then indicated that, because the offense might constitute a misdemeanor or a felony, immigration officials could resolve that indeterminacy by conducting an evidentiary hearing into whether the facts of the offense correspond to a misdemeanor. Pet. App. 9a & n.4. The B.I.A. subsequently adopted the same approach, directing immigration judges to consider "any probative evidence" either party might submit, no matter whether that evidence was presented in securing the conviction. *In re Castro-Rodriguez*, 25 I. & N. Dec. 698, 702 (B.I.A. 2012).

That ruling squarely conflicts with this Court's precedents by requiring the very fact-finding that the categorical approach forbids. Under the plain statutory text, as confirmed by this Court's precedents, the "*conviction*" – not the *offense* – must correspond to an "aggravated felony." The conviction and the offense will often differ significantly, as most criminal charges are resolved by plea agreements for lesser charges than the facts might have sustained. And a rule authorizing additional fact-finding turns the "conviction" into little more than a placeholder, promptly superseded by whatever evidence the immigration official decides to credit.

As the B.I.A. has itself previously recognized, "[f]or nearly a century, the Federal circuit courts of appeals have held that where a ground of deportability is premised on the existence of a 'conviction' for a particular type of crime, the focus of the immigration authorities must be on the crime of which the alien was *convicted*, to the exclusion of any other criminal or morally reprehensible acts he may have *committed*." *In re Velazquez-Herrera*, 24 I. & N. Dec. 503, 513 (B.I.A. 2008) (emphasis in original); *see also Evanson v. Attorney General*, 550 F.3d 284, 291 (3d Cir. 2008) ("8 U.S.C. § 1227(a)(2)(A)(iii) – the section of the INA that renders an aggravated felon removable – refers to '[a]ny alien who is *convicted* of an aggravated felony' (emphasis added) rather than to any alien who 'has committed' an aggravated felony.").

The significant constraints on the categorical approach reflect that the INA's "illicit trafficking" provision is not a further penalty for the non-citizen's prior drug offense. Rather, as this Court stated

regarding the analogous provisions of the Armed Career Criminal Act, it "focuses upon the special danger created when a particular type of offender" – a "drug trafficker" – remains in this country. *Begay v. United States*, 553 U.S. 137, 141 (2008). The categorical approach considers the "crime as *generally* committed," *Nijhawan v. Holder*, 557 U.S. 29, 34 (2009) (emphasis in original), in "the ordinary case," *James v. United States*, 550 U.S. 192, 208 (2007), in order to "capture all offenses of a certain level of seriousness," *Taylor v. United States*, 495 U.S. 575, 590 (1990).

This Court has accordingly repeatedly rejected the Government's attempts to look beyond the conviction to the facts of the individual offense under the categorical approach. *See, e.g.*, *Taylor*, 495 U.S. at 600-02; *see also Kawashima v. Holder*, 132 S. Ct. 1166, 1172 (2012) ("[W]e employ a categorical approach by looking to the statute defining the crime of conviction, rather than to the specific facts underlying the crime."); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007) (courts look "not to the facts of the particular prior case, but rather to the state statute defining the crime of conviction"); *Begay*, 553 U.S. at 141 ("[W]e consider the offense generically, that is to say, we examine it in terms of how the law defines the offense and not in terms of how an individual offender might have committed it on a particular occasion.").

Accordingly, under the categorical approach, "in order to determine whether a prior conviction is for the kind of offense described, the immigration judge must look to the [state] statute," as opposed to "the particular circumstances in which an offender

committed" the crime. *Nijhawan*, 129 S. Ct. at 2297-98. By contrast, the Fifth Circuit's rule "necessarily requires looking into evidence of [petitioner's] actual conduct, evidence that may never have been seen by the initial convicting court. It was the desire to avoid such particular inquiries – whether designed to show that a specific defendant was less or more culpable than what his actual conviction required – that led [this Court] to focus on categorical analysis." *Martinez v. Mukasey*, 551 F.3d 113, 121 (2d Cir. 2008).

2. The fact-finding required by the Fifth Circuit's decision gives rise to all the collateral litigation over the nature of the prior offense that this Court's precedents have consistently held is improper. The categorical approach is a "pragmatic" one "that avoids subsequent evidentiary enquiries into the factual basis for the earlier conviction." *Shepard v. United States*, 544 U.S. 13, 20 (2005). It responds directly to the "practical difficulties and potential unfairness of a factual approach." *Taylor*, 495 U.S. at 601. Relying on the findings necessary to the conviction "avoids the practical difficulty of trying to ascertain at sentencing, perhaps from a paper record mentioning only a guilty plea, whether the present defendant's prior crime, as committed on a particular occasion, did or did not" amount to a federal felony. *Chambers v. United States*, 555 U.S. 122, 125 (2009).

In conflict with those cases, the Fifth Circuit's decision compels "collateral trials," relitigating the conduct underlying the predicate conviction. *Shepard*, 544 U.S. at 23. Indeed, here more than in most contexts, "the practical difficulties and potential

unfairness of a factual approach are daunting." *Taylor*, 495 U.S. at 601.

Notwithstanding that the INA requires the Government to prove a non-citizen is removable by "clear and convincing" evidence, 8 U.S.C. § 1229a(c)(3)(A), the Fifth Circuit placed the burden of proof on the non-citizen. Pet. App. 9a. The relevant evidence of drug quantity and the absence of remuneration will often be unavailable to the non-citizen, however. Evidence relating to those facts will not have been introduced in the state criminal proceedings, or otherwise preserved, for the very reason that the conviction leaves those facts indeterminate: they are *irrelevant* under the statute of conviction. The great majority of such cases are in any event resolved by plea agreements. The offense also will often have occurred years or even decades earlier, so memories will have faded and corroborating witnesses dispersed.

If the evidence can be located, it will be hotly disputed. For example, in this case, the Government argued that the police report which petitioner produced from his own case to prove that he had not been convicted of a felony was entitled to no weight, because the report was "not authenticated or sworn." U.S. C.A. Br. 17. With no standard to guide their decisions, immigration judges will reach inconsistent results.

It gets worse. Non-citizens in removal proceedings based on drug convictions are subject to mandatory arrest. 8 U.S.C. § 1226(c)(1)(B). They regularly have no lawyer. The Government often detains them hundreds of miles from home and family in facilities with very little access to mail,

telephones, a library, or computers.[4] For many individuals, it will be impossible to produce the proof that the Fifth Circuit's decision demands.

Assuming the facts could be located, the Fifth Circuit's ruling is still impracticable. Immigration judges already have massive caseloads; the number of pending immigration cases is at an all-time high.[5]

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[4] See generally Human Rights Watch, A Costly Move: Far and Frequent Transfers Impede Hearings for Noncitizen Detainees in the United States 14, 19-20 (2011), available at http://www.hrw.org/reports/2011/06/14/costly-move-0; Seattle University School of Law, Voices from Detention: A Report on Human Rights Violations at the Northwest Detention Center in Tacoma, Washington 37-38 (2008), available at http://www.law.seattleu.edu/documents/news/archive/2008/DRFinal.pdf; National Immigration Law Center, A Broken System: Confidential Reports Reveal Failures in U.S. Immigrant Detention Centers 41-43, 48 (2009), available at http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CF4QFjAA&url=http%3A%2F%2Fwww.nilc.org%2Fdocument.html%3Fid%3D9&ei=1qPkT-bNMvO20QHhu-zXCQ&usg=AFQjCNFDn13giJU8EDMhc2Vcjl5auZLGgg&sig2=8dzDINa8E78F8siS2i9ekw; Lutheran Immigration & Refugee Service & Women's Commission for Refugee Women and Children, Locking Up Family Values: The Detention of Immigrant Families 38 (2007), available at http://www.womensrefugeecommission.org/docs/famdeten.pdf.

[5] See American Bar Association Commission on Immigration, Reforming the Immigration System: Proposals to Promote Independence, Fairness, Efficiency, and Professionalism in the Adjudication of Removal Cases 28 (2010), available at http://www.abanet.org/media/nosearch/immigration_reform_executive_summary_012510.pdf; Transactional Records Access Clearinghouse, Immigration Court Backlog Tool: Pending Cases and Length of Wait in Immigration Courts,

But the court of appeals imagined that immigration judges would effectively conduct trials of drug charges that were resolved by a different government many years before, hundreds or thousands of miles away. The situation will be worse for front-line immigration officers – and likely still more unfair to non-citizens – who will often be required to make "aggravated felony" determinations without the benefit of adversarial hearings.[6]

C. The Government's Alternative "Elements" Theory Is Meritless.

At the certiorari stage, the Government went even further than the Fifth Circuit, implying that no evidentiary hearing could be conducted because all marijuana distribution offenses are aggravated felonies, without exception. The Solicitor General argued that "[i]n the context of controlled-substances offenses, applying the categorical approach requires the IJ to examine the *elements* of the state offense and determine whether, if a trier of fact found all of

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available at http://trac.syr.edu/phptools/immigration/court_backlog/.

[6] *See, e.g.*, 8 U.S.C. §§ 1101(f)(8) (naturalization officers must determine whether a conviction is an aggravated felony because an aggravated felony conviction is a bar to naturalization), 1226(c)(1)(B) (detention officers make aggravated felony determinations because aggravated felonies trigger mandatory detention), 1228(a)(3)(A) (mandating expedited removal proceedings for detainees convicted of aggravated felonies); 8 C.F.R. § 335.3 (naturalization determinations are typically based on a paper record and a non-adversarial interview).

those elements satisfied, it necessarily also found that the defendant committed the elements of a felony offense under the CSA." BIO 7. On that view, "Section 841(b)(4) is *irrelevant* in using a 'categorical approach' to identify state convictions that constitute CSA felonies," because "[t]hat paragraph does not define any element of any crime." *Id.* 9 (emphasis added). Instead, a conviction involving "[a]ny quantity of marijuana" is categorically an aggravated felony. *Id.* 7 n.5.

That argument cannot be right, conflicts with this Court's precedents, and contradicts the Government's own position in *Carachuri-Rosendo*. It cannot be right because it would mean that a non-citizen convicted in federal court directly under the misdemeanor distribution provision of the CSA would nonetheless be deemed to have committed an aggravated felony for immigration purposes, triggering mandatory deportation. After all, the Government's very point is that Section 841(b)(4) – which defines the misdemeanor – is "irrelevant." So on the Government's view, the INA treats a *misdemeanor* conviction entered directly under the Controlled Substances Act as if it were a "*felony* punishable under the Controlled Substances Act." 18 U.S.C. § 924(c)(2) (emphasis added). That argument defeats itself.

This Court also rejected the Government's "elements" theory in *Carachuri-Rosendo*. The Solicitor General asserted in that case that "the categorical approach focuses on whether the generic crime [*i.e.*, federal offense] and the predicate crime have the same offense elements, which is essentially the inquiry the government advocates here; a

sentencing factor such as recidivism is not an element that would need to be present under the categorical approach." Br. for U.S., *Carachuri-Rosendo* Br. 28 n.12. On that view, "the facts that make a drug offense 'punishable' as a felony need not have been established in the prior state court proceeding, but only in the later immigration proceeding." *Id.* 29; *see also* Tr. of Oral Arg., *Carachuri-Rosendo* 44 (Assistant to the Solicitor General) ("This is a two-part inquiry where the first part, the offense elements, does need to be established in State court, and the second part, which goes to how it is punishable, does not need to be established in State court.").

This Court disagreed. The Government's two-step theory, it explained, failed to account for the fact that under the categorical approach *all* the facts necessary to establish both the federal offense and its felony status must be reflected in the conviction itself. If the conviction failed to establish that the non-citizen was a recidivist, that was the end of the matter; a further fact-finding stage was inappropriate. 130 S. Ct. at 2586-87.

But the Court separately *accepted* the Government's argument that the "felony" status of the conviction must account for *both* elements and sentencing factors. In *Carachuri-Rosendo*, the Solicitor General explained that a conviction is an aggravated felony if it is a "felony *punishable* under the [CSA]." Br. for U.S., *Carachuri-Rosendo* 16. The word "punishable," in turn, means "deserving of, or liable to, punishment." *Id.* (quoting *Webster's Third New International Dictionary of the English Language* 1843 (1993)). Because the CSA defines

whether a conviction is subject to felony punishment based on sentencing factors, "to determine how an offense is 'punishable' under the CSA, a court must look *beyond the offense elements to sentencing factors* relevant to the particular offender." *Id.* 30 (emphasis added).

This Court agreed. It explained that so long as the predicate conviction included a "finding" of recidivism, the non-citizen's conviction could be "*punishable*" as a felony "under the Controlled Substances Act." *See Carachuri-Rosendo*, 130 S. Ct. at 2586. Thus, an offense is "punishable" as a "felony" under the CSA whenever it is "eligible for" that punishment, *id.* at 2581, which means that "the 'maximum term of imprisonment authorized' must be 'more than one year,'" *id.* at 2586 (quoting 18 U.S.C. § 3559(a)(5)). It makes no difference that "facts leading to recidivist felony *punishment*, such as the existence of a prior conviction, do not qualify as 'elements' in the traditional sense." *Id.* at 2584 (quoting the B.I.A.'s decision).

In this case, the Government now reverses course and argues that only elements are relevant under the categorical approach because "[a] criminal offense is defined by its statutory 'elements.'" BIO 8. But *Carachuri-Rosendo* rejected that argument too, explaining that whether the conviction is "punishable" as a felony does not turn merely on its elements. "While most federal offenses are defined by elements that must be proved to a jury beyond a reasonable doubt," whether a "conviction" is a "felony" under the CSA depends on an "'amalgam of elements, substantive *sentencing factors*, and

procedural safeguards.'" 130 S. Ct. at 2583 (quoting the B.I.A.'s decision) (emphasis added).

Nor is there otherwise support in this Court's decisions for the Government's "elements" theory. While the Court's decisions articulating the "categorical approach" have sometimes loosely referred to the "elements of the offense," it has used that language not to distinguish "sentencing factors" but instead to reinforce that the categorical approach does not consider "the specific conduct of this particular offender." *James v. United States*, 550 U.S. 192, 202 (2007). The focus of the categorical approach has always been on the fact of conviction, and the burden of proof has always been placed on the Government to meet the "demanding requirement" of showing that the conviction itself supports a more serious penalty. *Shepard*, 544 U.S. at 24.[7]

---

[7] At the very least, petitioner is entitled to the opportunity to prove that his offense corresponds to the federal misdemeanor. The immigration judge and the B.I.A. held that this case was controlled by B.I.A. precedent holding that all marijuana distribution convictions are *per se* aggravated felonies. *See* Pet. App. 12a, 18a (citing *In re Aruna*, 24 I. & N. Dec. 452 (B.I.A. 2008)). The Fifth Circuit held to the contrary that the non-citizen has the right to prove that his offense corresponds to the misdemeanor provision. Pet. App. 9a. If this Court agrees with that ruling, petitioner should be entitled to that opportunity. Although the Fifth Circuit stated that petitioner waived that right by failing to introduce evidence before the ALJ, *see id.* 9a n.4, even the Government seemingly recognized in its brief below that the B.I.A. had provided petitioner with no such opportunity. U.S. C.A. Br. 17 n.2 (citing *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)). And while the

Government noted at the certiorari stage that before the immigration judge "petitioner did not argue that his Georgia offense had in fact involved a small amount of marijuana for no remuneration," BIO 4, it acknowledged that the BIA regarded the misdemeanor provision as irrelevant as a matter of law under the B.I.A.'s "controlling decision in *In re Aruna*," *id.* 5.

If, on the other hand, this Court holds that this case is governed by a "circumstance-specific" approach rather than the "categorical approach," a remand would also be required to consider whether petitioner's conviction is a "controlled substances" offense *at all*. Section 841(b)(4) provides that the distribution of a small amount for no remuneration should be treated as drug possession, and petitioner's offense involved the possession of thirty grams or less of marijuana for personal use. *See* 8 U.S.C. § 1227(a)(2)(B)(i). Under the correct "categorical approach," that argument is precluded, because petitioner was convicted of possession with intent to distribute. But if this Court were to hold instead that this case is governed by a "circumstance-specific" approach, petitioner would be entitled to prove that the facts of his offense fall within the personal-use exception.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

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APPENDIX

Relevant Statutory Provisions

Provisions of the Immigration and Nationality Act

8 U.S.C. § 1101(a)(43) provides:

> The term "aggravated felony" means –
>
> . . .
>
> (B) 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);

8 U.S.C. § 1227(a)(2)(B)(i) provides:

> Conviction
> Any alien who at any time after admission has been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in section 802 of title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(A)(iii) provides:

> Aggravated felony
> Any alien who is convicted of an aggravated felony at any time after admission is deportable.

8 U.S.C. § 1229a(c)(3)(A) provides:

> In the proceeding the Service has the burden of establishing by clear and convincing evidence that, in the case of an alien who has been admitted to the United States, the alien is deportable. No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence.

8 U.S.C. § 1229b(a) provides:

> Cancellation of removal for certain permanent residents
>
> The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien –
>
> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

Provisions of the Controlled Substances Act

21 U.S.C. § 841(a) provides:

> Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 841(b)(1)(D) provides:

> Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)
>
> . . .
>
> (D)
>
> In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more

> than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18 or $250,000 if the defendant is an individual or $1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18 or $500,000 if the defendant is an individual or $2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

21 U.S.C. § 841(b)(4) provides:

> Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title and section 3607 of title 18.

21 U.S.C. § 844(a) provides:

> Unlawful acts; penalties
>
> It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug,

narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding the preceding sentence, a person convicted under this subsection for the possession of a mixture or substance which contains cocaine base shall be imprisoned not less than 5 years and not more than 20 years, and fined a minimum of $1,000, if the conviction is a first conviction under this subsection and the amount of the mixture or substance exceeds 5 grams, if the conviction is after a prior conviction for the possession of such a mixture or substance under this subsection becomes final and the amount of the mixture or substance exceeds 3 grams, or if the conviction is after 2 or more prior convictions for the possession of such a mixture or substance under this subsection become final and the amount of the mixture or substance exceeds 1 gram. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this

> section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of title 18 that the defendant lacks the ability to pay.

21 U.S.C. § 924(c)(2) provides:

> For purposes of this subsection, the term "drug trafficking crime" means 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.

Provisions of the Georgia Code

Ga. Code § 16-13-2(a) provides:

> Whenever any person who has not previously been convicted of any offense under Article 2 or Article 3 of this chapter or of any statute of the United States or of any state relating to narcotic drugs, marijuana, or stimulant, depressant, or hallucinogenic drugs, pleads guilty to or is found guilty of possession of a narcotic drug, marijuana, or stimulant, depressant, or hallucinogenic drug, the court may without entering a judgment of guilt and with the consent of such person defer further proceedings and place him on probation upon such reasonable terms and conditions as the court may require, preferably terms which require the person to undergo a comprehensive rehabilitation program, including, if necessary, medical treatment, not to exceed three years, designed to acquaint him with the ill effects of drug abuse and to provide him with knowledge of the gains and benefits which can be achieved by being a good member of society. Upon violation of a term or condition, the court may enter an adjudication of guilt and proceed accordingly. Upon fulfillment of the terms and conditions, the court shall discharge the person and dismiss the proceedings against him. Discharge and dismissal under this Code section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of this Code section or for purposes of disqualifications or disabilities imposed by law upon conviction of a crime. Discharge and dismissal under this Code section

may occur only once with respect to any person.

Ga. Code § 16-13-21(11) provides:

> "Distribute" means to deliver a controlled substance, other than by administering or dispensing it.

Ga. Code § 16-13-30(j)(1) provides:

> It is unlawful for any person to possess, have under his control, manufacture, deliver, distribute, dispense, administer, purchase, sell, or possess with intent to distribute marijuana.

Ga. Code § 16-13-31(c) provides:

> Any person who knowingly sells, manufactures, grows, delivers, brings into this state, or has possession of a quantity of marijuana exceeding 10 pounds commits the offense of trafficking in marijuana and, upon conviction thereof, shall be punished as follows:
>
> (1) If the quantity of marijuana involved is in excess of 10 pounds, but less than 2,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of five years and shall pay a fine of $100,000.00;
>
> (2) If the quantity of marijuana involved is 2,000 pounds or more, but less than 10,000 pounds, the person shall be sentenced to a mandatory minimum term of imprisonment of seven years and shall pay a fine of $250,000.00; and
>
> (3) If the quantity of marijuana involved is 10,000

> pounds or more, the person shall be sentenced to a mandatory minimum term of imprisonment of 15 years and shall pay a fine of $1 million.

Ga. Code § 42-8-60(a) provides:

> Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant:
>
> (1) Defer further proceeding and place the defendant on probation as provided by law; or
>
> (2) Sentence the defendant to a term of confinement as provided by law.

Materials From Georgia State Court

Final Disposition

THE SUPERIOR COURT OF HOUSTON COUNTY, GEORGIA

FINAL DISPOSITION

THE STATE VS. ADRIAN PHILLIP MONCRIEFFE

CRIMINAL ACTION NO. 2007 C 38166

OFFENSE(S) COUNT 01

VGCSA – POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

MAY TERM, 2008

☒ PLEA:

☒NEGOTIATED

☒GUILTY ON COUNT(S) _____1_____

☐NOLO CONTENDERE ON COUNT(S) _____

☐TO LESSER INCLUDED OFFENSE(S) ___
ON COUNT(S) _____

☒JURY

☐NON-JURY

☐VERDICT:

☐GUILTY ON COUNT(S) _____

☐NOT GUILTY ON COUNT(S) _____

☐GUILTY OF INCLUDED OFFENSE(S) OF _____ON COUNT(S) _____

☒OTHER DISPOSITION:

☒NOLLE PROSEQUI ORDER ON COUNT(S) 2

☐DEAD DOCKET ORDER ON COUNT(S) _____

☒FIRST OFFENDER TREATMENT

WHEREAS, said defendant has not previously been convicted of a felony nor availed himself of the provision of the First Offender Act (GA. Laws 1968, p.324). NOW, THEREFORE, the defendant consenting hereto, it is the judgment of the Court that no judgment of guilty be imposed at this time, but that further proceeding are deferred and defendant is hereby sentenced to confinement for the period of 0 YEARS and/or placed on probation for the period of 5 YEARS from this date provided that said defendant complies with the following general and special conditions herein imposed by the Court as part of this sentence:

PROVIDED, further, that upon violation of the terms of probation, the Court may enter an adjudication of guilt and proceed to sentence defendant to the maximum sentence provided by law. Upon fulfillment of the terms of probation, or upon release of the defendant by the Court prior to the termination of the period thereof, the defendant shall stand discharged of said offense charged and shall be completely exonerated of said offense charged. Let a copy of this Order be forwarded to the Office of the State Probation System of Georgia, and the identification Division of the Federal Bureau of Investigation.

☒GENERAL CONDITIONS OF PROBATION

The defendant, having been granted the privilege of serving all or part of the above-stated sentence on probation, hereby is sentenced to the following general conditions of probation:

☒1) Do not violate the criminal laws of any governmental unit.

☒2) Avoid injurious and vicious habit – especially alcoholic intoxication and narcotics and other dangerous drugs unless prescribed lawfully.

☒3) Avoid persons or places of disreputable or harmful character.

☒4) Report to the Probation-Parole Supervisor as directed and permit such Supervisor to visit him(her) at home or elsewhere.

☒5) Work faithfully at suitable employment insofar as may be possible.

☒6) Do not change his(her) present place of abode, move outside the jurisdiction of the Court, or leave the State for any period of time without prior permission of the Probation Supervisor.

☒7) Support his(her) legal dependents to the best of his(her) ability.

☒8) Probationer shall, from time to time upon oral or written request by any Probation Officer, produce a breath, urine, and/or specimen for analysis for the possible presence of a substance prohibited or controlled by any law of the State of Georgia or the United States.

9) Submit to evaluation/testing relating to rehabilitation & participate in & successfully complete rehabilitative programming as directed by Probation Dept.

☒ OTHER CONDITIONS OF PROBATION

IT IS FURTHER ORDERED that the defendant pay a fine in the amount of 1,000.00 plus $30 or 10%, whichever is less pursuant to O.C.G.A. 15-21-70 and pay restitution in the amount of .00 : 32.00 MO Prob Fee, 50.00 POT, 100.00 IDF 100.00 Jail, 500.00 Drug, 50.00 VAF, .00 BSF, 50.00 CRM Lab, .00 DUI .00 DRVED, .00 LDAP

Special Conditions: DRUG OFFENDER CONDTIONS: BANISHMENT FROM HOUSTON COUNTY EXCEPT TO DRIVE THRU ON 1-75: EARLY TERMINATION AFTER 2 YRS @ DISCRETION OF PROB DEPT: NO POSSESSION OR CONSUMPTION OF ALCHOLIC OR ILLEGAL DRUGS;***

IT IS THE FURTHER ORDER of the Court, and the defendant is hereby advised that the court may, at any time, revoke any conditions of this probation and/or discharge the defendant from probation. The probationer shall be subject to arrest for violation of any condition of probation herein granted, if such probation is revoked, the Court may order the execution of the sentence in the manner provided by law after deducting there from the amount of time the defendant has served on probation. All special conditions imposed this date are pursuant to O.C.G.A. 42-8-34.1 and are, therefore, special conditions. Any vio-

lation(s) of any special conditions may result in a revocation in full. If offense is covered under O.C.G.A., 24-4-60, you must submit a DNA sample.

The defendant was represented by the Honorable SHOD WATSON Attorney at Law HOUSTON County, by (Employment) ([illegible]). By the Court, JUNE 30, 2008

So ordered this 30TH day of JUNE, 2008

/s/ [illegible]

Judge Houston Court

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of this Sentence of Probation has been delivered in person to the defendant and he/she instructed regarding the conditions as set forth above.

This 30th day of June, 2008 /s/ Elaine Cranford

Probation Officer

Copy received and instructions regarding conditions acknowledged.

This 30th day of June, 2008 /s/ Adrian Moncrieffe

Probationer

Filed in Open Court, this JUN 30 2008.

/s/ Sandra L [illegible] Deputy Clerk

FINAL DISPOSITION CONTINUATION PAGE
WARRANT NUMBER 2006 MP 55975

THE SUPERIOR COURT OF HOUSTON COUNTY, GEORGIA

THE STATE VS. ADRIAN PHILLIP MONCRIEFFE

CRIMINAL ACTION NO. 2007 C 38166

OFFENSE(S) COUNT 01

VGCSA-POSSESSION OF MARIJUANA WITH INTENT TO DISTRIBUTE

***NO POSSESSION OF ANY DRUG PARAPHERNALIA, NO POSSESSION OF ANY SURVIELLANCE EQUIPMANT; NO ILLEGAL DRIVING; TRANSFER PROBATIONTO STATE OF FLORIDA

So ordered this 30th day of JUNE, 2008

/s/ [SIGNATURE]
Judge, Houston Superior Court

IIIB01-0004A02
Attachment 2
3/01/04

ACKNOWLEDGEMENT Of

Prohibition Against Receiving, Shipping, Possessing, Transporting Or Attempting To Purchase a Firearm

/s/ Adrian Phillip Moncrieffe 12-19-80,

(Full name, Please Print) Date of Birth

_____

Social Security Number

acknowledge that I have read, or had read to me, and understand that:

(a) I have been convicted of a felony offense, or

(b) I am currently serving a sentence imposed under First Offender Act for a felony offense, or

(c) I have been convicted of a misdemeanor crime of domestic violence.

and as a result of this action, I am prohibited by Ga. Law (O.C.G.A. 16-11-131 and 42-8-60 through 65) and/or Federal Law (USC: 18 USC 921 through 925) from receiving, shipping, possessing, transporting or attempting to purchase a firearm. This includes any handgun, rifle, shotgun, or other weapon, which will or can be converted to expel a projectile by the action of an explosion or electrical charge. I also acknowledge that if I am a convicted felon, I am prohibited by Federal Law from receiving, shipping, possessing, transporting or attempting to purchase ammunition.

Possession of a firearm or ammunition means that I may not have a firearm or ammunition in my actual physical control (i.e. in my pants pocket) or within my area of access or control (i.e. in the glove box or my car). I may not possess a firearm or ammunition either by myself or jointly with another person.

If I receive, ship, possess, transport, or attempt to purchase a firearm or ammunition I will be guilty of a state and/or federal felony crime.

I understand that this document can be used as evidence in a court of law during probation revocation or criminal proceedings.

/s/ Adrian Moncrieffe	6/30/08
Signature	Date
/s/ Elaine Cranford	6-30-08
Witness	Date
PO II	
Position or Title	

Retain this form in the probationer's file according to Probation Division SOPs IIIB13-0004, IIIB13-0005, and IIIB13-0006.

Revised 1/04

Evidence Description: One small plastic bag, which contains a green leafy substance.

Results: A microscopic examination was conducted on the above-mentioned green leafy material along with a Duquenois-Levine Reagent test and a KN Reagent (Fast Blue B) test resulting in a positive confirmation of the material MARIJUANA.

Material Weight: Less than 1 oz. (approximate weight is 1.3 grams.)

Respectfully Submitted,

Cindy Jackson
Evidence Technician
Perry Police Department
Criminal Investigations Division
Certified Marijuana Identification