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#####  MEMBER

 NJ, NY & FL BARS

May 12, 2011

 **Re: State of New Jersey vs. Joe Jones - N.J.S.A. 2C:35-5a(1)/N.J.S.A. 2C:35-5b(3)/ N.J.S.A. 2C:35-10a(1)**

Dear Mr. Attorney:

 Thank you for referring the above defendant with respect to the immigration consequences of his pending New Jersey criminal violations. I appreciate the time that you and Mr. Jones have spent with me on the telephone and in my office.

 Section 101(a)(43) of the Immigration and Nationality Act defines the term “aggravated felony” to include a “drug trafficking crime” as defined in 18 U.S.C. § 924(c), “whether in violation of Federal or State law,” as well as any “conspiracy” to commit such an offense. In turn, 18 U.S.C. § 924(c)(2) defines “drug trafficking crime” to mean “any felony punishable under the Controlled Substances Act (21 U.S.C. § 801 et seq.).”

 The United States Supreme Court has held that “a state offense constitutes a ‘felony punishable under the Controlled Substances Act’ only if it proscribes conduct punishable as a felony under that federal law.” Thus, for a State drug offense to qualify as a “drug trafficking crime” and, by extension, an aggravated felony, it must correspond to an offense that carries a maximum term of imprisonment exceeding 1 year under the CSA.

 The issue for Mr. Jones is whether the above violations “proscribe conduct punishable as a felony” under the CSA within the meaning *of Lopez v. Gonzales, 127 S. Ct. 625 (2006)*, such that it may be considered a “drug trafficking crime” and, by extension, an “aggravated felony.”

 The New Jersey Statutes cited above contain drug trafficking language and the maximum term of imprisonment will qualify it as a felony punishable under the Controlled Substance Act. Therefore, the above cited NJS violation is indeed an "aggravated felony" and would render Mr. Jones deportable with no relief.

 However, there is an exception found in 21 U.S.C. § 841(b)(4) that provides that an offender who distributes a “small amount of marihuana for no remuneration shall be treated” as if he committed simple possession, which is a Federal misdemeanor under 21 U.S.C. § 844(a).

Pursuant to New Jersey Federal Case law (Third Circuit), the DHS has the burden of proving that he was convicted of either distributing a large amount of marijuana or distributing marijuana for remuneration. In other words, the proper Federal analogue for her New Jersey State distribution offense is “misdemeanor marijuana distribution” under 21 U.S.C. § 841(b)(4), rather than “felony marijuana distribution” under 21 U.S.C. § 841(b)(1)(D). I would still be much more comfortable if the plea colloquy proved that Mr. Jones had a very small quantity that he distributed without getting paid. As you are well aware, you can distribute in New Jersey without receiving a penny.

 The CSA does not define a “small amount,” and the Federal courts of appeals have issued few precedent decisions clarifying the meaning of the phrase. See, e.g., United States v. Fort, 248 F.3d 475, 483 (5th Cir. 2001) (concluding that 561.2 pounds of marijuana is not a “small amount”); United States v. Salazar-Flores, 238 F.3d 672, 674 n.1 (5th Cir. 2001) (concluding that 195 pounds of marijuana is not a “small amount”). The United States Court of Appeals for the Sixth Circuit has emphasized that 21 U.S.C. § 841(b)(4) was “designed to address the casual sharing of marijuana; behavior that is akin to mere possession rather than distribution.” Garcia-Echavarria v. United States, 376 F.3d 507, 514 n.5 (6th Cir. 2004). In accordance with that understanding, the court held that although distribution of 8 ounces of marijuana in violation of Kentucky law was a “small-scale drug transaction,” it did not qualify for misdemeanor treatment under 21 U.S.C. § 841(b)(4) because it represented “more than casual sharing.” Id.

 The Seventh Circuit has held that the term “small amount” has no absolute meaning and that the scope of the term depends not only on the weight of the marijuana distributed, but also on the context in which it is distributed. United States v. Damerville, 27 F.3d 254, 258-59 (7th Cir. 1994) (holding that conspiracy to distribute 17.2 grams of marijuana in prison could not be treated as a Federal misdemeanor because 17.2 grams was not a “small amount” in prison, even if it would be so considered when distributed in the general community).

 **If the State INSISTS upon a guilty plea to the above violation, the plea colloquy should simply contain the fact that Mr. Jones distributed .50 grams (about a marijuana cigarette) and that although the marijuana was distributed it was not for remuneration. Please obtain a copy of the plea colloquy.**

 I understand that you already investigated another "safe harbor". The Clifton Municipal Court Judge was NOT amenable to vacating Mr. Jones’s Conditional Discharge. As you are well aware, if that occurred and the Clifton Municipal Court Prosecutor agreed to a borough ordinance or a disorderly conduct violation (NJS 2C:33-2a), then the Bergen County Prosecutor MIGHT agree to PTI. This is the safest route but my understanding is that it is simply impossible.

 I mention another "safe harbor" knowing the facts of this case and the fact that the State is considering a straight possession type offense. The problem is the type of drug. If Mr. Jones pleads guilty to simple possession of cocaine, he will be charged with the following:

Pursuant to Section 237(a)(2)(B)(I) of the Immigration and Nationality Act, in that, at any time after admission (i.e., his legal entry into the United States), he is convicted of a violation of any law relating to a controlled substance, **other than a single offense involving possession for one’s own use of 30 grams or less of marijuana**, Mr. Jones will be subject to removal (deportation).

 May I suggest (with the understanding that the State might never agree) that you inquire of the prosecutor as to whether the State would be amenable to such a plea to marijuana. Perhaps as an inducement, you may have to offer something in return such as a period of incarceration. Having spoken to Mr. Jones several times, he appears to be interested in such a resolution, IF same is possible. Many foreign nationals, like Mr. Jones, would rather spend some time in jail here in order to avoid a lifetime prison sentence deported back to their home country.

Please do not hesitate to contact me with any questions or concerns that you may have.

Very truly yours,

Ronald P. Mondello, Esq.

RPM:cab

cc: Joe Jones