national IMMIGRATION project of the National Lawyers Guild

PRACTICE ADVISORY[1]

Matter of Davey & the Categorical Approach

January 15, 2013
By Sejal Zota[2]

I. Introduction

This practice advisory discusses the Board of Immigration Appeals (BIA) decision in *Matter of Davey,* 26 I&N Dec. 37 (BIA 2012) and its holding that the categorical approach does not apply to the "possession of 30 grams of marijuana" exception to deportability found in 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i). *Matter of Davey* is another in a line of recent Board decisions that erodes the use of the categorical approach in immigration cases. This practice advisory takes a close look at the Board's reasoning in *Matter of Davey* and suggests strategies to challenge the decision or limits its impact. It also contains an appendix surveying state marijuana laws and their weight requirements.

The "categorical approach" describes the method that immigration judges, the BIA and reviewing federal courts generally employ to decide whether a criminal conviction triggers removal.[3] Under this approach, the factfinder looks to the elements of the statute of conviction, rather than to the *conduct* underlying the conviction, to determine whether a given conviction triggers removability. The categorical approach may be "modified" if the statute of conviction defines more than one crime, at least one of which comes within the removal ground and one of which does not. In these cases, the factfinder may consult the "record of conviction"—a defined set of court documents including the charging document, plea agreement, plea colloquy transcript, and verdict or judgment of conviction—to determine whether the defendant was necessarily convicted of an offense falling within the removal ground. *See Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 187 (citing to *Shepard v. United States*, 544 U.S. 13, 26 (2005)). In

---

[1] Copyright (c) 2013, National Immigration Project of the National Lawyers Guild. This advisory is intended for lawyers and is not a substitute for independent legal advice provided by a lawyer familiar with a client's case.

[2] Sejal Zota is a staff attorney at the National Immigration Project of the National Lawyers Guild. The author thanks Dan Kesselbrenner for his invaluable comments and suggestions.

[3] The U.S. Supreme Court's current framework of applying the categorical approach comes from a pair of federal criminal sentencing cases, *Shepard v. United States*, 544 U.S. 13 (2005), and *Taylor v. United States*, 495 U.S. 575 (1990), and has been expressly applied to the immigration context. *Kawashima v. Holder,* ___ U.S. ___, 132 S. Ct. 1172, 1173 (2012); *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 186 (2007). Courts use this approach in determining whether to apply a sentencing enhancement in a criminal case, including an aggravated felony enhancement for the offense of illegal reentry.

limited contexts, however, the immigration court may take a non-categorical, "circumstance-specific" approach, which permits an inquiry into the facts of a prior conviction without regard to the elements of the statute of conviction. *Nijhawan v. Holder*, 557 U.S. 29, 34-36 (2009).

II. Background and Holdings of *Matter of Davey*

The ground of deportability for controlled substance convictions does not include every single violation related to a controlled substance. Congress provided that a noncitizen is not deportable if she or he has been convicted of only "a single offense involving possession for one's own use of thirty grams or less of marijuana." 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i). In *Matter of Davey*, the government charged Ms. Davey as deportable under the controlled substance ground based on two separate Arizona convictions—one for possession of marijuana and one for possession of drug paraphernalia. The immigration judge found that, despite having two convictions rather than one, Ms. Davey satisfied the exception for "a single offense involving possession for one's own use of thirty grams or less of marijuana." *Matter of Davey,* 26 I&N Dec. 37, 38. The immigration judge thus concluded that Ms. Davey was not subject to mandatory detention for the duration of her removal proceedings because the government, under *Matter of Joseph*, 22 I&N Dec. 799 (BIA 1999), was substantially unlikely to prove that her convictions supported a controlled substance charge. *Id.*

The Board of Immigration Appeals affirmed the decision of the immigration judge. At first blush, that result is favorable to noncitizens. But the rationale underlying the decision paints a more complicated picture. The Board made multiple findings:

- First, the Board reaffirmed that to sustain a charge under 8 U.S.C. § 1227(a)(2)(B)(i), INA § 237(a)(2)(B)(i), the government bears the burden of proving that the respondent's conviction does not fall within the "30 grams" exception. *Matter of Davey*, 26 I&N Dec. at 41. So far so good.

- But the Board also found that the categorical approach does not apply to the 30 grams exception under the framework developed in *Nijhawan v. Holder*. In *Nijhawan*, the Court clarified that the categorical approach as outlined in *Taylor* and *Shepard* remains appropriate when the removal statute refers to a "generic crime." *Nijhawan v. Holder*, 557 U.S. 29, 37. It contrasted this approach with a "circumstance-specific approach" that is appropriate when the removal statute refers to "the specific way in which an offender committed the crime on a specific occasion," allowing the immigration court to investigate underlying facts using evidence beyond the record of conviction. *Id* at 34. In *Matter of Davey*, the Board reasoned that the "narrow and fact-specific" language of the 30 grams exception calls for a circumstance-specific inquiry into the nature of the noncitizen's unlawful conduct on a particular occasion:

> It refers not to a common generic crime but rather to a specific type of conduct (possession for one's own use) committed on a specific number of

> occasions (a "single" offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana).

Matter of Davey, 26 I&N Dec. at 39.

- In applying the circumstance-specific approach, the Board also found that the exception's "single offense" language refers to the totality of the noncitizen's act, and thus may cover more than one conviction if all of the noncitizen's offenses were closely connected with a single incident in which the noncitizen possessed 30 grams or less of marijuana for his or her own use, provided that none of those offenses were inherently more serious than simple possession.[4] *Id.* at 40-41.

- In addition, the Board found that the 30 grams exception would cover the possession of drug paraphernalia where the paraphernalia was merely an adjunct to the noncitizen's simple possession or use of 30 grams or less of marijuana. *Id.* at 40-41.

The Board concluded that the facts in Ms. Davey's case satisfied the exception because the two offenses were committed simultaneously, involved the simple possession of less than 10 grams of marijuana, and the drug paraphernalia possessed was a plastic baggie in which the marijuana was contained.

III. Implications of Circumstance-Specific Approach

The Board of Immigration Appeals has further limited the categorical approach by applying the circumstance-specific inquiry to the 30 grams exception. In abandoning the categorical approach in this context, the BIA's decision would seem to have both positive and negative impacts for noncitizens with marijuana convictions. On the plus side, it allows the 30 grams exception to cover multiple marijuana-related convictions if they are closely-related. On the down side, it may harm noncitizens convicted of marijuana possession where the record of conviction is ambiguous regarding quantity. Previously, if the record was inconclusive regarding quantity, the government would be unable to satisfy its burden of showing that the conviction does not come within the 30 grams exception. Under the circumstance-specific approach, however, the government may defeat an otherwise well-crafted plea by pointing to evidence of quantity outside of the record of conviction. For example, where the noncitizen is convicted under a statute that penalizes possession of up to two ounces of marijuana and the record of conviction is

[4] The Board has previously interpreted "simple possession" very narrowly. *Matter of Moncado*, 24 I & N. Dec. 62, 67 (BIA 2007) (interpreting the deportability exception as not including a conviction for possession of 30 grams or less of marijuana in prison under California law); *Matter of Martinez-Zapata*, 24 I & N Dec. 424, 430 (BIA 2007) (holding that enhancement for possession of marijuana in a drug free zone renders conviction as more than simple possession of 30 grams of marijuana).

silent as to quantity possessed, the government could now offer a lab result to show that the quantity was 35 grams.[5]

Practitioners representing clients in this situation should use a two-part strategy: First, practitioners should try to limit the case's impact before the immigration judges and the BIA, where it is now binding law. Second, as discussed in the next section, practitioners should consider strategies for overturning *Davey* in the federal circuit courts.

To begin, what kinds of evidence can the factfinder consider in these cases? The Board in *Davey* did not delve into these broader implications but its reliance on the circumstance-specific approach in *Nijhawan v. Holder* offers possible hints. In *Nijhawan*, the Court held that the circumstance-specific approach allows for consideration of evidence beyond the statute and record of conviction in determining deportability. *Nijhawan*, 557 U.S. at 41-42. The Court specifically found that the factfinder could rely on sentencing documents and admissions, including stipulations, to demonstrate the amount of loss in the fraud and deceit aggravated felony ground. *Id* at 42-43. Various federal courts have found that factfinders may consider pre-sentence reports under the circumstance-specific approach. *See, e.g., Kaplun v. Atty Gen. of U.S.*, 602 F.3d 260, 266 (3d Cir. 2010) (finding that allegations in charging document coupled with uncontroverted statements in pre-sentencing report constituted clear and convincing evidence); *Hamilton v. Holder*, 584 F.3d 1284, 1288-89 (10th Cir. 2009) (allowing consideration of pre-sentencing report to demonstrate amount of loss); *Arguelles-Olivares v. Mukasey*, 526 F.3d 171, 178 (5th Cir. 2008); *Ali v. Mukasey*, 521 F.3d 737, 743 (7th Cir. 2008). In fact, the Board, in a recent unpublished case, has previously relied on a pre-sentence report to conclude that the amount of marijuana possessed was greater than 30 grams. *In Re: Jose Luis Grimaldo Rosas*, File No. A075 567 158, 2012 WL 2835223 (BIA June 15, 2012). Also, the Third Circuit, in an unpublished case, has recently relied on testimony in the trial transcript regarding the weight of the marijuana even though it did not have to be proven for conviction. *Grant v. Attorney General of U.S.*, 2012 WL 3292400 at *3 (3d Cir. Aug. 14, 2012).

The *Nijhawan* Court did, however, set some limits on the sources of evidence that a factfinder may consider in a circumstance-specific inquiry. First, a factfinder may consider evidence beyond what the conviction establishes *only* if the procedures were fundamentally fair, "including procedures that give an alien a fair opportunity to dispute a Government claim" that the underlying conviction qualifies. *See Nijhawan*, 557 U.S. at 41. Second, the Court specifically indicated that the evidence must be "tied to the specific counts covered by the conviction" and that dismissed counts must not be the source of the evidence. *Id.* at 42. Moreover, the evidence taken together must also satisfy a "clear and convincing" standard. These limits may help immigration practitioners argue that certain documents in the criminal record are too unreliable for a factfinder to admit into evidence. If the factfinder does admit them, she or he should accord them little weight.

[5] Two ounces equal approximately 56.7 grams.

IV. Strategies to Challenge *Matter of Davey* in Federal Courts

As discussed above, *Matter of Davey* may have both positive and negative impacts for noncitizens with marijuana convictions. It may harm noncitizens convicted of one marijuana offense under a statute that includes more than and less than 30 grams of marijuana, where the record of conviction is ambiguous regarding quantity. These individuals should consider challenging the decision and making the arguments suggested here in the advisory that the rationales for employing the circumstance-specific approach do not apply to the 30 grams exception. No federal court has yet applied the circumstance-specific approach in a published opinion. Even though *Matter of Davey* is controlling before immigration courts and the BIA, practitioners who want to challenge the decision in the federal courts must preserve those arguments in removal proceedings.

There are various ways to challenge *Matter of Davey*, and to argue that the categorical approach applies to the 30 grams exception. Practitioners in the Ninth Circuit are the best positioned to challenge the decision. There, settled law requires the government to employ the categorical approach to determine whether the offense comes under the 30 grams exception. *Medina v. Ashcroft*, 393 F.3d 1063, 1065-1066 (9th Cir. 2005). Practitioners, therefore, should argue that *Matter of Davey* is wrong as a matter of law. *But see Grant v. Attorney General of U.S.*, 2012 WL 3292400, *2 (3d Cir. Aug. 14, 2012) (unpublished) (finding that circumstance-specific approach applies to 30 grams exception). Practitioners, however, should be aware that *Medina* predates the Supreme Court's decision in *Nijhawan*, so the government may argue that it should be reconsidered.

In other circuits, practitioners can point to *Medina v. Ashcroft* as persuasive authority. Also, they can argue that because the 30 grams exception is like prosecution for recidivist drug possession, the factfinder should apply the categorical approach and look only to the record of conviction to determine the quantity.[6] In *Carachuri-Rosendo v. Holder*, __U.S. __, 130 S.Ct. 2577, 2586-88 (2010), the Supreme Court applied the categorical approach to determine whether a second state possession offense corresponds to recidivist felony conviction under federal law, and thus is a drug trafficking aggravated felony. In doing so, the Court limited the inquiry to the record of conviction even though recidivist possession is not defined in relation to *elements*, but is an amalgam of elements, sentencing factors, and procedural safeguards. *Id*. at 2586-87. Marijuana

[6] In the alternative, one could reach a similar result by arguing that the modified categorical approach applies to the 30 grams exception by relying on *Matter of Lanferman*, 25 I&N Dec. 721 (BIA 2012). *Matter of Lanferman* erroneously allows the fact-finder to look to the record of conviction even where the statute is not facially divisible, i.e., where it does not cover multiple offenses with disjunctive elements. *Id.* at 727-728. Most marijuana possession statutes are not divisible, but applying the modified categorical approach and looking to the record would allow the fact-finder in many cases to determine whether the 30 grams exception applies. If helpful to the client, practitioners may consider making and preserving the argument that *Lanferman* permits the fact-finder to look to the record of conviction to determine the quantity of marijuana.

quantity under the personal use exception is similar to recidivist prosecution because quantity is defined by elements in some states,[7] and sentencing designations in others.[8] While neither recidivist prosecution nor marijuana quantity can be determined solely by reference to the elements of the offense or may be technically divisible, both can be determined through review of the record of conviction.

Practitioners should also distinguish the 30 grams exception from the $10,000 loss associated with the fraud and deceit aggravated felony ground in *Nijhawan*. One of the concerns motivating the *Nijhawan* decision was that application of the categorical approach to the loss amount would leave the fraud ground "with little, if any, meaningful application" because so few state and federal statutes include a loss element. *Nijhawan*, 557 U.S. at 39. In 1996, when Congress added the $10,000 threshold,[9] 29 states had no major fraud or deceit statutes with any relevant monetary threshold. In 13 of the remaining 21 states, the fraud and deceit statutes contained monetary thresholds but with amounts significantly higher than $10,000, leaving only 8 states with statutes that categorically covered the $10,000 loss threshold. *Id.* at 39-40. Moreover, even in those 8 states, some statutes that targeted a specific type of fraud lacked a monetary threshold, e.g., credit card fraud in Connecticut did not contain a monetary loss requirement like other types of fraud statutes in Connecticut. *Id.* at 51. The Court reasoned that application of the categorical approach to the loss amount would result in too limited an application of the fraud ground with many offenders escaping removal.

Because an adjudicator can often discern marijuana weight through review of the record of conviction, it is more like the recidivist prosecution at issue in *Carachuri-Rosendo* than the loss amount in *Nijhawan*. Unlike the $10,000 loss, a factfinder can determine the quantity of marijuana from the record of conviction using the categorical approach. A review of state marijuana laws in November 1990, when Congress added the 30 grams exception,[10] demonstrates that statutes in at least 36 states quantified the weight of marijuana proscribed for possession through a mix of statutory elements, sentencing designations, and statutory presumptions. *See* Appendix. And in all 36 states, the relevant statutes would bar possession or

[7] For example, in Minnesota, a person is guilty of the offense of "possession or sale of small amounts of marijuana" if he or she unlawfully sells a small amount of marijuana for no remuneration, or unlawfully possesses a small amount of marijuana. Minn. Stat. § 152.027, subd. 4(a) (1990). A "small amount" of marijuana is statutorily defined as 42.5 grams or less. Minn. Stat. § 152.01, subd. 16 (1990).

[8] For example, in Indiana, a person is guilty of an A misdemeanor for knowingly or intentionally possessing marijuana, but guilty of a D felony if the amount is more than 30 grams. Indiana Code 35-48-4-11 (1990).

[9] The Supreme Court and the Board look at what the statute meant at the time Congress enacted it to determine its meaning. *See e.g., Nijhawan*, 557 U.S. at 39-40; *Matter of Sanchez-Lopez*, 26 I&N Dec. 71, 74 (BIA 2012).

[10] Immigration Act of 1990, Pub. L. No. 101-649, § 602(a), 104 Stat. 4978.

use of 30 grams or less,[11] in contrast to many fraud statutes with higher monetary thresholds that would not cover a $10,000 loss. In fact, in many of the 36 states the penalty was enhanced if the quantity possessed exceeded 30 grams or one ounce. *See* Appendix. Thus, application of the categorical approach to the 30 grams exception should not result in the overuse of the exception.[12] *Cf. Matter of Velasquez*, 24 I&N Dec. 503, 515 (BIA 2008) ("Furthermore, there is no reason to believe that application of the categorical approach will render section 237(a)(2)(E)(i) so underinclusive as to defeat the purpose of the statute. Most States have criminal statutes that are designed to punish child abuse in its various forms, and many of these statutes protect children exclusively.").

Another approach is to argue that the "strict" categorical approach applies in these cases, which remains an open question before the Supreme Court. Under the "strict" version of the modern categorical approach, courts simply compare the general or "generic" federal ground of removal with the minimum conduct necessary to violate the criminal statute. If every violation of the criminal statute necessarily falls within the federal removal ground, then a conviction under that criminal statute categorically triggers deportation. But if the criminal statute can be offended without engaging in conduct that falls within the generic deportation ground, the conviction will not be found to trigger removal regardless of the actual conduct that resulted in conviction. Under this analysis, the government can meet its burden only where the statute bars possession or use of more than 30 grams of marijuana, either as an element or sentence designation. The strength of this approach will depend on the Supreme Court's pending decision in *Moncreiffe v. Holder*, No. 11-702 (argued Oct. 10, 2012).[13]

V. 30 Grams Exception and "Under the Influence" Offenses

As discussed earlier, the Board found the 30 grams exception would apply to the possession of drug paraphernalia "where the paraphernalia was merely an adjunct to the offender's simple possession or ingestion of 30 grams or less of marijuana." *Matter of Davey,* 26 I&N Dec. at 40-41. In doing so, the Board explained, "that for purposes of section 237(a)(2)(B)(i), a crime 'involves' possession of 30 grams or less of marijuana for personal use if the particular acts that led to the alien's conviction were closely related to such conduct." *Id.* at 40. The Board reasoned that *because* paraphernalia is to help in the possession or ingestion of marijuana, the 30 grams exception applies to its possession.

[11] Many states proscribe an amount greater than and including 30 grams, e.g., 4 ounces or less.
[12] In fourteen states and under federal law, however, it is likely that the government may not be able to meet its burden because the convicting jurisdiction does not treat drug quantity as an element or relevant to sentencing gradation. *See* Appendix.
[13] The question in *Moncreiffe* is whether a conviction under a provision of state law that encompasses but is not limited to the distribution of a small amount of marijuana without remuneration constitutes an aggravated felony as a drug trafficking crime. The Petitioner argued that the strict categorical approach applies to determine whether the state marijuana distribution offense necessarily corresponds to a federal felony.

In footnote 3, the Board, however, contradicted this reasoning when noting that the 30 grams exception does not apply to the offense of being under the influence of marijuana because it is inherently more serious than simple possession.[14] It is unclear whether the statement in the footnote is a mistake or simply illogical, as being under the influence of or use of marijuana has traditionally come within the 30 grams exception. Practitioners should continue to argue that the 30 grams exception includes the offense of being under the influence of marijuana. *See Flores-Arellano v. INS*, 5 F.3d 360, 363 (9th Cir. 1993) (holding that a single conviction for being under the influence of marijuana under H&S § 11550 comes within the automatic exception to the deportation ground for simple possession of 30 grams or less of marijuana); *Medina v. Ashcroft*, 393 F.3d 1063, 1066 (9th Cir. 2005) (conviction for attempt to be under the influence of THC-carboxylic acid in violation of Nev. Rev. Stat. §§ 193.330 and 453.411 comes within the 30 gram exception to the ground of deportability); *see also Matter of Sum*, 13 I&N Dec 569 (BIA 1970) (historically treating possession offenses as more serious than use or being under the influence of a controlled substance); *cf. Matter of Martinez-Espinoza*, 25 I&N Dec. 118, 125 (BIA 2009) ("The 'use' of marijuana differs from 'simple possession,' but the two concepts are closely related. As we understand it, 'simple possession' denotes the exercise of dominion or control over marijuana with an eye to its use by the possessor. Indeed … Federal law… does not punish the use of marijuana at all, but instead treats it as subsumed by the concept of simple possession. This close relationship between 'simple possession' and 'personal use' of marijuana is also reflected in … an exception to deportability for any alien convicted of 'a single offense involving *possession for one's own use* of thirty grams or less of marijuana.'") (emphasis in original).

It may be that the Board was looking to *Nunez-Reyes v. Holder,* in which the Ninth Circuit held that being under the influence of controlled substance was not less serious than drug possession and thus would not be treated like an expungement under the Federal First Offender Act. 646 F.3d 684, 695 (9th Cir. 2011). The test used in Nunez-Reyes is distinct, however, and the BIA was arguably incorrect to import that test to the 30 grams exception, which employs the "involving" test and specifically contemplates "use" of marijuana.

VI. Suggestions for Criminal Defense Counsel

It is currently unclear what evidence factfinders will accept under *Matter of Davey*. In order to protect noncitizen defendants, where possible, criminal defense counsel should negotiate pleas to statutory possession of 30 grams or less of marijuana. Or when pleading to statutes that include possession of more than 30 grams, counsel should plead affirmatively to an amount of 30 grams

[14] *Matter of Davey,* 26 I&N Dec. at 40 n.3 ("A crime cannot 'involve' simple possession of a personal-use quantity of marijuana unless it bears a *direct* relationship to that conduct. Furthermore, it would defeat the purpose of the exception to interpret it as encompassing an offense that is inherently *more serious* than simple possession, such as distributing, manufacturing, transporting, or being under the influence of marijuana, or possessing marijuana in a prison or near a school.") (emphasis in original).

or less by noting the amount in the charging document or in plea colloquy. In other words, defense counsel should work to create a record of conviction that clearly protects the client and negates the need to consider evidence outside the record of conviction.

VII. Conclusion

In sum, the Board's application of the circumstance-specific inquiry to the 30 grams exception may have both positive and negative impacts for noncitizens with marijuana convictions. The positive is the potential for application of the 30 grams exception to multiple contemporaneous or closely-related marijuana convictions, including drug paraphernalia convictions. The negative is the potential harm to noncitizens convicted of marijuana possession where the record of conviction is ambiguous regarding quantity, despite an otherwise well-crafted plea. As no federal court has yet applied the circumstance-specific approach in a published opinion, practitioners should consider challenging *Matter of Davey*. In particular, practitioners should distinguish the 30 grams exception from the $10,000 loss associated with the fraud and deceit aggravated felony ground in *Nijhawan*. For the latest legal developments or litigation support on issues discussed in this advisory, contact the National Immigration Project at 617.227.9727 ext. 108 or sejal@nationalimmigrationproject.org.

APPENDIX: State Marijuana Laws in place on Nov. 29, 1990

State	Offenses Covering 30 Grams Exception	Quantity of Marijuana Covered	State Designation of Offense	Statute
Alabama	Possession of marijuana 2nd Degree	No amount specified,[i] but must be for personal use	Class A Misdemeanor	Ala. Code 1975 § 13A-12-214 (1991)
Alaska	Misconduct involving controlled substance 6th Degree	Less than 1.5lb (8oz)	Class B Misdemeanor	AS § 11.71.060(a)(1991)
Arizona	Possess or use of marijuana	Less than 1lb	Class 6 Felony	A.R.S. § 13-3405(a)(1) &(B)(1)(1991)
Arkansas	Possession of counterfeit or controlled substance - marijuana	No amount specified, but if more than 1 oz, statutory presumption of possession with intent to deliver	Class A Misdemeanor	Ark. Code Ann. § 5–64–401(c)&(d) (1991)
California	Possession of marijuana	28.5 grams or less More than 28.5 grams	Misdemeanor with max. fine of $100, no jail Max jail of 6 months and max fine of $500	Cal. Health and Safety Code 11357(b)(1991) Cal. Health and Safety Code 11357(c)(1991)
Colorado		1 oz[ii] or less More than 1 oz but less than 8 oz	Class 2 petty offense Class 1 Misdemeanor	C.R.S. 18-18-106 (1)(1991) C.R.S. 18-18-106 (4)(a)(I)
Connecticut	Possession of marijuana	less than 4 oz	Misdemeanor	C.G.S.A. § 21a-279(c)(1991)
Delaware	Possession of marijuana	No amount specified	Class B Misdemeanor	16 Del.C. § 4754 (1991)
Florida	Possession of marijuana	20 grams or less More than 20 grams	1st Degree Misdemeanor 3rd Degree Felony	Florida Criminal Code 893.13(1)(g)(1991) Florida Criminal Code 893.13(1)(f)(1991)
Georgia	Possession of marijuana	1 oz or less More than 1 oz	Misdemeanor Felony	Ga. Code Ann. §§ 16-13-2(b), 13-30(j)(1991) Ga. Code Ann. § 16-13-30(j)(1)(1991)
Hawaii	Promoting a	Less than 1 oz	Petty	Hi. Rev. Stat. Ann. § 712-

	Detrimental drug in the 3rd Degree Promoting a Detrimental drug in the 2nd Degree	 Between 1 oz - 1 lb	Misdemeanor Misdemeanor	1249 (1993) Hi. Rev. Stat. Ann. §§ 712-1248(1)(c)& 712-1247(1993)
Idaho	Possession of marijuana	3 oz or less	Misdemeanor	Idaho Code Ann. §§ 37-2732(e)(1991)
Illinois	Possession of marijuana	2.5g or less More than 2.5g - 10g More than 10g -30g	Class C Misdemeanor Class B Misdemeanor Class A Misdemeanor	IL ST CH 56 1/2 ¶ 704, § 4(a)(1991) IL ST CH 56 1/2 ¶ 704, § 4(b)(1991) IL ST CH 56 1/2 ¶ 704, § 4(c)(1991)
Indiana	Possession of marijuana	30g or less	Class A Misdemeanor	Indiana Code 35-48-4-11 (1990)
Iowa	Possession of marijuana	No quantity specified	Misdemeanor	Iowa Code Ann. § 204.401(3)(1991).
Kansas	Possession of certain drugs including marijuana	No quantity specified	Misdemeanor	Kan. Stat. Ann. 1990 Supp. § 65-4127b(a)
Kentucky	Possession of marijuana	Less than 8 oz	Max jail 90 days or max fine $250	Ken. Rev. Stat. § 218A.990(9) (added by 1990 Kentucky Laws H.B. 112 (Ch. 160) and repealed in 1992)
Louisiana	Possession of marijuana	60 lbs or less	Misdemeanor	Louisiana Rev. Stat. § 40:966(D)&(E)
Maine	Possession of marijuana	Useable amount, but if more than 1.25 oz, statutory presumption of criminally furnishing marijuana	Civil violation	22 M.R.S.A. § 2383 (1990) 17-A M.R.S.A. § 1106-(3)(A)(Supp 1992) (as amended by PL 1987, c. 535, § 4)
Maryland	Possession of a controlled substance	None specified	Misdemeanor with max jail of 1 year and/or max fine of $1000	MD. CODE ANN. Art. 27 §287(a)&(e)
Massachusetts	Possession of marijuana	No amount specified	Misdemeanor	Mass. Gen. Laws. ch. 94C, § 34 (1991)
Michigan	Possession of marijuana	No amount specified	Misdemeanor	M.C.L.A. 333.7403 (2)(d)(1991)

Minnesota	Possession or sale of small amounts of marijuana	42.5g or less	Petty Misdemeanor	Minn. Stat. §§152.027, subd. 4(a), 152.01, subd. 16 (small amount defined)(1990)
Mississippi	Possession of marijuana	1 oz or less More than 1oz – 1kg	Misdemeanor (1) Max fine $1,000 and/or max sentence of 1 year in county jail, or both; or (2) max fine of no $3,000 and/or max sentence of 3 years prison	Miss. Code Ann. § 41-29-139(c)(2)(A)(Supp. 1990) Miss. Ann. Code § 41-29-139(c)(2)(C)(Supp. 1990)
Missouri	Possession of marijuana	Less than 35g	Class A Misdemeanor	MO Rev Stat § 195.202(3)(1990)
Montana	Possession of marijuana	60g or less	Misdemeanor	Montana Code Ann. § 45-9-102(2)(1990)
Nebraska	Possession of marijuana	1 oz or less More than 1 oz but less than 1 lb	Infraction Misdemeanor	Nebraska Revised Statutes 28-416 (8)(1989) Nebraska Revised Statutes 28-416 (6)(1989)
Nevada	Unlawful Possession not for purpose of sale	No amount specified	Felony	Nev. Rev. Stat. Ann. § 453.336(2)(a)(1989)
New Hampshire	Possession of marijuana	No amount specified	Misdemeanor	N.H. Rev. Stat. § 318-B:2 & :26 (1990)
New Jersey	Possession of marijuana	50g or less More than 50g	Disorderly person offense Crime of 4th degree	NJSA 2C:35-10(a)(4)(1990) NJSA 2C:35-10(a)(3)(1990)
New Mexico	Possession of marijuana	1 oz or less More than 1 oz, but less than 8 oz	Petty misdemeanor Misdemeanor	New Mexico Stat. Ann. § 30-31-23(B)(1) (NM LEGIS 19 (1990)) New Mexico Stat. Ann. § 30-31-23(B)(2)(NM

				LEGIS 19 (1990))
New York	Unlawful possession of marijuana Possession of marijuana 5th Degree	Interpreted by case law as covering 25g or less More than 25g – 2oz OR marijuana in a public place	Violation Class B misdemeanor	NYPL 221.05 (1990) NYPL 221.10 (1990)
North Carolina	Possession of marijuana	0.5 oz or less More than 0.5 oz, but less than 1.5oz	Misdemeanor with max jail of 30 days and/or $100 fine with imprisonment suspended General misdemeanor	NC Gen Stat. § 90-95(d)(4)(1990) NC Gen Stat. § 90-95(d)(4)(1990)
North Dakota	Possession of a controlled substance	Less than 0.5 oz 0.5 oz – less than 1 oz 1 oz or more	Class B Misdemeanor Class A Misdemeanor Felony	ND Century Code 19-03.1-23(1990) ND Century Code 19-03.1-23(1990) ND Century Code 19-03.1-23(1990)
Ohio	Possession of marijuana	Less than 100g 100g or more	Minor Misdemeanor Misdemeanor of the 4th degree	Ohio Revised Code §2925.11(C)(3)(1990) Ohio Revised Code §2925.11(C)(3)(1990)
Oklahoma	Possession of marijuana	No amount specified	Misdemeanor	63 Okl. St. Ann. § 2-402(B)(2)(1990)
Oregon	Possession of marijuana	Less than 1 oz Any other amount	Violation Felony	O.R.S. § 475.992(4)(f) O.R.S. § 475.992(4)
Pennsylvania	Possession of marijuana	30g or less Any other amount	Misdemeanor, max jail 30 days and/or max fine $500 Misdemeanor, max jail 1 year and/or max fine $5000	35 Pa. Con. Stat.§ 780-113(a)(31) & (g)(1990) 35 Pa. Con. Stat.§ 780-113(a)(16) & (b)(1990)
Rhode Island	Possession of	Less than 1 kg	Misdemeanor	Rhode Island General

	marijuana	Between 1 and 5 kg	Felony	Laws, § 21-28-4.01(c)(1)(B)(1990) § 21-28-4.01.1(1990)
South Carolina	Possession of marijuana	28g or less More than 28g is prima facie evidence of possession with intent to distribute	Misdemeanor Felony	S.C. Code Ann. § 44-53-370(d)(1990) S.C. Code Ann. § 44-53-370(d)(1990)
South Dakota	Possession of marijuana	Less than 8 oz More than 8 oz but less than 16 oz	Class 1 Misdemeanor Felony	S.D. Cod. Laws § 22-42-6 (1990) S.D. Cod. Laws § 22-42-6 (199)
Tennessee	Simple possession or casual exchange	No amount indicated	Class A misdemeanor	Tennessee Code Ann. § 39-17-418(a)(1990)
Texas	Possession of marijuana	2 oz or less	Class B misdemeanor	Texas Stat. and Code Ann. § 481.121 (1991)
Utah	Possession of marijuana	Less than 1 oz More than 1 oz but less than 1 lb	Class B Misdemeanor Class A Misdemeanor	Utah Code Ann. § 58-37-8(2)(e)(1990) Utah Code Ann. § 58-37-8(2)(b)(iii)(1990)
Vermont	Possession of marijuana	Less than 2 oz 2 oz or more	Misdemeanor Felony	18 V.S.A. § 4230 (a)(1) (1990) 18 V.S.A. § 4230 (a)(2)(1990)
Virginia	Possession of marijuana	No amount specified	Misdemeanor	Va. Code Ann. § 18.2-250.1 (1990)
Washington	Possession of marijuana	40g or less More than 40g	Misdemeanor Felony	Wa. Rev. Code Ann. § 69.50.401(d)(1990) Wa. Rev. Code Ann. § 69.50.401(d)(1990)
W. Virginia	Possession of controlled substance	Less than 15 grams	Conditional discharge (charge dismissed without adjudication of guilt if conditions completed under § 60A-4-407)	W. Va. Code, § 60A-4-401(c) (1990)

		Any other amount	Misdemeanor	W. Va. Code, § 60A-4-401(c)(1990)
Wisconsin	Possession of controlled substance, including marijuana	No amount specified	Misdemeanor	Wisconsin Stat. Ann. § 161.41(3)(1990)
Wyoming	Possession of controlled substance	No amount specified	Misdemeanor	Wyoming Stat. Ann. § 35-7-1031(c)(1990)
Federal law	Simple possession of controlled substance	No amount specified	Misdemeanor	21 U.S.C. § 844 (1991)

[i] In a total of 14 states and under federal law, the statutes barring marijuana possession or use did not in any form designate the quantity of marijuana proscribed. These states are Alabama, Delaware, Iowa, Kansas, Maryland, Massachusetts, Michigan, Nevada, New Hampshire, Oklahoma, Tennessee, Virginia, Wisconsin, and Wyoming.

[ii] 1 ounce is roughly 28.34 grams