No. 11-50065

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

JOSE DAVID LEAL-VEGA,

Defendant-Appellee.

GOVERNMENT'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

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I

ISSUES PRESENTED

A. Whether a California conviction for possession of a controlled substance for sale categorically qualifies as a "drug trafficking offense" under Sentencing Guidelines § 2L1.2, notwithstanding that California law recognizes more substances as controlled substances than does federal law, where the Guidelines do not define "drug trafficking offense" to limit it to particular drugs.

B. Whether, if such a conviction does not categorically qualify as a "drug trafficking offense," defendant's prior conviction qualifies under the modified categorical approach, where the charging document indicates that defendant possessed

tar heroin -- a controlled substance under both federal and California law.

II

STATEMENT OF THE CASE

A. NATURE OF THE CASE, COURSE OF THE PROCEEDINGS, AND DISPOSITION IN THE DISTRICT COURT

Defendant Jose David Leal-Vega ("defendant") pleaded guilty to illegal reentry following deportation, 8 U.S.C. § 1326(a), (b)(1). (CR 12, 21; GER 70-99.)[1] At sentencing, the district court (the Honorable Philip S. Gutierrez) found that defendant's prior conviction for possession of a controlled substance for sale, in violation of California Health & Safety Code section 11351, was not a "drug trafficking offense" under Sentencing Guidelines § 2L1.2(B)(1)(A)(i) and therefore declined to impose the 16-level enhancement prescribed in that section. (GER 42-62; RT 1/24/11: 3-23.) Applying only the four-level enhancement for a prior felony conviction, USSG § 2L1.2(b)(1)(D), the court calculated a guideline range of 24 to 30 months and sentenced

[1] "CR" refers to the Clerk's Record and is followed by the document control number. "GER" refers to the Government's Excerpts of Record and is followed by the page number. "RT" refers to the Reporter's Transcript of Proceedings and is followed by the date and page number. "PSR" refers to the Presentence Investigation Report, "PSR Add." to the Addendum to the PSR, and "Rec. Letter" to the sentence recommendation letter prepared by the Probation Office; each is followed by the applicable page or paragraph number.

defendant to 30 months' imprisonment. (GER 62, 64; RT 1/24/11: 23, 25.) The government appeals defendant's sentence.

B. JURISDICTION, TIMELINESS, AND BAIL STATUS

The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 18 U.S.C. § 3742. The judgment was entered on January 27, 2011. (CR 41.) On February 24, 2011, the government filed a timely notice of appeal. (CR 42; GER 225); Fed. R. App. P. 4(b)(1)(B)(i). On July 11, 2011, the Solicitor General approved this appeal, in accordance with 18 U.S.C. § 3742(b). Defendant is in custody serving the 30-month sentence imposed in this case.

C. STATEMENT OF FACTS

Defendant pleaded guilty without a plea agreement to a single-count information charging illegal reentry following deportation in violation of 8 U.S.C. § 1326. (CR 12, 21.) The information charged and defendant admitted that he was deported following his felony conviction for possession of a controlled substance for sale, in violation of California Health & Safety Code section 11351. (GER 71, 95-97.)

The criminal complaint underlying the California conviction charged defendant in Count 1 with "possess[ing] for sale and purchas[ing] for purposes of sale a controlled substance, to wit, TAR HEROIN" in violation of section 11351. (GER 171.) The state court minute order, felony plea form, and abstract of judgment

indicate that defendant pleaded guilty to Count 1. (GER 172, 200, 205.)

Applying Sentencing Guidelines § 2L1.2(b)(1)(A)(i), the Presentence Report recommended a 16-level increase to defendant's base offense level because defendant had a prior conviction for a "drug trafficking offense," which the Guidelines' application notes define as "an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense." (PSR ¶¶ 19-20); USSG § 2L1.2 comment. (n.1(B)(iv)).[2] With the 16-level enhancement, defendant's total offense level was 21. (PSR ¶ 28.) Defendant's 16 criminal history points placed him in criminal history category VI and resulted in a sentencing range of 77 to 96 months. (PSR ¶¶ 53, 91.) The probation office recommended a below-Guidelines sentence of 57 months, on the grounds that the defendant's criminal history category overstated the severity of his past criminal conduct and that his most recent conviction was seven years old. (Rec. Letter 1, 3-4.)

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[2] The guideline called for a 16-level increase rather than a 12-level increase because the sentence imposed for defendant's prior conviction exceeded 13 months. Compare USSG § 2L1.2(b)(1)(A) (16-level increase), with id. § 2L1.2(b)(1)(B) (12-level increase).

Defendant objected to the 16-level enhancement, arguing that section 11351 is not categorically a "drug trafficking offense" under the Guidelines' definition because California includes more substances on its schedules of controlled substances than does the federal Controlled Substances Act ("CSA"). (CR 27; GER 114-17.) Defendant relied on three decisions from this Court holding that several California drug offenses did not categorically qualify as convictions "relating to a controlled substance" under an immigration statute, 8 U.S.C. § 1227(a)(2)(B)(i), which, unlike the Sentencing Guidelines' "drug trafficking offense" definition, expressly incorporates the definition of "controlled substance" from the federal CSA. See Ruiz-Vidal v. Gonzales, 473 F.3d 1072 (9th Cir. 2007) (Cal. H. & S. Code § 11377(a), possession of a controlled substance, categorically broader than § 1227(a)(2)(B)(i) definition); Mielewcyk v. Holder, 575 F.3d 992 (9th Cir. 2009) (same for Cal. H. & S. Code § 11352(a), transporting a controlled substance); S-Yong v. Holder, 600 F.3d 1028 (9th Cir. 2010) (same for Cal. H. & S. Code § 11379, sale or transportation of a controlled substance).

The government argued in response that section 11351 is categorically a drug trafficking offense, noting that this Court had so held in several unpublished decisions. (CR 29; GER 149-51.) The government alternatively argued that, under the modified categorical approach, state-court records showed

defendant's section 11351 conviction involved tar heroin, not a drug regulated by California but not the federal government. (GER 155-72.) In reply, defendant argued that the modified categorical approach failed because the conviction records revealed only that defendant pleaded guilty to Count 1, not that he pleaded guilty to that count "as charged" in the complaint. (CR 30; GER 177-78 (relying on United States v. Vidal, 504 F.3d 1072, 1087 (9th Cir. 2007) (en banc)).) The Probation Office subsequently disclosed an addendum to the PSR in which it concluded that defendant qualified for the 16-level enhancement under the modified categorical approach because the state charging instrument specifically referred to tar heroin. (PSR Add. 2-3.)

In a sur-reply brief, the government conceded that 11351 was overbroad under the categorical approach because the California controlled substance schedules are broader than the federal schedules, but the government persisted in its modified categorical approach argument. (CR 32; GER 183-86.)

At defendant's initial sentencing hearing on December 13, 2010, the district court indicated it would not pronounce a sentence at that hearing but wanted to hear argument from counsel on the modified categorical approach, defendant's criminal history, and the § 3553(a) factors. (GER 9-10; RT 12/13/10: 3-4.) The court then requested that the government obtain more

state-court documents relating to defendant's section 11351 conviction and continued the hearing. (GER 13; RT 12/13/10: 7.)

The government subsequently filed a supplemental brief expressly retracting its concession that section 11351 was categorically overbroad and arguing that the Guidelines' definition of a "drug trafficking offense" does not incorporate the federal controlled substance tables. (CR 35; GER 195-97.) The government also submitted more state-court documents (defendant's felony plea form and state-court minute orders), indicating that defendant had pleaded guilty to Count 1 of the criminal complaint. (GER 200-06.)

At the final sentencing hearing on January 24, 2011, the court found that section 11351 did not qualify as a drug trafficking offense under the categorical approach. (GER 44-46; RT 1/24/11: 5-7.) The court also declined to apply the modified categorical approach, reasoning that in state court "complaints are amended on the fly," and, without more information about defendant's plea colloquy or any preliminary hearing, the state-court documents were insufficient to prove defendant had pleaded guilty to selling heroin. (GER 54; RT 1/24/11: 15; see also id. ("I don't know what happened at the colloquy and whether or not the district attorney in Riverside got up and changed the drug, did whatever he did.").) As a result of this determination, defendant received only a four-level enhancement for his section

11351 conviction and his sentencing range fell to 24 to 30 months. (GER 58-59; RT 1/24/11: 19-20.) The court imposed a 30-month sentence. (GER 64; RT 1/24/11: 25.)

III

SUMMARY OF ARGUMENT

The district court erred when it found that defendant's prior conviction for possession or purchase of a controlled substance in violation of California Health & Safety Code section 11351 was not a "drug trafficking offense" under Sentencing Guidelines § 2L1.2.

First, under the categorical approach, section 11351 falls within § 2L1.2's "drug trafficking offense" definition. This Court has already held that the conduct regulated by the statute -- possession for sale or purchase for sale -- is categorically drug trafficking under the Guidelines' definition. It does not matter that California regulates more drugs as controlled substances than the federal government does under the Controlled Substances Act, because the Sentencing Commission did not incorporate the federal controlled substance schedules into its definition. There is no cross-reference to the federal statutory definition, the structure and history of § 2L1.2 indicates that the lack of cross-reference was intentional, and courts have consistently found the lack of a cross-reference to indicate the

Commission did not intend to incorporate a federal statutory definition.

Without any cross-reference to federal controlled substance schedules, the term "controlled substance" takes its ordinary, common sense meaning: a drug regulated by law. Controlled substance offense under either state or federal law, whatever the drug, meets this definition. This Court has consistently defined terms in generic definitions of crimes based on their ordinary meaning, and limiting the phrase "controlled substance" to those substances listed on the federal schedules would categorically disqualify every state drug law that could be applied to a chemical outside the federal schedules (which includes the drug laws of every state in this Circuit except Oregon). The Sentencing Commission cannot have intended such an absurd result.

Second, even if section 11351 is categorically over-inclusive, defendant's conviction qualifies as a drug trafficking offense under the modified categorical approach. Under Supreme Court and Circuit law, a charging document that narrows an over-inclusive statute combined with conviction records showing defendant pleaded guilty to the charge satisfies the modified categorical approach. Count 1 of the charging document alleges that defendant's offense involved "tar heroin," not some drug regulated by California but not the federal government, and the state-court conviction records show that defendant pleaded guilty

to this count. These documents proved with sufficient certainty under the modified categorical approach that defendant was convicted of trafficking in tar heroin.

IV

ARGUMENT

A. STANDARD OF REVIEW

This Court reviews de novo whether a defendant's prior conviction is a qualifying offense for a sentencing enhancement under Sentencing Guidelines § 2L1.2. E.g., United States v. Valle-Montalbo, 474 F.3d 1197, 1199 (9th Cir. 2007).

B. SECTION 11351 CATEGORICALLY QUALIFIES AS A "DRUG TRAFFICKING OFFENSE" UNDER SENTENCING GUIDELINES § 2L1.2

California Health & Safety Code section 11351 prohibits "possess[ion] for sale or purchases for purposes of sale" of certain controlled substances defined under California law.[3]

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[3] At the time of defendant's 1999 conviction, section 11351 provided:

> Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), or (g) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.

In 2000, the California Legislature reclassified the drug Dronabinol from a Schedule II to a Schedule III drug, and

(continued...)

Defendant argued and the district court found that section 11351 is categorically broader than the "drug trafficking offense" defined in the application notes to Sentencing Guidelines § 2L1.2 because section 11351 applies to more controlled substances than are covered by the federal Controlled Substances Act. This conclusion was error.

The application notes to Sentencing Guidelines § 2L1.2 define "drug trafficking offense" as:

> an offense under federal, state or local law, that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

USSG § 2L1.2 comment. (n.1(B)(iv)).

This Court has previously held that California Health & Safety Code section 11351.5, which prohibits the same conduct as

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[3](...continued)
conformed section 11351 by deleting the reference to subdivision (g) of Section 11055 and inserting the new classification of Dronabinol as "subdivision (h) of Section 11056." 2000 Cal. Stat. Ch. 8 (S.B. 550) § 4. Effective July 1, 2011, the California Legislature amended the final clause of the statute as part of a larger change to permit imprisonment in county jails (as opposed to state prisons) for certain felonies. The final clause now reads: "shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for two, three, or four years." 2011 Cal. Stat. Ch. 15 (A.B. 109). Neither amendment has any bearing on the legal issue presented here. Cf. McNeill v. United States, 131 S. Ct. 2218 (2011) (whether prior state conviction qualifies as an Armed Career Criminal Act predicate determined by state law at time of conviction).

section 11351 (possession or purchase for sale) but is limited to crack cocaine, is categorically a "drug trafficking offense" under the Guidelines' definition. United States v. Morales-Perez, 467 F.3d 1219, 1221-22 (9th Cir. 2006).[4] Defendant in the district court did not dispute that the conduct regulated by section 11351 (possession or purchase for sale) categorically qualifies as drug trafficking under § 2L1.2. Rather, defendant argued and the district court agreed that the Guidelines' definition incorporates the definition of "controlled substance" found in the federal Controlled Substances Act, 21 U.S.C. § 802(6).[5] Thus, in defendant's view, a prior drug conviction under any state statute that covers any drug not listed on the federal controlled substance schedules does not categorically qualify as drug trafficking offenses under the Guidelines.

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[4] The Fifth Circuit has similarly held that the possession or purchase for sale is drug trafficking under Sentencing Guidelines § 2L1.2's definition and thus that section 11351 categorically qualifies as a "drug trafficking offense." United States v. Palacios-Quinonez, 431 F.3d 471, 473-77 (5th Cir. 2005). The Fifth Circuit did not, however, address the argument defendant raised here regarding differences between the state and federal controlled substance schedules.

[5] Section 802(6) of Title 21 provides: "The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986." Congress initially established the five controlled substance schedules, 21 U.S.C. § 812, and delegated authority to the Attorney General to add or remove drugs from the schedules, id. § 811. The current schedules are found at 21 C.F.R. § 1308.

This argument is wrong. The Guidelines' definition does not incorporate the CSA definition of "controlled substance" and does not limit its application to only those state drug offenses that precisely track the federal drug schedules. Rather, the term "controlled substance" should take its ordinary, common meaning -- a drug regulated by law. Under this definition, defendant's California conviction for possession or purchase of a controlled substance for sale categorically qualifies as a drug trafficking offense under § 2L1.2.[6]

1. The Sentencing Commission Did Not Incorporate the CSA Definition of "Controlled Substance" into § 2L1.2's "Drug Trafficking Offense" Definition

Defendant in the district court relied on a series of cases holding that various California controlled substance offenses do not categorically qualify as convictions "relating to a controlled substance" for purposes of an immigration statute, 8 U.S.C. § 1227(a)(2)(B)(i), because "California law regulates the possession and sale of numerous substances that are not similarly regulated by the CSA [federal Controlled Substances Act]."

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[6] Because the government withdrew its temporary concession (CR 35; GER 195) that section 11351 is categorically overbroad in time for defendant to file a written response (CR 36; GER 218-20) and to argue the issue at the continued sentencing hearing, the government's temporary concession does not constitute waiver. See United States v. Miller, 822 F.2d 828, 831 (9th Cir. 1987) (withdrawn concession not binding where "withdrawal was made in the district court where [defendant] had the opportunity to challenge the government's new position").

Ruiz-Vidal, 473 F.3d at 1078 (Cal. H. & S. Code § 11377(a) reaches more drugs than CSA); accord Mielewcyk, 575 F.3d at 995 (same for § 11352(a)); S-Yong v. Holder, 600 F.3d at 1034 (same for § 11379); see also Perez-Mejia v. Holder, 641 F.3d 1143, 1154-55 (9th Cir. 2011) (holding alien had waived right to challenge removability, but observing that § 11351 reaches more drugs than CSA under Ruiz-Vidal).

The immigration statute at issue in all these cases expressly incorporates the CSA definition of "controlled substance." It renders removable any alien "convicted of a violation of . . . any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (as defined in Section 802 of Title 21)." 8 U.S.C. § 1227(a)(2)(B)(i). In light of the express cross-reference to the federal definition, Ruiz-Vidal held, "[t]he plain language of [§ 1227] requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is [also] covered by Section 802 of the CSA." 473 F.3d at 1076; see also id. at 1078 n.5 ("To hold otherwise would be to read out of the statute the explicit reference to Section 802 of the CSA."). These immigration decisions do not help defendant here because, unlike § 1227(a)(2)(B)(i), the "drug trafficking

offense" definition in Sentencing Guidelines § 2L1.2 does not incorporate the CSA "controlled substance" definition.[7]

The absence of a cross-reference to the CSA definition in § 2L1.2 indicates the Sentencing Commission's intent not to incorporate that definition into the guideline. This Court has explained that "when the drafters of the Guidelines intended to incorporate definitions from [a statute into the Guidelines] . . . they made that intention clear." United States v. Rodriguez-Guzman, 506 F.3d 738, 742 n.1 (9th Cir. 2007) (refusing to apply "crime of violence" definition in 8 U.S.C.

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[7] This Court has not addressed in a published opinion the argument that differences between California's list of controlled substances and the federal list make section 11351 categorically over-inclusive under § 2L1.2, but it has considered the argument in three unpublished decisions reaching three different conclusions. Compare United States v. Sanchez-Zarate, No. 09-50462, 2010 WL 3989884 (9th Cir. Sept. 13, 2010) (suggesting that section 11351 is categorically overbroad because it regulates a broader range of substances than the federal CSA, but finding defendant's conviction qualified under the modified categorical approach), with United States v. Diego-Barrera, No. 05-50541, 2008 WL 2278897 (9th Cir. May 22, 2008) (holding that section 11351 qualifies as a drug trafficking offense because the guideline does not incorporate the federal definition of controlled substance), and United States v. Gutierrez-Cruz, No. 05-50870, 2008 WL 205513 (9th Cir. Jan. 24, 2008) (holding that section 11351 qualifies because any substances regulated by California that are not specifically included on the federal schedule fall within the federal definition of "controlled substances analogues").

The government agrees with reasoning of Gutierrez-Cruz, 2008 WL 205513, at *1, which without citing Ruiz-Vidal rejects its overbreadth conclusion, but the government recognizes that Ruiz-Vidal forecloses this argument. As set forth in detail below, the reasoning of Diego-Barrera, which distinguishes Ruiz-Vidal, does apply and should be adopted.

§ 1101(a)(43)(F) to USSG § 2L1.2(b)(1)(A)(ii), where Guidelines' "crime of violence" definition contained no cross-reference to Title 8). Indeed, it is generally presumed that the inclusion or exclusion of language is intentional and purposeful. Russello v. United States, 464 U.S. 16, 23 (1983); see also Lopez v. Gonzales, 549 U.S. 47, 55 (2006) (express reference to CSA in 18 U.S.C. § 924(c)(2) intended to incorporate crimes punishable under the CSA).

The Sentencing Commission frequently incorporates by reference statutory definitions into Guidelines' definitions. It did so multiple times in Sentencing Guidelines § 2L1.2. E.g., USSG § 2L1.2 comment. (n.1(B)(i), (ii), (v), (vi), (viii)) (for 16-level enhancement, incorporating federal statutory definitions for "alien smuggling offense," "child pornography offense," certain firearms offenses, "human trafficking offense," and "federal crime of terrorism"); id. § 2L1.2 comment. (n.3(A)) (for 8-level enhancement, incorporating "aggravated felony" definition from 8 U.S.C. § 1101(a)(43)). Moreoever, the Commission was aware of the CSA definitions in 21 U.S.C. § 802 and capable of incorporating those definitions into the Guidelines because in the drug offense guideline, USSG § 2D1.1, the Commission expressly incorporated the CSA definitions of "counterfeit substance" and "controlled substance analogue." See USSG § 2D1.1 comment. (n.2) ("The statute and guideline also apply to

'counterfeit' substances, which are defined in § 802"); id. § 2D.1. comment. (n.5) ("For purposes of this guideline 'analogue' has the meaning given the term 'controlled substance analogue' in 21 U.S.C. § 802(32).").

Among the numerous defined terms in Application Note 1 to § 2L1.2 only two do not incorporate a federal statutory definition -- the definitions of "crime of violence" and "drug trafficking offense." USSG § 2L1.2 comment. (n.1(B)(iii), (iv)). This Court has already held that the absence of a cross-reference to the statutory definition of "crime of violence" (found in 18 U.S.C. § 16) means that the Commission did not intend to incorporate that statutory definition into § 2L1.2. Rodriguez-Guzman, 506 F.3d at 742 n.1. The result must be the same here. The absence of a cross-reference in the "drug trafficking offense" definition shows the Commission's intent not to incorporate the CSA controlled substance definition.

The history of Sentencing Guidelines § 2L1.2 indicates that the absence of a cross reference to the CSA in the "drug trafficking offense" definition is not accidental. See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 62 (2004) (using history of statute as interpretative aid); United States v. Lambert, 498 F.3d 963, 970 (9th Cir. 2007) (using history of Sentencing Commission commentary to interpret guideline). Before 2001, § 2L1.2 provided for a 16-level enhancement for any alien

deported after a prior conviction for an "aggravated felony" and a 4-level enhancement for all other felonies. The guideline expressly incorporated the definition of aggravated felony in 8 U.S.C. § 1101(a)(43), which includes, among other crimes, "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)." Section 924(c), in turn, cross-references the CSA and the Controlled Substance Import and Export Act.

When the Commission amended § 2L1.2 in 2001 to provide a more graduated scale of enhancements, it expressly defined a new category of "drug trafficking offenses," which result in 16- or 12-level enhancements depending on whether the sentence imposed exceeded 13 months. USSG App. C amend. 632. The Commission defined "drug trafficking offense" without reference to the CSA or any other statutory provision. The Commission's decision not to include any cross-reference to the CSA, as it applied to prior drug convictions before the 2001 amendments, weighs against implying a cross reference now. See Rodriguez-Guzman, 506 F.3d at 742 & n.1.

The "drug trafficking offense" definition in § 2L1.2 is, with two exceptions not relevant here, identical to the "controlled substance offense" definition in the career offender guideline, USSG § 4B1.2(b). See United States v. Charles, 581

F.3d 927, 934 (9th Cir. 2009).[8] Both definitions cover offenses involving "a controlled substance (or a counterfeit substance)" and neither definition cross-references the federal CSA, even though the CSA defines both terms. See 21 U.S.C. § 802(6) ("controlled substance" definition); id. § 802(7) ("counterfeit substance" definition).

No circuit has addressed whether the term "controlled substance" in the § 2L1.2 or § 4B1.2 definition incorporates the CSA definition, but five circuits have held that the companion term "counterfeit substance" does not incorporate the CSA "counterfeit substance" definition, which is limited to mislabeled drugs, and no circuit has held to the contrary. These circuits have uniformly held that the term "counterfeit substance" used in the Guidelines takes its ordinary meaning, which covers fake and mislabeled drugs. United States v. Brown, 638 F.3d 816, 818-19 (8th Cir. 2011) (Iowa conviction involving "simulated controlled substance" qualifies as a counterfeit substance offense even though Iowa statute extends to fake as well as mislabeled drugs); United States v. Hudson, 618 F.3d 700, 703-05 (7th Cir. 2010) (same for Indiana "look-alike" drug

[8] The definitions are "identical" except that (1) prior convictions must be punishable by a prison term exceeding one year to qualify as controlled substance offenses and a term of 13 months to qualify as drug trafficking offenses and (2) offenses under local, state or federal law may qualify as drug trafficking offenses, but only offenses under state or federal law qualify as controlled substance offenses. Charles, 581 F.3d at 934.

offense); United States v. Mills, 485 F.3d 219, 222-26 (4th Cir. 2007) (same for Maryland conviction for distributing fake narcotics); United States v. Robertson, 474 F.3d 538, 540-41 (8th Cir. 2007) (same for Illinois conviction for manufacture or distribution of "look-alike" drug); United States v. Crittenden, 372 F.3d 706, 707-10 (5th Cir. 2004) (same for Texas conviction for delivery of simulated controlled substance); United States v. Frazier, 89 F.3d 1501, 1505 (11th Cir. 1996) (same for Florida conviction for sale of substance in lieu of controlled substance).

These decisions make clear that the lack of a cross-reference to the CSA is dispositive. As the Fourth Circuit explained in Mills, the omission of a cross-reference "is significant because the Sentencing Commission clearly knows how to cross-reference when it wants to." 485 F.3d at 223. "Had the Commission intended for [the CSA definition] to apply," the Fourth Circuit reasoned, "it had only to say so." Id.; see also Hudson, 618 F.3d at 704 (although "[t]he Sentencing Commission frequently makes use of an explicit cross-reference to incorporate one provision or definition into another" it did not do so with respect to "counterfeit substance"); Robertson, 474 F.3d at 540 n.2 ("Had the Commission wished to import the CSA definition . . . it certainly could have. Indeed, the Commission's incorporation of federal statutory definitions in

other guidelines provisions indicates its capability to do so."). This Court should follow the same reasoning that the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits applied in construing the term "counterfeit substance" and decline to incorporate into the Guidelines the CSA definition of "controlled substance" where the Commission has not done so expressly.

2. The Term "Controlled Substance" Used in § 2L1.2 Should Take Its Ordinary, Contemporary, and Common Meaning as a Drug Regulated by Law

Without a cross-reference to the CSA, the term "controlled substance" in § 2L1.2 should take its "ordinary, contemporary, and common meaning." United States v. Corona-Sanchez, 291 F.3d 1201, 1204-05 (9th Cir. 2002) (en banc) (internal quotation marks omitted) (when qualifying offense "described in terms that do not embrace a traditional common law crime, we have employed the ordinary, contemporary, and common meaning of the statutory words"), superseded on other grounds by USSG § 2L1.2 comment. (n.4) (2002); United States v. Gomez-Mendez, 486 F.3d 599, 603 (9th Cir. 2007) (same); United States v. Trinidad-Aquino, 259 F.3d 1140, 1143 (9th Cir. 2001) (same). In considering the "ordinary, contemporary, and common meaning" of language in a definition of an offense like drug trafficking, which is not a traditional common-law offense, courts ask "whether the conduct reached by the specific state statute at issue [falls] within the common, everyday meaning of" the language in the definition.

Trinidad-Aquino, 259 F.3d at 1144. Courts conduct this analysis by looking to many sources, including treatises, dictionaries, model codes, and common understanding. E.g., Trinidad-Aquino, 259 F.3d at 1145 & n.2 (considering dictionaries and common understanding to interpret term "crime of violence").

The ordinary, common meaning of "controlled substance" is a drug regulated by law. E.g., Black's Law Dictionary (2009 ed.) (defining "controlled substance" as "Any type of drug whose possession and use is regulated by law, including a narcotic, a stimulant, or a hallucinogen."); Oxford English Dictionary (online version June 2011) ("an addictive or behaviour-altering drug: restricted by law in respect of availability, possession, or use"); Random House Unabridged Dictionary (1997 ed.) ("any of a category of behavior-altering or addictive drugs, as heroin or cocaine, whose possession and use are restricted by law"); but cf. American Heritage Dictionary (4th ed. 2000) (defining "controlled substance" as "[a] drug or chemical substance whose possession and use are regulated under the Controlled Substances Act."). In the absence of an express cross-reference to the CSA, there is no reason to require that states conform their controlled substance regulations to the precise list of drugs designated by the Attorney General for the federal controlled substance schedules, see 21 U.S.C. §§ 811, 812; 21 C.F.R. § 1308,

before treating a state drug crime as a "drug trafficking offense" under § 2L1.2.

Just as every court to address the issue has held that a substance (such as chalk or talcum powder) passed off as a drug is a "counterfeit substance" under the plain meaning of that term, despite not qualifying as a "counterfeit substance" under the CSA definition, any drug that a state regulates under its controlled substance scheme is a "controlled substance" under the ordinary meaning of that term, regardless whether the Attorney General has listed it on a CSA controlled substance schedule. See, e.g., Hudson, 618 F.3d at 703 (defining "counterfeit" based on its broad, ordinary meaning); Mills, 485 F.3d at 222 (defining "counterfeit" based on ordinary, dictionary meaning).

Despite defendant's contrary argument to the district court (GER 219-20), nothing in this approach is inconsistent with Taylor v. United States, 495 U.S. 575 (1990). Taylor dictates a categorical rather than fact-specific approach to determining whether a state conviction qualifies as a "drug trafficking offense" under § 2L1.2 and thus requires a single national definition. This Court in applying Taylor has recognized that a definition derived from the "ordinary, contemporary, and common meaning" of its terms will "be at a more general, descriptive level" than a list of necessary elements, thereby "permitting substantial variance among the state laws coming within that

definition." Trinidad-Aquino, 259 F.3d at 1144 n.1. The Guidelines include a specific national definition for "drug trafficking offense" -- the only question is whether the phrase "controlled substance" within that definition should take its broad ordinary meaning or should incorporate the specific list of substances designated by the Attorney General under the CSA. Giving the phrase its ordinary meaning does not run afoul of Taylor, even though different state controlled substance schemes would fall within the definition. There will still be a uniform national definition of "drug trafficking offense."

Nor does assigning the phrase "controlled substance" its ordinary meaning run afoul of this Court's decision in Estrada-Espinoza v. Mukasey, 546 F.3d 1147, 1152-56 (9th Cir. 2008) (en banc), to assign the phrase "sexual abuse of a minor" used in the "aggravated felony" definition in the immigration code, 8 U.S.C. § 1101(a)(43)(A), its federal statutory definition, despite the lack of a cross-reference to that definition. First, Estrada-Espinoza held that Congress's definition of "sexual abuse of a minor" (which is found in 18 U.S.C. § 2243) "comports with the ordinary, contemporary, and common meaning of the words of the term," id. at 1152-53, and that it was proper therefore to import the federal statutory definition absent a cross-reference because "sexual abuse of a minor" referred to a specific crime, not "a broad category of offenses" (like drug trafficking offenses), id.

at 1155. Second, this Court has subsequently held that the federal statutory definition used in Estrada-Espinoza did not "define the universe of sexual offenses" constituting "sexual abuse of a minor," but rather applied only to statutory rape crimes, and that in every other context the term "sexual abuse of a minor" should take a broader generic definition based on the ordinary meaning of the words "sexual," "abuse" and "minor." United States v. Medina-Villa, 567 F.3d 507, 513, 515-16 (9th Cir. 2009); see also United States v. Valencia-Barragan, 608 F.3d 1103, 1107 (9th Cir. 2010) (recognizing this Court has adopted two definitions of "sexual abuse of a minor," one based on ordinary meaning of the words and one based on federal statutory definition).

Even under Estrada-Espinoza's reasoning, there would be no reason to import the CSA definition of "controlled substance" into the § 2L1.2's drug trafficking offense definition. The Guidelines' definition covers an entire category of offenses involving manufacture, import, export, and distribution of drugs, and there is no indication, such as in Estrada-Espinoza, that the Commission intended to define one specific crime. The term "controlled substance" does not refer to a generic crime at all, but is merely one term within the Commission's "drug trafficking offense" definition. Moreover, this Court has consistently construed Estrada-Espinoza narrowly; reading that decision for a

broad proposition that any undefined term in a Guidelines' definition must take a federal statutory definition if one is available would be inconsistent with all of the precedent limiting Estrada-Espinoza to its particular facts. See Medina-Villa, 567 F.3d at 516 (observing that a broad reading of Estrada-Espinoza to define "sexual abuse of a minor" based on the federal statutory definition in all cases would lead to "absurd" and "bizarre" results).[9]

There is every reason to believe that the Sentencing Commission did not intend to categorically exclude from the Guidelines' definition every state drug crime that could cover a substance not listed under the CSA. At the outer margins of drug regulation, states have made different decisions whether to include particular chemical substances. Under defendant's and the district court's approach, these marginal decisions would disqualify numerous state drug crimes as "drug trafficking offenses" under § 2L1.2, not to mention as "controlled substance offenses" for purposes of the career offender guideline, § 4B1.2. (See pp. 18-19, supra.) Indeed, just within this Circuit, every state except Oregon regulates as a controlled substance at least one substance that the Attorney General has not specifically listed in the federal schedules. Compare 21 C.F.R. 1308 (federal

[9] One panel of this Court recently suggested revisiting Estrada-Espinoza en banc. United States v. Gonzalez-Aparicio, --- F.3d ---, 2011 WL 2207322, at *11 (9th Cir. June 8, 2011).

schedules), with Alaska Stat. § 11.71.140 (1,4-Butanediol), Ariz. Rev. Stat. § 36-2512 (Benzylfentanyl), Haw. Rev. Stat. § 329-14 (same), Idaho Code § 37-2705 (same), Mon. Code Ann. § 50-32-222 (same), Nev. Admin. Code § 453.510 (1,4-Butanediol), and Wash. Rev. Code Ann. § 69.50.210 (Carisoprodol). It strains credulity to believe that the Sentencing Commission in defining "drug trafficking offense" without any reference to the CSA intended sub silentio to exclude categorically every state drug statute that could be used to prosecute a substance not specifically listed by the Attorney General in the CSA schedules.

The government has located no California case in the Westlaw database involving a criminal prosecution for any of the substances identified by this Court in Ruiz-Vidal as regulated by California but not covered by the CSA. See Ruiz-Vidal, 473 F.3d at 1078 & n.6 (listing Apomorphine, Androisoxazole, Bolandiol, Boldenone, Oxymestrone, Norbolethone, Quinbolone, Stanozolol, Stenbolone, and "geometrical isomers" as punishable in California but not under the CSA).[10] In light of this, it is highly

[10] This list is not entirely accurate. Congress in 1990 extended the Controlled Substances Act to cover the anabolic steroids Boldenone, Oxymesterone, and Stanozolol. Anabolic Steroids Control Act of 1990, Pub. L. 101-647, § 1902, 104 Stat. 4789, 4852 (1990) (codified at 21 U.S.C. § 802(41)). In 2004 (after defendant's prior conviction in this case), Congress amended the CSA to cover the anabolic steroids Norbolethone and Stenbolone. Anabolic Steroid Control Act of 2004, Pub. L. 108-358, 118 Stat. 1161, 1162 (2004) (amending 21 U.S.C. § 802(41)).

(continued...)

implausible the Sentencing Commission intended to import the CSA controlled substance schedules into the Guidelines' definition and categorically disqualifying as drug trafficking every state drug scheme that does not match up chemical-by-chemical to the CSA. Indeed, defendant and the district court's approach runs afoul of the Supreme Court's admonition not to use "legal imagination" to disqualify a state statute from categorically satisfying a generic definition. Gonzales v. Duenas-Alvarez, 549 U.S. 183, 193 (2007) ("[T]o find that a state statute creates a crime outside the generic definition of a listed crime in a federal statute requires more than the application of legal imagination to a state statute's language.").

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[10](...continued)

There are a handful of cases in the Westlaw ALLCASES database involving federal or state criminal drug prosecutions for the anabolic steroids Stanazolol or Boldenone, both of which have been covered by the federal CSA since 1990; there do not appear to be any cases on Westlaw from any state or federal jurisdiction involving criminal drug prosecutions for other substances identified in Ruiz-Vidal. See United States v. Goldberg, 538 F.3d 280, 284 (3d Cir. 2008) (federal possession of stanozolol with intent to distribute); United States v. Donisi, 2007 WL 2915630 (N.D. Iowa Sept. 25, 2007) (federal possession with intent to distribute Stanozolol); Ware v. State, 949 So.2d 169, 176-77 (Ala. Crim. App. 2006) (Alabama possession of Stanozolol); State v. Garrett, 177 S.W.3d 652, 653 (Tex. Crim. App. 2005) (Texas possession with intent to deliver Stanozolol); United States v. Orduno-Aguilera, 183 F.3d 1138, 1139 (9th Cir. 1999) (federal possession with intent to distribute and importation of ester derivative of Boldenone); State v. Grubb, 725 A.2d 707, 709 (N.J. Super. Ct. App. Div. 1999) (New Jersey possession of Stanozolol).

This Court should give the phrase "controlled substance" its ordinary meaning, not limited only to those substances designated by the Attorney General under the CSA, but extending to all drugs regulated under state controlled substance schemes. So construed, there is no question that defendant's prior conviction for possession of drugs for sale under section 11351 categorically qualifies as a drug trafficking offense.

B. EVEN IF DEFENDANT'S PRIOR CALIFORNIA DRUG CONVICTION IS NOT CATEGORICALLY A DRUG TRAFFICKING OFFENSE, IT QUALIFIES UNDER THE MODIFIED CATEGORICAL APPROACH BECAUSE DEFENDANT'S OFFENSE INVOLVED HEROIN

Even if section 11351 is categorically overbroad because California regulates more drugs than the federal CSA, defendant's prior conviction qualified as a "drug trafficking offense" under the modified categorical approach because defendant's state-court conviction records show the offense involved tar heroin, not one of the outlier drugs regulated by California but not by the federal government.

1. The State-Court Charging Document Establishes Defendant Pleaded Guilty to Drug Trafficking Involving Tar Heroin

In Shepard v. United States, 544 U.S. 13, 26 (2005), the Supreme Court defined a set of documents on which a sentencing court may rely in determining under the modified categorical approach whether a defendant who pleaded guilty "necessarily" admitted the elements of a generic offense: "the charging document, the terms of a plea agreement or transcript of colloquy

between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or to some comparable judicial record of this information." The Supreme Court made clear that the "details of a generically limited charging document would do in any sort of case," whether tried or pleaded, to establish that the defendant's conviction under an overinclusive statute rested on generic elements. Id. at 21; see also id. at 25 (holding that, "without a charging document that narrows the charge to generic limits," a sentencing court's only certainty that a prior conviction was for a generic offense "lies in jury instructions, or bench-trial findings and rulings, or (in a pleaded case) in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea.") (plurality opinion).

This Court has repeatedly held the modified categorical approach satisfied by a charging document that limits an over-inclusive statute to the generic crime and a document showing that the defendant pleaded guilty to the charged offense. See, e.g., Ramirez-Villalpando v. Holder, --- F.3d ---, 2011 WL 2622389, at *4-*5 (9th Cir. July 1, 2011) (relying on charging instrument and abstract of judgment to narrow over-inclusive statute under modified categorical approach); United States v. Snyder, --- F.3d ---, 2011 WL 2573587, at *2-*3 (9th Cir. June 30, 2011) (indictment and judgment of conviction); United States

v. Snellenberger, 548 F.3d 699, 701 (2008) (en banc) (information and minute order of plea); United States v. Velasco-Medina, 305 F.3d 839, 852 (9th Cir. 2002) (information and abstract of judgment); United States v. Castillo-Rivera, 244 F.3d 1020, 1022-23 (9th Cir. 2001) (felony complaint and judgment).

This Court's en banc decision in Snellenberger, 548 F.3d 699, illustrates the analysis. There, the defendant had a prior burglary conviction under California Penal Code section 459. Id. at 700. That statute is broader than the pertinent generic offense, "burglary of a dwelling," because the statute covers entry into both dwellings and "all manner of other places." Id. at 701. But count one of the trial information charged the defendant with burglary of a "dwelling house," which is the structure required by the generic offense. Id. And the state court's minute order of the conviction stated that the defendant pleaded nolo contendere to "count[] 1." Id. Those records, this Court held, established that the defendant was convicted of the generically limited offense charged in the trial information. Id. at 702. The prior conviction, therefore, was properly used for sentence enhancement. Id.

The facts here are materially identical to those in Snellenberger. A felony complaint charged defendant in Count 1 with conduct that satisfies even the Controlled Substance Act definition of a "drug trafficking offense" because it

specifically identified the controlled substance involved in the offense as "tar heroin." (GER 171.) The minute order and abstract of judgment reflect that defendant pleaded guilty to Count 1 and that the statute of conviction was Health & Safety Code section 11351, which the abstract of judgment identifies as "Selling Controll." (GER 172, 200). Thus, as in Snellenberger, defendant's prior conviction qualifies as a conviction for the generic offense.

The district court declined to apply the modified categorical approach based on its concern that "during the heat of everything happening, complaints are amended on the fly" and that it "d[id]n't know what happened at the colloquy and whether or not the district attorney in Riverside got up and changed the drug." (GER 54; RT 1/24/11: 15.) The district court's concern was misplaced.

The district court was correct, of course, that the charging document alone does not eliminate the possibility that the charge was modified to a different drug "on the fly." However, this Court recognized en banc in Snellenberger that the modified categorical approach focuses on whether the government has proved "with reasonable certainty" that the prior conviction fell within the generic offense. 548 F.3d at 701. As with all sentencing facts, the evidence need not establish that fact by eliminating all other possibilities. Instead, the Supreme Court crafted its

list of documents so that the approved proof would "approach[] the certainty of the record of conviction in a generic crime State." Shepard, 544 U.S. at 23. And the Court determined that a generically limited charging document meets that standard. See id. at 21, 26.[11]

That is an eminently sensible rule. A charging document sets forth the discrete facts that the government is generally required to prove to convict and to which the defendant admits by pleading guilty. See United States v. Broce, 488 U.S. 563, 570 (1998) ("By entering a plea of guilty, the accused is not simply stating that he did the discrete acts described in the indictment; he is admitting guilt of a substantive crime."); see also People v. Palacios, 56 Cal. App. 4th 252, 257 (1997) ("A plea of guilty admits every element of the offense charged . . . , all allegations and factors comprising the charge contained in the pleading" (internal quotation marks omitted)). Absent some Shepard-approved document indicating the trial court allowed the defendant not to admit the charged facts in entering

[11] The Armed Career Criminal Act enhancement in Shepard imposed a 15-year mandatory minimum penalty, 18 U.S.C. § 924(e), and the Supreme Court based its decision to limit the universe of evidence the district court could consider in part on the Sixth Amendment concerns raised in Jones v. United States, 526 U.S. 227 (1999), and Apprendi v. New Jersey, 530 U.S. 466 (2000). See Shepard, 544 U.S. at 24-26. Because this case involves a determination of the advisory guideline range, not any statutory penalty provision, those Sixth Amendment concerns are not implicated.

his guilty plea or that the prosecutor modified the charge, it is entirely sound to conclude that the defendant's conviction for the charged offense rests on the charged facts, at least as to charged facts that prove an element of the offense.

This is particularly true here, where the district court's approach elevated the possible over the realistic to a degree even the modified categorical approach does not require. First, it is clear that defendant was charged with violating section 11351 based on tar heroin, and it is equally clear from the abstract of judgment and the felony plea form that defendant pleaded guilty to section 11351, not any other statute. (GER 172, 205.) Second, under California law, the fact that defendant pleaded guilty means that defendant pleaded to the charged offense. See Cal. Penal Code § 1017 (requiring plea of guilty to be "in substantially the following form: . . . 'The defendant pleads that he or she is guilty of the offense charged.'"); Sanchez v. Superior Court, 102 Cal. App. 4th 1266, 1269 (2002) (holding that "[a] plea of guilty may be made to the offense actually charged, not a lesser or different offense, unless the prosecution consents to the plea" and that a guilty plea admits "all allegations and factors comprising the charge contained in the pleading" (internal quotation marks omitted)). There is simply no reason to believe defendant pleaded guilty to anything other than possession or purchase for sale of tar heroin.

Even under defendant's approach, the only way his section 11351 conviction could fall outside a generic "drug trafficking offense" under Sentencing Guidelines § 2L1.2 would be if the charged drug was modified from heroin to some drug not listed in the federal CSA schedules. It is, however, extraordinarily implausible that the charge was modified "on the fly" from heroin, not just to any other drug, but to some outlier drug regulated by California but not listed in the CSA schedules. (See p. 27 n.10, supra.) Accordingly, the district court erred by not applying the 16-level enhancement of for a drug trafficking offense under Sentencing Guidelines § 2L1.2.

2. Vidal Does Not Compel a Contrary Ruling

In rejecting the government's modified categorical approach argument, defendant relied on and the district court referred to this Court's decision in United States v. Vidal, 504 F.3d 1072 (9th Cir. 2007) (en banc). (RT 1/24/11: 7-8, 15; GER 46-47, 54.) In Vidal, this Court considered whether a defendant's California car theft conviction (Cal. Veh. Code § 10851(a)) was a "theft offense" that qualified as an "aggravated felony" for the eight-level enhancement under Guidelines § 2L1.2(b)(1)(C). 504 F.3d at 1074. After holding that the California crime was not categorically a theft offense because it covered accessories after the fact, id. at 1077-86, the Court held that Vidal's state-court conviction records did not satisfy the modified

categorical approach either, id. at 1087-89. Vidal does not, however, prevent application of the modified categorical approach here for four reasons.

First, Vidal's modified categorical approach holding relied on the framework set out in the subsequently overruled three-judge panel opinion in Snellenberger, 493 F.3d 1015 (9th Cir. 2007), reh'g granted, 519 F.3d 908 (9th Cir. 2008), replaced by 548 F.3d 699 (9th Cir. 2008) (en banc). Vidal began with the premise from the three-judge Snellenberger opinion that a defendant's plea of nolo contendere to a generically limited charging instrument coupled with a minute order showing the conviction but containing no facts was insufficient "when the record did not contain 'the terms of a plea agreement or transcript colloquy between the judge and defendant in which the factual basis for the plea was confirmed by the defendant, or some comparable judicial record of this information.'" Vidal, 504 F.3d at 1087 (quoting Snellenberger, 493 F.3d at 1019) (internal quotation marks omitted).

The Vidal Court then held that the charging document and a written plea and waiver of rights form were insufficient to show that the defendant had been convicted as a principal or abettor (which fell within generic theft), as opposed to an accessory after the fact (which fell outside generic theft). Id. at 1087-89. Vidal explained that the case was similar to Snellenberger

because the record did not establish that "that Vidal admitted to all, or any of the factual allegations in the Complaint." Vidal, 504 F.3d at 1087. After the Snellenberger en banc decision, however, this reasoning is no longer sound; a generically limited charging instrument and a minute order reflecting a nolo plea (or, as here, a guilty plea) is sufficient to show that a defendant was convicted of the generically limited offense. Snellenberger, 548 F.3d at 702.

Second, Vidal's prior conviction was a guilty plea pursuant to People v. West, 3 Cal.3d 595, 611-13 (1970), which permits a court to accept, as part of a plea bargain, a plea of guilty or nolo contendere to a lesser offense "reasonably related" to the offense charged in the charging document. The only document in the record showing Vidal's conviction, the written plea and waiver of rights form stated that Vidal had pleaded guilty pursuant to "People v. West." Vidal, 504 F.3d at 1075, 1087. This Court observed that under West, the "prosecution need not have formally amended the [Complaint] in order for [the defendant] to have pled guilty to conduct other than that alleged in the Complaint." Id. at 1088 (citing People v. Sandoval, 140 Cal. App. 4th 111, 132-33 (2006)). The Court thus concluded that, absent an indication that the defendant entered his West plea to the offense "as charged in the information," the court "ha[d] no way of knowing what conduct [the defendant] admitted

when he pled guilty to conduct that was not identical to that charged in Count One of the Complaint." Id.

None of this reasoning applies here, however, because there is no indication that defendant entered his plea under West. Had there been a West plea to a lesser offense, not only would the prosecutor have had to consent, e.g., People v. Orin, 13 Cal.3d 937, 942 (1975), but the abstract of judgment and felony plea form (GER 172, 205) would not have listed section 11351 as the statute of conviction. Nor is there any indication in any of the conviction records, as there was in Vidal, that defendant pleaded pursuant to West, and thus that the drug-type could have been altered "on the fly"; rather the minute order (GER 165, 200) clearly reflects that defendant entered a guilty plea to Count 1. Accordingly, there is no reason to doubt that defendant pleaded guilty to the statute and drug listed in the charging instrument, and, because under California law a guilty plea to the charging instrument admits all the allegations in the pleading, e.g., Sanchez, 102 Cal. App. 4th at 1269, the record demonstrates defendant pleaded guilty to a tar heroin offense.

Third, the Vidal Court alternatively relied on a more simple theory that has no applicability here: The Vidal charging instrument "merely recite[d] the language the statute," which the Court had held was categorically over-inclusive. 504 F.3d at 1088. Thus, Vidal concluded the charging instrument was

"insufficient to establish the offense as generic for purposes of a modified categorical approach" without the defendant's admission or findings of fact narrowing the charge to the limits of a generic theft offense. Id. at 1088-89 ("When as here, the statute of conviction is overly inclusive, 'without a charging document that narrows the charge to generic limits, the only certainty of a generic finding lies . . . in the defendant's own admissions or accepted findings of fact confirming the factual basis for a valid plea.'" (quoting Shepard, 544 U.S. at 25)). The only record that could have provided this information, the Court observed, was Vidal's written plea and waiver of rights form, which reflected only that he had "entered a plea pursuant to People v. West." Id. at 1089. Here, the felony complaint narrowed the section 11351 charge to tar heroin; thus, this part of Vidal's reasoning is irrelevant.

Fourth, Vidal's discussion of whether the defendant pleaded guilty "as charged" does not require those magic words to appear in the state-court conviction records to narrow an overly-inclusive offense under the modified categorical approach. In the course of its application of the since-withdrawn Snellenberger panel opinion to Vidal's West plea, the Vidal opinion stated that when the record contains only the indictment and the judgment on a guilty plea, the judgment "must contain the critical phrase 'as charged in the Information'" to show

admission of the charged facts. Id. at 1087 (quotation marks omitted).

This "critical phrase" language appears to stem from this Court's pre-Shepard decision in United States v. Parker, 5 F.3d 1322, 1327 (9th Cir. 1993) (cited in Li v. Ashcroft, 389 F.3d 892, 898 (9th Cir. 2004) (cited in Vidal, 504 F.3d at 1087)). Parker's ruling requiring that "critical phrase" in the judgment, in addition to a generically limited charging document, is no longer good law after Shepard, which held that "the details of a generically limited charging document [will] do in any sort of case," pleaded or otherwise, to show that a conviction for the charged offense rests on the charged generic conduct. Shepard, 544 U.S. at 21. To the extent that Vidal, a post-Shepard case, reinvigorated Parker's ruling, that ruling in Vidal, at least outside the context of People v. West pleas, did not survive the en banc decision in Snellenberger. See United States v. Vasquez-Ramos, 531 F.3d 987, 991 (9th Cir. 2009) (circuit law is binding until a contrary en banc decision).

Indeed, since Vidal, this Court has not applied the "critical phrase" requirement with the breadth defendant urged on the district court. Snellenberger itself involved a California nolo plea, with no language in the minute order that defendant had pleaded guilty "as charged," yet the en banc court held the combination of the charging instrument and minute order

sufficient proof under the modified categorical approach that defendant had been convicted of burglary of a dwelling as charged in the trial information. 548 F.3d at 701-02. More recently, in Snyder, 2011 WL 2573587, at *2-*3, this Court held that a no contest plea to an indictment that limited an over-inclusive Oregon burglary statute to generic burglary was sufficient under the modified categorical approach, even though there was no indication that the defendant pleaded to the indictment "as charged."

Rather than applying Vidal as creating a universal "magic words" requirement, this Court has instead explained that the "lesson" of Vidal "is that a court conducting a modified categorical analysis cannot rely on only the fact of a guilty plea and a charging document that merely recite the multiple theories under which a defendant can be convicted under an overly-inclusive statute to hold that the defendant actually committed a generic offense." Young v. Holder, 634 F.3d 1014, 1022 (9th Cir. 2011) (emphasis added) (alien not convicted of aggravated felony under modified categorical approach because record showed only that alien pleaded guilty to a charging document alleging, in the conjunctive, fourteen different theories by which the alien could have violated the statute, only some of which qualified as an aggravated felony, and nothing in record narrowed charging instrument). There is no similar

"multiple theories" problem here. The complaint charged defendant with possessing for sale and purchasing for sale tar heroin, but this Court has already held that both possession for sale and purchase for sale fall within the "drug trafficking offense" definition in § 2L1.2, Morales-Perez, 467 F.3d at 1221-22, and the complaint charged a single drug.

When this Court has invoked Vidal's "as charged" requirement, it has been in the context of People v. West pleas. In Fregoza v. Holder, 576 F.3d 1030 (9th Cir. 2009), this Court held that an alien's prior California conviction for misdemeanor child endangerment was not categorically a crime of child abuse and remanded for the Board of Immigration Appeals to apply the modified categorical approach. In describing the remand, the Court cited Vidal to explain "that a no contest plea to charges that merely restate the language of a statute that is not a categorical match cannot conclusively establish that a defendant admitted to conduct falling entirely within the generic federal definition of a crime." Fregoza, 576 F.3d at 1040. The Court further explained, quoting the "as charged" language from Vidal, that the alien had entered a West plea, that the minute order left a box next to the phrase "as charged" unchecked, and that to narrow an overly-broad statute the judgment must reflect that the alien pleaded guilty "as charged." Fregoza is thus consistent with applying the particular Vidal scrutiny to West pleas, which

makes sense precisely because West permits a plea to some offense other than the one in the charging document. Fregoza does not, however, purport to require in every modified categorical approach case that the judgment include the particular words "as charged."

The record here shows with sufficient certainty that defendant pleaded guilty to possession or purchase for sale of tar heroin, not any other drug. Count 1 of the felony complaint does not merely recite the language of the statute or broadly list all the possible drugs that could have supported a conviction. Rather, the complaint narrows the offense to tar heroin. The minute order and abstract of judgment indicate defendant pleaded guilty to the Count 1, a violation of section 11351. This is sufficient to show defendant pleaded guilty to the generically limited charging instrument and that defendant's offense constitutes a "drug trafficking offense" under the modified categorical approach.

V

CONCLUSION

For the foregoing reasons, this Court should vacate defendant's sentence and remand for resentencing.

DATED: July 27, 2011

Respectfully submitted,

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STATEMENT OF RELATED CASES

This case is related to the following cases:

1. United States v. Alfonso Anorve-Verduduzco, No. 11-50050 (defendant's opening brief filed June 16, 2011). Presenting the question whether the defendant's conviction under California Health & Safety Code section 11351 qualifies as a drug trafficking offense under Sentencing Guidelines § 2L1.2 under the categorical or modified categorical approach.

2. United States v. Diaz-Maldanado, No. 09-30086 (argued and submitted Mar. 10, 2010; submission vacated and deferred Mar. 11, 2010 pending this Court's en banc decision in United States v. Aguila-Montes de Oca, No. 05-50170). Presenting the question whether a guilty plea to a generically limited charging document is sufficient to limit an overbroad statute under the modified categorical approach.

STATUTORY ADDENDUM

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United States Sentencing Guidelines § 2L1.2.

Unlawfully Entering or Remaining in the United States

(a) Base Offense Level: 8

(b) Specific Offense Characteristic

(1) Apply the Greatest:
If the defendant previously was deported, or unlawfully remained in the United States, after—

(A) a conviction for a felony that is (i) a drug trafficking offense for which the sentence imposed exceeded 13 months; (ii) a crime of violence; (iii) a firearms offense; (iv) a child pornography offense; (v) a national security or terrorism offense; (vi) a human trafficking offense; or (vii) an alien smuggling offense, increase by 16 levels;

(B) a conviction for a felony drug trafficking offense for which the sentence imposed was 13 months or less, increase by 12 levels;

(C) a conviction for an aggravated felony, increase by 8 levels;

(D) a conviction for any other felony, increase by 4 levels; or

(E) three or more convictions for misdemeanors that are crimes of violence or drug trafficking offenses, increase by 4 levels.

Commentary

* * *

Application Notes:

* * *

(B) Definitions.—For purposes of subsection (b)(1):

(i) "Alien smuggling offense" has the meaning given

that term in section 101(a)(43)(N) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)(N)).

(ii) "Child pornography offense" means (I) an offense described in 18 U.S.C. § 2251, § 2251A, § 2252, § 2252A, or § 2260; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(iii) "Crime of violence" means any of the following offenses under federal, state, or local law: murder, manslaughter, kidnapping, aggravated assault, forcible sex offenses (including where consent to the conduct is not given or is not legally valid, such as where consent to the conduct is involuntary, incompetent, or coerced), statutory rape, sexual abuse of a minor, robbery, arson, extortion, extortionate extension of credit, burglary of a dwelling, or any other offense under federal, state, or local law that has as an element the use, attempted use, or threatened use of physical force against the person of another.

(iv) "Drug trafficking offense" means an offense under federal, state, or local law that prohibits the manufacture, import, export, distribution, or dispensing of, or offer to sell a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

(v) "Firearms offense" means any of the following:

(I) An offense under federal, state, or local law that prohibits the importation, distribution, transportation, or trafficking of a firearm described in 18 U.S.C. § 921, or of an explosive material as defined in 18 U.S.C. § 841(c).

(II) An offense under federal, state, or local law that prohibits the possession of a firearm described in 26 U.S.C. § 5845(a), or of an

explosive material as defined in 18 U.S.C. § 841(c).

(III) A violation of 18 U.S.C. § 844(h).

(IV) A violation of 18 U.S.C. § 924(c).

(V) A violation of 18 U.S.C. § 929(a).

(VI) An offense under state or local law consisting of conduct that would have been an offense under subdivision (III), (IV), or (V) if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vi) "Human trafficking offense" means (I) any offense described in 18 U.S.C. § 1581, § 1582, § 1583, § 1584, § 1585, § 1588, § 1589, § 1590, or § 1591; or (II) an offense under state or local law consisting of conduct that would have been an offense under any such section if the offense had occurred within the special maritime and territorial jurisdiction of the United States.

(vii) "Sentence imposed" has the meaning given the term "sentence of imprisonment" in Application Note 2 and subsection (b) of §4A1.2 (Definitions and Instructions for Computing Criminal History), without regard to the date of the conviction. The length of the sentence imposed includes any term of imprisonment given upon revocation of probation, parole, or supervised release.

(viii) "Terrorism offense" means any offense involving, or intending to promote, a "Federal crime of terrorism", as that term is defined in 18 U.S.C. § 2332b(g)(5).

2. Definition of "Felony".—For purposes of subsection (b)(1)(A), (B), and (D), "felony" means any federal, state, or local offense punishable by imprisonment for a term exceeding one year.

3. Application of Subsection (b)(1)(C).—

(A) Definitions.—For purposes of subsection (b)(1)(C), "aggravated felony" has the meaning given that term in

section 101(a)(43) of the Immigration and Nationality Act (8 U.S.C. § 1101(a)(43)), without regard to the date of conviction for the aggravated felony.

(B) In General.—The offense level shall be increased under subsection (b)(1)(C) for any aggravated felony (as defined in subdivision (A)), with respect to which the offense level is not increased under subsections (b)(1)(A) or (B).

4. Application of Subsection (b)(1)(E).—For purposes of subsection (b)(1)(E):

(A) "Misdemeanor" means any federal, state, or local offense punishable by a term of imprisonment of one year or less.

(B) "Three or more convictions" means at least three convictions for offenses that are not counted as a single sentence pursuant to subsection (a)(2) of §4A1.2 (Definitions and Instructions for Computing Criminal History).

United States Sentencing Guidelines § 4B1.2(b).

Definitions of Terms Used in Section 4B1.1

* * *

(b) The term "controlled substance offense" means an offense under federal or state law, punishable by imprisonment for a term exceeding one year, that prohibits the manufacture, import, export, distribution, or dispensing of a controlled substance (or a counterfeit substance) or the possession of a controlled substance (or a counterfeit substance) with intent to manufacture, import, export, distribute, or dispense.

8 U.S.C. § 1101(a)(43)(B)

(a) As used in this chapter –

* * *

(43) The term "aggravated felony" means--

* * *

(B) 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);

* * *

The term applies to an offense described in this paragraph whether in violation of Federal or State law and applies to such an offense in violation of the law of a foreign country for which the term of imprisonment was completed within the previous 15 years. Notwithstanding any other provision of law (including any effective date), the term applies regardless of whether the conviction was entered before, on, or after September 30, 1996.

21 U.S.C. § 802(6), (7)

As used in this subchapter:

* * *

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

(7) The term "counterfeit substance" means a controlled substance which, or the container or labeling of which, without authorization, bears the trademark, trade name, or other identifying mark, imprint, number, or device, or any likeness thereof, of a manufacturer, distributor, or dispenser other than the person or

persons who in fact manufactured, distributed, or dispensed such substance and which thereby falsely purports or is represented to be the product of, or to have been distributed by, such other manufacturer, distributor, or dispenser.

Cal. Health & Safety Code § 11351 (1999)-

Possession or purchase for sale of designated controlled substances; punishment

Except as otherwise provided in this division, every person who possesses for sale or purchases for purposes of sale (1) any controlled substance specified in subdivision (b), (c), or (e) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b), (c), or (g) of Section 11055, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, shall be punished by imprisonment in the state prison for two, three, or four years.

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