Aggravated Felony

The term aggravated felony includes, inter alia, "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). A controlled substance offense qualifies as an aggravated felony for immigration purposes only (1) if it contains a trafficking element; or (2) if it would be punishable as a felony under federal drug laws. *Salviejo-Fernandez v. Gonzales*, 455 F.3d 1063, 1066 (9th Cir. 2006) (citing *Cazarez-Gutierrez v. Ashcrof*t, 382 F.3d 905, 912 (9th Cir. 2004)).

A. "Controlled Substance" as Defined in the Controlled Substances Act

Section 802(6) of Title 21 defines the term "controlled substance" as a "drug or other substance, or immediate precursor" included in the schedules attached to the subchapter. See 21 U.S.C. § 802(6). The Ninth Circuit Court of Appeals has recognized that "California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA [Controlled Substances Act]." *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007). For example, whereas the California drug schedules include both optical and geometrical isomers, the schedules attached to the CSA list only optical isomers. Id.

B. Illicit Trafficking

The general phrase "illicit trafficking" is left undefined by INA § 101(a)(43)(B). "Essential to the term . . . is its business or merchant nature, the trading or dealing of goods . . . ." *Matter of Davis*, 20 I&N Dec. 536, 541 (BIA 1992). Applying the "everyday understanding" of this term, the U.S. Supreme Court has similarly concluded that trafficking must involve "some sort of commercial dealing." *See Lopez v. Gonzales*, 127 S. Ct. 625, 630 (2006). The Ninth Circuit requires that trafficking be an element of the crime. *Salviejo-Fernandez*, 455 F.3d at 1066 (citing *Cazarez-Gutierrez*, 382 F.3d at 912).

Convictions that do not require the transfer or exchange of money or other consideration will not fall under the term "illicit trafficking." For example, a defendant can be convicted under section 11360(a) of the California Health and Safety Code for simple transportation of marijuana for personal use. *Rivera-Sanchez*, 247 F.3d at 908 (citing *People v. Rogers*, 486 P.2d 129, 132 (Cal. 1971) (en banc) and *People v. Eastman*, 13 Cal. Rptr. 2d 608, 612-13 (Cal. App. 1993)). The Ninth Circuit recognized that a conviction under this statute "does not depend on a profit motive: The statute also proscribes purely nonprofit activities." *Id*. (citing People ex rel. *Lungren v. Peron*, 70 Cal. Rptr. 2d 20, 25-27 (Cal. App. 1997)). A conviction under a California statute that encompasses transporting a controlled substance is therefore not categorically "illicit trafficking."

C. Drug Trafficking Crime

Section 924(c) of Title 18 of the United States Code defines the "drug trafficking crime" subcategory of "illicit trafficking," in relevant part, as "any felony punishable under the Controlled Substances Act (21 U.S.C. 801 et seq.), the Controlled Substances Import and Export Act (21 U.S.C. 951 et seq.), or [the Maritime Drug Law Enforcement Act (46 U.S.C. App. 1901 et seq.)]." See 18 U.S.C. § 924(c)(2). The Supreme Court has held that the phrase "any felony punishable under the Controlled Substances Act" requires that the offense be punishable as a felony under federal law, irrespective of the classification it receives under state law. *Lopez*, 127 S. Ct. at 630-32. Offenses punishable by a maximum term of imprisonment of more than one year are felonies under the CSA. 21 U.S.C. § 802(44); 18 U.S.C. § 3559(a). See also *Lopez*, 127 S. Ct. at 631 n.7.

1. Simple Possession

Mere possession of a controlled substance is punishable by a maximum term of imprisonment of not more than a year and is therefore not a felony under the CSA. 21 U.S.C. § 844(a); *Lopez*, 127 S. Ct. at 629.

2. Simple Possession of Cocaine Base or Flunitrazepam

Possession of more than five grams of a mixture or substance that contains cocaine base or any amount of flunitraze-pam (commonly known as the "date-rape drug") is punishable by a maximum term of imprisonment of not more than twenty years and not more than three years, respectively. 21 U.S.C. § 844(a). The Supreme Court recognized in dicta in *Lopez*, 127 S. Ct. at 630 n.6, that because possession of cocaine base is punishable as a felony under the CSA, it "clearly fall[s] within" the definition of an aggravated felony under INA § 101(a)(43)(B).

3. Recidivist Simple Possession

Section 844(a) of Title 21 of the United States Code provides, in relevant part, that a defendant who knowingly or intentionally possesses a controlled substance may be "sentenced to a term of imprisonment of not more than 1 year, . . . except that if he commits such offense after a prior conviction under [the CSA] 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 more than 2 years." 21 U.S.C. § 844(a). The Supreme Court recently recognized in dicta that recidivist possession of a controlled substance is punishable as a felony under the CSA and falls accordingly within the drug trafficking definition:

> Of course, we must acknowledge that Congress did counterintuitively define some possession offenses as "illicit trafficking." Those state possession crimes that correspond to felony violations of one of the three statutes enumerated in § 924(c)(2) such as possession of cocaine base *and recidivist possession*, clearly fall within the definitions used by Congress in 8 U.S.C. § 1101(a)(43)(B) and 18 U.S.C. § 924(c)(2), regardless of whether these federal possession felonies or their state counterparts constitute "illicit trafficking in a controlled substance" or "drug trafficking" as those terms are used in ordinary speech. But this coerced inclusion of a few possession offenses in the definition of "illicit trafficking" does not call for reading the statute to cover others for which there is no clear statutory command to override ordinary meaning.

Lopez, 127 S. Ct. at 630 n.6 (emphasis added).

This dicta may prompt the Ninth Circuit to reevaluate its holding in *Ferreira v. Ashcroft*, 382 F.3d 1045 (9th Cir. 2004) that a second simple possession offense does not constitute an aggravated felony under INA § 101(a)(43)(B). See *Matter of Carachuri-Rosendo*, 24 I&N Dec. 382, 386 n.3 (BIA 2007) (recognizing that Ferreira may be inconsistent with *Lopez*). The petitioner in Ferreira had been convicted of possession of marijuana under Wyoming law and subsequently of possession of a controlled substance under section 11377(a) of the California Health and Safety Code. *Id*. at 1048. Because only the "sentence available for the crime, without considering separate recidivist sentencing enhancements," may be taken into account in determining whether an offense is an aggravated felony, the Ninth Circuit declined to consider the sentencing enhancements under federal law for recidivist possession. See *id.* at 1050 (quoting *United States v. Corona-Sanchez*, 291 F.3d 1201, 1209 (9th Cir. 2002) (en banc)). Accordingly, it concluded that the petitioner's second simple possession offense was not an aggravated felony under INA § 101(a)(43)(B) because the maximum penalty for generic simple possession under the CSA is one year and it is therefore not punishable as a felony under federal law (1) . *Id.*

Even if the Ninth Circuit were to reevaluate its holding in *Ferreira*, several requirements must be met before a second state simple possession offense will

correspond to felony recidivist possession under the CSA. A conviction for recidivist possession under the CSA requires that the defendant be convicted of the first CSA offense or state "drug, narcotic, or chemical offense" (2) and that this conviction be "final" (3) before he committed the second simple possession offense. See 21 U.S.C. § 844(a). See also *United States v. Ballesteros-Ruiz*, 319 F.3d 1101, 1104 (9th Cir. 2003) ("[I]n order to be treated as a recidivist under the federal statute, a defendant must commit not just a second offense, but a second offense after a prior conviction.") (emphasis in original, internal quotation marks omitted); *United States v. Robles-Rodriguez*, 281 F.3d 900 (9th Cir. 2002).

Moreover, as the Board of Immigration Appeals ("Board") recently concluded in *Carachuri-Rosendo*, 24 I&N Dec. at 391, "absent circuit law to the contrary—the respondent's status as a recidivist drug possessor must have been admitted or determined by a court or jury within the prosecution for the second drug crime." See also *Matter of Thomas*, 24 I&N Dec. 416, 421 (BIA 2007). The Board explained that the state procedural laws governing the prosecution of recidivist possession offenses do not have to be an exact copy of the CSA; however, they "must correspond to the CSA's treatment of recidivism by providing the defendant with notice and an opportunity to be heard on whether recidivist punishment is proper." *Carachuri-Rosendo*, 24 I&N Dec. at 391 (citing *Oyler v. Boles*, 368 U.S. 448, 452-53 (1962)). The Board has thus far declined to consider the following issues: (1) whether the state criminal procedures also had to have afforded the respondent an opportunity to challenge the validity of the first conviction, as required by the CSA (21 U.S.C. § 851(c)); (2) the timing of notice; and; (3) the burdens or standards of proof applicable to a defendant's challenge to his status as a recidivist. See *id*. at 394 n.10 (citation omitted).

4. Transportation

Section 841(a) of Title 21 of the United States Code prohibits "for any person knowingly or intentionally to manufacture, distribute, dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance." 21 U.S.C. § 841(a). A conviction under 21 U.S.C. § 841 is punishable by more than one year's imprisonment and is therefore classified as a felony under federal law, except where the controlled substances is one listed in Schedule V of the CSA. See 8 U.S.C. § 841; *Ballesteros-Ruiz*, 319 F.3d at 1103.

"Distribute" is defined by the CSA as "to deliver (other than by administering or dispensing) a controlled substance or a listed chemical." 21 U.S.C. § 802(11). In turn, "delivery" is defined as "the actual, constructive, or attempted transfer of a controlled substance, or a listed chemical whether or not there exists an agency relationship." 21 U.S.C. § 802(8). Sharing drugs with another person constitutes distribution under federal law, even if the defendant did not benefit financially from the exchange. *United States v. Ramirez*, 608 F.2d 1261, 1264 (9th Cir. 1979). Nonetheless, a state statute prohibiting only the transportation of a controlled substance, without requiring its transfer between at least two individuals, arguably would not correspond to 21 U.S.C. § 802(11).

5. Attempt or Conspiracy

The CSA prohibits the attempt or conspiracy to commit any offense set forth therein. See 21 U.S.C. § 846; Leyva-Licea v. INS, 187 F.3d 1147, 1150 (9th Cir. 1999). An agreement between two or more parties constitutes a "conspiracy" under federal law, irrespective of whether an overt act is committed by any of the conspirators in pursuance of the agreement. United States v. Shabani, 513 U.S. 10, 13-16 (1994).

6. Solicitation

Whereas the CSA covers attempt and conspiracy, it does not mention solicitation. *See Leyva-Licea*, 187 F.3d at 1150. Nor does it contain "any broad catch-all provision that could even arguably be read to cover solicitation." *Id*. The Ninth Circuit has therefore concluded that convictions under any state law statute prohibiting solicitation or an "offer to," such as sections 11360(a) and 11379(a) of the California Health and Safety Code, are not categorically "drug trafficking crimes." *See Sandoval-Lua v. Gonzales*, 499 F.3d 1128 (9th Cir. 2007); *United States v. Rivera Sanchez*, 247 F.3d 905, 908-09 (9th Cir. 2001). In doing so, it has not distinguished between generic and specific solicitation statutes. Compare *Leyva-Licea*, 187 F.3d at 1150 with *Sandoval-Lua*, 499 F.3d at 1128 and *Rivera-Sanchez*, 247 F.3d at 908-09.

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1. The Ninth Circuit has also reached this conclusion in the federal criminal context. *See United States v. Ballesteros-Ruiz*, 319 F.3d 1101, 1105 (9th Cir. 2003) (finding that it must "disregard § 844's penalties for repeat offenders and treat second and third offenses as if they were a defendant's first" in determining whether the defendant had committed an aggravated felony for sentencing purposes) (internal quotation omitted); *United States v. Arellano-Torres*, 303 F.3d 1173, 1178 (9th Cir. 2002) (same), abrogated on other grounds by *United States v. Figueroa-Ocampo*, 494 F.3d 1211 (9th Cir. 2007).

2. The CSA defines the term "drug, narcotic, or chemical offense" as "any offense which proscribes the possession distribution, manufacture, cultivation, sale, transfer, or the attempt or conspiracy to possess, distribute, manufacture, cultivate, sell or transfer any substance the possession of which is prohibited [under the CSA]." 21 U.S.C. § 844(c).

3. A conviction becomes final under federal law after a judgment has been entered and appeal rights have been exhausted. *See Griffiths v. Kentucky*, 479 U.S. 314, 321 (1987).