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A Possible Argument that Washington's Drug Paraphernalia Offense is Not a Removable Controlled Substance Offense, Because Washington's "Controlled Substance" Definition is Broader than the Federal Definition.[1] (2-15-18)

I. To be a deportable conviction relating to a controlled substance (CS), an offense must involve a controlled substance as defined in 21 USC 802 et.seq. which is the Controlled Substances Act (CSA).

- **This includes substances scheduled by the DEA under its delegated authority[2].** See 21 CFR §§ 1300.01, *Definitions relating to controlled substances*; and 1308, *Schedules of Controlled Substances.*
- **In Washington State, substances can also be scheduled administratively, by the Washington Pharmacy Commissio**n.[3]

II. Listed chemicals are defined in the CSA separately from controlled substances. [4]

- Most controlled substance (CS) crime provisions of the INA do not refer directly to listed chemicals.[5]
- By contrast, INA § 212(a)(2)C)(i) ("reason to believe" ground of inadmissibility) refers specifically to *both* controlled substances and to listed chemicals, showing that Congress knew how to include listed chemicals when it chose to and that listed chemicals, although regulated *under* the CSA, are *not* controlled substances.

"[W]e decline to adopt the Government's position that the term 'controlled substance' should mean any substance controlled by law." *United States v. Leal-Vega*, 680 F.3d 1160, 1167 (9th Cir. 2012)[6]

III. The aggravated felony definition at INA § 101(a)(43)(B) includes a "drug trafficking crime" under 18 USC 924, which reaches any felony punishable under the CSA.

The CSA does include felonies involving only listed chemicals. Those felonies would be aggravated felonies under 101(a)(43)(B). But most of those listed chemical felonies have a statutory element involving controlled substances, such as intent to manufacture a CS.[7]

- Under 21 USC § 841 (f) *Wrongful distribution or possession of listed chemicals*, § (f)(2) is simply not a felony.[8]
- 21 USC § 841 (f)(1) is a listed chemical felony that has knowing illegal distribution as an element.[9]
- 21 USC § 841(c)(3) is a felony involving the additional element of receipt or distribution of listed chemicals with the intent of causing the evasion of the recordkeeping or reporting requirements.[10]

None of the listed chemical offenses under 21 USC § 841 that are felonies under the CSA reach simple possession of a listed chemical, or use of paraphernalia to simply contain or ingest a listed chemical.

IV. In Washington some of the controlled substances scheduled administratively by the Washington Pharmacy Commission are substances that are only listed chemicals under the CSA and 21 CFR 1300 et seq.

- For example piperidine, which is a List I listed chemical under 21 USC 802(34)(J) as "Piperidine and its salts" is administratively scheduled by the Washington Pharmacy Commission as a Schedule I controlled substance.[11]

- Another DEA List I listed chemical is gamma-hydroxybutyric acid lactone.[12] While a "listed chemical" under the CSA, it is listed in WAC 246-887-100 as a "controlled substance" under Schedule I[13]

- According to the DEA Anthranilic acid is a List 1 chemical.[14] Under WAC 246-887-150(2)(a), it is deemed an "immediate precursor" that "[u]nless specifically excepted or listed in another schedule. .... shall be a Schedule II controlled substance."[15]

- According to the DEA Phenylacetic acid, its esters, and its salts, is a List 1 chemical.[16] Under WAC 246-887-150(2)(e), it is likewise deemed an "immediate precursor" that ".... shall be a Schedule II controlled substance."[17]

V. California's controlled substance definition is known to be broader than the CSA definition.[18] In *Martinez-Lopez,* the Ninth Circuit ruled that California drug schedules were divisible for the purpose of the drug removal grounds:

- The modified-categorical approach applies, if a specific controlled substance is specified in the record of conviction.[19]
- Possession of a specific controlled substance was not an alternate means, but deemed a separate crime. *Id.* at 1040–41.

VI. A different divisibility outcome for Washington is perhaps theoretically arguable, but improbable.[20]

Therefore, the *Matter of Paulus*, 11 I. & N. Dec. 274 (BIA 1965) argument, where the substance is not identified and the state definition is broader, is not going to work if an actual CS is named, even though, or if, Washington's definition of a CS is broader than that of 21 USC 802 and 21 CFR 1300.

However, a simple possession conviction under RCW 69.50.4013 where the record of conviction does not identify the specific controlled substance (as unlikely as it may be in practice) should avoid being a removable drug conviction if the above overall argument is correct— at least in any case where the burden is on the government.[21] It would amount to simple possession of only a federally listed chemical, without any additional element of intent (e.g., intent to manufacture a controlled substance) that would make it a crime relating to a controlled substance or a felony under the CSA.

In *Matter of Ferreira*, 26 I&N Dec. 415, 420-21 (BIA 2014) the BIA said that "even where a State statute on its face covers a type of object or substance not included in a Federal statute's generic definition, there must be a realistic probability that the State would prosecute conduct falling outside the generic crime in order to defeat a charge of removability." *Id.* However *Ferreira* should not overcome the statute's explicit language defining federal listed chemicals as Washington controlled substances.[22]

VII. One place where this may be useful is with Washington use of drug paraphernalia convictions, which often do not specify the controlled substance.

The statute RCW 69.50.412 merely refers to use of paraphernalia for "a controlled substance other than marijuana."[23]

- If it is true that Washington's scheduling of federal listed chemicals as controlled substances makes its definition of a controlled substance broader than that of the CSA, this brings Washington's "use of paraphernalia" offense, RCW 69.50.412, under the scope of *Mellouli v. Lynch*, 135 S. Ct. 1980, 1984, 192 L. Ed. 2d 60 (2015).

- Like Kansas's paraphernalia law, Washington's paraphernalia definition is not restricted to "'equipment, product, or material' which is *'primarily intended or designed* for use in connection with various drug-related activities." *Mellouli*, 135 S.Ct at 1985. Rather, RCW 69.50.102 (a) reaches *all* "materials of any kind which are used" for drug activity.

- But principally, if a Washington paraphernalia conviction does not require naming of a specific controlled substance, it would be like "[t]he state law involved in Mellouli's conviction," in that it, "like the California statute in [*Matter of*] *Paulus*, was not confined to federally controlled substances; it required no proof by the prosecutor that Mellouli used his sock to conceal a substance listed under § 802, as opposed to a substance controlled only under Kansas law." [24] *Mellouli*, 135 S. Ct. at 1985.

> [C]onstruction of § 1227(a)(2)(B)(i) must be faithful to the text, which limits the meaning of "controlled substance," for removal purposes, to the substances controlled under § 802. We therefore reject the argument that any drug offense renders an alien removable, without regard to the appearance of the drug on a § 802 schedule. Instead, to trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien's conviction to a drug "defined in [§ 802].
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> *Mellouli* 135 S. Ct. at 1990-91.

Further investigation into this possible defense is strongly encouraged.

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[1] This advisory is intended to encourage further research and investigation into immigration-side defenses. It is not meant to be relied on by criminal defense lawyers where there is any alternative to a drug crime plea. Please send comments, critiques, thoughts, corrections or additions and any briefing that make use of these ideas to jonathan@defensenet.org, (especially if you do removal defense and have a degree in organic chemistry).

[2] See 21 USC § 811 ("the Attorney General may by rule—(1) add to such a schedule..." which authority is delegated to the Administrator of the Drug Enforcement Administration. 8 CFR § 0.100.

[3] See RCW 69.50.201(a) The commission shall enforce this chapter and may add substances to or delete or reschedule substances listed in RCW 69.50.204, 69.50.206, 69.50.208, 69.50.210, or 69.50.212 pursuant to the procedures of chapter 34.05 RCW.

[4] 21 USC § 802(34) The term "list I chemical" means a chemical specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this subchapter and is important to the manufacture of the controlled substances...

21 U.S.C. § 802(35)The term "list II chemical" means a chemical (other than a list I chemical) specified by regulation of the Attorney General as a chemical that is used in manufacturing a controlled substance in violation of this subchapter...

[5] See INA §§ 212(a)(2)(A)(i)(II); 237(a)(2)(B)(i).

[6] "[P]ossession of a listed chemical that can be used to manufacture a controlled substance is not sufficient to prove possession of a controlled substance . . ." *United States v. Ching Tang Lo*, 447 F.3d 1212, 1222 (9th Cir. 2006); "A listed chemical is a chemical that has legitimate, legal uses, although it is occasionally used to make a controlled substance. 21 U.S.C. § 802(33)-(35)." *United States v. Andrade-Calderon,* 638 F. App'x 622, 624 (9th Cir. 2016).

[7] 21 USC § 841 (c) Offenses involving listed chemicals. Any person who knowingly or intentionally--

(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this subchapter; or

(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

shall be fined in accordance with Title 18 or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

[8] 21 USC § 841 (f (2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 830 of this title have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18 or imprisoned not more than one year, or both.

[9] 21 USC § 841 (f) Wrongful distribution or possession of listed chemicals. (1) Whoever knowingly distributes a listed chemical in violation of this subchapter (other than in violation of a recordkeeping or reporting requirement of section 830 of this title) shall, except to the extent that paragraph (12), (13), or (14) of section 842(a) of this title applies, be fined under title 18 or imprisoned not more than 5 years, or both.

[10] 21 USC § 841 (c) Offenses involving listed chemicals. Any person who knowingly or intentionally--

(1) possesses a listed chemical with **intent to manufacture a controlled substance** except as authorized by this subchapter;

(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will **be used to manufacture a controlled substance** except as authorized by this subchapter; or

(3) with the **intent of causing the evasion of the recordkeeping or reporting requirements of section 830 of this title**, or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;

[11] See WAC 246-887-100 Schedule I. The board finds that the following substances have high potential for abuse and have no accepted medical use in treatment in the United States or that they lack accepted safety for use in treatment under medical supervision. The board, therefore, places each of the following substances in Schedule I.

(a) The controlled substances listed in this section, by whatever official name, common or usual name, chemical name, or brand name, are included in Schedule I.

(b) Opiates. Unless specifically excepted or unless listed in another schedule, any of the following opiates, including their isomers, esters, ethers, salts, and salts of isomers, esters, and ethers, whenever the existence of these isomers, esters, ethers, and salts is possible within the specific chemical designation: . . .

(7) Alpha-methylfentanyl (N-[1-alpha-methyl-beta-phenyl) ethyl-4-piperidyl] propionanilide; 1-(1-methyl-2-phenylethyl)-4-(N-propanilido) **piperidine**);

[12] 21 CFR § 1310.02(a) List I chemicals (25) Gamma-Butyrolactone (Other names include: GBL; Dihydro-2 (3H)-furanone; 1,2-Butanolide; 1,4-Butanolide; 4-Hydroxybutanoic acid lactone; **gamma-hydroxybutyric acid** lactone). See https://www.deadiversion.usdoj.gov/21cfr/cfr/1310/1310_02.htm accessed 12-20-2017.

[13] WAC 246-887-100 Schedule I (b) (27) **Gamma-hydroxybutyric Acid** (other names include: GHB). See http://apps.leg.wa.gov/WAC/default.aspx?cite=246-887-100 accessed 12-20-2017. Note however that gamma-butyrolactone may separately be treated as a "controlled substance analogue," so this may not be the best functional example. See *Boultinghouse v. Hall,* 583 F. Supp. 2d 1145, 1156 (C.D. Cal. 2008) ("Congress expressly provided that the designation of GBL as a listed chemical 'does not preclude a finding ... that [GBL] is a controlled substance analogue., 21 U.S.C. § 802(32)(b)." *Id.*)

A "controlled substance analogue" does not escape being treated as a CS. 21 USC 802 (32)(B); 21 USC 813.

[14] 21 CFR 1310.02(a)((2) Anthranilic acid, its esters, and its salts [DEA Chemical Code Number 8530]; see https://www.deadiversion.usdoj.gov/21cfr/cfr/1310/1310_02.htm

[15] WAC 246-887-150(2)(a); See http://apps.leg.wa.gov/wac/default.aspx?cite=246-887-150

[16] 21 CFR 1310.02(a)(9); https://www.deadiversion.usdoj.gov/21cfr/cfr/1310/1310_02.htm

[17] WAC 246-887-150(2)(e); See http://apps.leg.wa.gov/wac/default.aspx?cite=246-887-150

[18] *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007); *Cabantac v. Holder*, 693 F.3d 825, 826 (9th Cir. 2012), *opinion amended and superseded on denial of reh'g,* 736 F.3d 787 (9th Cir. 2013).

[19] *Martinez-Lopez*, 864 F.3d 1034 (9th Cir. 2017) *cert. denied,* No. 17-6490, 2017 WL 4868505 (U.S. Dec. 4, 2017); *United States v. Murillo-Alvarado*, 876 F.3d 1022 (9th Cir. 2017)

[20] But see *State v. Clark-El,* 196 Wash. App. 614, 617, 384 P.3d 627, 629 (2016) ("When a defendant is charged with delivering a controlled substance, the identity of the substance is an essential element that must be stated in the to-convict instruction if it increases the maximum sentence the defendant will face upon conviction." *Id*. (emphasis added.)); *State v. Goodman*, 150 Wash. 2d 774, 785–86, 83 P.3d 410, 415–16 (2004) (same). Conversely, if the specific sentence or sentence range is not increased by the specific identity of the controlled substance beyond the default minimum, it arguably might not be an element. See *State v. Eaton*, 164 Wash. 2d 461, 467, 191 P.3d 1270, 1272 (2008), J.M. Johnson, J. (concurring). As a practical matter such an argument may be unlikely to prevail.

[21] The burden of proof matters only as long as *Young v. Holder* 697 F.3d 976 (9th Cir.2012)-- which allocates a burden of proof in the case of an inconclusive record on a divisible statute-- remains in effect. *See Marinelarena v. Sessions,* 869 F.3d 780, 789 (9th Cir. 2017), continuing to distinguish *Moncrieffe v. Holder* 133 S.Ct. 1678 (2013) from *Young*. "But *Moncrieffe* itself explicitly forecloses this distinction, explaining that the categorical '*analysis is the same* in both [the removal and cancellation of removal] contexts.' *Moncrieffe*, 133 S.Ct. at 1685 n.4 (emphasis added)." *Id.* at 794, (Tashima,J., dissenting).

[22] *United States. v. Grisel* 488 F.3d 844, 850 (9th Cir.2007)("Where, as here, a state statute explicitly defines a crime more broadly than the generic definition, no "legal imagination," *Duenas-Alvarez*, 127 S.Ct. at 822, is required to hold that a realistic probability exists that the state will apply its statute to conduct that falls outside the generic definition of the crime. The state statute's greater breadth is evident from its text."); *Swaby v. Yates*, 847 F.3d 62, 66 (1st Cir. 2017) ("*Duenas–Alvarez* made no reference to the state's enforcement practices. It discussed only how broadly the state criminal statute applied. . . . But, that sensible caution against crediting speculative assertions regarding the potentially sweeping scope of ambiguous state law crimes has no relevance to a case like this. The state crime at issue clearly does apply more broadly than the federally defined offense. Nothing in *Duenas–Alvarez,* therefore, indicates that this state law crime may be treated as if it is narrower than it plainly is. Nor are we aware of any circuit court case, whether from this circuit or from any other, that supports the BIA's surprising view that, in applying the categorical approach, state law crimes should not be given their plain meaning." *Id*.)

[23] See, e.g.:

> Here, Flowers had on his person a digital scale with an **untested** residue. At trial, Deputy Tjossem testified that the scale "looks fairly well used." 2 RP at 174. The police also found on Flowers's person eight one-inch by one-inch baggies, two of which had methamphetamine residue and one which contained a rock of methamphetamine. Based on this evidence, a rational trier of fact could conclude beyond a reasonable doubt that Flowers used the baggies for storage of drugs and used the digital scale to weigh **drugs** for packing or repacking. Each of these actions is a violation of RCW 69.50.412(1) supporting Flowers's use of drug paraphernalia conviction.

State v. Flowers, 2010 WL 380911, at *6 (Wash.App. Div. 2,2010) (emphasis added).

> However, the defendant need not be found in possession of drug paraphernalia in order to be charged under RCW 69.50.412(1). For example, a defendant could be lawfully detained for questioning following his involvement in a car accident. The defendant could admit to recently attending a party where he used drug paraphernalia to inject controlled substances. Although no controlled substances or paraphernalia are found in the defendant's possession, his behavior and appearance may be consistent with recent controlled substance use, tests of his blood could confirm the presence of controlled substances, and recent injection marks could be found on his arm. Among other offenses, the defendant could be prosecuted for using drug paraphernalia to inject controlled substances, although it could not be established that he was in possession of either drug paraphernalia or controlled substances.

State v. Williams, 815 P.2d 825, 827, 62 Wash.App. 748, 752 (Wash.App.,1991)

[24] See e.g., WPIC 50.31 Use of Drug Paraphernalia—Elements, which list "[a controlled substance] [(name of substance)]" as alternate ways of fulfilling a single element of the offense.