Appendix B
Relevant Immigration Decisions

This appendix contains the following unpublished decisions by the Board of Immigration Appeals concerning immigration consequences of North Carolina criminal convictions.

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

Jama Ibrahim
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Atlanta, GA 30328

DHS/ICE Office of Chief Counsel - ATL
180 Spring Street, Suite 332
Atlanta, GA 30303

Name: [redacted] [redacted]

Date of this notice: 3/28/2014

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Pauley, Roger

schwarzA
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: [redacted] – Atlanta, GA Date: MAR 28 2014

In re: [redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Jama A. Ibrahim, Esquire

ON BEHALF OF DHS: Gene Hamilton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(ii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(ii)] -
Convicted of two or more crimes involving moral turpitude

Sec. 237(a)(2)(E)(i), I&N Act [8 U.S.C. § 1227(a)(2)(E)(i)] -
Convicted of crime of domestic violence, stalking, or child abuse, child neglect, or child abandonment

APPLICATION: Termination

The Department of Homeland Security ("DHS") appeals from an Immigration Judge's March 4, 2013, decision terminating proceedings. The respondent has filed a brief in opposition to the appeal. For the reasons that follow, the appeal will be dismissed.

At issue on appeal is whether the DHS met its burden of proving that the respondent's August 2010 conviction for assault on a female in violation of North Carolina law is a crime involving moral turpitude, which would combine with a 1996 conviction for felony theft under Florida law to satisfy the charge of removal arising under section 237(a)(2)(A)(ii) of the Immigration and Nationality Act. In addition, the DHS argues on appeal that the assault on a female conviction under section 14-33(c)(2) of the North Carolina statute is also a crime of domestic violence, satisfying the removal charge under section 237(a)(2)(E)(i) of the Act.[1] We

[1] In its Notice of Appeal, the DHS also raised the question whether the Immigration Judge erred in finding that it had failed to prove that the respondent's March 2012 conviction for cyberstalking in violation of section 14-196.3 constituted a crime involving moral turpitude. However, in its appeal brief, the DHS does not elaborate on this argument, nor support it with pertinent legal authority. We therefore deem this argument abandoned. Nevertheless, to the extent that the DHS challenges the Immigration Judge's findings with regard to whether the cyberstalking conviction can go towards satisfying the charge of removal under section 237(a)(2)(A)(ii) of the Act, we affirm the Immigration Judge's finding in this regard (Tr. at 85-86). *See Cano v. U.S. Att'y Gen.*, 709 F.3d 1052, 1053 n. 3 (11th Cir. 2013) (analysis must

(Continued . . . .)

review these legal questions de novo. *See* 8 C.F.R. § 1003.1(d)(3)(ii). We also note that there are no contested questions of fact arising in this appeal that would trigger clear error review. *See* 8 C.F.R. § 1003.1(d)(3)(i).

The question whether the assault conviction under the above-referenced section of North Carolina law constitutes a crime involving moral turpitude is informed by the Supreme Court's decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), which was issued after the Immigration Judge rendered his decision in this case. In *Descamps*, the Supreme Court explained that the modified categorical approach operates narrowly, and applies only if: (1) the statute of conviction is divisible in the sense that it lists multiple discrete offenses as enumerated alternatives or defines a single offense by reference to disjunctive sets of "elements,"[2] more than one combination of which could support a conviction, and (2) some (but not all) of those listed offenses or combinations of disjunctive elements are a categorical match to the relevant generic standard. *Id.* at 2281, 2283. Thus, after *Descamps* the modified categorical approach does not apply merely because the elements of a crime can sometimes be proved by reference to conduct that fits a generic federal standard; according to the *Descamps* Court, such crimes are "overbroad" but not "divisible." *Id.* at 2285-86, 2290-92.[3]

The state statute under which the respondent was convicted for misdemeanor assault provides in relevant part that ". . . any person who commits any assault, assault and battery, or affray, is guilty of a Class A1 misdemeanor if, in the course of the assault, assault and battery, or affray, he or she. . . (2) [a]ssaults a female, he being a male person at least 18 years of age." *See* N.C. Gen. Stat. 14-33(c)(2). The Immigration Judge found that this statute did not categorically define a crime involving moral turpitude, but pursuant to the parties' agreement, conducted a modified categorical analysis of the conviction record, to determine if the conviction would support the charge under section 237(a)(2)(A)(ii) of the Act (I.J. at 2-3).

We disagree that under *Descamps v. United States*, *supra*, the statute lends itself to a modified categorical inquiry into whether the respondent's conviction thereunder is for a crime involving moral turpitude. While the language referencing the commission of "any assault,

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determine if least culpable conduct necessary to sustain a conviction under the statute meets the standard of a crime involving moral turpitude). The cyberstalking conviction was not alleged as a factual predicate for the charge under section 237(a)(2)(E)(i) of the Act, and the DHS does not allege on appeal that this conviction would support removal under section 237(a)(2)(E)(i) of the Act. *See* DHS's Brief at 3, n. 2 and Exh. 5.

[2] By "elements," we understand the *Descamps* Court to mean those facts about a crime which must be proved to a jury beyond a reasonable doubt *and* about which the jury must agree by whatever margin is required to convict in the relevant jurisdiction. *Id.* at 2288 (citing *Richardson v. United States*, 526 U.S. 813, 817 (1999)).

[3] The Eleventh Circuit has held that the requirements of the categorical and modified categorical approaches may not be relaxed in CIMT cases. *Fajardo v. U.S. Att'y Gen.*, 659 F.3d 1303, 1305 (11th Cir. 2011).

assault and battery, or affray," describes alternative means of committing the crime, we do not read the Supreme Court's opinion to support a conclusion that these are disparate "elements" of the crime, supporting a modified categorical approach. Moreover, the balance of the statute relating to the perpetrator being "a male person at least 18 years of age" who "assaults a female" suggests no alternative *elements* of assault—certainly no question about a domestic relationship—about which North Carolina jurors must agree in order to convict. *See Descamps v. United States, supra*, at 2285 n. 2. We therefore find the modified categorical approach undertaken here to be unwarranted under intervening precedent.[4]

Even if the modified categorical approach was appropriate here, we affirm the Immigration Judge's determination that under noticeable documents, the DHS did not meet its burden to prove that the respondent's assault on a female conviction involved moral turpitude. *Fajardo v. U.S. Att'y Gen.*, *supra*. As the Immigration Judge found, the documents indicate that the respondent was convicted after trial by the district court acting as the trier of fact (I.J. at 2-3). The record of conviction, which included the warrant of arrest and the judgment (Exh. 3), does not reflect the factual basis for the finding of guilty, insofar as the warrant, even assuming that it is equivalent to an indictment, was not shown on this record to be the basis for a plea or finding of guilty (I.J. at 3; Tr. at 52-57). Accordingly, assuming that a modified categorical approach was appropriate, we find that the Immigration Judge properly found that the DHS did not prove that this record reflected the type of "willful" "infliction of bodily harm upon a person with whom one has . . . a familial relationship" that would indicate that the respondent's assault conviction involves moral turpitude. *Matter of Tran*, 21 I&N Dec. 291, 294 (BIA 1996).

Furthermore, we affirm the Immigration Judge's finding that the record does not support a finding that the conviction for assault on a female was for a crime of domestic violence. First, the North Carolina statute at issue does not set forth a categorical crime of violence as described under 18 U.S.C. § 16(a),[5] which would be necessary to a finding of a "domestic violence" crime. *See Matter of Velasquez*, 25 I&N Dec. 278, 279-80 (BIA 2010). That is because an "assault" for purposes of this statute is defined according to common law to include a battery, which requires a showing of *any* level of force, either direct or indirect, to the person of another. *See United States v. Kelly*, 917 F.Supp.2d 553, 559 (W.D.N.C. 2013) (*citing State v. Britt*, 154 S.E.2d 519 (N.C. 1967)). Battery under North Carolina law does not require the application of violent force or force capable of causing injury, and indeed has been described as requiring only "offensive touching." *See City of Greenville v. Haywood*, 502 S.E.2d 430, 433 (N.C. Ct. App. 1998). We

[4] We note that the parties conceded that the respondent's 1996 conviction for grand theft under section 812.014 of the Florida statutes was categorically a crime involving moral turpitude (Tr. at 82). However, *Descamps v. United States, supra*, may undermine any such finding, since we read the Florida theft statute to permit conviction for temporary or permanent takings, raising the question whether these would constitute alternative elements to the offense, so as to invite a modified categorical approach under relevant precedent.

[5] Because the respondent's conviction under section 14-33(c)(2) of the North Carolina statute was for a misdemeanor, it can only constitute a crime of violence if it is "an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another." *See Matter of Velasquez*, 25 I&N Dec. 278, 280 (BIA 2010).

have held that this conduct does not equate to an element of "physical force" that is required to qualify an offense as a crime of violence under 18 U.S.C. § 16(a). *See Matter of Velasquez, supra*, at 281-82; *Johnson v. United States*, 559 U.S.133 (2010). Even if we assume that the underlying assault conviction would not include a battery, it does not appear that violent force is always a requisite element of the crime of assault under North Carolina, since common law does not consistently require the showing of "force and violence" to convict under the statute. *See United States v. Kelly, supra,* at 557-58 (noting cases wherein conviction for assault predicated on showing of "force *or* violence" or a show of force).

We do not find that a modified categorical inquiry into the crime of violence question is viable in light of *Descamps v. United States, supra.* Furthermore, even if it were, the record does not contain the requisite judicially noticeable documents to reveal the manner in which the "assault" conviction occurred, since the record does not reflect that the facts in the "warrant" were considered and found by the trier of fact. These findings make unnecessary our consideration of evidence outside of the record of conviction to determine that the victim and the respondent were in a requisite "domestic" relationship, as urged by the DHS on appeal. *See Bianco v. Holder*, 624 F.3d 265 (5th Cir. 2010); DHS's Brief at 12-13.

Accordingly, we find no cause to disturb the Immigration Judge's decision to terminate proceedings. The following order will therefore be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 20530

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Lumpkin, GA 31815

Name: [redacted] [redacted]

Date of this notice: 3/25/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Geller, Joan B

Userteam: Docket

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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GARCIA OLVERA, MIGUEL
[redacted]
STEWART DETENTION CENTER
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LUMPKIN, GA 31815

DHS/ICE Office of Chief Counsel - SDC
146 CCA Road, P.O.Box 248
Lumpkin, GA 31815

Name: GARCIA OLVERA, MIGUEL [redacted]

Date of this notice: 3/25/2015

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Geller, Joan B

Userteam:

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: [redacted] – Lumpkin, GA

Date: MAR 25 2015

In re: MIGUEL GARCIA OLVERA

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Michael Christian Urbina-Pabon, Esquire

ON BEHALF OF DHS: Fayaz Habib
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Termination

The respondent appeals from an Immigration Judge's December 3, 2014, decision ordering him removed from the United States. The Department of Homeland Security ("DHS") opposes the appeal. The appeal will be sustained and the removal proceedings will be terminated.

The respondent is a native and citizen of Mexico and a lawful permanent resident of the United States. In 1999 the respondent was convicted in North Carolina of possessing marijuana with intent to manufacture, sell, or deliver, a felony violation of section 90-95(a)(1) of the North Carolina General Statutes (hereinafter "§ 90-95(a)(1)") for which he was sentenced to an indeterminate term of imprisonment of 4-6 months. The question on appeal is whether that conviction renders the respondent removable under section 237(a)(2)(A)(iii) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(A)(iii), as an alien convicted of an "aggravated felony." Upon de novo review, we conclude that it does not.

The term "aggravated felony" is defined to include "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)." Section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B). The phrase "illicit trafficking" refers to "any state, federal, or qualified foreign felony conviction involving the unlawful trading or dealing" in a controlled substance as defined by Federal law. *Matter of L-G-H-*, 26 I&N Dec. 365, 368 (BIA 2014) (citations omitted). However, an offense that does not involve unlawful "trading or dealing" within the meaning of the "illicit trafficking" concept may nonetheless qualify as an aggravated felony if it is a "drug trafficking crime" under 18 U.S.C. § 924(c); that is, a felony punishable under the Federal Controlled Substances Act ("CSA"), 21 U.S.C. § 802 et seq. A state drug offense qualifies as a "drug trafficking crime" only if it corresponds categorically to an offense punishable by a maximum term of imprisonment of more than 1 year under the CSA. *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1683 (2013).

[redacted]

In 1999, when the respondent committed his offense and sustained his conviction, § 90-95(a)(1) provided that "it is unlawful for any person … [t]o manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." According to the North Carolina Supreme Court, § 90-95(a)(1) establishes three distinct offenses: "(1) manufacture of a controlled substance, (2) transfer of a controlled substance by sale or delivery, and (3) possession with intent to manufacture, sell or deliver a controlled substance." *State v. Moore*, 395 S.E.2d 124, 126 (N.C. 1990). A "sale" is defined as "a transfer of property for a specified price payable in money" while a delivery is "the actual [sic] constructive, or attempted transfer from one person to another of a controlled substance[.]" *Id.* at 382, 395 S.E.2d at 127 (citations and quotations omitted).

In 1999, violations of § 90-95(a)(1) carried different maximum sentences depending upon the identity of the substance involved and the nature of the underlying offense conduct. A violation of § 90-95(a)(1) involving a remunerative "sale" of marijuana (a schedule VI controlled substance under North Carolina law) was punishable as a class H felony while a violation involving manufacture or non-remunerative "delivery" of marijuana was punishable as a class I felony, *unless* the violation involved "[t]he transfer of less than 5 grams of marijuana for no remuneration," in which case it was not to be treated as a "delivery" at all. N.C. Gen. Stat. § 90-95(b)(2) (1999). Finally, offenses involving the manufacture, sale, delivery, or possession of more than 10 pounds of marijuana were chargeable as discrete offenses under § 90-95(h) and were punished more severely than violations of § 90-95(a)(1).

To determine whether a violation of § 90-95(a)(1) qualifies as a categorical aggravated felony under section 101(a)(43)(B), we ask whether the "minimum conduct" that has a "realistic probability" of being successfully prosecuted under the statute corresponds to the "illicit trafficking" or "drug trafficking crime" definitions. *See Moncrieffe v. Holder, supra*, at 1684-85. The "minimum conduct" punishable under § 90-95(a) is possession of 5 grams of marijuana with intent to "deliver" without remuneration. The Immigration Judge found that § 90-95(a)(1) defines a categorical "drug trafficking crime" under 18 U.S.C. § 924(c) because possession of 5 grams of marijuana with the intent to deliver corresponds to conduct punishable by up to 5 years in prison under 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(D). We respectfully disagree.

As the *Moncrieffe* Court determined, and as the Immigration Judge acknowledged, possession of a "small amount" of marijuana for "no remuneration" is punishable as a federal misdemeanor under 21 U.S.C. § 841(b)(4). In *Matter of Castro Rodriguez*, 25 I&N Dec. 698, 703 (BIA 2012), we noted that the phrase "small amount" was not statutorily defined but concluded that 30 grams was a "useful guidepost" for immigration cases because Congress has employed that quantity throughout the Act as a threshold for identifying which marijuana offenses should give rise to immigration consequences and which should not. According to the Immigration Judge, the 30-gram guidepost discussed in *Matter of Castro Rodriguez* was merely advisory rather than "dispositive," and thus he elected to invoke North Carolina's 5-gram threshold instead. We reverse.

It is true that the 30-gram threshold described in *Castro Rodriguez* is a guidepost rather than an inflexible standard. As federal courts interpreting 21 U.S.C. § 841(b)(4) have recognized,

[redacted]

whether a quantity of marijuana is "small" can depend upon context—i.e., 5 grams of marijuana may not be a "small amount" if it is delivered in a prison or to a child. *See, e.g., United States v. Carmichael*, 155 F.3d 561 (4th Cir. 1998) (Table) (upholding district court's determination that 1.256 grams of marijuana is not a "small amount" under 21 U.S.C. § 841(b)(4) when distributed in a prison). Thus, we do not discount the possibility that some cases may present principled reasons for departing from *Castro Rodriguez*'s 30-gram threshold. However, the Immigration Judge identified no such principled reasons here, and thus we disagree with his decision to treat 5 grams of marijuana as a non-"small" amount.[1]

The language of § 90-95(a)(1) leaves open the possibility that defendants may be convicted for possessing 30 grams or less of marijuana with the intent to deliver without remuneration. That possibility is not dispositive of the aggravated felony question, however, because the categorical approach is concerned *not* with the minimum conduct that could theoretically be prosecuted under the statute of conviction, but rather with the minimum conduct that has a "realistic probability" of actually being successfully prosecuted thereunder. *See Moncrieffe v. Holder, supra*, at 1684-85 (explaining that "our focus on the minimum conduct criminalized by the state statute is not an invitation to apply 'legal imagination' to the state offense; there must be 'a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.'") (citing *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 193 (2007)).

To demonstrate the requisite "realistic probability" here, the evidence must reflect that North Carolina actually prosecutes defendants under § 90-95(a)(1) for possessing 30 grams or less of marijuana with intent to deliver. *Accord Moncrieffe v. Holder, supra*, at 1693; *Gonzales v. Duenas-Alvarez, supra*, at 193. The respondent has carried his burden of proof in that regard because in *State v. Blackburn*, 239 S.E.2d 626, 629-30 (N.C. Ct. App. 1977), the North Carolina Court of Appeals upheld a § 90-95(a)(1) conviction in which the jury found that the defendant possessed 14 grams of marijuana with intent to deliver. As the minimum conduct that has a realistic probability of being successfully prosecuted under § 90-95(a)(1) is possession of less than 30 grams of marijuana with the intent to deliver without remuneration, that offense corresponds categorically to the federal misdemeanor offense described in 21 U.S.C. § 841(b)(4),

[1] Although *Moncrieffe* did not adopt a test for evaluating whether or not a particular amount of marijuana is "small" within the meaning of 21 U.S.C. § 841(b)(4), the Supreme Court's decision does provide some guidance on the question. Specifically, in support of its determination that Mr. Moncrieffe's statute of conviction—Ga. Code § 16-13-30(j)(1)—encompassed the distribution of "small amounts" of marijuana, the Court relied upon *Taylor v. State*, 581 S.E.2d 386, 388 (Ga. App. Ct. 2003), in which a defendant was convicted for possessing 6.6 grams of marijuana with intent to distribute. *See Moncrieffe v. Holder, supra*, at 1686. The *Moncrieffe* Court's determination that 6.6 grams of marijuana is a "small amount" is irreconcilable with the Immigration Judge's determination that 5 grams is not.

[redacted]

which in turn means that it is not a categorical aggravated felony.[2] The Immigration Judge's contrary determination will be reversed.

Having determined that § 90-95(a)(1) does not define a categorical aggravated felony under section 101(a)(43)(B) of the Act, we now turn to the separate question whether § 90-95(a)(1) is "divisible" vis-à-vis the aggravated felony definition, such that the Immigration Judge may conduct a "modified categorical" inquiry into the respondent's conviction records to determine whether his particular conviction was for possession of more than 30 grams of marijuana with intent to deliver. According to the United States Court of Appeals for the Eleventh Circuit, in whose jurisdiction this case arises, "a divisible statute is one that 'sets out one or more elements of the offense in the alternative'" and in which at least one (but not all) of those alternative elements (or sets of elements) categorically matches the "generic" federal offense to which it must correspond. *United States v. Estrella*, 758 F.3d 1239, 1244-45 (11th Cir. 2014) (quoting in part *Descamps v. United States*, 133 S. Ct. 2276, 2281, 2283 (2013)).

Section 90-95(a)(1) is phrased in the disjunctive, defining three discrete offenses: (1) manufacture of a controlled substance, (2) transfer of a controlled substance by sale or delivery, and (3) possession with intent to manufacture, sell or deliver a controlled substance. *State v. Moore*, 395 S.E.2d 124, 126 (N.C. 1990). The first alternative defined by § 90-95(a)(1), i.e., "manufacturing" a controlled substance, may well correspond categorically to the analogous federal felony offense defined under 21 U.S.C. § 841(a)(1). However, the second and third alternatives defined by § 90-95(a)(1) do not correspond categorically to federal felonies because of their potential applicability to offenses involving distribution (or possession with intent to distribute) small amounts of marijuana for no remuneration. Under the circumstances, we conclude that it would be permissible for the Immigration Judge to conduct a modified categorical inquiry in order to determine which of the three alternative offenses the respondent was convicted of committing. As it is undisputed that the respondent was convicted of possession of marijuana with intent to deliver rather than manufacturing, such a modified categorical inquiry would not establish the respondent's removability.

Section 90-95(b)(2) also contains language which arguably makes § 90-95(a)(1) divisible. Specifically, by establishing that a transfer of less than 5 grams of marijuana for no remuneration does not qualify as a "delivery," § 90-95(b)(2) could be viewed as effectively adding a minimum quantity "element" to any marijuana "delivery" charge; that is, a North Carolina prosecutor who charges a defendant with violating § 90-95(a)(1) on the basis of a non-remunerative "delivery" of marijuana would need to prove to the jury beyond a reasonable doubt that the transfer involved 5 grams or more of marijuana. *See State v. Land*, 733 S.E.2d 588, 592 (N.C. Ct. App. 2012), *aff'd*, 742 S.E.2d 803 (2013) (explaining that "the State can, under … § 90–95(b)(2), prove

[2] As § 90-95(a) encompasses the non-remunerative delivery of marijuana, moreover, it is not an "illicit trafficking" offense under section 101(a)(43)(B). *See Matter of L-G-H-, supra*, at 371-72 & n. 9 (explaining that "to meet the definition of 'illicit trafficking under the Act, the offense must involve a commercial transaction," i.e., a "passing of goods from one person to another for money or other consideration.")

[redacted]

delivery of marijuana by presenting evidence *either* (1) of a transfer of five or more grams of marijuana, or (2) of a transfer of less than five grams of marijuana for remuneration.").

The existence of such a minimum quantity element would not make § 90-95(a)(1) divisible vis-à-vis section 101(a)(43)(B), however, because for the reasons stated in *Moncrieffe* not all offenses involving possession of 5 grams or more of marijuana with intent to deliver would correspond to federal felonies under the CSA. Although a North Carolina jury may sometimes need to agree that a defendant delivered 5 grams or more of marijuana, it would never need to agree about the extent to which the amount exceeded 5 grams, nor would it need to find that the amount exceeded 30 grams—the default "small amount" threshold for immigration cases.

In view of the foregoing, we conclude that § 90-95(a)(1) is neither a categorical aggravated felony under section 101(a)(43)(B) nor divisible in any manner which would serve to support the respondent's removability. Accordingly, the removal charge under section 237(a)(2)(A)(iii) of the Act will be dismissed. The DHS has not lodged any other removal charges against the respondent, moreover, and therefore the removal proceedings will be terminated.

ORDER: The appeal is sustained and the removal proceedings are terminated.

FOR THE BOARD

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: B[redacted]-B[redacted], V[redacted] M[redacted]... **A [redacted]723**

Date of this notice: 3/27/2015

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Guendelsberger, John

TranC
Userteam: Docket

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 20530

File: [redacted] 723 – Atlanta, GA Date: MAR 27 2015

In re: V[redacted] B[redacted]-B[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Ben Winograd, Esquire[1]

ON BEHALF OF DHS: Gene P. Hamilton
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (illicit trafficking offense)

Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony (attempt or conspiracy offense)

Lodged: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Cancellation of removal

The Department of Homeland Security (DHS) appeals from the decision of the Immigration Judge, dated March 5, 2014, finding the respondent removable on the lodged charge, and granting the respondent's application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a), in the exercise of discretion (I.J. at 4-7).[2] The respondent, a native and citizen of Venezuela, opposes the appeal, which will be dismissed. The record will be remanded to permit DHS to conduct the necessary background and security checks.

The Immigration Judge held that DHS carried its burden of proof to show that the respondent was removable under section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i), but that it had not done so with respect to the charges under section 237(a)(2)(A)(iii) of the Act (I.J. at 1-4).

[1] We acknowledge and appreciate the pro bono representation of counsel before us in this case.

[2] The Immigration Judge also denied the respondent's applications for asylum, withholding of removal, and protection under the Convention Against Torture, which we need not address given our disposition of the case (I.J. at 7-8).

The Immigration Judge granted cancellation of removal, concluding the respondent was statutorily eligible for such relief, and that a grant was warranted in discretion (I.J. at 4-7).

On appeal, DHS argues that it established the respondent's removability under section 237(a)(2)(A)(iii) of the Act by clear and convincing evidence, asserting the respondent's conviction was for an aggravated felony as defined by section 101(a)(43)(B) or (U) of the Act, 8 U.S.C. §§ 1101(a)(43)(B), (U), and that the respondent is therefore statutorily ineligible for cancellation of removal (DHS Br. at 9-22). In the alternative, DHS argues the Immigration Judge should have denied cancellation of removal in the exercise of discretion (DHS Br. 22-27). DHS also argues the Immigration Judge erred in denying its motion to reconsider in which it asserted the "stop-time" rule at section 240A(d) of the Act rendered the respondent ineligible for cancellation of removal (DHS Br. at 27-37).[3]

In opposition, the respondent asserts the Immigration Judge's decision to grant cancellation of removal should be sustained. He argues the Immigration Judge correctly held that he was not convicted of an aggravated felony as defined in section 101(a)(43)(B) of the Act, asserting his conviction was not categorically for an aggravated felony, and that DHS did not show the statute is divisible. He further asserts that, even applying the modified categorical approach, the record of conviction does not establish the conviction was for an aggravated felony (Resp't Br. at 9-20). The respondent also argues the Immigration Judge correctly determined he merits a favorable exercise of discretion (Resp't Br. at 20-26).

On review, we agree with the Immigration Judge that DHS did not show that the respondent's 2011 conviction for trafficking in cocaine in violation of N.C. GEN. STAT. § 90-95(h)(3) was categorically for an aggravated felony as defined in section 101(a)(43)(B) or (U) of the Act, because the statute only requires that an individual possess cocaine, and that DHS did not show that the modified categorical approach was applicable to this determination, because the statute is overbroad rather than divisible (I.J. at 2-4).

With respect to the categorical approach, DHS asserts that the aggravated felony of "illicit trafficking in a controlled substance" defined in section 101(a)(43)(B) of the Act includes other subsets of crimes in addition to "drug trafficking crimes," and, citing *Matter of Davis*, 20 I&N Dec. 536 (BIA 1992), that the Board has stated that other crimes fall within the "illicit trafficking" definition if they are a felony under state law, involve "unlawful trading and dealing," and involve a federally controlled substance (DHS Br. at 9-22). DHS argues that all

[3] In its appeal brief, DHS asserts that it simultaneously filed two Notices of Appeal, one pertaining to an appeal from the Immigration Judge's March 5, 2014, merits decision, and one pertaining to the Immigration Judge's March 18, 2014, motion decision, but that the Board only issued one briefing schedule (DHS Br. at 1, 8). Upon review, however, we find the record does not reflect that an appeal was filed from the March 18, 2014, motion decision. Accordingly, we agree with the respondent that the March 18, 2014, denial of the DHS' motion for reconsideration is not properly before us because the DHS has not separately appealed from that decision (Resp't Br. at 26-27). *See Matter of G-A-*, 23 I&N Dec. 366, 367 n.1 (BIA 2002).

conduct that can be prosecuted under N.C. GEN. STAT. § 90-95(h)(3) satisfies all three requirements, including the requirement that the offense involve "unlawful trading and dealing," because the "statutory scheme infers an intent to traffic from the large quantity of cocaine" (DHS Br. at 14-15).

We agree with the Immigration Judge and the respondent that the statute of conviction is not categorically an aggravated felony. As the Immigration Judge held and as the respondent argues, N.C. GEN. STAT. § 90-95(h)(3) criminalizes simple possession of 28 grams or more of cocaine, which does not involve the element of illicit trafficking, and which is not a felony under the Controlled Substances Act (I.J. at 2-4; Resp't Br. at 9-11). As the respondent asserts, the relevant inquiry is not whether the statute "infers an intent to traffic" (DHS Br. at 14-15), but what the conviction necessarily entails. The United States Court of Appeals for the Fourth Circuit has held that not all violations of this statute involve such an "intent to distribute." *See United States v. Brandon*, 247 F.3d 186, 195 (4th Cir. 2001) ("[I]t cannot fairly be said that an intent to distribute is inherent in all violations of N.C. GEN. STAT. § 90–95(h)."). Moreover, DHS conceded below that the offense was not categorically an aggravated felony (Tr. at 17-18). Finally, as the respondent asserts, simple possession is a misdemeanor and not a felony under the Controlled Substances Act. *See Lopez v. Gonzales*, 549 U.S. 47, 60 (2006).

With respect to the modified categorical approach, DHS argues that, even if not all conduct covered under the statute satisfies *Matter of Davis*, the statute "is clearly divisible because it is drafted in the alternative" (DHS Br. at 15 n.9). DHS asserts that the modified categorical approach shows the respondent's offense involved at least 400 grams of cocaine, which "evinces an intent to distribute" under state law, notwithstanding *United States v. Brandon*, *supra* (DHS Br. at 16-19). Further, DHS argues the offense constitutes a "drug trafficking crime" as defined in 18 U.S.C. § 924(c) because the offense would have been penalized under the distribution rather than the simple possession provisions of the Controlled Substances Act, although the state statute does not have a mens rea element (DHS Br. at 20-22).

We also agree with the Immigration Judge and the respondent that the statute of conviction is overbroad and indivisible. As the respondent asserts, DHS did not produce authority establishing that the statute contains alternative elements upon which a jury must unanimously agree in order to convict, rather than alternative means of committing the offense (Resp't Br. at 11-12). *See Descamps v. United States*, 133 S.Ct. 2276 (2013); *Matter of Chairez* (*Chairez I*), 26 I&N Dec. 349 (BIA 2014).[4] Further, to the extent DHS argues the amount of cocaine at issue

[4] The Board recently issued a new decision in *Matter of Chairez* (*Chairez II*), 26 I&N Dec. 478 (BIA 2015), in which we observed that, because Immigration Judges must follow the law of the circuit court of appeals in whose jurisdiction they sit in evaluating issues of divisibility, the interpretation of *Descamps v. United States*, 133 S.Ct. 2276 (2013), reflected in *Matter of Chairez*, 26 I&N Dec. 349 (BIA 2014), applies only insofar as there is no controlling authority to the contrary in the relevant circuit. In *United States v. Estrella*, the Eleventh Circuit agreed with the Board's jury unanimity approach. 758 F.3d 1239, 1245-46 (11th Cir. 2014) ("[I]f the statutory scheme is not such that it would typically require the jury to agree to convict on the

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"evinces an intent to distribute," we observe that such an inference would not satisfy the requirement that a jury unanimously "agree to convict on the basis of one alternative as opposed to the other." *See United States v. Estrella*, 758 F.3d 1239, 1245-46 (11th Cir. 2014). Accordingly, we agree with the Immigration Judge that the 2011 conviction did not render the respondent removable under section 237(a)(2)(A)(iii) of the Act or ineligible for cancellation of removal under section 240A(b)(1)(C) of the Act.

We are also not persuaded by DHS's appellate contention that the Immigration Judge should have denied the respondent's application for cancellation of removal under section 240A(a) of the Act in the exercise of discretion (DHS Br. 22-27). DHS argues the Immigration Judge did not properly balance the relevant factors, asserting that the Immigration Judge should have required additional corroboration, should have found that the respondent's conviction was for a "serious crime," and should not have found that the respondent demonstrated rehabilitation.

In exercising discretion, an Immigration Judge, upon review of the record as a whole, "must balance the adverse factors evidencing the alien's undesirability as a permanent resident with the social and humane considerations presented in his (or her) behalf to determine whether the granting of...relief appears in the best interest of this country." *Matter of C-V-T-*, 22 I&N Dec. 7, 11 (BIA 1998) (holding that the general standards developed in *Matter of Marin*, 16 I&N Dec. 581, 584-85 (BIA 1978), for the exercise of discretion under section 212(c) of the Act, 8 U.S.C. § 1182(c), are applicable to the exercise of discretion under section 240A(a) of the Act)).

Favorable considerations include such factors as family ties within the United States, residence of long duration in this country (particularly when the inception of residence occurred at a young age), evidence of hardship to the respondent and his family if removal occurs, service in this country's armed forces, a history of employment, the existence of property or business ties, evidence of value and service to the community, proof of genuine rehabilitation if a criminal record exists, and other evidence attesting to a respondent's good character. *Id.* Adverse factors include the nature and underlying circumstances of the grounds of removal that are at issue, the presence of additional significant violations of this country's immigration laws, the existence of a criminal record and, if so, its nature, recency, and seriousness, and the presence of other evidence indicative of a respondent's bad character or undesirability as a permanent resident of this country. *Id.*

The Immigration Judge weighed the respondent's criminal history against his positive equities and decided to grant cancellation of removal (I.J. at 4-7). The Immigration Judge found that the respondent's credible testimony demonstrated that his positive equities include the respondent's family ties (i.e., he lives with his mother, a United States citizen), his lengthy residence in the United States (i.e., he has been a lawful permanent resident for over 14 years), hardship his removal would cause his family (i.e., his mother who has had a kidney transplant

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(...continued)
basis of one alternative as opposed to the other, then the statute is not divisible in the sense required to justify invocation of the modified categorical approach.").

and is unable to work), his positive work history and filing of income taxes, that he performs community service and attends a church on a regular basis, and that he does not have any family members in his home country of Venezuela.

We have no wish to minimize the seriousness of the respondent's criminal record. It includes convictions for obtaining property by false pretenses and for possessing cocaine. The respondent was sentenced to 44 to 62 months' imprisonment for the drug conviction. We agree, however, with the Immigration Judge's assessment that the respondent's serious criminal history is offset by his strong equities and rehabilitation, since he has taken responsibility for the offense and provided assistance to the government.[5]

We find this is a close case, but in balancing the respondent's adverse factors against his positive equities, we conclude that one final chance to remain with his family is warranted in this case. *See Matter of C-V-T-*, 22 I&N Dec. 7 (BIA 1988); *see also* section 240A(c)(6) of the Act (providing that cancellation of removal can only be granted once). The DHS's appeal will be dismissed, and the record will be remanded to allow DHS to perform the necessary background investigation. The following orders shall be issued.

ORDER: The DHS's appeal is dismissed.

FURTHER ORDER: Pursuant to 8 C.F.R. § 1003.1(d)(6), the record is remanded to the Immigration Judge for the purpose of allowing the Department of Homeland Security the opportunity to complete or update identity, law enforcement, or security investigations or examinations, and further proceedings, if necessary, and for the entry of an order as provided by 8 C.F.R. § 1003.47(h).

FOR THE BOARD

Board Member Roger A. Pauley respectfully dissents and would deny cancellation of removal in the exercise of discretion in light of the respondent's serious criminal record.

[5] We are not persuaded by DHS's assertion that *Matter of Y-L-, A-G-, & R-S-R-*, 23 I&N Dec. 270 (A.G. 2002), informs the instant analysis, especially given that we agree with the Immigration Judge that the conviction was not an illicit trafficking aggravated felony and, moreover, that the respondent's eligibility for withholding of removal is not at issue.