No. 17-7521

IN THE

Supreme Court of the United States

SADONNIE KITCHEN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

SUPPLEMENTAL BRIEF

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SUPPLEMENTAL BRIEF

Petitioner Sadonnie Kitchen, pursuant to Supreme Court Rule 15.8, brings to this Court's attention two published decisions of the U.S. Court of Appeals for the Eleventh Circuit that were issued after Mr. Kitchen's petition for writ of certiorari was filed. *See Cintron v. U.S. Att'y Gen.*, 882 F.3d 1380 (11th Cir. Feb. 20, 2018) (attached hereto); *Francisco v. U.S. Att'y Gen.*, __ F.3d __, 2018 WL 1249998 (11th Cir. Mar. 12, 2018) (attached hereto). These decisions establish that Petitioner's sentence should not have been enhanced under U.S.S.G. § 2K2.1(a)(4)(A) based upon a prior conviction for drug trafficking under Fla. Stat. § 893.135 and that he should be resentenced without the enhancement.

1. Until *Cintron*, the Eleventh Circuit had applied the modified categorical approach to Fla. Stat. § 893.135. *See, e.g., United States v. Shannon*, 631 F.3d 1187, 1189-90 (11th Cir. 2011); *id.* at 1191-92 (Marcus, J., concurring); Pet. App. A at 2-3. In Petitioner's case, the Eleventh Circuit applied the modified categorical approach to conclude that his prior conviction under Fla. Stat. § 893.135 rested upon the possession of a specified quantity of drugs and qualifies as a "controlled substance offense" for federal sentencing guidelines purposes. Pet. App. A at 2-3. Petitioner has sought this Court's review, because the Eleventh Circuit's decision that trafficking-by-possession qualifies as a guidelines predicate conflicts with other circuits' decisions. Pet. at 6-10. Petitioner maintains his request for this Court's review.

2. Petitioner alternatively requests a remand to the Eleventh Circuit to apply its published decisions in *Cintron* and *Francisco* to his case. *Cintron* is the first published decision of the Eleventh Circuit to address the indivisibility of § 893.135 in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016). *See Cintron*, 882 F.3d at 1384-88. *Cintron* now holds that § 893.135 is

indivisible and that the modified categorical approach therefore does not apply. *Id.* *Francisco* accords with the binding decision in *Cintron*. *See Francisco*, 2018 WL 1249998, at *10.

In light of *Cintron* and *Francisco*, the modified categorical approach should not have been applied in Petitioner's case. Moreover, using the categorical approach, a prior conviction under § 893.135 never qualifies as a guidelines predicate. The Eleventh Circuit has already held that § 893.135 is overbroad because the statute includes "purchasing," whereas the guidelines definition of a "controlled substance offense" does not. *See Shannon*, 631 F.3d at 1188-90; Initial Brief of Appellant Kitchen, 2016 WL 6247333, at *10-11 (11th Cir. Oct. 24, 2016). Thus, if *Cintron* and *Francisco* were applied to Petitioner's case, those decisions would resolve that his guidelines range was erroneously enhanced and that resentencing is required. *See Gall v. United States*, 552 U.S. 38, 49 (2007) (requiring that "all sentencing proceedings" begin with the correctly calculated guidelines range); 18 U.S.C. § 3742(f)(1).

In making the alternative request for a remand, Petitioner notes that he has now served over 26 months of his sentence. Without the contested enhancement, his guidelines range would only be 30 to 37 months in prison, and he would soon be eligible for a time-served sentence. *See* Pet. at 5.

Moreover, this direct appeal may be Petitioner's only avenue for relief from the guidelines error. Despite this Court's recognition of the importance of the correct guidelines calculation, the Eleventh Circuit has thus far foreclosed post-conviction relief from guidelines errors. *See Spencer v. United States*, 773 F.3d 1132, 1135 (11th Cir. 2014) (en banc) (holding that guidelines errors are not cognizable under 28 U.S.C. § 2255); *Gilbert v. United States*, 640 F.3d 1293, 1295 (11th Cir. 2011) (en banc) (holding that guidelines errors may not be brought under 28 U.S.C. § 2241). Accordingly, Petitioner, while maintaining his request for review of the circuit conflict

presented in his petition, alternatively requests a remand to the Eleventh Circuit to apply its published decisions in *Cintron* and *Francisco* to his case.

Respectfully submitted,

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882 F.3d 1380
United States Court of Appeals, Eleventh Circuit.

Natalia Lorena CINTRON, Petitioner,
v.
U.S. ATTORNEY GENERAL, Respondent.

Nos. 15-12344, 15-14352
|
February 20, 2018

Synopsis

Background: Alien, a citizen of Argentina and a lawful permanent resident of the United States, petitioned for review of the affirmance, by the Board of Immigration Appeals (BIA), of the denial of her application for cancellation of removal.

[Holding:] The Court of Appeals, Jill Pryor, Circuit Judge, held that alien's conviction did not qualify as an aggravated felony within meaning of the Immigration and Nationality Act (INA) and did not disqualify her from cancellation of removal.

Petition granted, and remanded.

West Headnotes (9)

[1] **Aliens, Immigration, and Citizenship**
Law questions

Whether an alien's crime of conviction was an aggravated felony for purposes of removal proceedings is a question of law that Court of Appeals reviews de novo.

1 Cases that cite this headnote

[2] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

When Government alleges that a state conviction qualifies as an aggravated felony under Immigration and Nationality Act (INA), Court of Appeals generally employs a categorical approach to determine whether the state offense is comparable to an offense listed in INA.

Cases that cite this headnote

[3] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

Under the categorical approach used in determining whether a state conviction qualifies as an aggravated felony under the Immigration and Nationality Act (INA), Court of Appeals looks not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony; a state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense.

Cases that cite this headnote

[4] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

Because Court of Appeals examines what the state conviction necessarily involved, not the facts underlying the case, in determining under the categorical approach whether the conviction was for an aggravated felony under the Immigration and Nationality Act (INA), it must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense.

Cases that cite this headnote

[5] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

If the state statute underlying an alien's criminal conviction lists multiple, alternative elements, and so effectively creates several different crimes, then the statute is divisible and Court, in determining whether the state

conviction qualifies as an aggravated felony under the Immigration and Nationality Act (INA), employs the modified categorical approach to determine which alternative formed the basis of the prior conviction; under the modified categorical approach, Court looks to a limited class of documents, such as the indictment, jury instructions, or plea agreement and colloquy, to determine what crime, with what elements, the alien was convicted of.

Cases that cite this headnote

[6] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

If instead of listing alternative elements a statute lists alternative means, any one of which would not constitute an aggravated felony, then the statute is indivisible and categorically cannot constitute a generic offense for purpose of determining whether the conviction qualifies as an aggravated felony under the Immigration and Nationality Act (INA).

Cases that cite this headnote

[7] **Aliens, Immigration, and Citizenship**
Controlled substances offenses

Florida statute prohibiting trafficking in illegal drugs was categorically overbroad and indivisible, and thus alien's conviction under that statute did not qualify as an aggravated felony within meaning of the Immigration and Nationality Act (INA) and did not disqualify her from cancellation of removal; record of alien's conviction was inconclusive regarding which offense she had committed, and a plain reading of the statute, aided by the weight of Florida authority, indicated that statute created a single drug trafficking offense that could be committed by alternative means, and jury was not required to agree on the particular method of commission to convict. Fla. Stat. Ann. § 893.135 (2007).

1 Cases that cite this headnote

[8] **Federal Courts**
Prosecutions

In all instances, if a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, Court of Appeals is not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law.

Cases that cite this headnote

[9] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

If neither the text of the statute nor state decisional law resolves the means-or-elements question, as would establish whether the statute was indivisible for purposes of determination whether the conviction qualifies as an aggravated felony under the Immigration and Nationality Act (INA), then courts may look to other evidence of state law, including indictments or jury instructions; if these sources do not speak plainly, courts must resolve the inquiry in favor of indivisibility.

Cases that cite this headnote

Petitions for Review of Decisions of the Board of Immigration Appeals, Agency No. A096-761-835

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Before MARCUS, JILL PRYOR and SILER,* Circuit Judges.

* Honorable Eugene E. Siler, Jr., United States Circuit Judge for the Sixth Circuit, sitting by designation.

Opinion

JILL PRYOR, Circuit Judge:

***1382** Natalia Cintron petitions for review of a Board of Immigration Appeals ("BIA") decision denying her application for cancellation of removal from the United States and ordering that removal. The BIA concluded that Cintron failed to prove that she had not been convicted of an aggravated felony, which rendered her ineligible for cancellation of removal. In short, the BIA determined that the Florida narcotics statute under which Cintron had been convicted was divisible into separate offenses and, because the record of her conviction was inconclusive regarding which offense she had committed, she could not demonstrate her eligibility for cancellation of removal.

We disagree with the BIA's conclusion. Because the Florida statute under which Cintron was convicted was indivisible and categorically overbroad, a conviction under that statute cannot qualify as an aggravated felony. Cintron's narcotics conviction therefore does not disqualify her from cancellation of removal. We grant her petition and remand to the BIA to reconsider her application. [1]

1 Cintron filed a motion for reconsideration with the BIA, which it denied also. She petitions this Court to review that denial; however, in light of our decision to grant her initial petition, we dismiss Cintron's second petition as moot.

I. BACKGROUND

Cintron is a native and citizen of Argentina and a lawful permanent resident of the United States. In 2009, she pled guilty to violating Florida Statutes § 893.135(1)(c) 1. (2007), which criminalized various narcotics offenses. The Department of Homeland Security initiated removal proceedings against Cintron, and an immigration judge ordered her removal to Argentina. She appealed this decision to the BIA, which overturned it because the record of her narcotics conviction was inconclusive as to the elements of her crime of conviction. The BIA remanded the case to the immigration judge, and Cintron applied for cancellation of removal. The immigration judge determined that because the record of her conviction remained inconclusive, she failed to prove her crime of conviction was not an "aggravated felony" that would render her ineligible for cancellation of removal under the Immigration and Nationality Act ("INA") § 240A(a)(3). The immigration judge once again ordered her removal. Cintron appealed to BIA, which agreed with the immigration judge that she was ineligible for cancellation of removal because of the Florida conviction.

***1383** The BIA reached two conclusions about Cintron's Florida conviction. First, it determined that although a § 893.135(1)(c) 1. offense was not categorically an aggravated felony, the Florida statute was divisible. That is, the statute listed multiple elements in the alternative, effectively creating several different crimes. Second, the BIA concluded that because Cintron was unable to produce any documentation identifying which of those crimes she committed, she failed to carry her burden of proving that she had never been convicted of an aggravated felony. The BIA dismissed her appeal, and Cintron then filed this petition for review of the BIA's decision.

II. DISCUSSION

[1] Whether Cintron's crime of conviction was an aggravated felony is a question of law that we review *de novo*. *Donawa v. U.S. Att'y Gen.*, 735 F.3d 1275, 1279 (11th Cir. 2013). [2] In answering this question, we first discuss the meaning of "aggravated felony" in the INA and the so-called "categorical approach" we must use to determine whether an offense qualifies as an aggravated felony. Second, applying the Supreme Court's instructions and relevant Florida law, we conclude that the narcotics statute under which Cintron was

convicted was indivisible and categorically overbroad and, therefore, not an aggravated felony under the INA. Third, we explain why the government's arguments to the contrary are unavailing.

2 "Our review is limited to the BIA's decision because it did not expressly adopt the [immigration judge's] decision." *Donawa*, 735 F.3d at 1283 n.5 (internal quotation marks and alteration omitted).

A. We Use a "Categorical Approach" to Determine Whether an Offense Qualifies as an Aggravated Felony Under the INA.

The INA provides that "[t]he Attorney General may cancel removal in the case of an alien who is ... deportable from the United States if the alien ... has not been convicted of any aggravated felony." INA § 240A(a)(3). The INA defines "aggravated felony" to include "illicit trafficking in a controlled substance ... including a drug trafficking crime" as defined in 18 U.S.C. § 924(c). INA § 101(a)(43)(B). A "drug trafficking crime" is "any felony punishable under the Controlled Substances Act" ("CSA"), 18 U.S.C. § 924(c)(2), which, as relevant here, includes manufacturing, distributing, or dispensing a controlled substance or possessing a controlled substance with the intent to manufacture, distribute, or dispense it. 21 U.S.C. § 841(a)(1). Absent circumstances not present here, simple possession is not punishable as a felony under the CSA, so it is not a drug trafficking crime and thus not an aggravated felony under the INA. *See* 21 U.S.C. § 844.

[2] [3] [4] "When the Government alleges that a state conviction qualifies as an 'aggravated felony' under the INA, we generally employ a 'categorical approach' to determine whether the state offense is comparable to an offense listed in the INA." *Moncrieffe v. Holder*, 569 U.S. 184, 190, 133 S.Ct. 1678, 185 L.Ed.2d 727 (2013). "Under this approach we look not to the facts of the particular prior case, but instead to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony." *Id.* (internal quotation marks omitted). "[A] state offense is a categorical match with a generic federal offense only if a conviction of the state offense necessarily involved facts equating to the generic federal offense." *Id.* (internal quotation marks and alterations ***1384** omitted). "Because we examine what the state conviction necessarily involved, not the facts underlying the case, we must presume that the conviction rested upon nothing more than the least of the acts criminalized, and then determine whether even those acts are encompassed by the generic federal offense." *Id.* at 190-91, 133 S.Ct. 1678 (internal quotation marks and alterations omitted).

[5] If the state statute "lists multiple, alternative elements, and so effectively creates several different crimes," then the statute is "divisible," and we employ the "modified categorical approach ... to determine which alternative formed the basis of the [noncitizen]'s prior conviction." *Descamps v. United States*, 570 U.S. 254, 133 S.Ct. 2276, 2281, 2285, 186 L.Ed.2d 438 (2013) (internal quotation marks omitted).[3] Under the modified categorical approach, we look "to a limited class of documents (for example, the indictment, jury instructions, or plea agreement and colloquy) to determine what crime, with what elements, a [noncitizen] was convicted of." *Mathis v. United States*, —— U.S. ——, 136 S.Ct. 2243, 2249, 195 L.Ed.2d 604 (2016). These documents are known as *Shepard*[4] documents.

3 "*Descamps* addressed the modified categorical approach in the context of punishment under the Armed Career Criminal Act rather than ... the immigration context. The general analytical framework and principles, however, are analogous, and so this Court has routinely imported holdings from one context to the other." *Donawa*, 735 F.3d at 1280 n.3.

4 *Shepard v. United States*, 544 U.S. 13, 16, 125 S.Ct. 1254, 161 L.Ed.2d 205 (2005).

[6] Sometimes, though, what appear in a statute to be alternative elements—" 'constituent parts' of a crime's legal definition" that either must be admitted to by a defendant or found by a fact-finder to sustain a conviction —are instead alternative "means" of committing a single offense. *Mathis*, 136 S.Ct. at 2248. Unlike elements, "means" are circumstances that have no particular legal significance and "need neither be found by a jury nor admitted by a defendant." *Id.* If instead of listing alternative elements a statute lists alternative means, any one of which would not constitute an aggravated felony, then the statute is indivisible and categorically cannot constitute a generic offense. *See id.* at 2256-57.

B. Florida Statutes § 893.135(1)(c) 1. Is Categorically Overbroad and Indivisible; Thus, Cintron's Conviction

Does Not Qualify as an Aggravated Felony Under the INA.

At the time of Cintron's conviction, Florida Statutes § 893.135(1)(c) 1. provided:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, oxycodone, hydrocodone, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, as described in s. 893.03(1)(b), (2)(a), (3)(c)3., or (3)(c)4., or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs," punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

Fla. Stat. § 893.135(1)(c) 1. [5]

5 We here discuss the 2007 version of Florida Statutes § 893.135, which was in effect on the date Cintron's offense was committed. *See* Fla. Stat. § 893.135 (2007).

[7] Both parties agree that a violation of Florida Statutes § 893.135(1)(c) 1. was not categorically an aggravated felony because the least of the acts it criminalized—mere ***1385** possession of a listed narcotic—is not a felony under the CSA. *See id.*; *see also* 21 U.S.C. §§ 841(a)(1), 844. Where the parties disagree is whether the Florida statute was divisible, such that the modified categorical approach applies, or indivisible, meaning the statute is categorically overbroad. The specific question we must answer here is whether the statutory language, "sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of," listed alternative elements creating six distinct narcotics crimes or alternative means of committing a single crime. For the reasons that follow, we hold that these six alternative methods of commission were means, not elements, so that § 893.135(1)(c) 1. was indivisible. Thus, a conviction under the statute categorically does not qualify as an aggravated felony under the INA. [6]

6 Because we hold that the statute under which Cintron was convicted was indivisible, we need not decide the effect of inconclusive *Shepard* documents on a noncitizen's application for cancellation of removal, an issue that our Court has previously acknowledged but not yet decided. *See Gelin v. U.S. Att'y Gen.*, 837 F.3d 1236, 1242 (11th Cir. 2016) (leaving undecided "who has the burden of proof to establish eligibility for relief from removal" if the *Shepard* "documents are inconclusive").

[8] To determine whether statutory alternatives are elements or means, we look to authoritative sources of state law. *Mathis*, 136 S.Ct. at 2256. "[T]he statute on its face may resolve the issue." *Id.* If, for example, the statute provides for tiered punishments depending on particular statutory alternatives, the alternatives are elements. *Id.* Conversely, if the statute is "drafted to offer 'illustrative examples,' " those examples are means of committing the offense, not elements. *Id.* If the text of the statute itself does not resolve our inquiry, a state court decision may. *Id.* For instance, in *Mathis* the Supreme Court looked to a decision of the Iowa Supreme Court, which held that a state burglary statute's "listed premises ... are 'alternative method[s]' of committing one offense, so that a jury need not agree whether the burgled location was a building, other structure, or vehicle." *Id.* (citing *State v. Duncan*, 312 N.W.2d 519, 523 (Iowa 1981)). The Supreme Court therefore determined that Iowa's burglary statute was indivisible. *Id.* In all instances, "[i]f a State's courts have determined that certain statutory alternatives are mere means of committing a single offense, rather than independent elements of the crime, we simply are not at liberty to ignore that determination and conclude that the alternatives are, in fact, independent elements under state law." *Schad v. Arizona*, 501 U.S. 624, 636, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991).

[9] If neither the text of the statute nor state decisional law resolves the means-or-elements question, then courts may look to other evidence of state law, including indictments or jury instructions. *Mathis*, 136 S.Ct. at 2256-57. If these sources do not "speak plainly," courts must resolve the inquiry in favor of indivisibility. *Id.* at 2257. "But between those documents and state law, that kind of indeterminacy should prove more the exception than the rule." *Id.*

Here, "the statute on its face" strongly suggested indivisibility. *Id.* at 2256. Section 893.135(1)(c) 1. specified that an individual who "knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of" a listed narcotic committed "a felony of the first degree, which felony shall be known as 'trafficking in illegal drugs.' " The alternative methods were denominated as a single offense —"trafficking ***1386** in illegal drugs"—suggesting that the six listed alternatives were all means of accomplishing "trafficking," rather than separate elements creating distinct offenses.

Florida caselaw confirms what the statutory language suggested. The Fifth District Court of Appeal considered whether conspiracy to traffic cocaine required the State to prove that the conspirators (a buyer and a seller) both agreed to commit the same trafficking act—that is, "selling, purchasing, delivering, or possessing." *Hampton v. State*, 135 So.3d 440, 441 (Fla. Dist. Ct. App. 2014) (internal quotation marks omitted). [7] The court explained that the State was not required to make this showing, reasoning that "[t]rafficking in cocaine is *an offense* that can be committed *in a variety of ways*. Thus, the buyer and seller ... were, in fact, agreeing to commit the *same crime* (trafficking), albeit in *different ways* (one by purchasing, the other by selling)." *Id.* at 443 (emphases added). The Third District Court of Appeal rejected a similar challenge advanced against a conviction for conspiracy to traffic in oxycodone. *See State v. Roth*, 165 So.3d 66, 67 (Fla. Dist. Ct. App. 2015) ("The offense of trafficking can be committed by one or more of the several acts delineated in the statute, including sale or delivery. A conspiracy to commit trafficking only requires that the co-conspirators agree to commit the same specified offense, not the same act.").

7 The cocaine trafficking statute is structured identically to the statute at issue in this case. *Compare* Fla. Stat. § 893.135(1)(b) 1., *with* Fla. Stat. § 893.135(1)(c) 1.

Numerous other Florida state court decisions have described § 893.135 in ways that suggest it set forth a single "trafficking" crime that could be committed in a variety of ways. *See, e.g., Palmer v. State*, 180 So.3d 1096, 1097 (Fla. Dist. Ct. App. 2015) ("[O]ne may commit the crime of trafficking in methamphetamine, *inter alia*, by manufacturing the drug in specified quantities."); *Cogbill v. State*, 940 So.2d 537, 539 (Fla. Dist. Ct. App. 2006) ("[Section 893.135(f)] sets forth a number of alternate forms of conduct, any of which constitute the proscribed offense."); *McCluster v. State*, 681 So.2d 716, 717 (Fla. Dist. Ct. App. 1996) ("Trafficking in illegal drugs can be proven in a variety of ways: sale, possession, manufacture, delivery and bringing into this state."); *Ramos v. State*, 529 So.2d 807, 808 (Fla. Dist. Ct. App. 1988) ("[T]rafficking includes the acts of possession and delivery[.]").

Only one case the government cites, *Burson v. State*, 102 So.3d 714 (Fla. Dist. Ct. App. 2012), concerns the statute under which Cintron was convicted. Contrary to the government's argument, though, *Burson* does not support its position; indeed, *Burson* is fully consistent with our conclusion that Florida Statutes § 893.135(1)(c) 1. was indivisible. In *Burson*, the indictment charged the defendant solely with the sale of oxycodone, but the jury instructions allowed a conviction based on proof that the defendant " 'knowingly possessed, purchased, sold, or delivered' oxycodone." *Id.* at 715 (emphasis omitted). Despite noting that the verdict form, in keeping with the jury instructions, did not require the jury to agree on a particular mode of commission, the *Burson* court gave no indication that the use of this general verdict form was error. *Id.* at 717. Instead, the court held that the instructions created error *in Burson's case* because they defined trafficking to include possession, an offense for which Burson was not charged and which could not legally have supported a trafficking conviction given that Burson had a valid prescription for oxycodone. *Id.* There was no suggestion that, had the verdict form excluded possession but included the remaining alternatives, any error would have been committed.

***1387** The government quotes portions of *Burson* that discussed "elements," but these are all found in a single block quotation from *Wright v. State*, 975 So.2d 498, 499 (Fla. Dist. Ct. App. 2007). *See Burson*, 102 So.3d at 716. Outside of that quote, *Burson* never used the word "element." And, in any event, *Wright* also is consistent with our conclusion here. In *Wright*, the Second District Court of Appeal explained that the state cocaine trafficking statute—which, as we have mentioned, is structured identically to the statute under which Cintron was convicted—has "three elements" which are "met when an individual (1) knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, (2) cocaine or any mixture containing cocaine, (3) in

the amount of 28 grams or more, but less than 150 kilograms." 975 So.2d at 499 (citing Fla. Stat. § 893.135(1)(b) 1.). Nothing in *Wright* suggested that the alternative methods of commission were, themselves, separate elements. Rather, the court's explanation indicated that the alternative methods of commission were means of committing "[t]he offense of trafficking in cocaine." *Id.*

Here, Florida "courts have determined that [the] statutory alternatives [were] mere means of committing a single offense, rather than independent elements of the crime." *Schad*, 501 U.S. at 636, 111 S.Ct. 2491. We are bound by their decision. *Id.*; *see Mathis*, 136 S.Ct. at 2256.

C. The Government's Arguments To the Contrary Are Unavailing.

The government argues that Florida decisional law, rather than demonstrating indivisibility, shows that the statute under which Cintron was convicted was divisible. But the government's cited authority largely concerns a different Florida controlled substance statute with a different structure, Florida Statutes § 893.13(1)(a). That statute provides that "a person may not sell, manufacture, or deliver, or possess with intent to sell, manufacture, or deliver, a controlled substance." This Court recently held that Florida Statutes § 893.13(1)(a) is divisible, *see Spaho v. U.S. Att'y Gen.*, 837 F.3d 1172, 1177 (11th Cir. 2016), and the government argues that, because the statutes are similar, we are compelled to reach the same divisibility conclusion with respect to § 893.135(1)(c) 1. Not so.

Importantly, unlike § 893.135(1)(c) 1., § 893.13(1)(a) lacks any language indicating that the six methods of commission are to be treated as a single offense. The impact of this textual distinction—which renders § 893.135(1)(c) 1. indivisible and § 893.13(1)(a) divisible—is played out in Florida caselaw. For example, in *Tyler v. State*, 107 So.3d 547, 549 (Fla. Dist. Ct. App. 2013), the First District Court of Appeal held that under § 893.13(1)(a) the State could charge a defendant both with possession with intent to sell a controlled substance and sale of that same controlled substance without running afoul of the Double Jeopardy Clause. The court explained, "possession with intent to sell, on the one hand, and the actual sale, on the other, of the same illicit substance should be viewed, not as alternative ways in which section 893.13(1)(a) could be violated, but as two separate crimes, albeit proscribed by the same, undivided subsection of the same statute." *Id.*

The *Tyler* court also recognized that "[i]n other contexts, the courts have distinguished between different crimes, proscribed by different statutory provisions, and different methods of committing a 'single statutory offense.' " *Id.* at 549 n.3. In those contexts, "[w]hen a single statutory offense describes multiple alternative acts, each of which is prohibited, each separate prohibited act does not constitute a separate offense for double jeopardy purposes since there is but one statutory offense." ***1388** *Id.* (internal quotation marks omitted). Section 893.135(1)(c) 1. was just this type of single statutory offense. It provided that the alternative methods of commission constitute "*a felony* ... known as 'trafficking in illegal drugs.' " Fla. Stat. § 893.135(1)(c) 1. (emphasis added).

The government also contends that Florida's model jury instructions for § 893.135 indicated divisibility, but we think the instructions only echo this distinction we have identified between that statute and § 893.13(1)(a). For § 893.135, the instructions provided: "To prove the crime of Trafficking in Illegal Drugs, the State must prove the following four elements beyond a reasonable doubt." *In re Std. Jury Instr. in Crim. Cases (No. 2005-3)*, 969 So. 2d 245, 265 (Fla. 2007). These instructions described one crime: "Trafficking in Illegal Drugs."[8] By contrast, the instructions for § 893.13 provide, "[t]o prove the crime of (crime charged), the State must prove the following (applicable number) elements beyond a reasonable doubt." *In re Std. Jury Instr. in Crim. Cases (No. 2013-05)*, 153 So.3d 192, 196 (Fla. 2014). These instructions provide trial courts a blueprint for describing multiple crimes, all chargeable under the same statute.

8 The model jury instructions further define the first of these "four elements" of "the crime of Trafficking in Illegal Drugs" as:

> **1.** (Defendant) **knowingly**
> **[sold]**
> **[purchased]**
> **[manufactured]**
> **[delivered]**
> **[brought into Florida]**
> **[possessed]**
> **a certain substance.**

In re Std. Jury Instr. in Crim. Cases (No. 2005-3), 969 So. 2d at 265. Bracketed alternatives may suggest divisibility, as the government argues. Here, though, because the bracketed information appeared as alternatives to prove a single crime, we do not

> read the instruction that way. But even if we assume that this portion of the jury instructions suggested alternative elements rather than means, we must look first to the statutory text and state decisional law, *see Mathis*, 136 S.Ct. at 2256, which we find conclusive on the issue. *See supra* Part II.B.

For these reasons, we are unmoved by the government's plea that we construe § 893.135(1)(c) 1. as divisible.

III. CONCLUSION

A plain reading of the statute, aided by the weight of Florida authority, indicates that Florida Statutes § 893.135(1)(c) 1. created a single drug trafficking offense that could be committed by alternative means. Because the jury did not need to agree on the particular method of commission to convict, the statute was indivisible. An indivisible and overbroad statute is categorically not an aggravated felony; thus, Cintron's conviction under the statute does not disqualify her from cancellation of removal. *See Donawa*, 735 F.3d at 1281-82. We therefore **GRANT**[9] Cintron's petition and **REMAND** this case to the BIA for further proceedings consistent with this opinion.

9 **PETITION 15-12344 GRANTED. PETITION 15-14352 DISMISSED AS MOOT.**

All Citations

882 F.3d 1380

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United States Court of Appeals, Eleventh Circuit.

Jose Emilio Ulloa FRANCISCO, Petitioner,
v.
U.S. ATTORNEY GENERAL, Respondent.

No. 15-13223
|
(March 12, 2018)

Synopsis

Background: Alien, native and citizen of Dominican Republic who was admitted into United States as lawful permanent resident, was convicted of felony related to drug trafficking. After his removal was ordered, alien petitioned to cancel removal. Immigration judge (IJ) granted his petition. Government appealed. Board of Immigration Appeals overturned IJ's decision and reinstated removal finding. Alien appealed.

[Holding:] The Court of Appeals, Tjoflat, Circuit Judge, held that Florida statute prohibiting trafficking in illegal drugs was not aggravated felony, and therefore alien's conviction under that statute did not disqualify him from cancellation of removal.

Vacated and remanded.

West Headnotes (14)

[1] **Sentencing and Punishment**
Violent or Nonviolent Character of Offense

To determine under the Armed Career Criminal Act (ACCA) whether a conviction qualifies as a violent felony, and therefore an enhanced sentence, a court may look only to the statutory definition of the prior offense, and not to the particular facts underlying the conviction. 18 U.S.C.A. § 922(g).

Cases that cite this headnote

[2] **Sentencing and Punishment**
Violent or Nonviolent Character of Offense

Sentencing and Punishment
Burden of proof

When considering if an enhanced sentence should be applied under the Armed Career Criminal Act (ACCA), and the statute under which the defendant was convicted is divisible because it contains multiple offenses, some that are violent felonies and some that are not, the government must prove that the conviction qualified as a violent felony; to do so, it may introduce limited parts of the record of the conviction, but if those parts do not identify the offense of conviction, the government has failed to carry its burden of proof, and it is presumed that the conviction was for an offense that did not qualify as a violent felony. 18 U.S.C.A. § 922(g).

Cases that cite this headnote

[3] **Sentencing and Punishment**
Violent or Nonviolent Character of Offense

When the government must prove under the Armed Career Criminal Act (ACCA) that a defendant's prior conviction qualified as a violent felony, and therefore an enhanced sentence applies, it is limited to the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information; this is so even though the defendant as a matter of fact was convicted of a crime that did qualify as a violent felony. 18 U.S.C.A. § 922(g).

Cases that cite this headnote

[4] **Aliens, Immigration, and Citizenship**
Presumptions and burden of proof

Aliens, Immigration, and Citizenship
Admissibility

If an alien was convicted of a crime under a divisible statute, one which contains both designated offenses and non-designated offenses, and then seeks cancellation of removal, the Attorney General in a proceeding under the Immigration and Nationality Act (INA) may prove that the conviction qualified as one of the designated offenses by introducing *Shepard* documents; if the Attorney General fails to do so, it is presumed that the alien was convicted of a non-designated offense.

Cases that cite this headnote

[5] **Aliens, Immigration, and Citizenship**
Controlled substances offenses

Florida statute prohibiting trafficking in illegal drugs was not aggravated felony, and therefore conviction of alien, native and citizen of Dominican Republic who was admitted into United States as lawful permanent resident, under that statute did not disqualify him from cancellation of removal, since statute was not divisible and it did not have categorical match in Controlled Substance Act (CSA). Immigration and Nationality Act §§ 101, 237, 240A, 8 U.S.C.A. §§ 1101(a)(43), 1227(a)(2)(B)(i), 1229b(a)(3); 18 U.S.C.A. § 922(g); Fla. Stat. Ann. §§ 893.135(1)(b), 893.135(1)(c).

Cases that cite this headnote

[6] **Aliens, Immigration, and Citizenship**
Controlled substances offenses

Under the Immigration and Nationality Act (INA), a state crime constitutes an aggravated felony for illicit trafficking in a controlled substance only if the conduct it proscribes is punishable as a felony under federal law. Immigration and Nationality Act § 101, 8 U.S.C.A. § 1101(a)(43).

Cases that cite this headnote

[7] **Aliens, Immigration, and Citizenship**
Aggravated felonies in general

Under the categorical approach which is used to decide whether the alien's state conviction is of an offense comparable to an offense listed in the Immigration and Nationality Act (INA), the facts underlying the conviction are ignored; the immigration court instead looks to whether the state statute defining the crime of conviction categorically fits within the generic federal definition of a corresponding aggravated felony.

Cases that cite this headnote

[8] **Aliens, Immigration, and Citizenship**
Crime and Related Grounds

When deciding whether an alien's state conviction is of an offense comparable to an offense listed in the Immigration and Nationality Act (INA), the question is whether the state statute shares the nature of the federal offense that serves as a point of comparison; this involves a comparison of the elements of the state offense and the federal offense to see if they match.

Cases that cite this headnote

[9] **Aliens, Immigration, and Citizenship**
Commission of Crime as Basis for Denial of Relief

After determining that an alien's state conviction categorically matches an offense listed in the Immigration and Nationality Act (INA), a court reviewing a petition to cancel removal must presume that the conviction rested upon nothing more than the least of the acts criminalized.

Cases that cite this headnote

[10] **Aliens, Immigration, and Citizenship**
Crime and Related Grounds

Under the categorical approach which is used to decide whether the alien's state conviction is of an offense comparable to an offense

listed in the Immigration and Nationality Act (INA), a divisible statute is one that sets out one or more elements of the offense in the alternative.

Cases that cite this headnote

[11] **Aliens, Immigration, and Citizenship**
Crime and Related Grounds

When deciding whether the alien's state conviction is of an offense comparable to an offense listed in the Immigration and Nationality Act (INA), if a statutory offense merely lists alternative means to commit an element of a single crime, a court must perform the categorical analysis and ask only whether the elements of the state crime and generic offense make the requisite match; to determine whether a statute contains alternative elements or means, a court may look at the statutory text and authoritative sources of state law.

Cases that cite this headnote

[12] **Aliens, Immigration, and Citizenship**
Crime and Related Grounds

When deciding whether the alien's state conviction is of an offense comparable to an offense listed in the Immigration and Nationality Act (INA), an indictment that reiterates all the terms of a statute with alternatives is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt.

Cases that cite this headnote

[13] **Aliens, Immigration, and Citizenship**
Admissibility

If a statute is determined to be divisible after the categorical analysis, the government may present a limited class of documents to establish the offense the alien committed and therefore the ground for removal; specifically, the government may introduce the trial record, including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms.

Cases that cite this headnote

[14] **Aliens, Immigration, and Citizenship**
Controlled substances offenses

Mere possession of cocaine is not an aggravated felony, for the purpose of determining on a petition for cancellation of removal whether an alien's conviction is of an offense comparable to an offense listed in the Immigration and Nationality Act (INA).

Cases that cite this headnote

Petition for Review of a Decision of the Board of Immigration Appeals, Agency No. A045-874-205

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Before TJOFLAT and WILSON, Circuit Judges, and ROBRENO,* District Judge.

* Honorable Eduardo C. Robreno, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Opinion

TJOFLAT, Circuit Judge:

*1 [1] [2] [3] The Armed Career Criminal Act ("ACCA") provides that a person convicted of violating 18 U.S.C. § 922(g) faces an enhanced sentence if he or she

has three previous convictions for "violent felon[ies]." [1] To determine whether a conviction qualifies as a violent felony, a court may look "only to the statutory definition[ ] of the prior offense[ ], and not to the particular facts underlying th[e] conviction[ ]." *Taylor v. United States*, 495 U.S. 575, 600, 110 S.Ct. 2143, 2159, 109 L.Ed.2d 607 (1990). In some cases, the statute under which the defendant was convicted contains multiple offenses—some that are violent felonies and some that are not. This means that the statute is divisible. *Descamps v. United States*, 570 U.S. 254, 257, 133 S.Ct. 2276, 2281, 186 L.Ed.2d 438 (2013). In such cases, the Government must prove that the conviction qualified as a violent felony. To do so, it may introduce limited parts of the record of the conviction. [2] *Shepard v. United States*, 544 U.S. 13, 26, 125 S.Ct. 1254, 1263, 161 L.Ed.2d 205 (2005) (plurality opinion). If these parts, which we refer to as *Shepard* documents, do not identify the offense of conviction, the Government has failed to carry its burden of proof, and it is presumed that the conviction was for an offense that did not qualify as a violent felony. [3] *Johnson v. United States*, 559 U.S. 133, 137, 130 S.Ct. 1265, 1269, 176 L.Ed.2d 1 (2010).

1 18 U.S.C. § 924(e)(1). The ACCA also provides for an enhancement if a person has committed three or more "serious drug offense[s]." *Id.* § 924(e)(1). The statute defines both "violent felony" and "serious drug offense." *Id.* § 924(e)(2)(A)–(B).

2 The Government is limited to "the terms of the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." *Shepard*, 544 U.S. at 26, 125 S.Ct. at 1263. Ordinarily, these items are not in dispute and thus are subject to judicial notice.

3 This is so even though the defendant as a matter of fact was convicted of a crime that did qualify as a violent felony.

[4] This same presumption applies in proceedings brought by the Attorney General ("AG") under the Immigration and Nationality Act ("INA") to remove an alien from the United States on the ground that the alien, after admission into the country, had been convicted of an offense designated in the INA. *See* INA § 237(a)(2); 8 U.S.C. § 1227(a)(2). If the alien was convicted under a divisible statute, one which contains both designated offenses and non-designated offenses, the AG may prove that the alien's conviction qualified as one of the designated offenses by introducing *Shepard* documents. [4] *Moncrieffe v. Holder*, 569 U.S. 184, 191–92, 133 S.Ct. 1678, 1684–85, 185 L.Ed.2d 727 (2013). If the AG fails to do so, it is presumed that the alien was convicted of a non-designated offense. *Id.* This is referred to as the *Moncrieffe* presumption. *See, e.g.*, *Sauceda v. Lynch*, 819 F.3d 526, 531–32 (1st Cir. 2016).

4 The INA expressly permits the Government to use an enumerated set of documents:

> [A]ny of the following documents or records (or a certified copy of such an official document or record) shall constitute proof of a criminal conviction:
> (i) An official record of judgment and conviction.
> (ii) An official record of plea, verdict, and sentence.
> (iii) A docket entry from court records that indicates the existence of the conviction.
> (iv) Official minutes of a court proceeding or a transcript of a court hearing in which the court takes notice of the existence of the conviction.
> (v) An abstract of a record of conviction prepared by the court in which the conviction was entered, or by a State official associated with the State's repository of criminal justice records, that indicates the charge or section of law violated, the disposition of the case, the existence and date of conviction, and the sentence.
> (vi) Any document or record prepared by, or under the direction of, the court in which the conviction was entered that indicates the existence of a conviction.
> (vii) Any document or record attesting to the conviction that is maintained by an official of a State or Federal penal institution, which is the basis for that institution's authority to assume custody of the individual named in the record.

INA § 240(c)(3)(B); 8 U.S.C. § 1229a(c)(3)(B). *Shepard* evidence encompasses all of these items since they are judicially noticeable. *See supra* note 2.

***2 [5]** In the case before us, the AG proved that the alien, a lawful permanent resident, was removable for having been convicted of a felony related to drug trafficking. INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i). After his removal was ordered, the alien petitioned the AG to cancel the removal. To be eligible for such discretionary relief, the alien had to prove that he had not previously been

convicted of an "aggravated felony," as the INA defines that term. INA § 240A(a)(3); 8 U.S.C. § 1229b(a)(3).

The state statute under which the alien had been convicted created the felony of "trafficking in cocaine," which was defined to include the selling, purchasing, manufacturing, delivering, or possessing of cocaine, or the bringing of cocaine into Florida. Fla. Stat. § 893.135(1)(b)1.c. The alien admitted that these alternative conduct elements created separate crimes, some of which fell under the definition of an aggravated felony and some which did not. He argued that because the AG had not shown that he had been convicted of one of the crimes constituting an aggravated felony, the *Moncrieffe* presumption applied and required the immigration court to find that he had been convicted of an offense that was not an aggravated felony.

The Board of Immigration Appeals ("BIA") agreed that the state statute created separate crimes, some of which were aggravated felonies and some of which were not. It then rejected the alien's argument—holding that he had the burden to prove that his conviction was not for an aggravated felony—and denied his application for cancellation of removal. The alien now petitions us to review the BIA's decision. A recent decision of this Court binds us to hold that the alien did not commit an aggravated felony because the state statute under which he was convicted is neither divisible nor has a categorical match in the Controlled Substance Act ("CSA"). *See Cintron v. U.S. Attorney Gen.*, No. 15-12344, —— F.3d ——, ——, 2018 WL 947533, at *6 (11th Cir. Feb. 20, 2018). We therefore grant the alien's petition, vacate the BIA's decision, and remand the case for further proceedings.

I.

The INA authorizes the AG to remove from the United States any alien who, at any time after admission, was convicted of certain felonies, including the violation of a law "relating to a controlled substance" and the commission of an "aggravated felony." INA § 237(a)(2)(A)(iii), (a)(2)(B)(i); 8 U.S.C. § 1227(a)(2)(A)(iii), (a)(2)(B)(i). To obtain the alien's removal, the AG must prove a conviction of one of these felonies by clear and convincing evidence. INA § 240(c)(3)(A); 8 U.S.C. § 1229a(c)(3)(A). [5]

5 The INA states:

> In the proceeding the [Government] 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.

INA § 240(c)(3)(A); 8 U.S.C. § 1229a(c)(3)(A).

If an immigration court issues an order of removal, a permanent resident may petition the AG to cancel the removal. INA § 240A(a); 8 U.S.C. § 1229b(a). The AG may exercise his discretion to grant such relief if the alien satisfies three requirements, one being that the alien "has not been convicted of any aggravated felony." [6] INA § 240A(a)(3); 8 U.S.C. § 1229b(a)(3). The alien has the burden both to establish these "eligibility requirements" and to show that he or she "merits a favorable exercise of discretion," [7] INA § 240(c)(4)(A), 8 U.S.C. § 1229a(c)(4)(A), by a "preponderance of the evidence," 8 C.F.R. § 1240.8(d). [8]

6 The INA states:

> 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.

INA § 240A(a)(1)–(3); 8 U.S.C. § 1229b(a)(1)–(3).

7 The INA states:

> An alien applying for relief or protection from removal has the burden of proof to establish that the alien—
>
> (i) satisfies the applicable eligibility requirements; and
>
> (ii) with respect to any form of relief that is granted in the exercise of discretion, that the alien merits a favorable exercise of discretion.

INA § 240(c)(4)(A); 8 U.S.C. § 1229a(c)(4)(A).

8 The regulation states:

> Relief from removal. The respondent shall have the burden of establishing that he or she is eligible for any requested benefit or privilege and that it should be granted in the exercise of discretion.

> If the evidence indicates that one or more of the grounds for mandatory denial of the application for relief may apply, the alien shall have the burden of proving by a preponderance of the evidence that such grounds do not apply.
>
> 8 C.F.R. § 1240.8(d).

*3 **[6]** The INA defines the term "aggravated felony" in a seemingly interminable list of offenses. *See* INA § 101(a)(43); 8 U.S.C. § 1101(a)(43). The list includes "illicit trafficking in a controlled substance" and "drug trafficking crime[s]" as defined under federal law.[9] INA § 101(a)(43)(B); 8 U.S.C. § 1101(a)(43)(B). A state crime constitutes an aggravated felony for illicit trafficking in a controlled substance only if the conduct it proscribes is punishable as a felony under federal law. *Lopez v. Gonzales*, 549 U.S. 47, 60, 127 S.Ct. 625, 633, 166 L.Ed.2d 462 (2006).

9 The INA defines the term "aggravated felony" as "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)." INA 101(a)(43)(B); 8 U.S.C. § 1101(a)(43)(B).
The BIA has defined "illicit trafficking in a controlled substance." *See Matter of Davis*, 20 I. & N. Dec. 536, 540–41 (BIA 1992). The term "illicit" means "not permitted or allowed; prohibited; unlawful; as an illicit trade." *Id.* at 541 (quotation omitted). It thus "simply refers to the illegality of the trafficking activity." *Id.*
The BIA takes "[t]rafficking" to mean "[t]rading or dealing in certain goods." *Id.* (quotation omitted). It has stated that trafficking is a term "commonly used in connection with illegal narcotic sales." *Id.* (quotation omitted). "Essential to the term in this sense is its business or merchant nature, ... although only a minimum degree of involvement may be sufficient under the precedents of this Board to characterize an activity as 'trafficking' or a participant as a 'trafficker.' " *Id.*
The BIA therefore defined "illicit trafficking in a controlled substance" to be "unlawful trading or dealing of any controlled substance as defined in section 102 of the Controlled Substances Act." *Id.* It further noted that illicit trafficking in a controlled substance includes any "drug trafficking crime" as defined in 18 U.S.C. § 924(c)(2). *Matter of Davis*, 20 I. & N. Dec. at 542. "A 'drug trafficking crime' ... is 'any felony punishable under' the [CSA]." *Id.*

The Supreme Court has constructed a framework—with roots in both immigration and criminal law—to determine when a state crime constitutes an aggravated felony. *See Mellouli v. Lynch*, 575 U.S. ——, 135 S.Ct. 1980, 1986–87, 192 L.Ed.2d 60 (2015). The framework was designed for cases in which the Government seeks the removal of an alien under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) for having been convicted of an "aggravated felony," and the immigration court has to decide whether the alien's state conviction qualified as one.[10] The framework presents two approaches: the categorical approach, which poses a question of law,[11] and the modified categorical approach, which poses a mixed question of law and fact.[12] We discuss each approach in turn.

10 The framework also applies to cases in which the Government seeks the removal of an alien under INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted for violating a state law "relating to a controlled substance."

11 The question is whether "the state offense is comparable to an offense listed in the INA." *Moncrieffe*, 569 U.S. at 190, 133 S.Ct. at 1684; *see Mellouli*, 575 U.S. at ——, 135 S.Ct. at 1987 (noting that the categorical approach focuses on a "legal question of what a conviction *necessarily* established" (emphasis in original)).

12 Where the alien's conviction does not indicate which of the offenses the alien committed—an offense that has an aggravated felony analogue or one that does not—the immigration court's decision turns on the probative value of the Government's *Shepard* evidence. It thus requires findings of fact. The goal of this fact finding is to determine whether the alien was convicted of an offense that has a federal analogue.

A.

*4 **[7]** **[8]** **[9]** The categorical approach is used to decide whether the alien's state conviction is of an offense "comparable to an offense listed in the INA." *Moncrieffe*, 569 U.S. at 190, 133 S.Ct. at 1684. Under this approach, "the facts" underlying the conviction are ignored. *Id.* The immigration court looks "instead to whether 'the state statute defining the crime of conviction' categorically fits within the 'generic' federal definition of a corresponding aggravated felony." *Id.* (quoting *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186, 127 S.Ct. 815, 818, 166 L.Ed.2d 683 (2007)). The question is whether "the

state statute shares the nature of the federal offense that serves as a point of comparison." *Moncrieffe*, 569 U.S. at 190, 133 S.Ct. at 1684. This involves a comparison of the elements of the state offense and the federal offense to see if they match. *See Mathis v. United States*, 579 U.S. ——, 136 S.Ct. 2243, 2248, 195 L.Ed.2d 604 (2016). After determining that the offenses categorically match, the court must "presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190–91, 133 S.Ct. at 1684 (alterations omitted) (quoting *Johnson*, 559 U.S. at 137, 130 S.Ct. at 1269).

The Supreme Court developed the categorical approach to promote efficiency in removal proceedings by prohibiting the relitigation of "past convictions in minitrials conducted long after the fact." *Moncrieffe*, 569 U.S. at 200–01, 133 S.Ct. at 1690. The approach eliminates the necessity of a factual inquiry that would unduly burden the administration of immigration law, especially given that the alien's conviction may have occurred years prior to the removal proceeding. *Mellouli*, 575 U.S. at ——, 135 S.Ct. at 1986–87. The categorical approach also "enables aliens to anticipate the immigration consequences of guilty pleas in criminal court." *Id.* at 1987 (quotation omitted).

B.

[10] The Supreme Court has modified the categorical approach where the criminal statute is "a so-called 'divisible statute.' " *Descamps*, 570 U.S. at 257, 133 S.Ct. at 2281. A divisible statute is one that "sets out one or more elements of the offense in the alternative." *Id.*; *see Donawa v. U.S. Attorney Gen.*, 735 F.3d 1275, 1281 (11th Cir. 2013) (stating that a statute is divisible when it "lists a number of alternative elements that effectively create several different crimes"). In *Mathis v. United States*, the Supreme Court made clear that the modified categorical approach applies only to statutes that list alternative elements and so create multiple crimes, not to statutes that list alternative means through which to satisfy a single element.[13] 136 S.Ct. at 2247–48.

13 The Court defined elements as "constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *Mathis*, 579 U.S. ——, 136 S.Ct. at 2248 (quotation omitted). "At a trial, they are what the jury must find beyond a reasonable doubt to convict the defendant ... and at a plea hearing, they are what the defendant necessarily admits when he pleads guilty." *Id.*

[11] **[12]** Thus, if a statutory offense merely lists alternative means to commit an element of a single crime, a court must perform the categorical analysis and "ask only whether the *elements* of the state crime and generic offense make the requisite match."[14] *Id.* at 2256 (emphasis in original). To determine whether a statute contains alternative elements or means, a court may look at the statutory text and "authoritative sources of state law." *Id.* However, "if state law fails to provide clear answers, federal judges have another place to look: the record of a prior conviction itself." *Id.* Where an indictment reiterates "all the terms of" a statute with alternatives, it "is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Id.* at 2257.

14 The reason for this rule is that when a list "merely specifies diverse means of satisfying a single element of a single crime—or otherwise said, spells out various factual ways of committing some component of the offense—a jury need not find (or a defendant admit) any particular item." *Id.* at 2249. As a result, "[s]tatements of 'non-elemental fact' in the records of prior convictions are prone to error precisely because their proof is unnecessary." *Id.* at 2253 (quoting *Descamps*, 570 U.S. at 270, 133 S.Ct. 2276). The Court thus sought to "avoid unfairness to defendants" by limiting the modified categorical approach to statutes that contain multiple crimes, not alternative means to satisfy an element. *Id.*

*5 **[13]** If a statute is determined to be divisible after this analysis, the Government may present "a limited class of documents" to establish the offense the alien committed and therefore the ground for removal. *Spaho v. U.S. Attorney Gen.*, 837 F.3d 1172, 1177 (11th Cir. 2016) (quoting *Descamps*, 570 U.S. at 257, 133 S.Ct. at 2281). Specifically, the Government may introduce the "trial record—including charging documents, plea agreements, transcripts of plea colloquies, findings of fact and conclusions of law from a bench trial, and jury instructions and verdict forms." *Johnson*, 559 U.S. at 144, 130 S.Ct. at 1273.

After the Government has presented these items and established the crime the alien committed, the court must

"do what the categorical approach demands: compare the elements of the crime of conviction (including the alternative element used in the case) with the elements of the generic crime." [15] *Descamps*, 570 U.S. at 257, 133 S.Ct. at 2281. Therefore, the modified categorical approach allows the court to consider a limited set of documents to identify the crime of conviction and thus "implement the categorical approach." *Id.* at 263, 133 S.Ct. at 2285.

15 If the elements match, it is "presume[d] that the conviction 'rested upon nothing more than the least of the acts' criminalized." *Moncrieffe*, 569 U.S. at 190–91, 133 S.Ct. at 1684 (alterations omitted) (quoting *Johnson*, 559 U.S. at 137, 130 S.Ct. at 1269).

II.

Jose Emilio Ulloa Francisco is a native and citizen of the Dominican Republic. He was admitted into the United States as a permanent resident on October 5, 1997.

On January 13, 2010, Francisco was arrested by the North Miami Beach Police Department in a sting operation after he gave an undercover police officer $30,000 as partial payment for ten kilograms of cocaine at a price of $21,000 per kilogram. [16] Four weeks later, on February 3, the Assistant State Attorney of Miami-Dade County filed a two-count Information in the Miami-Dade County Circuit Court charging Francisco with drug trafficking. Count 1 alleged that Francisco violated Fla. Stat. § 893.135(1)(b)1.c, which makes it unlawful to sell, purchase, manufacture, deliver, or bring cocaine into Florida or to knowingly possess cocaine. Count 2 alleged that Francisco violated Fla. Stat. §§ 777.04(3) and 893.135(5) by conspiring to commit the Count 1 offense. [17] On September 10, 2012, Francisco pled guilty to both counts pursuant to a plea agreement. The Circuit Court sentenced him to concurrent prison terms of three years to be followed by a three-year term of probation and imposed a fine of $250,000. [18]

16 The affidavit the arresting officer filed in support of a Complaint issued on the same day described the circumstances of Francisco's arrest.

> [On January 13, 2010, at 3:10 PM], the defendant Jose Ulloa [Francisco] and an unknown co-defendant met with an undercover agent of the [North Miami Beach Police Department] to negotiate a cocaine deal. Ulloa & the co-defendant negotiated to purchase ten kilograms of cocaine for $21,000 per kilogram. At approximately 1510 hours, Ulloa arrived at the Pep Boys Parking lot, [295 N.E. 167th St. in North Miami Beach,] and showed the agent a large amount of U.S. currency. Ulloa responded to the NMBPD undercover location and gave the agent $30,000 in U.S. currency as a down payment for cocaine. Ulloa was placed under arrest for trafficking in cocaine. The total weight of kilogram including packaging was approximately 1027.4 grams. Ulloa was transported to NMBPD/DCJ for processing.

17 The two counts read as follows:

> Count 1
>
> JOSE E. FRANCISCO ULLOA, on or about January 13, 2010, in the County and State aforesaid, did unlawfully sell, purchase, manufacture, deliver, or bring into this state, or was knowingly in actual or constructive possession of cocaine, as described in s. 893.03(2)(a)4, Florida Statutes, or any mixture containing cocaine, in the amount of four-hundred (400) grams or more, but less than one-hundred and fifty (150) kilograms of cocaine, or any mixture containing cocaine, in violation of s. 893.135(1)(b)1.c, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.
>
> Count 2
>
> And the aforesaid Assistant State Attorney, under oath, further information makes JOSE E. FRANCISCO ULLOA, on or about January 13, 2010, in the County and State aforesaid, did unlawfully and feloniously agree, conspire, combine or confederate with another person or persons, to wit: VICTOR, to commit a felony under the laws of the State of Florida, to wit: unlawful Trafficking in Cocaine, or any mixture

containing cocaine, as described in s. 893.135(5) and s. 777.04(3) and s. 777.011, Fla. Stat., contrary to the form of the Statute in such cases made and provided, and against the peace and dignity of the State of Florida.

Fla. Stat. § 893.135(1)(b)1.c states, in pertinent part:

> Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, ... but less than 150 kilograms of cocaine ... commits a felony of the first degree, which felony shall be known as "trafficking in cocaine".... If the quantity involved ... [i]s 400 grams or more, but less than 150 kilograms, such person shall be sentenced to a mandatory minimum term of imprisonment of 15 calendar years and pay a fine of $250,000.

It is a first degree felony under Fla. Stat. § 893.135(5) to "conspire[ ] ... to commit any act prohibited" by Fla. Stat. § 893.135(1). Under Fla. Stat. § 777.04(3), "[a] person who agrees, conspires, combines, or confederates with another person or persons to commit any offense commits the offense of criminal conspiracy." Further, Fla. Stat. § 777.011 states:

> Whoever commits any criminal offense against the state, whether felony or misdemeanor, or aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he or she is or is not actually or constructively present at the commission of such offense.

18 As indicated in note 17, *supra*, Francisco faced on each of Counts 1 and 2 a mandatory minimum prison sentence of fifteen years, and a maximum sentence of sixty years. Florida's Sentencing Guidelines called for a minimum sentence of eleven years. The State waived the fifteen-year mandatory minimum, however, so the Guideline minimum of eleven years took effect. The Court then departed downward from that minimum and imposed a prison term of three years. We assume the Court imposed that sentence because the plea agreement recommended it.

***6** On September 13, 2012, the Government served Francisco with a Notice to Appear ("NTA"). Based on his conviction on Count 1 of the Information, the NTA alleged that Francisco was removable under INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), [19] as an alien convicted of an "aggravated felony," a term defined to encompass "illicit trafficking in a controlled substance" and "drug trafficking crime[s]," INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). [20]

19 The INA states: "Any alien who is convicted of an aggravated felony at any time after admission is deportable." INA § 237(a)(2)(A)(iii); 8 U.S.C. § 1227(a)(2)(A)(iii).

20 *See supra* note 9.

A hearing on the removal charge was scheduled to come before an immigration judge ("IJ") on February 27, 2013. The hearing, however, was rescheduled for April 24, 2013. During the hearing in April, Francisco's attorney challenged the NTA charge, contending that Francisco's Count 1 conviction did not meet the INA definition of an aggravated felony. The IJ ordered the parties to brief the issue and scheduled a hearing to resolve it for August 28, 2013.

In the August hearing, the IJ, after considering the parties' briefs and arguments, decided that the Count 1 conviction constituted a drug trafficking crime, and therefore an aggravated felony, because it was comparable to an offense in INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). The IJ employed the categorical approach in reaching this decision. [21] Because the Count 1 conviction was an aggravated felony, the IJ announced that she would order Francisco's removal and deny his request for cancellation of removal. Faced with the IJ's decision, Francisco's attorney represented that Francisco would seek political asylum and withholding of removal under the United Nations Convention Against Torture ("CAT"). [22] The IJ continued the removal proceeding to November 27, 2013, to enable counsel to make the case for CAT relief.

21 The IJ reasoned that "[Fla. Stat. § 893.135(1)(b)1.c] and certified criminal court documents" indicated that Francisco committed an aggravated drug trafficking offense within the aggravated felony definition. The IJ further noted that Francisco's conviction involved a "commercial" element within the meaning of *Lopez*, 549 U.S. at 53, 127 S.Ct. at 630, which supported the finding that Francisco committed the aggravated felony of illicit trafficking in a controlled substance.

22 *See* 8 C.F.R. § 1208.16(c)(4) ("If the immigration judge determines that the alien is more likely than not to be tortured in the country of removal, the alien is

entitled to protection under the Convention Against Torture.").

On November 27, the IJ rendered her decision from the bench in open court. The IJ reiterated the conclusion she had reached in August that the Count 1 conviction was a drug trafficking crime and therefore an aggravated felony. She held that Francisco was ineligible for cancellation of removal for that reason. The IJ also ruled that Francisco was "ineligible to seek political asylum or withholding of removal" under the CAT.

Francisco appealed the IJ's decision to the BIA on December 20, 2013. He argued that his conviction could not amount to an aggravated felony because Fla. Stat. § 893.135(1)(b)1.c does not necessarily criminalize conduct that falls within the INA's definition of "aggravated felony."

The BIA vacated the IJ's decision on April 28, 2014. It did so after concluding that Fla. Stat. § 893.135(1)(b)1.c is divisible—meaning that it contains offenses for which there were analogues in the INA definition of aggravated felony and offenses for which there were not. The BIA therefore held that the IJ erred by employing the categorical approach in determining whether, in pleading guilty to Count 1, Francisco pled guilty to an aggravated felony. It concluded that the IJ should have used the modified categorical approach instead. Since the IJ erred in this way, the BIA remanded the case with the instruction that the IJ employ the modified categorical approach in resolving the aggravated felony issue.

*7 On June 20, 2014, the Government amended the NTA to assert an additional ground of removability against Francisco. The amendment alleged that Francisco was removable for violating a "law or regulation of a State ... relating to a controlled substance," INA § 237(a)(2)(B)(i), 8 U.S.C. § 1227(a)(2)(B)(i), [23] because of his conviction under Fla. Stat. § 893.135(1)(b)1.c. The Government also alleged that Francisco's conviction of conspiracy under Count 2 of the Information provided a separate ground of removal as either a conviction of an aggravated felony or a violation of a state law relating to a controlled substance.

23 The INA states:

> 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.

INA § 237(a)(2)(B)(i); 8 U.S.C. § 1227(a)(2)(B)(i).

The IJ responded to the BIA's remand on July 2, 2014. She ignored the BIA's instruction to apply the modified categorical approach in determining whether Francisco had been convicted of a crime with an analogue in the INA's definition of "aggravated felony." She instead applied the categorical approach once more. This time, however, the IJ concluded that Francisco's conviction under Fla. Stat. § 893.135(1)(b)1.c did not constitute an aggravated felony. She reasoned that *Donawa v. U.S. Attorney General*, 735 F.3d at 1283—where we held that Fla. Stat. § 893.13(1)(a) [24] is not divisible—bound her to apply the categorical approach to Fla. Stat. § 893.135(1)(b)1.c.

24 This statute prohibits a person from "sell[ing], manufactur[ing], or deliver[ing], or possess[ing] with intent to sell, manufacture, or deliver, a controlled substance." Fla. Stat. § 893.13(1)(a). It does not criminalize mere possession as does Fla. Stat. § 893.135(1)(b)1.c. *See Paccione v. State*, 698 So.2d 252, 254 (Fla. 1997).

Applying that approach, the IJ observed that Fla. Stat. § 893.135(1)(b)1.c does not require proof that the defendant knew of the illicit nature of the controlled substance, whereas its federal analogue, 21 U.S.C. § 841(a)(1), requires it. [25] The IJ concluded that because Fla. Stat. § 893.135(1)(b)1.c does not require the same *mens rea* as the federal analogue, Francisco was not convicted of an aggravated felony. Having so concluded, the IJ ruled that the Government failed to make a case for Francisco's removability. After reaching these conclusions, the IJ stated that the removal proceeding was lodged in the wrong venue. The appropriate venue was the immigration court in Orlando, Florida, because Francisco was in federal custody there. Though the appropriate venue lay elsewhere, the IJ rescinded the removal order and certified her decision to the BIA.

25 Section 841(a) states:

> 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(a).

In arriving at her July 2, 2014 decision, the IJ did not consider the Government's June 20, 2014 amendment to the NTA, which alleged an alternative ground of removability—namely that Francisco was removable for violating a "law or regulation of a State ... relating to a controlled substance." INA § 237(a)(2)(B)(i); 8 U.S.C. § 1227(a)(2)(B)(i).[26] The BIA, on September 10, 2014, therefore remanded the case to the immigration court in Orlando with the instruction that the court address the alternative ground of removability the Government alleged in its amended NTA.

26 On July 14, 2014, the Government moved the BIA to change the venue to Orlando, Florida and to remand the case for consideration of its alternate ground for removal.

***8** On December 18, 2014, Francisco's attorney filed on Francisco's behalf an Application for Cancellation of Removal for Certain Permanent Residents. In the application, Francisco disclosed his convictions on Counts 1 and 2 of the Information, but stated that he "ha[d] not been convicted of an aggravated felony." On January 13, 2015, Francisco signed the application in Orlando, before the IJ and under oath prior to the commencement of the removal hearing scheduled for that day.

The purpose of the hearing on January 13 was to determine whether Francisco was removable on the NTA's alternative ground and, if so, whether his application for cancellation of removal should be granted. The IJ agreed with the Government that Francisco's conviction under Fla. Stat. § 893.135(1)(b)1.c related to a controlled substance and therefore found Francisco removable. The IJ next considered Francisco's application for cancellation of removal. To prevail, Francisco had to prove that he was eligible for that relief—in particular, that he had not been convicted of an aggravated felony. The focus was on his conviction under Fla. Stat. § 893.135(1)(b)1.c.

In an effort to prove that the conviction was not an aggravated felony, Francisco testified. The following is the gist of his testimony. Jeson Rosa, whom Francisco had known as a "friend" for seventeen years, introduced him to a "guy" and said, "I want you to do this for me." When Francisco asked what it was, Rosa said that he wanted Francisco to purchase a "packet" and "deliver" it to the man he had just met. Rosa gave Francisco $30,000, the amount needed for the purchase, and the man, whom Francisco soon discovered was an undercover police officer, drove him to "a warehouse." They went inside the warehouse office, where "[t]hey showed [him] a pack of cocaine." Francisco gave them the $30,000. He was immediately arrested.

The arresting officers asked him if he "wanted to [cooperate], work with them." Francisco felt "nervous" and "called Jeson Rosa for them but [Rosa] never appeared."[27] When the arresting officers asked Francisco if he knew what he was doing when he gave them $30,000 for the package, he responded: "You know, I ha[d] an idea what I was doing." He was attempting to purchase a large amount of cocaine.

27 The undercover officer was identified (but not by name) in the affidavit the arresting officer executed for the issuance of the Complaint. *See supra* note 16.

[14] Nevertheless, the IJ applied the modified categorical approach and invoked the *Moncrieffe* presumption to conclude that Francisco had been convicted of mere possession of cocaine,[28] the least serious conduct criminalized by Fla. Stat. § 893.135(1)(b)1.c, which did not fall within the INA's definition of aggravated felony.[29] Francisco was thus eligible for cancellation of removal.[30] At the close of the January 13, 2015 hearing, the IJ, in an exercise of discretion, cancelled Francisco's removal based on his "equities" and "representations to the court."[31]

28 Without stating as much, the IJ saddled the Government with the burden of proof on the issue of cancellation of removal.

29 Mere possession of cocaine is not an aggravated felony. *See Lopez*, 549 U.S. at 60, 127 S.Ct. at 633.

30 In finding Francisco eligible for cancellation of removal, the IJ did not directly address on the record or in his oral decision whether Francisco established the first two requirements for relief, which relate to his

residence. *See supra* note 6. However, in the hearing on January 13, Francisco testified that he received a "green card" in "October, 1997" and has lived in the United States "[s]ince that time." In the oral decision, the IJ found that Francisco "is a lawful permanent resident who has been admitted back since October 5, 1997."

31 The IJ did not elaborate on these "equities" and "representations."

***9** The Government appealed the IJ's decision to the BIA. In its brief, it asserted two grounds for reversal. The first ground was that Francisco failed to prove his eligibility for cancellation of removal by establishing that his conviction under Fla. Stat. § 893.135(1)(b)1.c did not constitute the aggravated felony of trafficking in an illicit controlled substance. The Government pointed out that the statute criminalized more than mere possession of cocaine and was therefore divisible. It created disjunctive sets of offenses, at least one of which satisfied the definition of aggravated felony for either "illicit trafficking" in a controlled substance or "drug trafficking crime[s]." INA § 101(a)(43)(B); 8 U.S.C. § 1101(a)(43)(B). The Government went on to observe that the term "illicit trafficking" included "any state ... felony conviction involving the unlawful trading or dealing of any controlled substance." Since two of the offenses in Fla. Stat. § 893.135(1)(b)1.c involved trading and dealing in cocaine, commercial transactions of a controlled substance, the Government argued that the IJ erred in failing to require Francisco to prove that his Count 1 conviction was not for engaging in such conduct.

The Government's second ground for reversal was that the IJ abused his discretion in finding that Francisco merited relief given the seriousness of the conduct for which he had been convicted.

In his brief, Francisco conceded that he was removable for having been convicted for violating a law relating to a controlled substance offense. He also conceded that Fla. Stat. § 893.135(1)(b)1.c is a divisible statute which "criminalizes conduct punishable as a felony under the CSA, such as the sale, purchase, or manufacture of cocaine and some conduct that is not, such as simple possession." He submitted that because the record was not clear as to whether he had been convicted of purchasing cocaine with intent to distribute, and thus of committing an aggravated felony, the IJ did not err in invoking the *Moncrieffe* presumption and finding that his conviction was for mere possession of cocaine—an offense having no analogue among the offenses the INA designates as aggravated felonies.[32] According to Francisco, *Moncrieffe* required the IJ, and thus the BIA, to "presume that [his] conviction rested on nothing but the least culpable conduct" criminalized in Fla. Stat. § 893.135(1)(b)1.c: mere possession of cocaine.[33]

32 In referring to the "record," Francisco was apparently referring to the judgment, including the sentences, the Circuit Court entered after he pled guilty to Counts 1 and 2 of the Information, and not to the testimony he gave at the January 13, 2015 removal hearing.

33 Implicit in Francisco's argument was the proposition that the IJ, and the BIA on review, were precluded from considering his testimony that he accompanied the undercover agent to the warehouse for the purpose of purchasing cocaine.

On June 18, 2015, the BIA overturned the IJ's decision and reinstated the removal finding. Once again, the BIA found that the modified categorical approach applies to Fla. Stat. § 893.135(1)(b)1.c because the statute effectively creates multiple crimes, some of which qualify as aggravated felonies and some that do not.[34] After determining that the modified categorical approach applied, the BIA agreed with the Government that Francisco had the burden of proving that he was eligible for cancellation of removal and that he failed to carry his burden. It held that Francisco failed to prove that he had not committed a drug trafficking offense or engaged in illicit trafficking in a controlled substance, aggravated felonies listed in INA § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B). Since neither Count 1 of the Information nor the sentence imposed by the Circuit Court revealed which Fla. Stat. § 893.135(1)(b)1.c offense Francisco violated, the onus fell on him to prove that he had not committed an aggravated felony. He failed to carry that burden and therefore rendered himself ineligible for cancellation of removal. The BIA accordingly sustained the Government's appeal, vacated the IJ's grant of cancellation of removal, and ordered Francisco removed to the Dominican Republic.

34 The BIA distinguished our decision in *Donawa* on the ground that Fla. Stat. § 893.135(1)(b)1.c "expressly requires that the defendant have knowledge of the nature of the substance in his possession," the same *mens rea* as required in 21 U.S.C. § 841(a)(1). In

contrast, the statute at issue in *Donawa*, Fla. Stat. § 893.13(1)(a)(2), did not require knowledge of the nature of the substance in possession, meaning that the crime did not have a categorical match in the CSA.

III.

***10** Throughout this litigation, the parties and the BIA have agreed that the modified categorical approach applies to Fla. Stat. § 893.135(1)(b) because it is a divisible statute.[35] In *Cintron v. U.S. Attorney General*, however, a panel of this Court recently held that Fla. Stat. § 893.135(1)(c) is neither divisible nor a categorical match to a federal crime in the CSA. —— F.3d at ——– – ——, ——, 2018 WL 947533, at *3–*4, *6. The holding of *Cintron* controls our decision because Fla. Stat. § 893.135(1)(b) and (1)(c) have substantively identical language.[36] Therefore, Francisco's conviction under Fla. Stat. § 893.135(1)(b)1.c cannot be an aggravated felony.[37] The consequence is that Francisco satisfied the third requirement for eligibility for cancellation of removal, that he "has not been convicted of an aggravated felony." INA § 240A(a)(3); 8 U.S.C. § 1229b(a)(3). We accordingly vacate the BIA decision and remand the case for further proceedings.[38]

35 Although we lack jurisdiction to review a judgment granting or denying discretionary relief from a removal order, such as cancellation of removal, INA § 242(a)(2)(B)(i), 8 U.S.C. § 1252(a)(2)(B)(i), we may review questions of law, INA § 242(a)(2)(D), 8 U.S.C. § 1252(a)(2)(D). It is a legal question whether a conviction under a statute is an aggravated felony. *Donawa*, 735 F.3d at 1279–80.

36 In pertinent part, Fla. Stat. § 893.135(1)(b)–(c) states:

> (b) 1. Any person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 28 grams or more of cocaine, as described in s. 893.03(2)(a) 4., or of any mixture containing cocaine, but less than 150 kilograms of cocaine or any such mixture, commits a felony of the first degree, which felony shall be known as "trafficking in cocaine," punishable as provided in s. 775.082, s. 775.083, or s. 775.084....
>
> (c) 1. A person who knowingly sells, purchases, manufactures, delivers, or brings into this state, or who is knowingly in actual or constructive possession of, 4 grams or more of any morphine, opium, hydromorphone, or any salt, derivative, isomer, or salt of an isomer thereof, including heroin, ... or 4 grams or more of any mixture containing any such substance, but less than 30 kilograms of such substance or mixture, commits a felony of the first degree, which felony shall be known as "trafficking in illegal drugs," punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

37 Since we consider Fla. Stat. 893.135(1)(b)1.c to be an indivisible statute that lacks a categorical match in the CSA, we do not reach the issue of whether the *Moncrieffe* presumption applies in determining an alien's eligibility for cancellation of removal when the *Shepard* documents are inconclusive as to which crime the alien committed in a divisible statute. The circuits have split on this issue. *See Le v. Lynch*, 819 F.3d 98, 105–06 (5th Cir. 2016) ("[T]he alien, not the Government, bears the initial burden of production of evidence that he is eligible for discretionary relief." (quotation omitted)); *Syblis v. U.S. Attorney Gen.*, 763 F.3d 348, 357 (3d Cir. 2014) ("[A]n inconclusive record of conviction does not satisfy an alien's burden of demonstrating eligibility for relief from removal."); *Sanchez v. Holder*, 757 F.3d 712, 719–20 (7th Cir. 2014) (holding that the burden of proof controls only if the evidence remains inconclusive after the adjudicator examines evidence outside *Shepard* evidence documents); *Young v. Holder*, 697 F.3d 976, 989 (9th Cir. 2012) (en banc) ("[A]n inconclusive record of conviction does not demonstrate eligibility for cancellation of removal."); *Salem v. Holder*, 647 F.3d 111, 116 (4th Cir. 2011) ("Presentation of an inconclusive record of conviction is insufficient to meet an alien's burden of demonstrating eligibility."); *Garcia v. Holder*, 584 F.3d 1288, 1289 (10th Cir. 2009) ("An alien who has conceded removability has the 'burden of establishing that he or she is eligible for any requested benefit or privilege.' " (quoting 8 C.F.R. § 1240.8(d)). *But see Sauceda*, 819 F.3d at 532 (holding that "the unrebutted *Moncrieffe* presumption applies" when the record is inconclusive as to which offense the alien committed in a divisible state statute); *Martinez v. Mukasey*, 551 F.3d 113, 122 (2d Cir. 2008) (holding that the Board "erred by placing the burden on [an alien] to show that his conduct was the equivalent of a federal misdemeanor").

38 In appealing the IJ's January 13, 2015 decision, the Government argued, as second ground for reversal, that in light of the conduct that led to Francisco's convictions of conspiring to violate and violating Fla. Stat. § 893.135(1)(b)1.c, the IJ abused his discretion

in granting Francisco's application for cancellation of removal. Given its holding that Francisco failed to prove that he had not been convicted of an aggravated felony, the BIA did not reach the argument. We assume that on remand, the BIA will address it.

***11 SO ORDERED.**

All Citations

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