U.S. DEPARTMENT OF HOMELAND SECURITY
IMMIGRATION AND CUSTOMS ENFORCEMENT
ORLANDO IMMIGRATION COURT

IN THE MATTER OF: [redacted] Respondent	File Number [redacted] DETAINED WITH ICE BAKER COUNTY SHERIFF'S OFFICE

RESPONDENT'S BRIEF IN OPPOSITION TO THE APPLICATION OF THE AGGRAVATED FELONY BAR TO HIS REQUEST FORA DISCRETIONARY GRANT OF CANCELLATION OF REMOVAL

Comes now [redacted], through Counsel, with his brief opposing the application of the aggravated felony bar to a determination of eligibility for a discretionary grant of cancellation of removal. On September 8, 2011, the Honorable James K. Grim ordered Respondent to draft this brief in support of his position and submit the brief to him on or before the next Master Calendar Hearing on September 19, 2011. Mr. [redacted] timely complies with the Judge's Order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

[redacted] a native and citizen of [redacted] has been lawfully admitted for permanent residence since being [redacted] on or about September 30, 2002. See exhibits previously submitted with Respondent's Motion for Bond Hearing.

On March 14, 2011, [redacted] pled guilty to a violation of FLA. STAT. §893.13(a)(2) which states it is unlawful to sell, manufacture or deliver a controlled substance as referenced in FLA. STAT. §893.03(1)(c), which:

(1) Includes a number of controlled substances appearing in 21 C.F.R.

§1308.1 Schedules I through V, such as cannabis (or marijuana), and at least one, salvia divinorum, which is not;

(2) Does not include a minimum amount of marijuana required as an element of the crime

Mr. [redacted] received a sentence of six months after pleading guilty to a violation of FLA. STAT. §893.13(a)(2) and has remained in custody since that time, through August 13, 2011 to complete his sentence on the criminal matter and from on or about August 16, 2011 in detention while in removal proceedings.

The government served a Notice to Appear upon [redacted] on or about March 24, 2011, alleging [redacted] was convicted of [redacted]" On or about August 30, 2011, the government added a charge that Respondent had, through the conviction referenced in the original NTA, also been [redacted]" as defined in I.N.A. §237(a)(2)(A)(iii).

On September 8, 2011, during a bond hearing before the Immigration Judge (IJ) by televideo in Baker County and Orlando, Florida, the government submitted its Notice to Appear, the I-213, and I-261 to show that Respondent had been convicted of a controlled substance violation and therefore subject to mandatory custody. The IJ agreed and ordered Respondent remain in custody and declined to set bond. The government further argued that it expected to meet the government's burden of proof to wit: "clear and convincing" evidence that the controlled substance violation was also an aggravated felony conviction and therefore [redacted] was ineligible for a discretionary grant of cancellation of removal.

Respondent files this response to the government's argument.

ARGUMENT

I. Illicit Trafficking in a Controlled Substance is an Aggravated Felony

I.N.A. §101(a)(43)(B) states "aggravated felony" means illicit trafficking in a controlled substance (as defined in section 102 of the Controlled Substances Act), including a drug trafficking crime (as defined in section 924(c) of title 18, United States Code. The Supreme Court in *Lopez vs. Gonzales* 549 U.S. 47, 60 (2006) 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."

II. The Supreme Court Has Explicitly Stated that Illicit Trafficking in a Controlled Substance is a Generic Offense

Nijhawan v. Holder, 129 S.Ct 2294 (2009) is the latest enunciation of the Supreme Court on this matter and is controlling authority. The Court in *Nijhawan* states the two permissible interpretive approaches to take when making a determination as to whether a state conviction for a particular crime equates to an "aggravated felony" under the INA is the categorical approach in the case of generic offense or the modified categorical approach in the case of circumstance-specific offenses. The Supreme Court specifically lists "'illicit trafficking in a controlled substance'" as a generic offense:

> *The "aggravated felony" statute [INA 101(a)(43)(B); 8 U.S.C. 1101(a)(43)] lists several of its "offenses" in language that must refer to generic crimes... Subparagraph (B) lists "illicit trafficking in a controlled substance." See Gousse v. Ashcroft, 339 F.3d 91, 95-96 (C.A.2 2003) (applying categorical approach); Fernandez v. Mukasey,*

544 F.3d 862, 871-872 (C.A. 7 2008) (same); Steele v. Blackman, 236 F.3d 130, 136 (C.A.3 2001) (same). Nijhawan v. Holder, 129 S.Ct 2294, 2300 (2009).

The Court then goes on to distinguish circumstance-specific offenses contained within the aggravated felony statute to include P, M(i), and likely (K)(ii).

III. A Generic Offense Requires the Application of the Categorical Method to Determine Whether the Conviction is an Aggravated Felony

The Court in *Nijhawan* reiterates its prior holdings in *Taylor v. United States*, 495 U.S. 575 (1990); *Chambers v. U.S.*, 555 U.S. 122 (2009).

> *In Taylor and James we held that ACCA's [Armed Career Criminal Act] language read naturally uses the word "felony" to refer to a generic crime as generally committed. Chambers, supra, at ____, 129 S.Ct., at 690691 (discussing Taylor, 495 U.S., at 602, 110 S.Ct. 2143); James, supra, at 201-202, 127 S.Ct. 1586. The Court noted that such an interpretation of the statute avoids "the practical difficulty of trying to ascertain" in a later proceeding, "perhaps from a paper record" containing only a citation (say, by number) to a statute and a guilty plea, "whether the [offender's] prior crime... did or did not involve," say, violence. Chambers, supra, at ____, 129 S.Ct., at 690-691...Thus in James, referring to Taylor, we made clear that courts must use the "categorical method" to determine whether a conviction for "attempted burglary" was a conviction for a crime that, in ACCA's language, "involved conduct that presents a serious potential risk of physical injury to another." §924€(2)(B)(ii). That method required the court to "examine, not the unsuccessful burglary the defendant attempted on a particular*

occasion, but the generic crime of attempted burglary." Chambers, supra at ____, 129 S.Ct., at 690-691 (discussing James, supra at 204-206, 127 S.Ct. 1586).

IV. Only in a Narrow Range of Cases, May a Reviewing Court Go Beyond the Mere Fact of Conviction When Applying the Categorical Approach (or the Modified Categorical Approach)

Consistent with Congressional intent and acknowledging the fallibility of the record of conviction both in terms of the charging document merely constituting the State's theory of a case as well as the reality of hard choices in today's system of plea bargaining and the prosecution's promise to throw the book at a defendant who forces the state to trial, in *Taylor*, the Supreme Court held that the trial court was to look only to the fact of conviction and the statutory definition of the prior offense. The Court went on to state the categorical approach may permit the sentencing court to go beyond the mere fact of conviction only in a narrow range of cases where a jury was actually required to find all the elements of the generic crime. The example cited by the Court:

> *For example, in a State whose burglary statutes [are broader than the federal statute and include for example]... entry of an automobile as well as a building, if the indictment or information and jury instructions show that the defendant was charged only with a burglary of a building, and that the jury necessarily had to find an entry of a building to convict, then the Government should be allowed to use the conviction for enhancement.*
>
> *Taylor v. U.S.*, 495 U.S. 575, 602 (1990).

V. Respondent Presents Reasonable Challenges to the Record of Conviction, Rendering the Record Unreliable and therefore the Modified Categorical Approach

Inapplicable

In *Nijhawan*, the Court refers to both the categorical and modified categorical approaches and cites *Gousse v. Ashcroft*, 339 F.3d 91 (2d Cir. 2003). *Gousse* states

> *Where the record of conviction thus supplies an element of the offense, a court may find that element satisfied* ***absent any reasonable challenge to the validity of the record****. See Kuhali v. Reno, 266 F.3d 93, 106 (2d Cir.2001); see also Hamdan v. INS, 98 F.3d 183, 189 (5th Cir.1996) ("The general rule is that, absent specific evidence to the contrary in the record of conviction, the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute." (citing United States ex rel. Guarino v. Uhl, 107 F.2d 399 (2d Cir.1939) (L.Hand, J.) [emphasis added].*

If this court finds the record of conviction supplies an element of the federal offense, and therefore finds the requisite federal offense element/s satisfied for purposes of making an aggravated felony determination, Respondent makes following challenges to the validity of such record and argues the record is unreliable and therefore unable to be considered.

1. That the official Duval County, Florida Clerk of Courts docket shows the charge to be: "S893.13(1)(A)(**24**) SALE **OR DELIVERY** OF CANNABIS [emphasis added]". There is no such section as S893.13(1)(A)~~(24)~~. **Exh. A**. *Docket Entry on the Duval County Clerk of Courts Website.*

2. That the official charging information listed on the Jacksonville Sheriff's Office website, the same agency that investigated and arrested [redacted]

and provided the affidavit upon which his arrest warrant issued has continuously, since [redacted] was incarcerated on [redacted] through his release from their custody on or around [redacted], shown the charge to be:

"S893.13(1)(A)(2) Description: **ARMED**: SELL MARIJUANA." Emphasis added. **Exh. B.** *Jacksonville Sheriff's Office, Department of Corrections, JSO Inmate Information Search Report.* There was never any allegation of any kind of weapon being used in this matter. And, nowhere in §893.13 of the FLA. STAT. is a weapon mentioned. Even if this charge applied to [redacted], which it does not, this description is nonsensical. Either one would be charged with selling marijuana or committing an armed robbery, not both.

3. [redacted] made a FOIA request for documents relating to an Internal Affairs Investigation conducted by the Office of Professional Responsibility for ICE. The Internal Affairs investigation related to the misconduct of the two ICE agents who were originally assigned this removal matter. During the course of [redacted] incarceration, the ICE agents sought [redacted] out to become a confidential informant despite the fact that he has no other criminal history. When [redacted] repeatedly invoked his right to counsel, the ICE agents steadfastly refused to abide by [redacted] invocations of his right to counsel and instead responded by implying that the undersigned counsel was dead, would soon be dead, or was at risk of being dead, and then continued to question [redacted]. The

ICE agents allegedly stated the following to [redacted] "We can do anything we want. We can say anything we want. We are the ones in control." The ICE officers reportedly told [redacted] they could make it rough for [redacted] The response to the FOIA request was not that such documents were not subject to a FOIA request, but that no documents related to an internal affairs investigation exist. Obviously, this is a misstatement of fact, given that undersigned counsel and [redacted] both were interviewed by the OPR internal affairs investigator (Agent Sarah Rideout), that Agent Rideout and undersigned counsel corresponded with one another to coordinate the interviews, and that undersigned counsel provided Agent Rideout with a written chronology of events after the interviews pursuant to Agent Rideout's request. **Exh. C.** *FOIA Request and Appeal.*

In this matter, four agencies were involved in the creation of charging documents, the record of conviction, and removal documents relating to [redacted] Jacksonville Sheriff's Office, State Attorney's Office, Duval County Clerk of Courts and Department of Homeland Security (ICE). Three of those four agencies have made serious and substantive errors in their creation of the records relation to [redacted] conviction and one of those agencies, ICE, through its agents, has implied it would "do anything" or "say anything" in relation to this removal hearing if [redacted] did not become their confidential informant. Those allegations of constitutional violations on the part of ICE agents were serious enough to lead to a week-long series of interviews conducted by a 23 year veteran member of ICE pulled off her detail in Atlanta, Georgia.

Given the reasonable challenges to the record, Respondent contends the record of conviction is unreliable and therefore cannot be considered in determining whether a conviction under FLA. STAT. §893.13(1)(A)(2) is an aggravated felony. As such, this court must apply the strictly categorical approach and "the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute." *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir.1939).

VI. The Minimum Conduct Necessary to Sustain a Conviction under FLA. STAT. §893.13(1)(A)(2) Is Not an Aggravated Felony

The minimum conduct necessary to sustain a felony conviction under FLA. STAT. §893.13(1)(A)(2) include the following:

1. Mere delivery of <u>any amount</u> of cannabis for no remuneration; and
2. Illicit trafficking in a substance that is <u>not</u> defined as a controlled substance in section 102 of the Controlled Substances Act.

The Supreme Court established in *Lopez v. Gonzales* that mere delivery of a "small amount of marihuana for no remuneration" is a federal misdemeanor. 21 U.S.C. §841(b)(1)(D). By incorporation, Salvia Divinorum is defined as a controlled substance in FLA. STAT. §893.13(1)(A)(2). Salvia Divinorum is a perennial herb recently brought to public attention by Miley Cyrus. It is a member of the mint family and is <u>not</u> included in 21 C.F.R. §1308.1 Schedules I-V. The DEA specifically states: "Currently, neither Salvia divinorum nor any of its constituents, including salvinorin A, are controlled under the federal Controlled Substances Act (CSA)." **Exh. D.** *U.S. Drug Enforcement Administration Website Description of Salvia Divinorum.*

The Supreme Court in *Lopez vs. Gonzales* 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." *Lopez vs. Gonzales*, 549 U.S. 47, 60 (2006). The minimum level of conduct required for a felony conviction under FLA. STAT. §893.13(2)(1)(A) include two offenses that clearly would not be punishable as a felony under the Controlled Substances Act. As such, under the categorical approach, [redacted] conviction under FLA. STAT. §893.13(2)(1)(A) does equate to an aggravated felony as defined in I.N.A. §237(a)(2)(A)(iii).

CONCLUSION

In 2009, the Supreme Court reiterated in *Nijhawan v. Holder* that illicit trafficking in a controlled substance is a generic offense requiring application of the categorical approach, distinguishable from circumstance-specific offenses in which the reviewing court may go beyond the mere fact of conviction.

In the *Nijhawan* opinion, the Court ratified its prior holdings in *Taylor v. U.S.*, 495 U.S. 575 (1990), and *Chambers v. U.S.*, 555 U.S. 122 (2009). The *Taylor* Court stated that the categorical approach may permit the sentencing court to go beyond the mere fact of conviction only in a narrow range of cases where a jury was actually required to find all the elements of the generic crime, ***absent any reasonable challenge to the validity of the record***. *Nijhawan* citing *Gousse v. Ashcroft*, 339 F.3d 91, 95-96 (C.A.2 2003).

Respondent has made more than a reasonable challenge to the record of conviction to show that such record or any part thereof is unreliable. As such, the record of conviction may not properly be considered in determining whether a conviction under

FLA. STAT. §893.13(1)(A)(2) is an aggravated felony. As such, this court must apply the strictly categorical approach and "the statute must be read at the minimum criminal conduct necessary to sustain a conviction under the statute." *United States ex rel. Guarino v. Uhl*, 107 F.2d 399 (2d Cir.1939) .

The minimum conduct necessary to sustain a felony conviction under FLA. STAT. §893.13(1)(A)(2) include the delivery of a small amount of cannabis for no remuneration; and illicit trafficking in [redacted] Such convictions would not equate to federal felonies. Therefore, [redacted]s conviction under FLA. STAT. §893.13(2)(1)(A) does equate to an aggravated felony as defined in I.N.A. §237(a)(2)(A)(iii).

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CERTIFICATE OF SERVICE

This is to certify that a true and accurate copy of the BRIEF IN OPPOSITION TO THE APPLICATION OF THE AGGRAVATED FELONY BAR TO RESPONDENT'S REQUEST FORA DISCRETIONARY GRANT OF CANCELLATION OF REMOVAL, has been duly delivered via Fedex Courier on this 19th day of Septmeber, 2011, to:

1. **Immigration and Customs Enforcement, Baker County Sheriff's Office,** ATTN: Deportation Officer, 1 Sheriffs Office Dr., Macclenny, FL 32063

2. **Orlando Immigration Court,** 3535 Lawton Rd., Suite 200, ATTN: Clerk of Court, Orlando, FL 32803

3. **Office of the Chief Counsel – Orlando,** U.S. Department of Homeland Security, 3535 Lawton Rd., Suite 100, Orlando, FL 32803

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Susan Pai