CA NO. 11-50065

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. JOSE LEAL-VEGA, Defendant-Appellee.	DC# CR 10-756-PSG

APPELLEE'S BRIEF

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

HONORABLE PAUL S. GUTIERREZ
United States District Judge

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APPELLEE'S BRIEF

I.

STATEMENT OF ISSUES PRESENTED

A. WHETHER THE DISTRICT COURT WAS CORRECT IN RULING THAT THE CALIFORNIA CONTROLLED SUBSTANCE SCHEDULES' INCLUSION OF SUBSTANCES THAT ARE NOT INCLUDED IN THE FEDERAL CONTROLLED SUBSTANCE SCHEDULES MEANS A CONVICTION UNDER A CALIFORNIA POSSESSION FOR SALE STATUTE FAILS TO QUALIFY AS A SENTENCING GUIDELINES § 2L1.2 "DRUG TRAFFICKING OFFENSE" UNDER THE "CATEGORICAL APPROACH" TO EVALUATING PRIOR CONVICTIONS.

B. WHETHER THE DISTRICT COURT WAS CORRECT IN RULING THAT THE GOVERNMENT DID NOT CARRY ITS BURDEN OF SHOWING MR. LEAL-VEGA'S CONVICTION QUALIFIED AS A § 2L1.2 "DRUG TRAFFICKING OFFENSE" UNDER THE "MODIFIED CATEGORICAL APPROACH" WHEN THE GOVERNMENT PRESENTED NOTHING MORE THAN A ONE-COUNT INFORMATION ALLEGING THE "CONTROLLED SUBSTANCE" WAS HEROIN AND OTHER COURT RECORDS SHOWING ONLY THAT MR. LEAL-VEGA HAD PLED GUILTY TO " COUNT 1" FOR "SELLING CONTROLL."

C. WHETHER ANY ERROR IN THE GUIDELINE CALCULATION WAS HARMLESS BECAUSE THERE WERE NON-GUIDELINES REASONS FOR THE 30-MONTH SENTENCE AND THE DISTRICT COURT FOUND THAT A 30-MONTH SENTENCE WAS "SUFFICIENT BUT . . . NO GREATER THAN NECESSARY TO COMPLY WITH THE PURPOSES STATED IN TITLE 18 UNITED STATES CODE SECTION 3553(A)"?

II.

STATEMENT OF THE CASE

A. STATEMENT OF JURISDICTION.

This appeal is a government appeal from a sentence for being found in the United States illegally after having been deported, in violation of 8 U.S.C. § 1326. Mr. Leal was sentenced on February 4, 2011 to serve 30 months in custody and 3

years of supervised release. GER 1, 64.

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. This Court has jurisdiction pursuant to 28 U.S.C. § 1291. A timely notice of appeal was filed on February 24, 2011. GER 225.

B. COURSE OF PROCEEDINGS.

The information charging Mr. Leal was filed on July 13, 2010. GER 70-71. Mr. Leal was arraigned on the information and pled not guilty on July 19, 2010, CR 19, but subsequently changed his plea to guilty on August 23, 2010, GER 72-100. A presentence report was prepared, *see* PSR, and disclosed to the parties on November 4, 2010.

After disclosure of the presentence report, the defense, on November 18, 2010, filed its "Position re: Sentencing Factors," with an objection to the presentence report's sentencing guidelines offense level calculation. GER 111-30. The government filed its response to that position on December 1, 2011, GER 146-72; the defense filed a reply to the government's response on December 8, 2010, GER 173-80; and the government filed a sur-reply on December 9, 2010, GER 181-91. The district court held an initial sentencing hearing on December 13, 2010 but put the matter over for a month to more carefully consider the arguments. GER 7-39. The government filed a supplemental sentencing memorandum on January 12, 2011, GER 192-215, to which the defense responded on January 13, 2011, GER 216-24. The court imposed sentence on January 24, 2011. GER 1-6, 40-69.

C. BAIL STATUS OF DEFENDANT.

Mr. Leal is presently serving the 30-month sentence imposed by the district court.

III.

STATEMENT OF FACTS

The government adequately describes the legal arguments made, the evidence presented,[1] and the district court's rulings and findings regarding the sentencing guidelines. It omits an important additional finding the district court made, however. In addition to making the guidelines findings the government describes, the district court made the following additional finding before it imposed sentence: "I find that the following sentence is reasonable and is sufficient, but is no greater than necessary to comply with the purposes stated in Title 18 United States Code Section 3553(a)." GER 63-64.

There were a wealth of mitigating circumstances before the court that justified this finding, moreover. Some of them were recognized by the probation office when it recommended a 20-month downward variance/departure from the 77-96 month guideline range that it believed applied. The probation office summarized those mitigating factors as follows in its recommendation letter.

> Regarding other mitigating factors, the defendant reported – and his common-law wife has confirmed – that he has a history of working hard over the years. He indicated that he grew up

[1] The government does overlook some significant deficiencies in the state court records it offered, which are discussed *infra* pp. 39-40.

> on a farm/ranch in Mexico and decided to "make [his] own life" when he came to the U.S. in approximately 1988. After being deported, he decided to come back again, knowing that he should not return, but he reportedly "just wanted to work."
>
> As for avoiding recidivism, Leal-Vega indicated that he now has "plans of returning to my parents and siblings" where "I am going to work with them," adding that "those are my plans, to stay forever in Mexico." To the extent that he is able to keep true to his stated intentions, Leal-Vega appears to pose less of a threat to the public than many similarly situated defendants.
>
> In exploring the sentencing factors under 18 U.S.C. § 3553, it is necessary to place in the proper perspective that Leal-Vega sustained a prior conviction over 11 years ago for possession for sale of a narcotic controlled substance, which is the aggravated felony conviction generating the 16-level increase in the defendant's total offense level. The net result is a guideline range that may be greater than necessary to deter the defendant and protect the public, and creates a potentially unwarranted sentencing disparity with many similarly-situated defendants. (Footnote omitted.).

11/1/10 USPO Recommendation Letter, at 4.[2]

The defense had presented extensive evidence and argument about these and other mitigating circumstances and their relevance to the 18 U.S.C. § 3553(a) factors, moreover. GER 23-26, 118-29, 222-24. *See also* GER 131-45 (sentencing letters). As summarized by defense counsel in his oral argument, there were the following considerations:

- Mr. Leal had engaged in no new criminal activity for the past seven years, which defense counsel pointed out was quite rare in illegal reentry cases such as Mr. Leal's. GER 23.
- The prior conviction which triggered the 16-level enhancement in Mr.

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[2] The probation office also recommended a criminal history departure under § 4A1.3(b)(1) of the guidelines, *see* Recommendation Letter, at 3-4. The district court rejected that recommendation, but did recognize criminal history considerations as a factor justifying a non-guidelines variance under § 3553(a), GER 21-22.

Leal's case was 11 years old. GER 23-24.

- Letters provided to the court indicated that Mr. Leal was a good father, a good stepfather, a good husband, and a good employee. GER 24.
- Perhaps most important, and definitely not the case in anywhere near the majority of illegal reentry cases, Mr. Leal has a realistic alternative life in Mexico. He has family in Mexico who own a family farm on which he can work; his only child here in the United States is one with whom he does not have significant contact and he also has another child in Mexico; and while he did have a relationship with a woman here in the United States, he is not legally married to her and has no children with her. As defense counsel, summarized it: "So he really can say *I know what I'm going to do in Mexico. This is what I'm going to do.* And there's really good reason to believe he's going to do it." GER 25 (emphasis in original).

Defense counsel also suggested – again, in both the pleadings and at oral argument – that the purpose of the 16-level enhancement for Mr. Leal's prior conviction was not implicated even if it technically applied, which the defense of course argued it did not. GER 17-20, 127-28, 223-24. Counsel noted that the enhancement for prior convictions varies depending not on the number or likelihood of illegal reentries but depending on the seriousness of the prior conviction: "Someone with a felony conviction gets four additional [points]. Someone with an aggravated felony gets an eight. And someone with more serious aggravated felonies gets 12. And someone with the most [serious] aggravated felonies gets 16." GER 17. *See also* U.S.S.G. § 2L1.2(b)(1). Counsel

then pointed out that the logical reason for that sort of escalation of offense level based on the nature of the prior conviction was to protect society not from the likelihood of the defendant reentering again, but from the likelihood that he might commit additional crimes similar to the crime or crimes he had committed before. GER 17-18. Finally, counsel argued that reason did not exist here – and so the enhancement's purpose was not implicated – where the defendant, Mr. Leal, had shown by refraining from criminal activity for years that the risk did not exist.[3]

In sum, there was evidence and argument presented not just about the correct legal categorization of Mr. Leal's prior conviction, but also about § 3553(a) factors that justified the lesser sentence in any event. And what the district court found in the end was not just a lower guideline range, but also that "the [30-month] sentence is reasonable and is sufficient, but is no greater than necessary to comply with the purposes stated in Title 18 United States Code Section 3553(a)." GER 63-64.

IV.

SUMMARY OF ARGUMENT

Courts considering whether a prior state conviction is sufficient to trigger an enhancement under § 2L1.2(b)(1) must begin with what has been labeled the "categorical approach." Under this approach, the court looks only to the statutory definition of the prior offense. The question the court must ask is whether there is

[3] The court noted that Mr. Leal did have four prior deportations, but defense counsel pointed out that he had never before been sent to prison for reentering and that a graduated approach starting with a short prison sentence was most appropriate to deter further reentries. GER 48-52.

any conduct that is covered by the state statute but is not included within the offenses that are encompassed by the prior conviction enhancement.

A prior California drug conviction, at least one under California Health and Safety Code § 11351, cannot qualify under this categorical approach as a "drug trafficking offense" as that term is used in § 2L1.2(b)(1)(A)(1). Multiple prior published opinions of this Court have recognized that the California controlled substance schedules include "controlled substances" which are not included within the federal controlled substance schedules. As a result, there is some conduct which is "drug trafficking" in violation of California law but not "drug trafficking" in violation of federal law.

The government's attempts to distinguish this Court's precedent as limited to "drug trafficking offense" in the immigration context and its suggestion that "drug trafficking offense" in the criminal context includes any substance controlled by the state in which the prior conviction was sustained should be rejected for several reasons. First, it is inconsistent with holdings that a term which is used in both the immigration law context and the criminal law context generally, though not always, should be construed consistently. More fundamentally, the government's suggestion flies in the face of one of the most basic premises of the categorical approach, which is to assure that defendants are not treated differently simply because of the state in which their prior conduct took place. The government's claim that its proposed definition of "controlled substance" as a drug regulated "by law" does not vary from state to state ignores the fact that the "law" which this definition incorporates will be the 50 different laws of the 50 different states. The answer to the government's complaint that using the federal definition of "controlled substance" will exclude the statutes of

most of the states in this circuit is the same as the answer in the burglary context: (1) That concern must give way to the greater interest in uniformity; and (2) the government still has the "modified categorical approach" to try to use.

Neither does the history of § 2L1.2 or the inclusion of specific definitions for other types of offenses covered by the guideline support the government's argument. The presumption that language included in one section of a statute but omitted in another and/or included in an earlier version of a statute and not included in a later version shows an intent to have different definitions is a presumption which (1) can lose force for a multitude of reasons and (2) has been rejected in a number of cases, including the original categorical approach case of *Taylor v. United States*, 495 U.S. 575 (1990). The Sentencing Commission's own explanations of its amendments suggest that (1) it did not intend to change the definition of "drug trafficking offense" when it created different enhancements for different aggravated felonies and (2) it added specific statutory definitions for some terms either in response to post-amendment litigation or to *distinguish* the definition in § 2L1.2 from the definition in other statutes. There is certainly nothing in the history of the guideline that suggests the Commission intended to vary from the fundamental principle of uniformity that *Taylor* recognized as all important.

Finally, the federal definition in other statutes is exactly what this Court has looked to when there is no consensus definition and when there is an existing federal definition to use. The court did this in both *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc) and *United States v. Anderson*, 989 F.2d 310 (9th Cir. 1993).

As to the "modified categorical approach," the records the government

presented – just a complaint, a California record known as an abstract of judgment, and some docket entries and a "felony plea form" that added nothing to the abstract of judgment – were insufficient. *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc) holds that a charging document such as an information is sufficient only if the judgment either states or otherwise indicates that the defendant pled guilty "as charged in the information," which the judgment here did not do. *Vidal* has been neither sub silento overruled nor limited as the government tries to claim.

There were also other reasons the additional records were not a sufficient supplement to the information. First, this Court's precedent holds that abstracts of judgment generally are of questionable reliability, except perhaps when they mirror the language of the charging document and so can act as a substitute for the express statement, "as charged in the information." Second, there were specific indicia of unreliability in the abstract of judgment in this case, for it listed the statute of conviction as a *possession for sale* statute, but contained a description of the offense as being *actual sale*. This is particularly problematic for a California conviction because the California "sale" statutes include mere transportation for personal use, which is not "trafficking" no matter what substance is involved.

Lastly, the Court can and should find any error in the guidelines calculation here was harmless. The district court did not just find that the 30-month sentence imposed was within the guideline range. It further found, presumably based on the various mitigation arguments made by defense counsel, that a 30-month sentence was the one which was "sufficient but . . . no greater than necessary to comply with the purposes stated in Title 18 United States Code § 3553(a)." This constitutes a finding on what this Court has recognized as the "overarching

statutory charge" of § 3553(a) and, which is what controls regardless of the guidelines.

V.

ARGUMENT

A. REVIEWABILITY AND STANDARD OF REVIEW.

The district court agreed with both the defense argument that Mr. Leal's prior conviction did not qualify under the "categorical approach" and the defense argument that the court records offered by the government were insufficient to qualify the conviction under the "modified categorical approach." GER 54, 56, 57, 61, 62. Such rulings are subject to de novo review. *See e.g., United States v. Rivera-Sanchez*, 247 F.3d 905, 907 (9th Cir. 2001) (en banc).

The government is also correct that it has preserved both issues for review despite the fact that its district court counsel initially conceded the prior conviction did not qualify under the categorical approach. *See United States v. Miller*, 822 F.2d 828, 831 (9th Cir. 1987). Still, the government attorney's initial concession, which was made in a formally filed sentencing pleading, *see* GER 183-84, is an implicit recognition of the weakness in the government's argument on that issue. Government counsel rarely concedes an issue in a formal pleading when the government's position is strong.

* * * *

B. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE CALIFORNIA CONTROLLED SUBSTANCE SCHEDULES' INCLUSION OF SUBSTANCES THAT ARE NOT INCLUDED IN THE FEDERAL CONTROLLED SUBSTANCE SCHEDULES MEANS A CONVICTION UNDER CALIFORNIA HEALTH AND SAFETY CODE § 11351 FAILS TO QUALIFY AS A § 2L1.2 "DRUG TRAFFICKING OFFENSE" UNDER THE "CATEGORICAL APPROACH" TO EVALUATING PRIOR CONVICTIONS.

As the government acknowledges, and as is by now well established, courts which are considering whether a prior conviction is sufficient to trigger one of the prior conviction enhancements in § 2L1.2(b)(1) of the guidelines must at least begin with a "categorical approach." *E.g.,United States v. Benitez-Perez*, 367 F.3d 1200, 1203 (9th Cir. 2004). Under that approach, the court must "'look only' to the fact of conviction and the statutory definition of the prior offense." *Id*. (quoting *United States v. Corona-Sanchez*, 291 F.3d 1201, 1203 (9th Cir. 2002) (en banc) and *Taylor v. United States*, 495 U.S. 575, 602 (1990)). In the case of a prior drug conviction, the court "must first look to the statute of conviction to determine if the offense would qualify as a 'drug trafficking' offense for § 2L1.2 purposes." *Benitez-Perez*, 367 F.3d at 1203.

* * * *

1. This Court's Published Precedent Establishes That a Conviction Under California Health and Safety Code § 11351 Fails to Qualify as a "Drug Trafficking Offense" Under the "Categorical Approach" to Evaluating Prior Convictions.

The Ninth Circuit has applied the categorical approach to California controlled substance convictions in at least three published cases. In each of those cases the court found the California statute at issue to be categorically overbroad because the schedules of controlled substances to which the California statutes apply include substances that are not included in the federal controlled substance statutes.

Initially, in *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007),[4] the court held, in considering a prior conviction under California Health & Safety Code § 11377, that "the government must show that Ruiz-Vidal's criminal conviction was for possession of a substance that is not only listed under California law, but also contained in the federal schedules of the CSA [the federal Controlled Substances Act]." *Id*. at 1077-78. The court then explained that this was not the case as a categorical matter, because the California schedules include more controlled substances than the corresponding federal schedules.

We note that California law regulates the possession and sale

[4] *Ruiz-Vidal* and the other two cases discussed herein were not criminal cases, but were immigration cases in which petitioners were appealing removal orders. The same categorical approach is applied in the immigration context, however. *See Tokatly v. Ashcroft*, 371 F.3d 613, 621-22 & n.8 (9th Cir. 2004) (collecting cases); *but cf. Nijhawan v. Holder*, 129 S. Ct. 2294 (2009) (holding that courts may look to the actual underlying facts for some aggravated felonies in the immigration context).

> of numerous substances that are not similarly regulated by the CSA. For instance, the possession of apomorphine is specifically excluded from Schedule II of the CSA, *see* 21 C.F.R. § 1308.12(b)(1), but California's Schedule II specifically includes it. *See* Cal. Health & Safety § 11055(b)(1)(G). Cal. Health & Safety Code § 11033 punishes the possession of optical and geometrical isomers; the CSA, in contrast, generally punishes the possession of optical isomers alone. 21 C.F.R. § 1300.01(b)(21). We must, therefore, conclude that the IJ [immigration judge] was in error in stating that "any substance listed in 11377 are [sic] included within the federal ambit of § 102 of the Controlled Substances Act[;]" the simple fact of a conviction under Cal. Health & Safety Code § 11377 is insufficient.

Ruiz-Vidal, 473 F.3d at 1078 (footnote omitted). *See also Pagayon v. Holder*, 642 F.3d 1226, 1233 (9th Cir. 2011) (citing *Ruiz-Vidal* for proposition that "[b]ecause not all substances covered by California law are 'controlled substances' under federal law, the simple fact of conviction under § 11377(a) of the California Health and Safety Code does not prove that the conviction involved a controlled substance").

Next, in *Mielewczyk v. Holder*, 575 F.3d 992 (9th Cir. 2009), the petitioner argued that the overbreadth of the California schedules rendered his conviction under California Health & Safety Code § 11352(a) for transporting heroin categorically overbroad. *See Mielewczyk*, 575 F.3d at 993. Citing *Ruiz-Vidal*, the Court held that the state statute was overbroad because it applied to substances not falling under the federal definition of controlled substances in 21 U.S.C. § 802(6). *See Mielewczyk*, 575 F.3d at 995. The Court explained: "Because the statutory definition of the crime in § 11352(a) embraces activity related to drugs, both listed in the CSA and not listed in the CSA, an alien convicted under this statute is not categorically removable under 8 U.S.C. § 1227(a)(2)(B)(i)." *Mielewczyk*, 575 F.3d at 995.

Finally, in *S-Yong v. Holder*, 600 F.3d 1028 (9th Cir. 2010), the Court

followed *Ruiz-Vidal* to hold that California Health & Safety Code § 11379 was categorically overbroad for comparable reasons.

> We have previously found that California law regulates the possession and sale of many substances that are not regulated by the CSA, *Ruiz-Vidal*, 473 F.3d at 1078, and therefore that Section 11379 is "categorically broader" than Section 1227(a)(2)(B)(i) of the INA [Immigration and Naturalization Act]. *See Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1124 (9th Cir. 2007). This means that a conviction under Section 11379 does not necessarily entail a "controlled substance offense" under Section 1227(a)(2)(B)(i) of the immigration statute, ...

S-Yong, 600 F.3d at 1034.[5]

For the same reasons that the California controlled substance statutes considered in *S-Yong*, *Mielewczyk* and *Ruiz-Vidal* are overbroad under the categorical approach, the statute under which Mr. Leal was convicted, California Health & Safety Code § 11351, is overbroad. *Accord Perez-Mejia v. Holder*, 641 F.3d 1143, 1148-49 (9th Cir. 2011) (noting defendant's contention that section 11351 is overbroad and implicitly agreeing by going on to apply "modified categorical approach" rather than categorical approach). *Mielewczyk* is particularly apposite because the statute considered in that case, Health & Safety Code § 11352, lists exactly the same controlled substances as section 11351, with the one exception that section 11352 also includes cocaine base. *Compare* Cal. Health & Safety Code § 11351 (listing various subsections and subparagraphs of

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[5] In *S-Yong* and the other two cases just discussed, the Court went on to apply the "modified categorical approach," *see id*. at 1035-36; *Mielewczyk*, 575 F.3d at 995-96; *Ruiz-Vidal*, 473 F.3d at 1078-79, which is discussed *infra* pp. 32-41. In one of the cases, the Court found the government had carried its burden under this approach, *see Mielewczyk*, 575 F.3d at 995-96, and in the two others, the Court found the government had not carried its burden, *see S-Yong*, 600 F.3d at 1036; *Ruiz-Vidal*, 473 F.3d at 1079.

controlled substance schedule statutes) *with* Cal. Health & Safety Code § 11352 (listing same subsections and subparagraphs, with one addition of subparagraph (f)(1) of section 11054); *see* Cal. Health & Safety Code § 11054(f)(1) (subsection for cocaine base). And cocaine base is not the cause of the California statute's overbreadth, for it is obviously covered by federal law. *See* 21 U.S.C. § 841(b)(1)(A)(iii), (b)(1)(B)(iii).[6]

2. The Court Should Reject the Government's Proposed Different Rule in the Criminal Context, Which Would Make "Drug Trafficking Offense" Include Whatever Substances the Particular State in Which the Defendant Is Convicted Chooses to Include in its Controlled Substance Schedules.

The government argues that the foregoing cases do not apply because those

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[6] The government notes that the unpublished case of *United States v. Gutierrez-Cruz*, No. 05-50870, 2008 WL 205513 (9th Cir. Jan. 24, 2008) held that all California controlled substances were included in the federal controlled substance schedules because those not specifically listed in the federal schedule fell within the federal definition of "controlled substance analogue." *See* Government's Opening Brief, at 15 n.7. The government acknowledges that the unpublished opinion in *Gutierrez-Cruz* is overridden by the published opinion in *Ruiz-Vidal,* however. *See* Government's Opening Brief, at 15 n.7. But *Gutierrez-Cruz* was also mistaken in its assumption that the "analogue" possibility cures the overbreadth of the California schedules. Even if all the additional substances controlled by California were analogues, which *Gutierrez-Cruz* simply asserted, an "analogue" is treated as a "controlled substance" under federal law only "to the extent [it is] intended for human consumption." 21 U.S.C. § 813. There is no "intended for human consumption" requirement for California controlled substances, however. The California schedules are thus overbroad even if every California controlled substance is an "analogue" – because of the inclusion of "analogues" that are not intended for human consumption.

cases are immigration cases applying an immigration statute that specifically incorporates the federal definition of "controlled substance" where § 2L1.2 of the sentencing guidelines does not. But this argument runs into several problems.

First, it is at least in tension with the general rule that a term which is used in both the immigration law context and the criminal law context should be construed consistently in both contexts. The Supreme Court first stated this principle in *Leocal v. Ashcroft*, 543 U.S. 1 (2004), in which it held that 18 U.S.C. § 16 must be interpreted consistently in both contexts, *see id*. at 12 n.8, and this Court followed *Leocal* in *Martinez-Perez v. Gonzales*, 417 F.3d 1022 (9th Cir. 2005) and *Fernandez-Ruiz v. Gonzalez*, 466 F.3d 1121, 1127 (9th Cir. 2006) (en banc). *See Fernandez-Ruiz*, 466 F.3d at 1127; *Martinez-Perez*, 417 F.3d at 1028 n.3. While those cases involved interpretation of a single statute which was being applied in the two contexts, the principle has been extended to interpretation of the same term used in different statutes. *See United States v. Pelayo-Garcia*, 589 F.3d 1010, 1013 n.1 (9th Cir. 2009) (explaining that "decisional law defining the term 'sexual abuse of a minor' in the sentencing context . . . is informed by the definition of the same term in the immigration context . . . and vice versa" (quoting *United States v. Medina-Villa*, 567 F.3d 507, 511-12 (9th Cir. 2009)); *United States v. Narvaez-Gomez*, 489 F.3d 970, 976 (9th Cir. 2007) (applying principle to identical language in 18 U.S.C. § 16(a) and U.S.S.G. § 2L1.2).

More fundamentally, the reading the government argues for – that "drug trafficking offense" should be construed to apply to whatever substances the particular state in which the defendant is convicted chooses to include in its controlled substance schedules – flies in the face of one of the most basic premises of the categorical approach that the Supreme Court adopted in *Taylor v. United*

States, 495 U.S. 575 (1990). As this Court explained in *Estrada-Espinoza v. Mukasey*, 546 F.3d 1147 (9th Cir. 2008) (en banc):

> The underlying theory of *Taylor* is that a national definition of the elements of a crime is required so as to permit uniform application of federal law in determining the federal effect of prior convictions. *Taylor*, 495 U.S. at 590, 110 S. Ct. 2143. A *Taylor* analysis requires a comparison between the prior conviction and the nationally-established generic elements of the offense at issue. Without defined elements, a comparison of the state statute with a federally-defined generic offense is not possible. (Footnotes omitted.)

Estrada-Espinoza, 546 F.3d at 1157-58. *See also Taylor*, 495 U.S. at 590-91 (characterizing as an "odd result[ ]" which Congress could not have intended that "a person convicted of unlawful possession of a firearm would, or would not, receive a sentence enhancement based on exactly the same conduct, depending on whether the State . . . happened to call that conduct 'burglary'").

This was not some new concept, moreover, as evidenced by *Taylor*'s citation of prior cases applying exactly the same principle. One of the cases *Taylor* cited was *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103 (1983), which stated a general principle that "in the absence of a plain indication to the contrary, . . . it is to be assumed when Congress enacts a statute that it does not intend to make its application dependent on state law." *Id*. at 119 (quoting *NLRB v. Natural Gas Utility Dist.*, 402 U.S. 600, 603 (1971) and *NLRB v. Randolph Electric Membership Corp.*, 343 F.2d 60 (4th Cir. 1965)).[7] The other case was *United States v. Turley*, 352 U.S. 407 (1957), which stated that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal

[7] The specific holding in *Dickerson* was that individual states' expungement procedures did not vitiate the effect of a conviction for purposes of the felon in possession of a firearm statute codified at 18 U.S.C. § 922(g)(1). *See Dickerson*, 460 U.S. at 115, 121-22.

criminal statute, the meaning of the federal statute should not be dependent on state law." *See id*. at 410-11.[8] *Turley* followed an even older case, moreover – *Jerome v. United States*, 318 U.S. 101 (1943). *See Turley*, 352 U.S. at 411 (citing *Jerome*). *Jerome* stated that "we must generally assume, in the absence of a plain indication to the contrary, that Congress when it enacts a statute is not making the application of the federal act dependent on state law." *Id*. at 104.[9]

The treatment of burglary in *Taylor* and its subsequent application to the burglary statutes of the states in this circuit also provides an answer to the government's complaint that the district court's holding here would have the effect of excluding convictions under every state drug statute in this circuit except Oregon's, *see* Government's Opening Brief, at 26-27. The *Taylor* definition of burglary excludes convictions under the burglary statutes of all states in this district except perhaps the least populated states of Hawaii, Alaska, and Montana. *See United States v. Aguila Montes de Oca*, ___ F.3d ___, No. 05-50170, 2011 WL 3506442, at *25 (9th Cir. Aug. 11, 2011) (recognizing that California burglary statute does not satisfy *Taylor* definition); *United States v. Grisel*, 488 F.3d 844, 850 (9th Cir. 2007) (en banc) (recognizing that Oregon second degree burglary statute does not satisfy *Taylor* definition); *United States v. Matthews*, 374 F.3d 872, 875 (9th Cir. 2004) (noting government concession that Nevada burglary statute does not satisfy *Taylor* definition because it includes non-dwellings);

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[8] The specific holding in *Turley* was that individual states' definitions of "stolen" were not incorporated into the federal statute penalizing the transportation of a stolen motor vehicle in interstate commerce. *See Turley*, 352 U.S. at 410-11.

[9] The specific holding in *Jerome* was that the federal statute making it a crime to break into a bank with intent to commit a "felony" did not incorporate individual states' definitions of "felony." *See id*.

United States v. Wenner, 351 F.3d 969, 972-73 (9th Cir. 2003) (recognizing that Washington residential burglary statute does not satisfy *Taylor* definition); *United States v. Bonat*, 106 F.3d 1472, 1475 (9th Cir. 1997) (recognizing that Arizona second degree burglary statute does not satisfy *Taylor* definition); *see also* Nev. Rev. Stat. § 205.060 (Nevada burglary statute allowing conviction without unlawful entry); Idaho Code Ann. § 18-401 (Idaho burglary statute allowing conviction without unlawful entry). *Compare* Alaska Stat. § 11.46.310 (Alaska statute defining burglary consistent with *Taylor* definition); Haw. Rev. Stat. §§ 708-800, 708-811 (Hawaii statutes defining burglary consistent with *Taylor* definition); Mont. Code Ann. § 45-6-204 (Montana statute defining burglary consistent with *Taylor* definition). The solution in the burglary context has been to turn to the modified categorical approach, which in some cases has been enough, *see, e.g., Bonat*, 106 F.3d at 1477, and in other cases has not been enough, *see e.g., Aguila Montes de Oca*, 2011 WL 3506442, at *26. This is an unavoidable side effect of the more important goal that *Taylor* and the line of cases upon which it relied have recognized, which is to have national uniformity.

None of the principles of statutory construction the government offers justify varying from the fundamental and well-established general rule recognized and followed in *Taylor*, either. Initially, the dictionary definitions of "controlled substance" to which the government points, *see* Government's Opening Brief, at 22, do not help it. Each of these definitions – except the one which the government acknowledges specifically refers to the federal Controlled Substances Act – refers to a drug regulated or restricted "by law." What is left unanswered is what "law" – a single federal "law" that assures all state convictions are evaluated by the same standard, or 50 different state "laws"? These definitions thus add

nothing to the argument, other than to pose the original question again in a different form. Will the definition of "controlled substance offense" incorporate 50 different states' "laws" and thereby create 50 different definitions of "controlled substance offense," or should just one "law" be used, and, if so, what "law" will it be?[10]

This distinguishes the "counterfeit substance" cases the government cites that have rejected reliance on the Controlled Substances Act in construing that term, *see* Government's Opening Brief, at 19-20. There is a standard dictionary definition for "counterfeit" that does not leave the ambiguity left by the standard dictionary definition of "controlled substance," and it is that standard definition of "counterfeit," not a multitude of varying state definitions, which the cases use. *See United States v. Crittenden*, 372 F.3d 706, 708 (5th Cir. 2004) (quoting and using Webster's and Black's Law Dictionary definitions of "counterfeit); *see also United States v. Hudson*, 618 F.3d 700, 703-04 (7th Cir. 2010) (quoting other definitions as well and noting decisions in *Crittenden* and other circuits); *United*

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[10] This exposes the fallacy in the government's claim that under its proposed definition, "[t]here will still be a uniform national definition of 'drug trafficking offense,'" Government's Opening Brief, at 24. The use of different states' "law" in this facially uniform definition would create the same lack of uniformity that would be created if each state's own definition of "unlawfully" was used in applying the *Taylor* definition of burglary, which this Court has squarely held is not allowed, *see United States v. Aguila Montes de Oca*, 2011 WL 3506442, at *21-25 (finding California burglary does not satisfy *Taylor* definition even if "unlawful" entry is alleged because California definition of "unlawful" differs from meaning of "unlawful" in *Taylor*); *United States v. Bonat*, 106 F.3d at 1475 (finding Arizona burglary statute requiring that defendant have "enter[ed] or remain[ed] unlawfully" did not satisfy *Taylor* definition, because Arizona case law had interpreted "unlawful" entries to include even privileged entries with intent to commit crime).

States v. Mills, 485 F.3d 219, 222 (4th Cir. 2007) (quoting Oxford English Dictionary and Black's Law Dictionary definitions and also noting other decisions); *United States v. Robertson*, 474 F.3d 538, 540-41 (8th Cir. 2007) (following *Crittenden*). One of the cases also relied upon the fact that the federal Controlled Substances Act definition of counterfeit substance is specifically cross-referenced in § 2D1.1 and not in § 4B1.2. *See Mills*, 485 F.3d at 223. This is not particularly significant given the different context in which the conviction is being used in § 2D1.1, where it is the new conviction, and the context in which it is being used in § 4B1.2 and § 2L1.2, where it is a prior conviction. *See City of Columbus v. Ours Garage and Wrecker Service*, 536 U.S. 424, 436 (2002) (explaining that presumption that Congressional intent is revealed by presence of phrase in one provision and absence in another reveals intent "grows weaker with each difference in the formulation of the provisions under inspection"). Still, to the extent this reasoning does deserve any weight, it also distinguishes the present case, for the federal definition of "controlled substance" is not specifically cross-referenced in § 2D1.1.[11]

The government also is not aided by what the Supreme Court and this Court have called the "*Russello* presumption," *see City of Columbus*, 536 U.S. at 436;

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[11] Interestingly, this same case – and one of the others – also relied upon the fact that the federal statute includes "counterfeit substance" within the definition of "controlled substance." It reasoned from this that using the federal definition of "counterfeit substance" would make the term superfluous since such substances would already be included by the term, "controlled substance." *See Mills*, 485 F.3d at 223-24 (quoting *Robertson*, 474 F.3d at 540 n.2). Not only does this argument also not extend to the question of whether the federal definition of "controlled substance" should be used, but it implicitly assumes that it is the federal definition of "controlled substance" which is intended.

United States v. O'Donnell, 608 F.3d 546, 552 (9th Cir. 2010) – that "where Congress includes particular language in one section of a statute, but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion," *Russello v. United States*, 464 U.S. 16, 23 (1983) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972)). First, that presumption applies – or is at least strongest – where language is included in one section and omitted in another section of the *same statute*, *see Johnson v. United States*, 130 S. Ct. 1265, 1272 (2010) (quoting *Russello* and placing emphasis on words, "the same Act"); *O'Donnell*, 608 F.3d at 552 (explaining that enactment of two sections at different times "weakens the *Russello* presumption"), and many of the differences to which the government points, *see* Government's Opening Brief, at 16, are provisions that were added to § 2L1.2 at different times, *see infra* pp. 27-28 & n.13. Second, the *Russello* presumption is only a guide, which is stronger or weaker depending on the context in which it is being considered and what alternative explanations there may be for the differing language. *See, e.g., Clay v. United States*, 537 U.S. 522, 532 (2003) ("The *Russello* presumption – that the presence of a phrase in one provision and its absence in another reveals Congress' design – grows weaker with each difference in the formulation of the provisions under inspection." (Quoting *City of Columbus*, 536 U.S. at 436)); *Field v. Mans*, 516 U.S. 59, 67 (1995) (acknowledging that "[w]ithout more, the inference might be a helpful one," but that where there is more, "the negative pregnant argument should not be elevated to the level of interpretive trump card "); *O'Donnell*, 608 F.3d at 552 (*Russello* presumption weaker when statutes enacted at different times and applies with more limited force when language used is broad rather than specific);

Gorman v. Wolpoff and Abramson, LLP, 584 F.3d 1147, 1156 (9th Cir. 2009) (citing and quoting *Field* and noting that presumption applies with much less force where "there are convincing alternative explanations for a difference in statutory language"). *See also Environmental Defense v. Duke Energy Corp*., 549 U.S. 561, 574 (2007) (noting presumption that identical words used in different parts of same act have same meaning "is not rigid and readily yields whenever there is such variation in the connection in which the words are used as reasonably to warrant the conclusion that they were employed in different parts of the act with different intent" (quoting *Atlantic Cleaners & Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932)).

Taylor itself is actually one example of a case in which the Supreme Court declined to apply the *Russello* presumption. *See Taylor*, 495 U.S. at 590 (acknowledging that "the omission of a pre-existing definition of a term often indicates Congress' intent to reject that definition" and citing *Russello*, but declining to draw inference in case at bar). And it did so in circumstances very similar to those here, where the lawmaking body – there, Congress – had revised a statute – there, the Armed Career Criminal Act – and omitted to include the definition it had included before. *See Taylor*, 495 U.S. at 589. The Court opined that "the deletion of the [prior] definition of burglary may have been an inadvertent casualty of a complex drafting process" and then stated: "Although the omission of a pre-existing definition often indicates Congress' intent to reject that definition [citing, *inter alia*, *Russello*], we draw no such inference here." *Id*. at 589-90.

Related to this, the case of *United States v. Rodriguez-Guzman*, 506 F.3d 738 (9th Cir. 2007) which the government cites is not as far-reaching as the

government suggests. Initially, the primary rationale for the Court's holding in that case was that § 2L1.2 has a "substantively different definition of 'crime of violence,' . . . one that includes a number of specifically identified offenses." *Rodriguez-Guzman*, 506 F.3d at 742, which § 2L1.2 does not have for "drug trafficking offense." The language the government quotes (and modifies) – that "when the drafters of the Guidelines intended to incorporate definitions from [a statute into the Guidelines] . . . they made that intention clear," Government's Opening Brief, at 15 (bracketed language added by government) – was a secondary rationale offered in a footnote as mere "textual confirmation." *Rodriguez-Guzman*, 506 F.3d at 742 n.1.

The government overreaches when it inserts the bracketed language of "a statute into the Guidelines," moreover. What the Court actually stated was that "when the drafters of the Guidelines intended to incorporate definitions from *[8 U.S.C.] § 1101(a)(43)* . . . they made that intention clear," *Rodriguez-Guzman*, 506 F.3d at 742 n.1 (emphasis added). It is not at all clear that the court intended this specific statement about incorporating definitions from 8 U.S.C. § 1101(a)(43), which defines "aggravated felony," to apply to any and every other statutory definition the Sentencing Commission might have had in mind.

And the defense here is not asserting that the Commission intended to incorporate a definition from 8 U.S.C. § 1101(a)(43). The defense is asserting that the Commission intended to incorporate – or assumed – the definition of "controlled substance" from the Controlled Substances Act, which is codified at 21 U.S.C. §§ 801 et seq. It is true that Congress incorporated that same definition into the definition of "aggravated felony," through 8 U.S.C. § 1101(a)(43)(B)'s inclusion of "illicit trafficking in a controlled substance (as defined in section 802

of Title 21)." But this makes the *Russello* presumption comparison a comparison between the express incorporation of the Controlled Substances Act definition by Congress into 8 U.S.C. § 1101(43) and the Sentencing Commission's failure to expressly incorporate that definition into a guideline. This triggers both the point that the *Russello* presumption is much weaker when the differences in language are in different acts, *see Johnson*, 130 S. Ct. at 1272 and *O'Donnell*, 608 F.3d at 552, *cited supra* p. 23,[12] and the point that the presumption is weaker "with each difference in the formulation of the provisions under inspection," *Clay*, 537 U.S. at 523, *quoted supra* p. 23. The way Congress did something in 8 U.S.C. § 1101(43) says little about what the Sentencing Commission meant when it wrote a guideline at a separate time and place.

It also bears noting that nothing in *Rodriguez-Guzman* comes close to supporting the more extreme argument the government is making here – that the guidelines term can be construed to incorporate whatever different states' laws happen to label a "controlled substance." *Rodriguez-Guzman* clearly envisioned one standard definition of the term at issue there – "crime of violence." Similarly, there must be one standard definition of "controlled substance offense," not a potpourri of definitions including 50 different states' 50 different controlled substance schedules.

The history of the guideline to which the government points does not support its position either. Indeed, on more careful examination the history affirmatively supports the defense position, and provides the "alternative

[12] And the presumption is presumably weaker still when the provisions at issue are different types of provisions – a statute and a guideline – enacted by different entities – Congress and the Sentencing Commission.

explanation," *Gorman*, 584 F.3d at 1156, *quoted supra* p. 24, or "more," *Field*, 516 U.S. at 67, *quoted supra* p. 23, which this Court and the Supreme Court have held is reason not to apply the *Russello* presumption.

To begin, the Sentencing Commission's explanation of why "drug trafficking offenses" were separated out from other aggravated felonies in 2001, *see* Government's Opening Brief, at 18, suggests it was still those drug offenses that are also "aggravated felonies" which the Commission had in mind.

> This amendment responds to these concerns [about the breadth of the definition of "aggravated felony"] by providing a more graduated sentencing enhancement of between 8 levels and 16 levels, depending on the seriousness of *the prior aggravated felony*. In doing so, the Commission determined that the 16-level enhancement is warranted if the defendant previously was deported, or unlawfully remained in the United States, after a conviction for certain serious offenses, specifically, a drug trafficking offense for which the sentence imposed exceeded 13 months, a felony that is a crime of violence, a felony that is a firearms offense, a felony that is a national security or terrorism offense, a felony that is a human trafficking offense, and a felony that is an alien smuggling offense committed for profit. Other felony drug trafficking offenses will receive a 12-level enhancement. All *other aggravated felony offenses* will receive an 8-level enhancement.

U.S.S.G. App. C, § 632 (Reason for Amendment) (emphasis added). The italicized references to "the prior aggravated felony" and "other aggravated felony offenses" suggest that the drug trafficking offenses the Commission had in mind were still the same ones that also come within the aggravated felony definition. And that definition specifically incorporates the 21 U.S.C. § 803 definition of "controlled substance." *See* 8 U.S.C. § 1101(a)(43)(B).

The explanation of a later amendment which created most of the specific definitions the government points to as a contrast, *see* Government's Opening Brief, at 16, similarly undercuts the government and supports the defense.

> [T]he amendment adds commentary to define the following

> offenses: "alien smuggling", "child pornography", and "human trafficking." Prior to the amendment, these offenses received a 16 level increase but were not defined. The lack of definitions led to litigation regarding the meaning and scope of some of these terms. The Commission has determined that these offenses warrant application of the 16 level enhancement though some of *these offenses*, as defined by the amendment, may not meet the statutory definition of an aggravated felony in 8 U.S.C. § 1101(a)(43).

U.S.S.G. App. C, § 658 (Reason for Amendment) (emphasis added). In other words, specific definitions were adopted either in response to litigation which suggested confusion or because the Sentencing Commission wanted the definition to be *broader* than the aggravated felony definition (or perhaps both).[13] The absence of a specific definition thus suggests a desire *not* to have a broader definition of the offense in question – here, "drug trafficking offense."

The definition of "controlled substance" used elsewhere in federal law is also the most logical definition to use, absent some reason to the contrary. Using an existing federal definition is exactly what this Court did for statutory rape in

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[13] This amendment created all of the definitions with specific cross-references in application note 1(B) to § 2L1.2 except for the definition of "firearms offense" in subparagraph (v) and the definition of "terrorism offense" in subparagraph (viii). The definition of "terrorism offense" was also added after the more general 2001 amendment – as part of a series of amendments responding to various terrorism provisions in the PATRIOT Act. *See* U.S.S.G. App. C, § 637 (Reason for Amendment). The definition with cross-references for "firearms offense" was part of the 2001 amendment, and the reasons for the cross-references were not specifically given, but they can be gleaned from a consideration of the firearms statutes which are not cross-referenced. The most common form of firearms offense which is an "aggravated felony" – being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1), *see* 8 U.S.C. § 1101(a)(43)(E)(ii) (including offense described in 18 U.S.C. § 922(g)(1) in definition of "aggravated felony") – is not cross-referenced. This is thus another example of a cross-reference that was intended to make clear a *difference* between the § 2L1.2 definition and the aggravated felony definition.

Estrada-Espinoza v. Mukasey, 546 F.3d 1147 (9th Cir. 2008) (en banc).[14] It explained:

> We begin by determining the generic elements of the crime of "sexual abuse of a minor." In the absence of specific congressional guidance as to the elements of a crime, courts have been left to determine the "generic sense in which the term is now used in the criminal codes of most States." [*Taylor*, 495 U.S.] at 598, 110 S. Ct. 2143. Fortunately, we are not faced with that circumstance here, because Congress has enumerated the elements of the offense of "sexual abuse of a minor" at 18 U.S.C. § 2243. (Footnote omitted.).

Estrada-Espinoza, 546 F.3d at 1152.

It is true that the Court also noted the federal definition to which it looked in *Estrada-Espinoza* "comports with 'the ordinary, contemporary, and common meaning of the words' of the term." *Id*. at 1152-53 (quoting *United States v. Baron-Medina*, 187 F.3d 1144, 1146 (9th Cir. 1999)). That was simply an extra reason to use the federal definition, however, which the Court specifically characterized as "unnecessary. . . to ascertain a federal definition because Congress has already supplied it." *Id*. at 1152. In the cases the government cites for the proposition that in the absence of a cross reference, a term should take its "ordinary, contemporary, and common meaning," Government's Opening Brief, at 21 (quoting *United States v. Corona-Sanchez*, 291 F.3d 1201, 1204-05 (9th Cir. 2002) (en banc)), there was no existing federal definition to consider. Those cases

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[14] While *Estrada-Espinoza* did not expressly limit its holding and reasoning to statutory rape, the Court explained in *United States v. Medina-Villa*, 567 F.3d 507 (9th Cir. 2009) that *Estrada-Espinoza* did not use the federal definition considered there for all sexual abuse of a minor offenses. *But see United States v. Gonzalez-Aparicio*, 648 F.3d 749, 761 (9th Cir. 2011) (suggesting *Medina-Villa* might be inconsistent with *Estrada-Espinoza*). *Estrada-Espinoza* did use the federal definition to limit which statutory rape offenses were included within sexual abuse of a minor offenses, however.

have no relevance here in any event, because there is no "ordinary, contemporary, and common meaning" of "controlled substance."

Certainly the most logical definition to use where there is no "ordinary, contemporary, and common meaning" is the federal definition. This is made clear by another case in which this Court did just that – *United States v. Anderson*, 989 F.3d 310 (9th Cir. 1993). The Court there had to decide on the definition of "extortion" intended in 18 U.S.C. § 924(e), the Armed Career Criminal Act. *See id*. at 311. The Court considered first whether there was a consensus definition among the states, but concluded there was not. *See id*. at 312 (noting states "split almost evenly" and that "it's impossible to know which definition the legislators who voted for the Armed Career Criminal Act had in mind"). The Court then reasoned that the federal definition was the most sensible one to use.

> In a case like this, we must articulate a definition of extortion as a matter of federal law. There are several ways we can do this. We might simply let the definition of extortion develop on a case-by-case basis. This would be consistent with the common law tradition, but inconsistent with the rule that penal statutes should give the citizenry fair notice, both of the crime and the punishment. (Citation omitted.) We might try to glean a definition from state law, but as we mentioned, this is virtually impossible in this case because the state laws differ so much. We might make up a definition from scratch, but being fundamentally law interpreters, not law makers, we generally prefer not to do this.
>
> Fortunately, we have one other avenue open to us: Congress has already defined "extortion" in another federal criminal statute. The Hobbs Act, 18 U.S.C. § 1951, which punishes extortion (and attempted extortion) that obstructs commerce, defines extortion as "the obtaining of property . . . by wrongful use of actual or threatened force, violence, or fear, or under color of official right." We realize the Hobbs Act is not *in pari materia* with the Armed Career Criminal Act; it was aimed at a different problem and passed at a different time. It is, however, the law under which most federal extortion prosecutions take place, and its definition of extortion is the one quoted in Black's Law Dictionary at 525 (5th ed. 1979). To the extent the word "extortion" had any specific meaning to the legislators who enacted 18 U.S.C. § 924(e), the Hobbs Act

definition seems to be a more likely candidate than any other.

Anderson, 989 F.2d at 312-13.[15]

Similar reasoning compels use of the federal definition, *i.e.*, the one in the Controlled Substances Act, here. Different states use different controlled substance schedules, and there is no one schedule to which the government has pointed – or can point – as representing any sort of consensus.[16] It follows from both *Anderson* and *Estrada-Espinoza* that it is the federal schedules which should be used, if for no other reason than that there is no better alternative. These schedules and the related statutes do create what the Supreme Court has described as "a comprehensive scheme to combat the international and interstate traffic in illicit drugs," *Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (quoting *Gonzales v. Raich*, 545 U.S. 1, 12 (2005)), and so, as in *Anderson*, the federal definition "seems to be a more likely candidate than any other."

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[15] The First Circuit disagreed with *Anderson* in *United States v. DeLuca*, 17 F.3d 6 (1st Cir. 1994). *See DeLuca*, 17 F.3d at 10. *See also United States v. Malloy*, 614 F.3d 852, 858 (8th Cir. 2010) (following *DeLuca*). But it did so only because it believed there was a consensus definition to which the courts could look. *SeeDeLuca*, 17 F.3d at 9. It did not suggest that the definition of "extortion" could vary with the definition used in whatever state in which a defendant happened to have been convicted.

[16] The only other alternative which could arguably be considered would be the Uniform Controlled Substances Act, since this court often, though not always, looks to model codes. *United States v. Esparza-Herrera*, 557 F.3d 1019, 1023 (9th Cir. 2009). The California schedules for controlled substances, are broader than this model code as well, however. As just two examples, apomorphine and butorphanol are expressly excluded from the Uniform Act, *see* Uniform Controlled Substances Act § 206(1)(i) (1994), but are included in the California drug schedules, *see* Cal. Health & Safety Code §§ 11055(b)(1)(G), 11057(c)(3).

B. THE DISTRICT COURT WAS CORRECT IN RULING THAT THE COMPLAINT, ABSTRACT OF JUDGMENT, AND OTHER COURT RECORDS THE GOVERNMENT OFFERED WERE NOT SUFFICIENT TO CARRY THE GOVERNMENT'S HEAVY BURDEN UNDER THE MODIFIED CATEGORICAL APPROACH.

The government correctly notes that even when a prior conviction does not qualify under the "categorical approach," the government may ask a court to consider whether the prior conviction qualifies under what is known as the "modified categorical approach." Under this approach, a court may go beyond the statute and also consider limited categories of judicially noticeable documents, though only in "a narrow range of cases." *United States v. Benitez-Perez*, 367 F.3d 1200, 1203 (9th Cir. 2004). The judicially noticeable documents which the Supreme Court has listed include "the statutory definition, charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding by the trial judge to which the defendant assented." *Shepard v. United States*, 544 U.S. 13, 16 (2005)).

What the government offered here included neither a written plea agreement, the transcript of a plea colloquy, or any explicit factual finding by the trial judge to which the defendant assented, however. All the government offered was the complaint, a California court record known as an "abstract of judgment," and some docket entries and a "felony plea form" which reflected nothing more than the entry of the guilty plea that the abstract of judgment reflected. *See* GER 155-72, 199-215.

These records were not sufficient evidence of a judicial finding or defendant

admission that the "controlled substance" Mr. Leal was convicted of possessing satisfies the federal definition of "controlled substance." While the complaint did allege cocaine, GER 171, all the abstract of judgment offered as a description of the crime was " Selling Controll," GER 172. Neither the abstract of judgment nor any of the other records reflected that Mr. Leal admitted or the sentencing court found the controlled substance was cocaine.[17]

This is fatal to the government's argument. As hard as it might try, the government cannot escape the holding of this Court sitting en banc in *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc), which is the case the defense cited and the district court correctly relied upon, *see* GER 46-47, 54, 177-78. The holding of that case is clear: "[W]hen the record of conviction comprises only the indictment and the judgment, the judgment must contain 'the critical phrase "as charged in the Information."'" *Id.* at 1087 (quoting *Li v. Ashcroft*, 389 F.3d 892, 898 (9th Cir. 2004)).

Reliance on California abstracts of judgments is particularly problematic, moreover. As this Court explained in *United States v. Navidad-Marcos*, 367 F.3d 903, 908-09 (9th Cir. 2004):

> Under California law, as the Supreme Court of California has recently reminded us: "An abstract of judgment is not the judgment of conviction; it does not control if different from the trial court's oral judgment and may not add to or modify the judgment it purports to digest or summarize." Indeed, in California, "[a]ppellate courts routinely grant requests on appeal of the Attorney General to correct errors in the abstract of judgment." Under California law, the form of the abstract of

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[17] The other records provide even less information than the abstract of judgment. All the docket entries reflect is that Mr. Leal entered a plea to Count 1, without describing what conduct he admitted or the court found. GER 156-69, 200-02. All the "felony plea form" adds is a description of the statute, as "11351 h & s." GER 204-05.

> judgment is promulgated by the Judicial Council of California. The form simply calls for the identification of the statute of conviction and the crime, and provides a very small space in which to type a description. It does not contain information as to the criminal acts to which the defendant unequivocally admitted in a plea colloquy before the court.

Navidad-Marcos, 367 F.3d at 908-09 (citations omitted).

The Court did qualify *Navidad-Marcos* in the later decision of *Ramirez-Villalpando v. Holder*, 645 F.3d 1035 (9th Cir. 2011), in part because the district court in *Navidad-Marcos* had relied on the abstract of judgment alone and in part because the record in *Ramirez-Villalpando* was "more explicit." *Ramirez-Villalpando*, 645 F.3d at 1040. In *Ramirez-Villalpando*, the abstract of judgment (1) was accompanied by a charging document and (2) exactly tracked the narrowing language of the charging document. Specifically, both the charging document and the abstract of judgment described the theft offense the defendant had committed as "GRAND THEFT OF PERSONAL PROPERTY." *Id.* at 1041.[18] The court held that this abstract of judgment combined with the charging document was sufficient. *See id.*

What *Ramirez-Villalpando* means when read in conjunction with *Vidal* – which it did not cite – is that the defendant may be shown to have pled guilty "as charged in the information [or complaint]" by either an express statement to that effect in the judgment or by a judgment which actually shows that happened by exactly tracking the language of the information or complaint.[19] But the abstract

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[18] The abstract of judgment abbreviated the word "PERSONAL" to "PERS" *See id.*

[19] In another appeal raising the issue of the circumstances in which a court can rely on a California abstract of judgment – the pending case of *United States v. Alfonso Anorve-Verduzco*, No. 11-50050, *see* Government's Opening Brief,

of judgment here does neither of these things.

None of the government's attacks on *Vidal*, *see* Government's Opening Brief, at 35-43, save it, moreover. First, *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), cannot be read as sub silentio overruling *Vidal*. *Snellenberger* addressed only the issue of whether a court can consider a minute order at all. *See id*., 548 3d at 700. The question of what the minute order had to say was neither presented to the court nor ruled upon. And, as both this Court and the Supreme Court have stated, "[q]uestions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents." *United States v. Rivera-Guerrero*, 377 F.3d 1064, 1071 (9th Cir. 2004) (quoting *Webster v. Fall*, 266 U.S. 507, 511 (1925)). *See also Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926, 938 (9th Cir. 2007) (quoting *Webster* and adding that "unstated assumptions on non-litigated issues are not precedential holdings binding future decisions" (quoting *Sakamoto v. Duty Free Shoppers, Ltd.*, 764 F.2d 1285, 1288 (9th Cir. 1985))). Further, and contrary to the government's claim, *see* Government's

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Statement of Related Cases – the government has cited other cases that found a judgment sufficient, but those cases do not help the government here for various reasons. Two of the cases – *United States v. Castillo-Rivera*, 244 F.3d 1020 (9th Cir. 2001) and *United States v. Velasco-Medina*, 305 F.3d 839 (9th Cir. 2002) – were decided prior to the en banc holding in *Vidal*. Further, one of them – *Velasco-Medina* – spoke, at least generally, of the defendant having pleaded guilty "as charged in his Information," *Velasco-Medina*, 305 F.3d at 853. In the one recent case – *United States v. Snyder*, 643 F.3d 694 (9th Cir. 2011) – the "judgment of conviction" was not a California abstract of judgment, but an Oregon judgment, which may not be as problematic as California abstracts of judgment; the exact language of the judgment was not described; and the defendant made only two arguments, neither of which was an argument about the judgment's particular language. *See id*. at 697-98.

Opening Brief, at 40-41, there are post-*Snellenberger* cases in which this Court has applied *Vidal*'s holding to straight guilty pleas. *See, e.g., Garcia Tellez v.* Holder, No. 07-72366, 2011 WL 4542678, at *1 (9th Cir. Oct. 3, 2011); *Anguiano-Medel v. Holder*, 344 F. App'x 345 (9th Cir. 2009); *Romo-Anaya v. Holder*, 338 F. App'x 598 (9th Cir. 2009).[20]

This leads into the government's second argument about *Vidal* – its claim that *Vidal* depended on the fact that the plea in that case happened to be a "*People v. West*" plea. *See* Government's Opening Brief, at 37-38. This also is incorrect, because the government is wrong in suggesting that the informal amendment procedure described in *Vidal* is limited to *People v. West* pleas. The very case *Vidal* and the government cite – *People v. Sandoval*, 43 Cal. Rptr. 3d 911 (Cal. App. 2006) – dealt with the oral amendment of a prior conviction enhancement which the defendant initially denied and then admitted. *See id*. at 927. One of the cases *Sandoval* cited – *People v. Hensel*, 43 Cal. Rptr. 865 (Cal. App. 1965) – allowed amendment of an information to be implied by the defendant's conduct without any express amendment either in writing or orally. *See Hensel*, 43 Cal. Rptr. at 869, *cited in Sandoval*, 43 Cal. Rptr. 3d at 926. The leading treatise on

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[20]z The case of *Young v. Holder*, 634 F.3d 1014 (9th Cir. 2011), which the Government asserts "explained . . . the 'lesson' of *Vidal*," Government's Opening Brief, at 41, has been vacated pending rehearing en banc, *see Young v. Holder*, ___ F.3d ___, 2011 WL 3250632 (9th Cir. July 29, 2011), and so is no longer citable authority. In any event, that opinion was more reasonably read as speaking of not all the "lessons" of *Vidal*, but just one of its "lessons." The panel recognized just two paragraphs earlier in the opinion that "[w]e based our holding in *Vidal* on two principles," and then described the first as: "[I]n order to identify a conviction as a generic offense through the modified categorical approach when the record contains only the charging document and the judgment, the judgment must contain 'the critical phrase "as charged in the information[.]"'" *Young*, 634 F.3d at 1022 (quoting *Vidal*, 504 F.3d at 1087).

California law – Witkin – makes clear that this informal, oral – or even implied – amendment procedure is a general procedure which can be used in any context. *See* 4 Bernard E. Witkin, *California Criminal Law*, Pretrial Proceedings § 213 (3d ed. 2000). Indeed, the district judge in the present case noted this was his own experience as a judge in the state courts, commenting: "Mr. Gunn took me back to a time when I was on state court and during the heat of everything happening, complaints are amended on the fly. They just are. It's a fact of life there." GER 54.

The government's citation of the state cases holding that a defendant who pleads guilty "admits every element of the offense charged," *People v. Palacios*, 65 Cal. Rptr. 2d 318, 321 (Cal. App. 1997), *quoted in* Government's Opening Brief, at 33, and that a plea of guilty may be made only "to the offense actually charged . . . unless the prosecution consents," *Sanchez v. Superior Court*, 126 Cal. Rptr. 2d 200, 202 (Cal. App. 2002), *quoted in* Government's Opening Brief, at 34, misses the point. In particular, it ignores the problem presented by the California practice of permitting informal, oral – or even implied – amendment of the complaint or information at the time of plea or judgment. It is true that the plea admits every element of the crime charged, but the oral or implied amendment option means the ultimate "crime charged" which the prosecution agrees to let the defendant admit may differ from the crime charged in the written complaint or information.

Finally, the government's third argument – that *Vidal* relied on an alternative "more simple theory," Government's Opening Brief, at 38-39 – does not make *Vidal* inapplicable here. The addition of an alternative rationale does not undercut in any way the first holding that an abstract of judgment may be

considered only if it states the defendant pled guilty as charged in the information. For one thing, this first holding was already a holding in the panel opinion in *Li v. Ashcroft,* and the court in *Vidal* was merely approving it en banc. Further, this first holding has been applied even post-*Snellenberger,* in both the published opinion the government cites involving a prior nolo contendere plea, *see Fregozo v. Holder*, 576 F.3d 1030, 1040 (9th Cir. 2009), *cited in* Government's Opening Brief, at 42-43, and the unpublished opinions involving ordinary guilty pleas which are cited *supra* p. 36.[21]

The reason for the "as charged in the information" requirement is a combination of the potential ambiguity created by California's informal, oral – or even implied – amendment procedure and the high burden set for the modified categorical approach. While *Snellenberger* used the words "reasonable certainty" to describe that burden, other cases – both before and after *Snellenberger* – describe the level of "reasonable certainty" which is required as court records which "unequivocally demonstrat[e]" that the prior offense comes within the generic federal definition. *United States v. Gonzalez-Aparacio*, 648 F.3d 749, 755 (9th Cir. 2011); *United States v. Rodriguez-Guzman*, 506 F.3d 738, 747 (9th Cir. 2007); *United States v. Navidad-Marcos*, 367 F.3d 903, 908 (9th Cir. 2004); *United States v. Corona-Sanchez*, 291 F.3d 1201, 1211 (9th Cir. 2002) (en banc). As articulated in more depth in *Navidad-Marcos*:

> [T]he documents used to satisfy a modified-categorical analysis must meet a "rigorous standard." *United States v. Sandoval-Venegas*, 292 F.3d 1101, 1106 (9th Cir. 2002). Because the consequences of a sentence enhancement for a qualifying

[21] The government's fourth argument about *Vidal*, *see* Government's Opening Brief, at 39-40, is really just a reiteration of its first argument that *Snellenberger* silently overruled *Vidal*.

> conviction are significant, we have noted that "'might' simply cannot be enough," and "neither the district court nor this Court should be handed the task of reading between the lines." *Id*. at 1109. In short, the purpose of this modified categorical approach is "to determine if the record unequivocally establishes that the defendant was convicted of the generically defined crime, even if the statute defining the crime is overly inclusive." *Corona-Sanchez*, 291 F.3d at 1211.

Navidad-Marcos, 367 F.3d at 908.

This high standard was simply not met here. It is not just that the abstract of judgment fails to include the language required by *Vidal* and fails to mirror the charging document as in *Ramirez-Villalpando*, though that is obviously a problem for the government. It is that the abstract of judgment does not even mention heroin. And the government sets up a straw man – though how much of a straw man depends on how uncommon the additional controlled substances California regulates are – when it argues that it is implausible the charge was modified to one of those other controlled substances, *see* Government's Opening Brief, at 35. Another possibility left open by the documents the government presented is that a careful defense attorney representing Mr. Leal in the state case limited his admissions to the minimum necessary to support a plea and had him admit just a "controlled substance subject to California Health and Safety Code § 11351," without specifying what that substance was. Still another possibility left open by the documents is that there was some real dispute about whether the substance was in fact heroin and the parties resolved that dispute by simply agreeing that it was some substance covered by section 11351. As the district court recognized: "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." GER 54.

The documents the government presented are not just ambiguous, moreover. They are also internally inconsistent and contradictory. While the statute to which

the documents referred is California Health and Safety Code § 11351, which criminalizes possession of certain controlled substances for sale, the summary description of the crime in the abstract of judgment is "*selling* controll" (emphasis added), which is a violation of California Health and Safety Code § 11352. And the conduct covered by that statute includes not just selling controlled substances but also transporting them for personal use, which this Court has recognized is not a "drug trafficking crime." *See United States v. Kovac*, 367 F. 3d 1116, 1119-20 (9th Cir. 2004) *and cases cited therein*. While the abstract of judgment speaks of "selling" rather than "transporting," the Court recognized in *Navidad-Marcos* that the use of "sale" in an abstract of judgment is insufficient to establish sale was the actual conduct because it may be just a clerk's shorthand description of the statute. *See Navidad-Marcos*, 367 F.3d at 908-09.

These cases taken together mean the documents presented by the government also left open the possibility of an oral modification of the *conduct* charged in the complaint – to mere transportation of a controlled substance for personal use. And that is not a "drug trafficking crime" regardless of the nature of the controlled substance.[22]

In sum, there are two independent reasons the abstract of judgment in this case does not provide the "unequivocal demonstration" required by this Court's case law on the modified categorical approach. First, *Vidal*'s holding that an abstract of judgment may only be considered if it indicates the defendant pled

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[22] The two-year sentence the abstract of judgment says was imposed would be inconsistent with this possibility, because California Health and Safety Code § 11352 requires a sentence of three, four, or five years, not two years. That merely highlights another internal inconsistency or contradiction in the records, however. It does not answer the question of which document is wrong in which way.

guilty as charged in the information is still good law and applies to all pleas, not just "*People v. West*" pleas. Second, abstracts of judgment must at least be considered with care, and the abstract of judgment in this particular case has an ambiguity and an internal inconsistency which makes it fall well short of the "unequivocal demonstration" that is required.

C. ANY ERROR IN THE DISTRICT COURT'S GUIDELINE CALCULATION WAS HARMLESS, BECAUSE THERE WERE NON-GUIDELINES REASONS FOR IMPOSING THE 30-MONTH SENTENCE AND THE DISTRICT COURT SPECIFICALLY FOUND THAT THIS SENTENCE WAS SUFFICIENT, BUT NO GREATER THAN NECESSARY, IN ACCORD WITH THE "OVERARCHING PROVISION" OF 18 U.S.C. § 3553(a).

Soon after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), this Court considered the question of whether and when remand is required if there is an incorrect application of the guidelines by a sentencing court. What the court stated – and has reiterated in multiple subsequent cases – was: "If we determine that the sentence resulted from a correct application of the Sentencing Guidelines, *and further that the error in application was not harmless*, we will remand to the district court for further sentencing proceedings." *United States v. Cantrell*, 433 F.3d 1269, 1279 (9th Cir. 2006) (emphasis added). *See also United States v. Calderon Espinosa,* 569 F.3d 1005, 1008 (9th Cir. 2009); *United States v. Franco-Flores*, 558 F.3d 978, 980-81 (9th Cir. 2009); *United States v. Ankeny*, 502 F.3d 829, 841 (9th Cir. 2007); *United States v. Ingham,* 486 F.3d 1068, 1073 n.2 (9th Cir. 2007); *United States v. Mohamed*, 459 F.3d 979, 985

(9th Cir. 2006); *United States v. Plancarte-Alvarez*, 449 F.3d 1059, 1060 (9th Cir. 2004); *United States v. Thornton*, 444 F. 3d 1163, 1165 (9th Cir. 2005). This Court has found harmless error against the government where it had "no doubt that the district court would impose the same sentence under the advisory Guidelines regime." *United States v. Menyweather*, 447 F.3d 625, 634 (9th Cir. 2006).

The Court did distinguish *Menyweather* in *United States v. Munoz-Camarena*, 631 F.3d 1028 (9th Cir. 2011), as a case where "[t]here was no dispute on appeal about the Guidelines calculation or its correctness (citation omitted), but only about whether the district [court] gave a proper and adequate explanation for the significant downward departure." *Munoz-Camarena*, 631 F.3d at 1030 n.4. And the court went on to state that "[a] district court must start with the recommended Guidelines sentence, adjust upward or downward from that point, and justify the extent of the departure from the Guidelines sentence." *Id*. at 1030. It further stated that "[a] district court's mere statement that it would impose the same above-Guidelines sentence, no matter what the correct calculation cannot, without more, insulate the sentence from remand." *Id.* at 1031. But the court also recognized that "[i]f [the district court] makes a mistake, harmless error review applies," *id*. at 1030, and gave several examples in a footnote, which it acknowledged were "not exhaustive," *id*. at 1030-31 n.5.

Here, there is the "more" that is necessary beyond a "mere statement that [the court] would impose the same above-Guidelines sentence, no matter what the correct calculation." Specifically, there was an express finding by the district court that the 30-month sentence imposed was "sufficient but . . . no greater than necessary to comply with the purposes stated in Title 18 United States Code Section 3553(a)." GER 64. This finding is key, because it is a finding on what the

Supreme Court has called the "overarching provision" of § 3553(a), *Kimbrough v. United States*, 552 U.S. 85, 101 (2007), and what this Court has labeled "the overarching statutory charge," *United States v. Carty*, 520 F.3d 984, 991 (9th Cir. 2008) (en banc). This characterization means the sentence which is sufficient but not greater than necessary is not just *a* sentence which the court *may* impose, but is *the* sentence which the court *must* impose, or at least places a ceiling on the sentence it may impose.

Given this overarching and governing provision, and given the district court's finding that 30 months satisfied it in this case, the district court was *required* to impose a sentence of no more than 30 months. That makes any error in the district court's guideline calculation harmless. In fact, it would have been error – and would be error on remand – for the district court to impose anything more.

VI.

CONCLUSION

Mr. Leal's sentence should be affirmed.

Respectfully submitted,

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DATED: October 7, 2011

By s/ Carlton F. Gunn
CARLTON F. GUNN
Deputy Federal Public Defender

CERTIFICATE OF RELATED CASES

The following cases presents an issue related to an issue raised in this brief:

1. *United States v. Guillermo Eloy Alamos*, No. 10-50304.
2. *United States v. Alfonso Anorve-Verduzco*, No. 11-50050.

DATED: October 7, 2011

s/ Carlton F. Gunn
CARLTON F. GUNN
Deputy Federal Public Defender

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C) and Circuit Rule 32-1, I certify that this brief is proportionally spaced, has a typeface of 14 points or more, and contains 12,804 words.

DATED: October 7, 2011

s/ Carlton F. Gunn
CARLTON F. GUNN
Deputy Federal Public Defender

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2011, I electronically filed the foregoing Appellee's Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

s/ Carlton F. Gunn
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