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## MONCRIEFFE: LESSONS IN CRIMMIGRATION LAW

By [Maritza I. Reyes](#), Associate Professor of Law, Florida A&M University College of Law

César did a great job of [summarizing the U.S. Supreme Court opinion](#) in *Moncrieffe v. Holder*, No. 11-702, slip. op. (U.S. April 23, 2013). I will not duplicate what has already been posted, but I will briefly examine some of the lessons in the opinion to elucidate the importance of crimmigration as a developing area of law.

At the state level, Moncrieffe pleaded guilty to possession of marijuana with intent to distribute, a violation under Georgia law (Ga. Code Ann. § 16–13–30(j)(1) (2007)). *Moncrieffe*, No. 11-701, slip. op. at 3. The state court ordered Moncrieffe to complete five years of probation, after which time his charge would be expunged. *Id.* At the Supreme Court, the parties did not dispute that this type of state procedure (available for first-time offenders) is a conviction under section 101(a)(48)(A) of the Immigration and Nationality Act (INA), 8 U.S.C. § 1101(a)(48)(A). *Id.* at 3 n.2.

At the federal immigration level, the Government charged Moncrieffe as removable under INA sections 237(a)(2)(A)(iii) and (B)(i), 8 U.S.C. § 1227(a)(2)(A)(iii), (B)(i) for an “aggravated felony” and a controlled substance offense respectively. Brief for Petitioner at 6. The immigration judge ruled “that every marijuana distribution conviction is ipso facto an ‘aggravated felony’” and ordered Moncrieffe removed. *Id.* at 6; *Moncrieffe*, No. 11-701, slip op. at 3. The Board of Immigration Appeals (BIA) affirmed the immigration judge’s order and the Fifth Circuit Court of Appeals denied Moncrieffe’s petition for review. *Moncrieffe*, slip. op. at 3–4. The importance of challenging the “aggravated felony” ground of removability was set forth by the Court at the beginning of the opinion when it explained that an aggravated felony conviction would preclude Moncrieffe from applying for discretionary forms of relief, such as asylum and cancellation of removal. *Id.* at 2.

The Supreme Court resolved a conflict among the Courts of Appeals and decided that “[i]f a noncitizen’s conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA.” *Id.* at 22. In reaching its conclusion, the Court examined what it termed a “chain of [statutory] definitions.” *Id.* at 2. In section 101(a)(43), 8 U.S.C. § 1101(a)(43), the INA defines a range of offenses that constitute aggravated felonies. Under subsection 101(a)(43)(B) “illicit trafficking in a controlled substance,” as defined in 21 U.S.C. § 802, is an aggravated felony, which includes a “drug trafficking crime,” which is defined in 18 U.S.C. § 924(c)(2) as “any felony punishable under the Controlled Substances Act [CSA].” *Id.* at 2. The final definition in the

chain is 18 U.S.C. § 3559(a)(5), which defines a “felony” as “an offense for which the ‘maximum term of imprisonment authorized’ is ‘more than one year.’” *Id.* at 2.

In accordance with *Lopez v. Gonzalez*, 549 U.S. 47, 60 (2006), a state offense constitutes a felony punishable under the CSA only if it “proscribes conduct punishable as a felony under [the CSA].” *Id.* at 3. The Government argued that possession of marijuana with intent to distribute is an offense under the CSA, 21 U.S.C. § 841(a), punishable by up to five years’ imprisonment as provided in 21 U.S.C. § 841(b)(1)(D), and therefore an aggravated felony. *Id.* at 3. Moncrieffe argued that marijuana distribution of a small amount of marijuana without remuneration is only punishable as a misdemeanor under the CSA, 21 U.S.C. § 841(b)(4), and is therefore not an aggravated felony. *Id.* at 4.

The two dissenters, Justice Thomas and Justice Alito (the two Justices that remained silent during oral arguments, as noted by *Professor Mark Noferi in his contribution to this online symposium*) argued that the Court should look to the “default provision” (subsection 841(b)(1)(D)) and not to the “mitigating” exception/sentencing guideline (subsection 841(b)(4)) to determine the punishment prong. *Id.* (Thomas, J., dissenting at 3; Alito, J., dissenting at 5–6). To support this proposition, Justices Thomas and Alito cited *United States v. Outen*, 286 F. 3d 622 (2d Cir. 2002), a criminal case that dealt with an *Apprendi* issue and, in citing *Outen*, both Justices included a parenthetical noting that Justice Sotomayor wrote the opinion in that case. *Id.* In addressing the *Outen* decision in *Moncrieffe*, Justice Sotomayor provided a lesson on the distinction between a federal criminal prosecution and an immigration removal proceeding. Slip op. at 11-14. She explained why the interpretation in a criminal proceeding does not apply for the purpose of the INA’s definition of a generic federal offense, including because an *Apprendi* issue is a jury issue and immigration proceedings are not conducted before a jury. *Id.*

As in *Nijhawan v. Holder*, 557 U.S. 29 (2009), the Court applied the “categorical approach” to determine whether the Georgia offense is comparable to an offense listed in the INA. *Id.* at 4–5. Therefore, the Court looked, not at the particular facts of Moncrieffe’s case, but at whether the Georgia statute’s definition categorically fit within the “generic” federal crime of “illicit trafficking in a controlled substance.” *Id.* at 5–6. The Court set forth a “two conditions” test (prohibited conduct plus felony punishment) for a state drug offense to satisfy the categorical approach and fit within the generic federal crime of illicit trafficking in a controlled substance: (1) the state offense must “‘necessarily’ proscribe conduct that is an offense under the CSA;” and (2) “the CSA must ‘necessarily’ prescribe felony punishment for that conduct.” *Id.* at 6. The Court’s decision hinged on the second condition—the punishment as a felony prong. *Id.* at 7.

As evidenced by the facts of Moncrieffe’s case (1.3 grams of marijuana: the equivalent of about two or three marijuana cigarettes), Georgia prosecutes the offense for possession of a small amount of marijuana. *Id.* at 3, 9. Additionally, “distribution” does not require remuneration. *Id.* at 9. The Court made an important distinction between criminal law and immigration law when, in response to one of the Government’s arguments, it explained that *Carachuri Rosendo v. Holder*, 130 S. Ct. 2577 (2010), clarified that, “for purposes of the INA, a generic federal offense may be defined by reference to both” the elements of the statute AND the sentencing factors used to determine the punishment. *Id.* at 13.

The majority opinion also provided guidance beyond the facts of Moncrieffe’s case. For example, the Court once again stated that the categorical approach applies for generic crimes, but, as the Court held in *Nijhawan*, for circumstance-specific provisions, the immigration court is allowed to examine “the ‘particular circumstances in which an offender committed the crime on a particular occasion.’” *Id.* at 17 (citing *Nijhawan*, 557 U.S. at 38–40).

Another interesting portion of the opinion addressed the Government's suggestion that defense attorneys in criminal proceedings, as part of their effective assistance of counsel duty under *Padilla v. Kentucky*, 559 U.S. 359 (2010), will build an appropriate record of facts that may subsequently assist their noncitizen clients in subsequent removal proceedings. *Id.* at 18. The Court responded to this argument as follows:

“ Even assuming defense counsel “will” do something simply because it is required of effective counsel (an assumption experience does not always bear out), this argument is unavailing because there is no reason to believe that state courts will regularly or uniformly admit evidence going to facts, such as remuneration, that are irrelevant to the offense charged.

*Id.* Interestingly, the Government's argument that effective assistance of counsel requires defense attorneys to develop the record in the criminal proceeding implies that defense counsel must know how to perform the type of crimmigration analysis that the Court conducted in *Moncrieffe*. The Government's position highlights the increasing importance of crimmigration as an area of expertise for attorneys that practice criminal law.

In yet one more crimmigration law lesson, the Court went out of its way to explain that the non-aggravated felony determination, for the purpose of removability (deportation), only means that noncitizens who qualify for some forms of discretionary relief may not be presumptively denied. *Id.* at 19. Ultimately, the decision as to whether the relief from deportation will be granted is discretionary. *Id.*

One final but important point was, in my opinion, the Court's direct admonishment to the Government to stop trying to expand the aggravated felony category by characterizing low-level drug offenses as “illicit trafficking in a controlled substance.” *Id.* at 21. The Court basically told the Government that this approach lacks common sense as evidenced by the fact that the Court has been forced to stop this aggravated felony expansion for “the third time in seven years.” *Id.* at 21 (citing *Carachuri-Rosendo* and *Lopez*). This point was of particular interest to me because the Court did what I had suggested that it can do in cases that involve potential deportation of lawful permanent residents based on criminal-related removal grounds.

In my article, *Constitutionalizing Immigration Law: The Vital Role of Judicial Discretion in the Removal of Lawful Permanent Residents*, 84 Temple Law Review 637 (2012), I recognized that, due to the Court's deference to the political branches in the area of admission and deportation of noncitizens, “the Court has refused to engage in a constitutional analysis of the removal laws.” *Id.* at 670. But, I suggested that, even if the Court continues to refuse to examine the constitutionality of the current crime-based deportability grounds (as violations of the Eighth Amendment in the case of lawful permanent residents, a proportionality argument), the Court can use its decisions “to advise Congress about the injustices of the current removal laws.” *Id.* at 675. This is exactly what the Court did in *Moncrieffe* when it admonished the Government to stop trying to expand the aggravated felony category.

In his posting, Professor Noferi discussed how the concept of “proportionality”—categorical removal based on a minor drug conviction— was not addressed during oral arguments. It was also not mentioned explicitly in the Court's opinion. However, *Moncrieffe*, *Carachuri-Rosendo* and *Lopez* all involved longtime lawful permanent residents who were ordered removed for minor drug crimes. And, the Court's admonishment to the Government to stop treating minor drug offenses as aggravated felonies implicitly addressed proportionality, even if the case was decided on the basis of statutory interpretation (the type of approach that Professor Noferi termed “undertaking constitutional analysis on subconstitutional grounds”). Professor Noferi

also referred to Professor Hiroshi Motomura's suggestion that a "reliance on 'surrogates' for constitutional analysis is at best a 'crude tool,' and impedes the sound development of immigration law."

I agree that the Court should stop avoiding the constitutional issues. In my *Constitutionalizing Immigration Law* article, I also advanced that "recent jurisprudence may provide an avenue for review of the constitutionality of removal laws that are tied to criminal convictions." *Id.* at 670. In support of this position, I analyzed a trilogy of cases, *United States v. Booker*, 543 U.S. 220 (2005), *Fong Yue Ting v. United States*, 149 U.S. 698 (1893), and *Padilla* (cited in *Moncrieffe*), that, together, may provide the basis for the Court to entertain constitutional challenges to the removal provisions that are tied to criminal convictions in cases of lawful permanent residents like *Moncrieffe*. *Id.* at 670-76. The removal laws at the time of *Fong Yue Ting*, the case where the Court held that deportation is not punishment, were very different from the criminal-removal grounds that are used to deport lawful permanent residents today. *Id.* at 674. The Court came closer to recognizing that deportation is punishment in *Padilla* (a case that involved a lawful permanent resident), but precedent still holds that deportation is not punishment and, so long as that precedent stands, the Court will have a difficult time analyzing today's crime-based removal laws from a constitutional perspective.

*Moncrieffe* is a welcomed reprieve for many noncitizens who will not necessarily avoid deportation, as the Court properly recognized, but who may be at least able to seek discretionary relief in the immigration proceeding where proportionality of the punishment (removal) to the crime may be considered. Even if the constitutional analysis is still missing, I am happy that the Court is putting a break to the Government's continued attempts to expand the aggravated felony category. As important, the Supreme Court continues to educate all of us as it continues to educate itself about crimmigration law and the drastic immigration treatment that noncitizens face in today's deportation nation.

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