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TWO IMPORTANT NEW NINTH CIRCUIT CASES AFFECTING THE DRUG-TRAFFICKING AGGRAVATED FELONY GROUND OF DEPORTATION

February 2018

After *United States v. Valdivia-Flores*, 876 F.3d 1201 (9th Cir. 2017), possession with intent to deliver a controlled substance (PWID) under Revised Code of Washington (RCW) § 69.50.401 should no longer be found to be an aggravated felony drug crime.[1] "Under a straightforward application of the categorical approach, Washington's drug trafficking statute is overbroad compared to its federal analogue, and Valdivia–Flores's conviction cannot support an aggravated felony determination." *Valdivia-Flores* at 1209.

The reason is that Washington's aiding and abetting, or accomplice, liability merely requires knowledge, while, federal law requires a *mens rea* of specific intent for conviction for aiding and abetting. *Id.* at 1207-1208. The distinction between the two mental states is meaningful in Washington and federal law. *Id* at 1207. The distinction between principals and aiders and abettors has been "expressly abrogated" in "every jurisdiction [in] all States and the Federal Government." *Gonzales v. Duenas-Alvarez*, 549 U.S. 183, 189, 127 S.Ct. 815 (2007).

As far as we can discern, this ruling should apply to § 69.50.401 as a whole, and should cover delivery as well as PWI: "Because a jury need not distinguish between principals and accomplices, the drug trafficking statute is not divisible so far as the distinction between those roles is concerned, so the modified categorical approach may not be applied, and it was error for the district court to do so." *Valdivia-Flores* at 1210.

Because of the critical nature of this ruling, and its divergence from past assumptions in the case law, we urge counsel to review this case for themselves.[2]

This argument may also have application in distinguishing any generic definition of a removal ground that requires a *mens rea* higher than knowledge. (E.g., "*intent to deprive* the owner of property either permanently or under circumstances where. . .".)

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[1] At: http://cdn.ca9.uscourts.gov/datastore/opinions/2017/12/07/15-50384.pdf

[2] On February 15, 2018 the government received a third 30-day extension of time to file a petition for rehearing, until March 23, 2018.

In an unpublished case, *United States v. Paniagua-Paniagua*, No. 15-50454, 2018 WL 578705, at *1 (9th Cir. Jan. 29, 2018), a Ninth Circuit panel found that *Valdivia*-Flores' "changes in the law" did not apply retroactively for the purpose of a collateral challenge to an 8 USC §1326 illegal re-entry conviction.

In *United States v. Brown*, 879 F.3d 1043 (9th Cir. 2018) the Ninth Circuit ruled that the "Washington drug conspiracy statute covers conduct that would not be covered under federal law, and Brown's conviction under the Washington statute is not a categorical match." *Id.* at 1048.[3]

The Court found that the general definition of conspiracy at RCW § 9A.28.040 supplies the definition for the specific drug conspiracy statute at § 69.50.407. "Under federal law, a defendant cannot be convicted of conspiracy if the only alleged co-conspirator is a federal agent or informant," but under Washington law this is specifically ruled out as a defense. RCW § 9A.28.040(2)(f) provides that "[i]t shall not be a defense to criminal conspiracy that the person or persons with whom the accused is alleged to have conspired ... [i]s a law enforcement officer or other government agent who did not intend that a crime be committed." *Brown* at 1048.

"As a result, the Washington drug conspiracy statute covers conduct that would not be covered under federal law, and Brown's conviction under the Washington statute is not a categorical match." *Id.*

In *Brown* the categorical analysis was applied to the definition of a federal guideline sentencing enhancement for a "controlled substance offense," more or less coterminous with a trafficking offense. (USSG § 2K2.1(a)(4)(A)). It should apply equally well to an aggravated felony conviction for conspiracy under INA § 101(a)(43)(U) and the same offense should also not be an aggravated felony.

This argument could generally distinguish Washington conspiracy convictions from aggravated felonies defined under INA § 101(a)(43)(U).

Whether or not it applies to distinguish Washington convictions for conspiracy to possess a controlled substance under RCW § 9A.28.040 from the removal grounds at INA §§ 212(a)(2)(A)(i)(II) or 237(a)(2)(B)(i) needs to be explored. Washington prosecutors are sometimes reluctant to accept a plea to solicitation to possess, which comes under the Ninth Circuit-only solicitation exception laid out in *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997), when they want a felony, since solicitation reduces possession from a C felony to a gross misdemeanor. However, conspiracy under § 69.50.407 does *not* reduce the level of a crime, so could be an acceptable option—if it were determined that *Brown* also serves to distinguish RCW conspiracy to possess from the non-aggravated felony drug removal grounds.

[3] At: http://cdn.ca9.uscourts.gov/datastore/opinions/2018/01/16/16-30218.pdf