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**UNITED STATES DEPARTMENT OF JUSTICE**

**EXECUTIVE OFFICE FOR IMMIGRATION REVIEW**

**UNITED STATES IMMIGRATION COURT**

**ELIZABETH, NEW JERSEY**

In the Matter of : In Removal Proceedings

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: A#

**Mr. Jones and BOND MOTION**

Respondent, , through undersigned counsel, moves the Immigration Judge to conduct a “Jones Hearing” in the above referenced case.

**FACTS**

Respondent, a native of Guatemala, is being detained by the Bureau of Immigration and Custom Enforcement (“ICE”) at Elizabeth, New Jersey. No bond has been set at this time. This application for a “Jones Hearing” is made to the Office of the Immigration Judge at or nearest the place of detention, in accordance with 8 CFR § 1003.19. A bond redetermination hearing is yet to be scheduledbefore Your Honor.

In the instant case, upon information and belief, DHS has determined that Respondent is subject to mandatory detention based on a April 22, 2013 conviction in the Superior Court of New Jersey, Hudson County, under Indictment Number 13-03-00579-I for a violation of the offense N.J.S.A. 2C:35-7. Controlled Dangerous Substances Near or On School Property. Upon information and belief, DHS has taken the position that this is an Aggravated Felony pursuant to 8 U.S.C. § 1101(a)(43)(B)thus rendering the Respondent removable pursuant to 8 U.S.C. § 1227(a)(2)(A)(iii)and subject to mandatory detention pursuant to 8 U.S.C. § 1226(c)(1)(B). Upon information and belief, DHS has taken the position that the Respondent is also removable pursuant to 8 U.S.C. § 1227(a)(2)(B)(i).

ARGUMENT

An alien may seek a determination by an Immigration Judge that the alien is “not properly included within” certain of the regulatory provisions which would deprive the Immigration Judge of bond jurisdiction, including the mandatory detention provisions at issue in this matter. See 8 C.F.R. § 1003.19(h)(2)(ii); Matter of Jones, 22 I&N Dec. 799, 802 (BIA 1999). An alien is considered not properly included in such a class if the Immigration Judge or the Board determines that the DHS is “substantially unlikely” to prove a removal charge subjecting the alien to mandatory custody. Matter of Jones, supra at 806. In a so-called “Jones” hearing, the respondent bears the burden of establishing that DHS would be substantially unlikely to prevail on a charge of removability under a section of the Act mandating custody. See id; Matter of Kotliar, 24 I&N Dec. 124 (BIA 2007).

Upon information and belief, DHS has presented to the Respondent a Judgment of Conviction as its sole piece of evidence that N.J.S.A. 2C:35-7 is an aggravated felony. The Respondent is not removable because she shared a small amount of marihuana for no remuneration in her apartment located at .

Specifically, pursuant to 21 U.S.C. § 841(b)(1)(E)(4):

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

21 U.S.C. § 844(a)

Unlawful acts; penalties

It shall be unlawful for any person knowingly or intentionally to possess a controlled substance unless such substance was obtained directly, or pursuant to a valid prescription or order, from a practitioner, while acting in the course of his professional practice, or except as otherwise authorized by this subchapter or subchapter II of this chapter. It shall be unlawful for any person knowingly or intentionally to possess any list I chemical obtained pursuant to or under authority of a registration issued to that person under section 823 of this title or section 958 of this title if that registration has been revoked or suspended, if that registration has expired, or if the registrant has ceased to do business in the manner contemplated by his registration. It shall be unlawful for any person to knowingly or intentionally purchase at retail during a 30 day period more than 9 grams of ephedrine base, pseudoephedrine base, or phenylpropanolamine base in a scheduled listed chemical product, except that, of such 9 grams, not more than 7.5 grams may be imported by means of shipping through any private or commercial carrier or the Postal Service. **Any person who violates this subsection may be sentenced to a term of imprisonment of not more than 1 year, and shall be fined a minimum of $1,000, or both**, except that if he commits such offense after a prior conviction under this subchapter or subchapter II of this chapter, or a prior conviction for any drug, narcotic, or chemical offense chargeable under the law of any State, has become final, he shall be sentenced to a term of imprisonment for not less than 15 days but not more than 2 years, and shall be fined a minimum of $2,500, except, further, that if he commits such offense after two or more prior convictions under this subchapter or subchapter II of this chapter, or two or more prior convictions for any drug, narcotic, or chemical offense chargeable under the law of any State, or a combination of two or more such offenses have become final, he shall be sentenced to a term of imprisonment for not less than 90 days but not more than 3 years, and shall be fined a minimum of $5,000. Notwithstanding any penalty provided in this subsection, any person convicted under this subsection for the possession of flunitrazepam shall be imprisoned for not more than 3 years, shall be fined as otherwise provided in this section, or both. The imposition or execution of a minimum sentence required to be imposed under this subsection shall not be suspended or deferred. Further, upon conviction, a person who violates this subsection shall be fined the reasonable costs of the investigation and prosecution of the offense, including the costs of prosecution of an offense as defined in sections 1918 and 1920 of Title 28, except that this sentence shall not apply and a fine under this section need not be imposed if the court determines under the provision of Title 18 that the defendant lacks the ability to pay.

The statute of conviction is N.J.S.A. 2C:35-7:

a. Any person who violates subsection **a. of N.J.S.2C:35-5 by distributing, dispensing or possessing with intent to distribute** a controlled dangerous substance or controlled substance analog while on any school property used for school purposes which is owned by or leased to any elementary or secondary school or school board, or within 1,000 feet of such school property or a school bus, or while on any school bus, is guilty of a crime of the third degree and shall, except as provided in N.J.S.2C:35-12, be sentenced by the court to a term of imprisonment. Where the violation involves less than one ounce of marijuana, the term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, or one year, whichever is greater, during which the defendant shall be ineligible for parole. In all other cases, the term of imprisonment shall include the imposition of a minimum term which shall be fixed at, or between, one-third and one-half of the sentence imposed, or three years, whichever is greater, during which the defendant shall be ineligible for parole. Notwithstanding the provisions of subsection b. of N.J.S.2C:43-3, a fine of up to $150,000 may also be imposed upon any conviction for a violation of this section.

and N.J.S.A. 2C:35-5a

a. Except as authorized by P.L.1970, c. 226 (C.24:21-1 et seq.), it shall be unlawful for any person knowingly or purposely:

(1) To manufacture, distribute or dispense, or **to possess** or have under his control **with intent to** manufacture, **distribute or dispense**, a controlled dangerous substance or controlled substance analog; or

(2) To create, distribute, or possess or have under his control with intent to distribute, a counterfeit controlled dangerous substance.

The Supreme Court of the United States *Held:* If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, it is not an aggravated felony under the INA. Pp. 1683 – 1694. This is the third time in seven years that we have considered whether the Government has properly characterized a low-level drug offense as “illicit trafficking in a controlled substance,” and thus an “aggravated felony.” Once again we hold that the Government's approach defies “the ‘commonsense conception’ ” of these terms. Carachuri–Rosendo, 560 U.S., at ––––, 130 S.Ct., at 2584–2585 (quoting Lopez, 549 U.S., at 53, 127 S.Ct. 625). Sharing a small amount of marijuana for no remuneration, let alone possession with intent to do so, “does not fit easily into the ‘everyday understanding’ ” of “trafficking,” which “ ‘ordinarily ... means some sort of commercial dealing.’ ” Carachuri–Rosendo, 560 U.S., at ––––, 130 S.Ct., at 2584–2585 (quotingLopez, 549 U.S., at 53–54, 127 S.Ct. 625). Nor is it sensible that a state statute that criminalizes conduct that the CSA treats as a misdemeanor should be designated an “aggravated felony.” We hold that it may not be. If a noncitizen's conviction for a marijuana distribution offense fails to establish that the offense involved either remuneration or more than a small amount of marijuana, the conviction is not for an aggravated felony under the INA.Moncrieffe v. Holder, 133 S. Ct. 1678, 185 L. Ed. 2d 727, 81 USLW 4265 (2013).

The Respondent’s case is directly on point with Moncrieffe. Both defendants were charged with an intent to possess and distribute marijuana. The Georgia statute is just like the New Jersey statute. The statutes are not divisible and the minimum conduct in order to secure a conviction is the same…a sharing of marijuana for no remuneration. The Respondent is not removable.

Respondent pled guilty to possession with intent to distribute. There is absolutely no evidence in the record of conviction that she did anything other than share a small amount of marijuana for no remuneration therefore her conviction cannot be considered an Aggravated Felony the DHS would be substantially unlikely to prevail on a charge of removability under that section of the Act/U.S.C. mandating removal and custody. The Respondent respectfully requests that Your Honor determine that she is “not properly included within” those regulatory provisions above which would deprive Your Honor of setting a reasonable bond.