

Washington Defender Association’s Immigration Project

Representing Immigrant Defendants Charged With Drug Crimes

By Ann E. Benson & Jonathan Moore

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Getting Expert Immigration Assistance on Your Case

WDA's Immigration Project provides individual case consultations to assist defenders in understanding the immigration issues and consequences facing a client and, where possible, alternatives to mitigate or avoid them. Consultations are free of charge.

For assistance on your case, please contact Jonathan Moore. Jonathan prefers to be contacted via email at jonathan@defense.net. He can also be reached by telephone at (206) 623-4321, ext. 104.

The confluence of criminal and immigration law is complex and fluid. The immigration consequences that can result to a non-citizen from even the most minor criminal offense are often much more severe than the criminal punishment. Since 1996 (when Congress passed several harsh, retroactive anti-immigrant laws), over one million non-citizens with criminal convictions have been deported from the U.S., many with nonviolent or minor misdemeanor violations.¹ Given the severity of the immigration consequences of criminal convictions and the complexity of the law, defenders must seek assistance in representing non-citizen defendants.

Additional Resources

For additional immigration resources, including a chart of the immigration consequences of most RCW offenses, please consult the Immigration Project section of the Washington Defender Association's website at www.defense.net.

Immigration Counsel

While WDA's Immigration Project staff will provide assistance to defense counsel in negotiating resolutions to criminal charges, it is imperative, regardless of the outcome of the criminal case, that all non-citizen defendants be advised that they must consult with competent immigration counsel prior to leaving the U.S. or applying for any immigration benefits (such as lawful residency or citizenship). For a referral list of immigration attorneys please consult the WDA website.

¹ See statistics available on the website of the Immigration and Customs Enforcement, a division of the Department of Homeland Security, at www.ice.gov.

I. Overview of Key Immigration & Criminal Law Concepts

A. Immigration Status & Criminal History—The Essential First Step

PRACTICE POINT: The first step to representing a non-citizen defendant is to identify her immigration status (and if she has lawful status, for how long) and obtain a complete criminal history (including any dismissed charges, misdemeanor offenses, and sentences).

A defendant's immigration status (in combination with the specific crime at issue and his criminal history) will be the starting point to determine which crime-related immigration law provisions his criminal conviction(s) might/will trigger (e.g. which grounds of deportation are at issue) and what strategies are available to mitigate or avoid such consequences.

Any non-US citizen (regardless of lawful status, how long in US or other equities) is *always* subject to removal (a.k.a. deportation) for a violation of immigration laws.²

There are two major classifications of immigration status:

- **Lawful immigration status**, which includes:
 - **Lawful Permanent Resident (LPR) Status** (a.k.a greencard holders)—can live and work in the US indefinitely and apply for citizenship after 5 years (3 years for persons married to US citizens). This status is generally obtained through family ties, employment or refugee/asylum status;
 - **Refugee and Asylum Status**—can live and work in the US indefinitely and apply for LPR status after 1 year; obtained by proving past/future persecution;
 - **Non-Immigrant Visa Status**—can remain lawfully in the U.S. for the duration of their temporary visa (e.g. tourist visa, student visa).

PRACTICE POINT: Persons with lawful status, particularly LPRs and refugees and asylees generally will not face deportation UNLESS they are convicted of a crime.

- **Undocumented immigrants**, which includes:
 - **Persons who entered the US illegally** and have never had lawful immigration status; or
 - **Nonimmigrant visa holders** who entered the US lawfully on a visa that has expired.

² Crime-related violations of immigration law and being present in the US without immigration status (which is not a crime) account for the vast majority of deportations.

PRACTICE POINTS:

Undocumented persons are subject to removal/deportation due to their lack of lawful status. However, many undocumented people may be eligible to apply for lawful status. Criminal convictions will, generally, foreclose these options or present onerous obstacles to obtaining lawful status.

In many instances, the most useful advocacy on behalf of undocumented non-citizens is to get them released from jail prior to the imposition of an immigration detainer (“hold”) or, if already released, to keep them out of jail.

B. Overview of Immigration Penalties for Drug Offenses

PRACTICE POINT: All arrests and convictions will have some negative immigration consequences. To effectively represent non-citizen defendants, defenders must identify and create strategies to avoid or mitigate these consequences.³

The range of possible immigration consequences of a drug conviction is wide. A conviction could (and often does) trigger one or more of the following consequences:

- Automatic and certain deportation (e.g. most drug trafficking offenses);
- Mandatory detention during the course of any removal proceedings;
- Statutory ineligibility to ask an immigration judge for discretionary relief from deportation/removal;
- Statutory ineligibility for immigration benefits (e.g. greencard or citizenship);
- Negative discretionary factors in an application for immigration benefits (e.g. citizenship, greencard);⁴
- Permanent bar to lawful reentry into the U.S. (essentially permanent banishment); and
- Significantly increased sentence enhancements for a conviction of illegal reentry after deportation under 8 U.S.C. 1326.

³ Note that while non-citizens facing deportation are entitled to legal representation, there is no entitlement to appointed counsel for indigent non-citizens. Eighty percent of non-citizens facing deportation are unrepresented. Thus, for many, criminal defense counsel will be the only legal representation they will get in addressing the immigration consequences of their criminal convictions.

⁴ Immigration authorities will not grant citizenship to anyone on probation.

As outlined in more detail *infra*, there are three primary provisions of immigration law that are relevant to drug offenses:

- The grounds of deportation;
- The grounds of inadmissibility;
- The aggravated felony definition.

Any non-citizen with a criminal conviction (or in some instances merely documentation of relevant conduct) will be placed in removal proceedings (and often mandatory detention) wherein the government will seek an order of removal upon which to remove (deport) them from the U.S.

1. Drug Offenses and the Grounds of Deportation

The grounds of deportation will be used by the government as a basis to remove non-citizens who have been “lawfully admitted:” Lawful permanent residents, persons with refugee status or asylum, and nonimmigrant visa holders (regardless of whether or not their nonimmigrant visas are current or have expired).⁵ The grounds of deportation do not apply to undocumented persons who entered illegally and have never had lawful immigration status.

Drug-related grounds of deportation include:

- **Conviction of any offense “relating to a controlled substance” or attempt or conspiracy to commit any controlled substance offense.**⁶
- **Crimes Involving Moral Turpitude.** See § I.B.3 *infra*.⁷
- **Aggravated felonies.** See § I.B.5 *infra*.⁸
- **Drug addict or abuser.** Any non-citizen who is, or has been, a drug abuser or addict at any time since admission to the U.S. *is deportable even absent a conviction.*⁹

2. Drug Offenses and the Grounds of Inadmissibility

The grounds of inadmissibility apply to non-citizens in the following circumstances:

- Non-citizens seeking lawful admission to the U.S.;
- Non-citizens applying for immigration benefits such as lawful permanent resident status (a greencard) or citizenship;
- As a basis for the government to remove (deport) undocumented non-citizens who entered illegally and have no lawful status.

Drug-related grounds of inadmissibility include the following:

⁵ See 8 U.S.C. § 1227.

⁶ 8 U.S.C. § 1227(a)(2)(B)(i).

⁷ 8 U.S.C. § 1227(a)(2)(A)(i).

⁸ 8 U.S.C. § 1227(a)(2)(A)(iii).

⁹ 8 U.S.C. § 1227(a)(2)(B)(ii).

- **Conviction for an offense “relating to a controlled substance” or attempt or conspiracy to commit such an offense.**¹⁰
- **Conviction for (or admission of the essential elements of) a crime involving moral turpitude.**¹¹
- A non-citizen who is a “**current**” **drug addict or abuser** is inadmissible, even where there is no conviction.¹²
- A non-citizen is inadmissible if immigration authorities have “**reason to believe**” that she has ever been or assisted a drug trafficker in trafficking activities, or if she is the trafficker’s spouse or child and benefited from the trafficking within the last five years.¹³ **This provision does not require a conviction.** In meeting its burden of proof, the government is not limited to the reviewable record of conviction documents¹⁴ but can use any relevant and reliable evidence (including police reports) to establish that the non-citizen was a knowing and conscious participant or conduit in the transfer, passage, or delivery of narcotic drugs.¹⁵

3. Drug Offenses Classified as Crimes Involving Moral Turpitude

Offenses deemed to be “crimes involving moral turpitude” (CIMT) can trigger both CIMT grounds of deportation and inadmissibility. Some, but not all, drug offenses will constitute CIMTs.

- Drug trafficking offenses will constitute a CIMT where knowledge or intent is an element of the offense.¹⁶
- Simple drug possession or lesser offenses *do not* constitute CIMTs.
- Solicitation to commit drug trafficking, like attempt and conspiracy, generally will be held to be a crime involving moral turpitude if the offense solicited would have been so held.¹⁷ Since **drug trafficking is a CIMT**, a conviction for solicitation to commit a trafficking offense, while not triggering the aggravated felony and controlled substance

¹⁰ 8 U.S.C. § 1182(2)(2).

¹¹ 8 U.S.C. § 2(a)(2)(A)(i)(I).

¹² 8 U.S.C. § 1182(a)(1)(A)(iv), I.N.A. § 212(a)(1)(A)(iv).

¹³ 8 U.S.C. § 1182(a)(2)(C), I.N.A. § 212(a)(2)(C).

¹⁴ See *Shepard v. U.S.*, 125 S. Ct. 1254, 1257 (2005). In addition to the criminal statute and caselaw interpreting it, these documents are the charging document, written plea agreement, transcript of plea colloquy, and any explicit factual finding to which the defendant assented.

¹⁵ See *Pichardo v. I.N.S.*, 188 F.3d 1079 (9th Cir. 1999), vacated on other grounds; *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004). See also *Matter of Rico* 16 I. & N. Dec. 181 (BIA 1977) (Inadmissibility for this “must be based upon reasonable, substantial, and probative evidence”).

¹⁶ *Matter of Khourn*, 21 I. & N. Dec. 1041 (BIA 1977).

¹⁷ *Barragan-Lopez v. Mukasey* 508 F.3d 899, 905 (9th Cir. 2007) (offense involves moral turpitude because the underlying offense solicited, drug trafficking, involves moral turpitude). The Court left open the possibility that possession for sale of a “very small” amount of marijuana might not involve moral turpitude. See also, e.g., *Goldeshtein v. I.N.S.*, 8 F.3d 645, 647 n. 6 (9th Cir. 1993) (“conspiracy to commit an offense involves moral turpitude only when the underlying substantive offense is a crime involving moral turpitude”).

grounds of deportation, can trigger deportation under the CIMT ground(s). Since **simple possession of a controlled substance is not a CIMT**, solicitation to possess for personal use should not be held a crime involving moral turpitude.¹⁸

4. Non-Citizens Classified as Drug Abusers or Drug Addicts

Drug abuse and addiction are grounds of inadmissibility and deportability. A non-citizen is inadmissible if the drug addiction or abuse is current, and deportable if the addiction or abuse occurred at any time after admission into the United States.¹⁹ See § I.C.2, *infra* for strategies to navigate these grounds in relation to drug court agreements.

5. Drug Offenses Classified as Aggravated Felonies²⁰

Convictions classified as an aggravated felony under immigration law carry the worst possible immigration consequences: virtually automatic deportation (regardless of equities and restricted due process) with no possibilities for lawful return to the U.S.

Drug-related aggravated felonies include:

- A conviction that meets the general definition of **drug trafficking**, such as sale/delivery or possession for sale/delivery;
- A conviction (whether or not it involves trafficking) that is analogous to any of the federal drug offenses referenced in the aggravated felony definition. The common example is simple possession of a controlled substance. However, the Supreme Court held in *Lopez v. Gonzales* that a **first conviction for simple possession** is not an aggravated felony, even if the state classifies the offense as a felony.²¹ The B.I.A. has held that, absent controlling circuit opinion to the contrary, a second conviction for simple possession is an aggravated felony only if the alien's status as a recidivist drug offender was either admitted by the alien or determined by a judge or jury in connection with a prosecution for the simple possession offense.²² Even a first conviction for simple possession of more than **5 grams of cocaine base or any amount of flunitrazepam** will be held an aggravated felony.
- A conviction for **attempt or conspiracy** to commit any offense that falls within either of these two categories above. Note, however, that solicitation to possess or deliver a controlled substance under RCW 9A.28.030 *does not* qualify as an aggravated felony drug offense. See §§ II.A & III.A *infra*.

¹⁸ Cf. Barragan-Lopez, at 903; Matter of Khourn 21 I. & N. Dec. 1041 (BIA 1997)(distribution of controlled substance is a crime involving moral turpitude where knowledge or intent is element); Hampton v. Wong Ging, 299 F. 289, 290 (9th Cir. 1924) (possession conviction under the Narcotic Act not in itself a crime of "moral turpitude").

¹⁹ I.N.A. § 212(a)(1)(A)(iii), 8 U.S.C. § 1182(a)(1)(A)(iii) (inadmissibility ground); I.N.A. § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (deportation ground).

²⁰ I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B).

²¹ *Lopez v. Gonzales*, 127 S. Ct. 625 (2006).

²² Matter of Carachuri, 24 I&N 382 (BIA 2007); see also Matter of Thomas, 24 I&N 416 (BIA 2007).

6. **Drug Offenses: Re-Entry into the U.S., Immigration Benefits and Relief from Deportation**

Re-Entry into the U.S. Non-citizens with any type of drug offense (whether conviction or merely charged) should *never* leave the U.S. without first consulting with competent immigration counsel. This is true regardless of how long ago the conviction or where it occurred, and regardless of whether the conviction or charges were dismissed, and regardless of how minor the offense. When re-entering the U.S., non-citizens are required to establish that they do not trigger any of the crime-related grounds of inadmissibility, including the drug offenses outlined supra.²³ Non-citizens who do trigger these grounds when they seek re-entry will be denied admission and/or placed in removal proceedings.

Bar to immigration benefits. Most immigration benefits, including lawful permanent residency (greencard) and citizenship reference the grounds of inadmissibility in some aspect. Thus, drug-related offenses that trigger the grounds of inadmissibility outlined above will render an otherwise qualifying non-citizen ineligible for these benefits.

Cancellation of removal for Lawful Permanent Residents. Longtime LPRs facing removal for a criminal conviction are entitled to ask an immigration judge in removal proceedings for a discretionary “waiver” of deportation known as “cancellation of removal” as long as their conviction(s) are not classified as aggravated felonies.

Drug trafficking as a particularly serious crime barring asylum and withholding of removal. Asylum and withholding of removal are the two primary avenues by which persons who fear persecution in their home country can petition to remain in the U.S. Conviction of an offense classified as a “particularly serious crime” will bar an application for asylum or withholding of removal. An aggravated felony drug trafficking conviction is a per se bar to an application for asylum. It will also constitute a per se bar to withholding of removal where a sentence of five years or more has been imposed.

C. **Convictions Under Immigration Law**

1. **The Immigration Statute’s Definition of “Conviction”**

The immigration statute contains a specific definition of what constitutes a conviction under immigration law. That definition states:

“The term “conviction” means, with respect to an alien, a formal judgment of guilt of the alien entered by a court or, if adjudication of guilt has been withheld, where—

A judge or jury has found the alien [non-citizen] guilty or the alien has entered a plea of guilty or nolo contendere or has admitted sufficient facts to warrant a finding of guilt, and the judge has ordered some form of punishment, penalty, or restraint on the alien’s liberty to be imposed.²⁴”

In the case *Matter of Roldan*,²⁵ the Board of Immigration Appeals interpreted the statutory language very broadly such that any admission of guilt will constitute a conviction in perpetuity

²³ See 8 U.S.C. 1101(a)(13).

²⁴ 8 USC § 1101(a)(48)(A); INA § 101(a)(48)(B).

²⁵ *Matter of Roldan*, 21 I&N Dec. 512 (BIA 1999).

for immigration purposes, even if the guilty plea/admission is subsequently withdrawn and proceedings dismissed (e.g. pursuant to a deferred sentence agreement under provisions like RCW §§ 35.20.255, 3.50.320, or 3.66.067.

The Ninth Circuit decision in *Lujan-Armendariz v. I.N.S.*,²⁶ tempers this broad interpretation only for first-time simple possession and lesser drug offenses. See § II.C.3, *infra*.

Post conviction relief will only eliminate a conviction for immigration purposes where the order clearly establishes that there was an underlying legal defect in the original proceedings (e.g. ineffective assistance of counsel).²⁷ PCR premised on any equitable basis (e.g. to avoid deportation) will not eliminate the conviction for immigration purposes.

Expungements or “vacation of conviction” pursuant to RCW 9.94A.640 (felony expungement) and RCW § 9.96.060 (misdemeanor expungement), *will* eliminate a conviction for immigration purposes *only* where the conviction was for a first-time simple possession of drugs or less. See § II.C.3, *infra*. For all other types of offenses, expungement will not eliminate the conviction for immigration purposes.

Gubernatorial and presidential pardons will eliminate certain (but not all) grounds of deportation (but not inadmissibility) for drug offenses. Specifically, where granted, a gubernatorial or presidential pardon will protect a non-citizen from removal under the “crime involving moral turpitude”

2. Drug Court Agreements

Drug court agreements pose two risks to non-citizen defendants:

- That the language of the agreement will constitute a conviction in perpetuity under the definition in (a) *supra*, regardless of whether the non-citizen complies with treatment and the charge is subsequently dismissed;
- That the documentation will establish that the non-citizen is a drug abuser or drug addict.

PRACTICE POINT: Defenders must take care to ensure that the language of the drug court agreement does not constitute a conviction under immigration law. Any agreement that requires the defendant to admit guilty will constitute a conviction for a controlled substance violation (a deportable offense). Any agreement that requires defendant to stipulate to the admissibility and sufficiency of the police report will also arguably constitute a conviction under immigration law.

The following language is “immigration safe” and is being used in numerous drug court agreements throughout the state (including King County):

“With respect to this/these charge(s), I understand that I have a right to contest and object to evidence that the State may present against me and to present evidence on my own behalf. With respect to this/these charge(s), I give up the right to contest and object to any evidence presented against me and to present evidence on my own behalf as to my guilt or innocence. I understand and agree that if I do not comply with the conditions of this agreement, a hearing

²⁶ *Lujan-Armendariz v. I.N.S.* 222 F.3d 728 (9th Cir. 2000).

²⁷ See e.g., *Matter of Adamiak* 23 I&N Dec. 878 (BIA 2006).

will be held at which the State will present evidence related to this/these charge(s) including but not limited to the police report and the results of any law enforcement field test. I stipulate that the field test used in this case was accurate and reliable, and is admissible. This stipulation is not an admission of guilt, and is not sufficient, by itself, to warrant a finding of guilt. I understand that the judge will review the evidence presented by the State and will decide if I am guilty or not guilty of this charge based solely on that evidence. I waive my right under Criminal Rule 6.1(d) to written findings of fact and conclusions of law.”

Even where it is not possible to use immigration-safe language and the agreement language constitutes a conviction, if a non-citizen is able to successfully complete drug court prior to apprehension by immigration authorities the conviction will be eliminated for immigration purposes under the Ninth Circuit’s decision in *Lujan-Armendariz*.²⁸ See § II.C.3, *infra*.

Drug abuse and addiction are grounds of inadmissibility and deportability. A non-citizen is inadmissible if the drug addiction or abuse is current, and deportable if the addiction or abuse occurred at any time after admission into the United States.²⁹ The test of what is addiction or abuse is extremely broad and may include even casual and sporadic use of “soft” drugs. No conviction is required to trigger these grounds.

PRACTICE POINTS:

Despite these dangers, drug court, if successfully completed is often still a better option for non-citizens since by remaining out of custody, the non-citizen avoids apprehension by immigration authorities in jail. It also can allow for non-citizens with drug problems, which if left untreated, pose serious risk of behavior that will lead to deportable convictions.

It is imperative that non-citizens be aware that, even after successful completion of drug court, they must not leave the U.S. or seek immigration benefits, such as a greencard or citizenship, without careful consultation with competent immigration counsel.

3. Deferred Prosecutions Under RCW § 10.05

Deferred prosecution agreements under RCW § 10.05 will constitute convictions under immigration law since the defendant is required to enter a plea of guilty.

The conviction will be in perpetuity and subsequent withdrawal of the plea for successful compliance will have no legal effect on the immigration classification of the agreement as a conviction.

However, the Board of Immigration Appeals, the Ninth Circuit and the Supreme Court have all held that DUI convictions, such as those under RCW § 46.61.5055, do not trigger statutory grounds for deportation or inadmissibility.³⁰ Nonetheless, a DUI for being under the influence of

²⁸ *Lujan-Armendariz v. I.N.S.* 22 F. 3d 728 (9th Cir. 2000).

²⁹ I.N.A. § 212(a)(1)(A)(iii), 8 U.S.C. § 1182(a)(1)(A)(iii) (inadmissibility ground); I.N.A. § 237(a)(2)(B)(ii), 8 U.S.C. § 1227(a)(2)(B)(ii) (deportation ground).

³⁰ See *Matter of Torres Varela*, 23 I&N Dec. 78 (B.I.A., 2001)(simple DUI not a crime of moral turpitude); *United States v. Trinidad-Aquino*, 259 F.3d 1140 (9th Cir. 2001)(DUI not a crime of violence and thus not an aggravated felony under INA 101(a)(43)(F)); see also *Montiel-Barraza v. INS*, 275 F.3d 1178 (9th Cir. 2002); *U.S. v. Portillo-Menodoza*, 273 F.3d 1224, 1228 (9th Cir. 2001)(with priors); *Leocal v. Ashcroft*, 125 S.Ct. 377

a controlled substance should be avoided, since it could be considered to be a violation of a law “relating to” a controlled substance.

Deferred prosecution under this RCW § 10.05 is available to defendants whose wrongful conduct was caused by alcoholism, drug addiction, or mental problems.³¹

PRACTICE POINT: Deferred prosecutions for drug addiction should be avoided where they establish that the defendant has a drug addiction, since such a record could trigger the “drug abuser/drug addict” grounds of deportation and inadmissibility. A straight plea to a (non-drug) DUI would be a safer option.

4. Deferred Sentence Adjudications

Under various provisions of Washington law,³² subsequent to an offender’s plea of guilty, a judge may impose a probationary period of up to two years for any misdemeanor offense (five years for a DUI), whether the sentence was suspended or deferred.³³ Upon successful completion of probation, the defendant can apply to withdraw the guilty plea and the conviction is deemed vacated for most purposes.³⁴

For immigration purposes, however, the offense at issue in a deferred sentence case *will* constitute a conviction because there has been a finding of guilt and the conditions imposed by the court constitute a form of punishment, penalty or restraint on the non-citizen’s liberty.³⁵ Even where the defendant has complied with the conditions imposed under the deferred sentencing scheme and has succeeded in withdrawing the plea and dismissing the case, it remains a conviction in perpetuity for immigration purposes.³⁶

EXCEPTION: Under the Ninth Circuit’s decision in *Lujan-Armendariz*³⁷ a successfully completed deferred sentence that is subsequently withdrawn will eliminate a first-time simple possession (or less) conviction for immigration purposes. See § II.C.3, *infra* for a more detailed explanation of this exception.

5. Juvenile Dispositions

Adjudication in juvenile delinquency proceedings does not constitute a conviction for any immigration purpose, regardless of the nature of the offense.³⁸

Juveniles convicted in adult court will be deemed convicted for immigration purposes.

(2004).

³¹ RCW § 10.05.020(1).

³² RCW §§ 35.20.255, 3.50.320, 3.66.067, 46.61.5055.

³³ RCW § 9.95.210(1).

³⁴ RCW § 9.95.240. This procedure also applies to felony pleas entered prior to July 1, 1984.

³⁵ *Matter of Punu*, 22 I. & N. Dec. 224 (B.I.A. 1998).

³⁶ *Matter of Roldan*, 22 I. & N. Dec. 547 (B.I.A. 1999); *Murillo-Espinoza v. I.N.S.*, 261 F.3d 728 (9th Cir. 2001), partially upholding *Matter of Roldan*.

³⁷ *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000), the exception is based on the Federal First Offender Act (FFOA), see 18 U.S.C. § 3607.

³⁸ *Matter of Devison*, 22 I. & N. Dec. 1362 (B.I.A. 2000); *Matter of C.M.*, 5 I. & N. Dec. 327 (B.I.A. 1953), *Matter of Ramirez-Rivero*, 18 I. & N. 135 (B.I.A. 1981).

Juvenile delinquency adjudications that involve drug trafficking will likely constitute “**reason to believe**” that the offender has been involved in illicit drug trafficking and trigger that ground of inadmissibility which does not require a conviction. See § I.B.2, *supra*. This will bar undocumented youth from ever obtaining lawful immigration status and pose significant risks to youth with lawful status in regard to future re-entries into the U.S. or applications for permanent residence or citizenship.

Juvenile delinquency adjudications that involve findings of drug abuse or drug addiction should be avoided so as to not to trigger those conduct-related grounds of inadmissibility and deportability outlined *supra*.

D. Sentences Under Immigration Law

PRACTICE POINT: For immigration purposes the sentence that matters is the amount of time imposed by the court, regardless of time suspended. So if a sentence of 365 days is imposed, with 364 suspended, the sentence for immigration purposes will be 365 days. Only some of the immigration law provisions are triggered by a particular sentence (e.g. a theft offense with a sentence imposed of one year or more). Most of the drug offense provisions of immigration law are not contingent upon the amount of sentence imposed (e.g. a conviction for any controlled substance violation will trigger immigration penalties regardless of the sentence imposed).

Immigration law defines a “sentence” as:

“**Any reference to a term of imprisonment** or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law **regardless of any suspension** of the imposition or execution of that imprisonment or sentence in whole or in part.”³⁹

Most of the immigration penalty provisions related to drug offenses are not contingent upon the sentence and will apply (or not) regardless of the actual time imposed, the potential sentence that could have been imposed or the time served. The primary exception to this is that a drug trafficking offense where the defendant has been sentenced to an aggregate period of five years or more will be a per se bar to an application for withholding of removal.⁴⁰

The immigration sentence definition language refers to **the sentence actually imposed**, not to a potential sentence or the amount of time served. It governs almost all provisions of the immigration statute that deal with sentences. There are several important exceptions (the most relevant being the deportability and inadmissibility provisions dealing with crimes involving moral turpitude which are triggered in part by the *maximum possible sentence* that could be imposed).

³⁹ 8 U.S.C. § 1101(a)(48)(B); I.N.A. § 101(a)(48)(B). This statutory definition was promulgated by the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) and applies to “sentences entered before, on, or after the date of enactment” of IIRIRA.

⁴⁰ 8 U.S.C. 1231(b)(3)(A) and (B) (“restriction on removal” of immigrants subject to persecution, does not apply if convicted of a “particularly serious crime”).

The sentence does not include the period of probation or parole, but any jail time imposed as a condition of probation or parole will count; the time served after a probation or parole violation is included within the “sentence imposed.”⁴¹

The sentence includes the entire sentence imposed even if all or part of the *execution* of the sentence has been suspended (i.e. a “suspended sentence” under RCW §§ 9.95.210 or 9.95.210). Where *imposition* of suspension is suspended (i.e. a “deferred sentence” under RCW §§ 3.66.067 or 9.95.210), **it includes any period of jail time ordered by a judge** as a condition of probation.

Sentence enhancements will be problematic where they add additional elements to the offense of conviction that can bring it within the ambit of one of the immigration grounds of deportation, inadmissibility or of the aggravated felony definition. In order for this to happen, the sentence enhancement must be found beyond a reasonable doubt, not by the lesser preponderance-of-the-evidence standard.⁴²

Example: *The judge suspends imposition of sentence (a.k.a. deferred sentence), orders two years probation, and requires jail time of six months as a condition of probation. The defendant is released from jail after three months with time off for good behavior. For immigration purposes the “sentence imposed” was six months. However, if this defendant then violates probation and an additional 6 months is added to the sentence, she will have a total “sentence imposed” of 12 months. If this offense were to become an aggravated felony by having a one-year sentence imposed, the defendant would do better to take a new conviction instead of the probation violation and have the time imposed for that.*

Example: *The judge imposes a sentence of 365 days but suspends execution of 363 days and gives credit for two days served (a.k.a. suspended sentence). For immigration purposes the “sentence imposed” was 365 days (1 year). To ensure that the offense does not trigger any of the aggravated felony provisions involving sentences of one year or more, defense counsel should always request a sentence of 364 days or less, regardless of time suspended.*⁴³

⁴¹ See, e.g., *United States v. Jimenez*, 258 F.3d 1120 (9th Cir. 2001) (a defendant sentenced to 365 days probation who then violated the terms of his probation and was sentenced to two years imprisonment had been sentenced to more than one year for purposes of the definition of an aggravated felony).

⁴² *Matter of Martinez-Zapata*, 24 I. & N. Dec. 424 (B.I.A. 2007).

⁴³ “‘And if you take one from three hundred and sixty-five, what remains?’ ‘Three hundred and sixty-four, of course.’ Humpty Dumpty looked doubtful. ‘I’d rather see that done on paper,’ he said”. *Through the Looking Glass*, by Lewis Carroll.

II. Drug Possession Offenses: Selected RCW Offenses

A. RCW § 9A.28.030—Anticipatory Offenses: Conspiracy, Attempt, and Solicitation to Possess

WARNING: ATTEMPT AND CONSPIRACY to commit an offense “relating to” a controlled substance will be treated as being equivalent to the principal or substantive completed drug offense. It will make the person deportable and/or inadmissible for a drug conviction. In the Ninth Circuit, however, solicitation is different.⁴⁴

Solicitation to possess. The Ninth Circuit has ruled that a conviction for solicitation to possess cocaine is not a deportable drug crime.⁴⁵ Until Congress changes the law or until this line of Ninth Circuit decisions is overruled, this is the controlling rule for anyone within the nine states of the Ninth Circuit, including Washington. Because the controlled substance inadmissibility ground contains similar statutory language as the deportation ground—it includes attempt and conspiracy but not solicitation—solicitation to possess should also not be an inadmissible offense.⁴⁶

Solicitation to possess will not avoid a person becoming inadmissible under the “reason to believe” drug trafficker ground,⁴⁷ if the police report, certificate of probable cause, or original complaint show participation in trafficking this ground of inadmissibility will still apply. See § I.B.2, *supra*, on the “reason to believe” inadmissibility ground.

A conviction under a generic statute for solicitation, where the underlying offense is *simple possession*, should not by itself provide “reason to believe” that the person engaged in or aided illicit trafficking. Obtaining a controlled substance for personal use is not a trafficking offense⁴⁸ (or else all users would be “traffickers.”) If the plea language is crafted and if all the underlying documents (including police reports, original information, or certificate of probable cause) support that there was no participation in trafficking and the amount was small, a plea to solicitation to possess should be possible without evoking the “reason to believe” ground.

However, **outside the Ninth Circuit, solicitation could be found to be a crime relating to a controlled substance.**⁴⁹ So, for example, a person with a conviction for solicitation to possess, if

⁴⁴ See 8 U.S.C. 1227(a)(2)(B) (controlled substances violation ground of deportation); 8 U.S.C. 1182(a)(2) (controlled substances violation ground of inadmissibility).

⁴⁵ *Coronado-Durazo v INS* 123 F.3d 1322 (9th Cir. 1997)(interpreting 8 USC. § 1251(a)(2)(B)(i)) “The plain language of [8 U.S.C. § 1251] (a)(2)(B)(i) limits convictions for generic crimes that may result in deportation to conspiracy and attempt. Simply put, solicitation is not on the list.” *Id.* at 1325.

⁴⁶ 8 U.S.C. 1182(a)(2)(A)(i)(II).

⁴⁷ 8 USC 1182(a)(2)(C). See § I.B.2, *supra*.

⁴⁸ *State v. Warnock* (1972) 7 Wash. App. 621, 501 P.2d 625, review denied (purchaser of controlled substance is neither an accomplice of nor a co-conspirator with the seller). The theory is that soliciting someone—a dealer—to provide or sell a small amount of drugs to you for your own personal use could be solicitation.

⁴⁹ There is a circuit split on the larger question of solicitation. The B.I.A. has found that solicitation to possess is a violation of a law “relating to a controlled substance.” *Matter of Beltran* 20 I. & N. 521 (B.I.A. 1992). See, e.g., *Mizrahi v. Gonzales* 492 F.3d 156 (2d Cir. 2007) (statute is ambiguous; *Matter of Beltran* gets deference); *Peters v. Ashcroft*, 383 F.3d 302 (5th Cir. 2004).

traveling through Texas or visiting New York, could be put in removal proceedings and found removable, and that decision would be upheld under the prevailing Circuit court authority.⁵⁰

B. RCW § 69.41.030 Sale, Delivery, or Possession of Legend Drug without Prescription or Order Prohibited

Any conviction under this statute is likely to be a conviction for crime relating to a controlled substance that will make a non-citizen either deportable or inadmissible or both.

Some ways of being convicted under this statute will also make the person deportable for a conviction defined as an aggravated felony drug trafficking conviction. **An offense under RCW § 69.41.030(2)(a) for sale, delivery, or possession with intent to sell or deliver will be an aggravated felony.**

However an offense under RCW § 69.41.030(2)(b), involving only unlawful possession of a prescription drug, is not inherently a trafficking offense nor a “felony punishable under the Controlled Substances Act,” and should not be treated as an aggravated felony.⁵¹ Such an offense is essentially the same as simple possession under RCW § 69.50 4013. Therefore, a lawful permanent resident (LPR) who has enough time in the USA after admission, although deportable for a drug conviction, would not be barred from seeking the discretionary pardon called “cancellation of removal.”⁵²

If there is no non-drug offense alternative, and a plea to simple possession under RCW § 69.50 4013 is not available, **the most important strategy for a long-term permanent resident, is to restrict the record of conviction to only unlawful possession** of a prescription drug.

The same mitigating strategies should apply for this offense as for as for RCW § 69.50 4013, if the offense is restricted to just possession.⁵³ See § II.C.3, *infra*.

C. RCW § 69.50.4013 Possession of Controlled Substance

1. Overview and First-time Simple Possessory Offenses

PRACTICE POINT: Regardless of which (if any) of the following strategies is pursued, defense counsel must be careful to NOT DO either of these two things: 1. DO NOT DO

⁵⁰ In such circumstance, trying to change venue back to one’s home within a Ninth Circuit state would be the best strategy. A pre-existing attorney-client relationship would strengthen the argument that changing venue is consistent with a right to counsel; however changing venue in a removal case while the client is in detention is extremely difficult. A non-citizen who “is deportable” for a drug offense is subject to mandatory detention. 8 U.S.C. 1226(c)(1)(B).

⁵¹ A criminal statute encompassing several different offenses, where some of the enumerated offenses fit into a removal ground, and others do not, is sometimes referred to as a “divisible” statute. In this case, the statute is divisible as an aggravated felony, but not as a removable crime relating to a controlled substance, which it always fits.

⁵² 8 U.S.C. 1229b(a).

⁵³ Since possession only is misdemeanor under RCW § 69.41.030(2)(b); if it were a first offense and received a rehabilitative disposition resulting in dismissal, it should fit the “less serious” criterion mentioned in *Cardenas-Uriarte v. I.N.S.*, 294 F.3d 1132 (9th Cir. 2000) and thus be covered by the exception to removability covered in that decision and in *Lujan-Armendariz* and the FFOA.

ALFORD/NEWTON PLEA agreements that incorporate the police report or affidavit of probable cause into the plea as a factual basis; 2. DO NOT STIPULATE TO REAL FACTS at sentencing.

Any conviction for possession of a controlled substance is an offense that can (and, without careful attention, will) make any non-citizen deportable,⁵⁴ inadmissible⁵⁵ or both. See § I.A,*supra*, to determine if defendant is subject to the grounds of inadmissibility or deportability, or both.

The only statutory exception to deportability for a drug conviction, is the exception to *deportability* for a single offense involving simple possession for one’s personal use of 30 grams or less of marijuana.⁵⁶ There is *no* parallel statutory exception to *inadmissibility* for a first marijuana conviction.⁵⁷

A conviction for **even a minor drug offense —such as simple possession under RCW § 69.50.4013, or attempt or conspiracy to possess —will make a non-citizen deportable and inadmissible** under the controlled substances violations grounds.⁵⁸

The Supreme Court has ruled that **a first offense for a state felony simple possession conviction is not also an aggravated felony**. The aggravated felony drug trafficking ground⁵⁹ is a separate deportation ground from that of a conviction for crime relating to a controlled substance. An aggravated felony has additional severe consequences such as barring long term lawful permanent residents (LPR) from seeking a discretionary pardon of deportation called “cancellation of removal”.⁶⁰ See § I.B.5 for an overview of aggravated felonies.

⁵⁴ 8 U.S.C. § 1227(a)(2)(B)(i).

⁵⁵ 8 U.S.C. § 1182(a)(2)(A)(i)(II).

⁵⁶ 8 U.S.C. 1227(a)(2)(B)(i). It is also the only drug conviction that is in the statutory exception to the bars to the “good moral character” needed for naturalization (becoming a US citizen). 8 U.S.C. 1101.

⁵⁷ Some applicants for an immigrant visa may be eligible for a waiver, under 8 U.S.C. 1182(h). A single offense involving simple possession for personal use of 30 grams or less of marijuana is the only drug conviction that is potentially waivable for a person seeking status as a lawful permanent resident (LPR).

⁵⁸ In regard to the substance known as “khat,” immigration and defense counsel working in areas such as Seattle, with many East African immigrants, should be aware that khat (or “qat”), a plant native to that area that is usually chewed like tobacco, is likely to be treated as a federally defined controlled substance. Unlike marijuana (but like psilocybin mushrooms) the plant itself is not scheduled—only its two active ingredients are, cathinone and cathine. According to the DEA, khat use “is an established cultural tradition for many social situations in the areas of primary cultivation: East Africa and the Arabian Peninsula.” www.usdoj.gov/dea/concern/khat.html. Because of that, and the fact that the plant itself is not listed by name, defense counsel should at least consider whether there is a factual defense to possession based on lack of knowledge or unwitting possession of the scheduled ingredient. See *Argaw v. Ashcroft*, 395 F.3d 521, 523 (4th Cir.2005). (“Because khat is not listed as a controlled substance and it has not been established when khat might contain a controlled substance, Argaw’s conduct did not amount to a criminal offense.”) *Id.* at 523. Fresh khat contains cathinone—a Schedule I drug under the Controlled Substances Act. Older leaves may contain only cathine, a Schedule IV substance. See also *United States v. Caseer*, 399 F.3d 828, 838 (6th Cir. 2005) (“[T]he term “cathinone” is sufficiently obscure that persons of ordinary intelligence reading the controlled substances schedules probably would not discern that possession of khat containing cathinone and/or cathine constitutes possession of a controlled substance.”) The Ninth Circuit does not seem to have addressed this yet. Cf. *United States v. Hussein*, 351 F.3d 9 (1st Cir, 2003) (statute gives fair warning, similar to psilocybin); *United States v. Jama*, 2007 WL 709295 (W.D.Wash. 2007) (same).

⁵⁹ 8 U.S.C. 1227(a)(2)(A)(iii); 8 U.S.C. 1101(a)(43)(B).

⁶⁰ Cancellation of removal under 8 U.S.C. 1229b(a).

This means that a conviction for a first offense of possession of a controlled substance will make a non-citizen both deportable and inadmissible. But it will not be an aggravated felony under the illicit trafficking ground. A non-citizen who returns unlawfully after removal (deportation) is subject to federal criminal prosecution, but the possible sentence enhancement will be significantly less for deportation after a simple possession conviction than for after a drug trafficking offense.⁶¹

Under some conditions, a second or additional state felony simple possession can be an aggravated felony, if it corresponds to the “recidivist possession” felony described in federal drug laws. However, there are strong arguments that a Washington second simple possession should not be treated as an aggravated felony. See § I.C.2, *infra*, discussing second or subsequent drug possession convictions.

An “**EXPEDITED FELONY**” disposition which offers a (gross misdemeanor) attempted possession instead of felony possession, does not affect the immigration consequences. **A person is just as deportable and just as inadmissible for attempted possession as for possession.** Attempted possession triggers the same removal provisions as the completed offense.⁶² Most “expedited felony” cases involving non-citizens will need careful analysis pursuant to the information contained herein to resolve. See § II.C.3, *infra*.

2. Second or Subsequent Simple Possessory Offenses

An aggravated felony has many more severe immigration consequences than just deportability for a crime relating to a controlled substance. Classification as an aggravated felony subjects a non-citizen to virtually certain deportation, mandatory detention and severe sentence enhancements if prosecuted for illegal reentry after deportation under 8 U.S.C. 1326. For lawful permanent residents an aggravated felony conviction bars all waivers of deportability. An aggravated felony is an absolute bar to political asylum, and subjects non-lawful permanent residents to summary administrative removal.⁶³

The Supreme Court has ruled that a first offense state felony simple possession conviction is not an aggravated felony.⁶⁴ A state drug conviction can be an aggravated felony even if it does not involve what is generally considered to be drug trafficking, if the offense is *exactly analogous to a federal drug felony* cited in the aggravated felony definition.⁶⁵

⁶¹ 8 U.S.C. 1326(b). See U.S. Sentencing Commission, Guidelines Manual, § 2L1.2(b)(1) (2007). The enhancements include: a 4-level upward departure for unlawful return after a felony; 8 levels for any aggravated felony; 12 levels for a “felony drug trafficking offense” for which the sentence imposed was 13 months or less, and a 16-level rise for a “felony drug trafficking offense” for which the sentence imposed was 13 months or more. Under *Lopez v. Gonzales*, 127 S. Ct. 625 (2006) the same definition of aggravated felony applies in federal prosecutions for illegal re-entry following conviction of an aggravated felony. See *United States v. Figueroa-Ocampo*, 494 F.3d 1211(9th Cir. 2007).

⁶² See *Matter of Bronsztejn* 15 I. & N. Dec. 281 (B.I.A. 1974); (attempted possession of marijuana is a deportable drug offense) (“We have held repeatedly that a person who is found deportable if convicted of a substantive offense would be deportable if convicted of an attempt to commit that offense”). See also: *Simpson v. United States*, 195 F.2d 721 (C.A. 9, 1952).

⁶³ 8 U.S.C. 1228(b).

⁶⁴ *Lopez v. Gonzales*, 127 S.Ct. 625 (2006).

⁶⁵ I.N.A. § 101(a)(43)(B), 8 U.S.C. § 1101(a)(43)(B) defines as an aggravated felony conviction “any drug trafficking crime (as defined in section 924(c)(2) of title 18, United States Code).” Section 924(c)(2) reads, “[f]or purposes of this subsection, the term 'drug trafficking crime' means any felony punishable under the

The offense of simple possession under state law potentially qualifies as an aggravated felony if it contains the same elements as the federal felony offense of simple possession. **A first offense of simple possession is punishable under federal law only as a misdemeanor**, and the aggravated felony drug trafficking definition⁶⁶ only makes a non-trafficking drug offense into an aggravated felony if it is a “felony punishable under the Controlled Substances Act.”

However, the Supreme Court’s *Lopez* decision contains language characterizing federal convictions of misdemeanor possession offenses with a recidivist enhancement to a potential sentence in excess of one year, as “felonies” falling within the 18 U.S.C. § 924(c)(2) “drug trafficking crime” definition.⁶⁷ Although this discussion is arguably only footnote dicta lacking discussion or analysis, litigation has begun on the issue of when “recidivist possession” is an aggravated felony.

The Board of Immigration Appeals (BIA) ruled in two key precedent decisions, that —unless there is a contrary Circuit court authority-- a second possession conviction can be an aggravated felony only when the non-citizen defendant’s status as a recidivist drug offender was either admitted by the alien or determined by a judge or jury in connection with a prosecution for that simple possession offense.⁶⁸

Washington’s specific recidivist drug statute is at RCW § 69.50.408(a).⁶⁹ Because **RCW § 69.50.408 specifically excludes such a recidivist enhancement for simple possession**—“[t]his section does not apply to offenses under RCW 69.50.4013” —there is a very strong argument that a second or additional simple possession offense in Washington cannot be an aggravated felony as “recidivist possession.”⁷⁰

Controlled Substances Act, 21 U.S.C. § 801, et seq., the Controlled Substances Import and Export Act, 21 U.S.C. § 951, et seq., and the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901, et seq.” See also *Matter of Barrett*, 20 I. & N. Dec. 171 (B.I.A. 1990); *Matter of Davis*, 20 I. & N. Dec. 536 (B.I.A. 1992). Under *Matter of Barrett*, to be an aggravated felony the offense must include “all of the elements of an offense for which an alien ‘could be convicted and punished’ under the cited federal laws.” 20 I. & N. Dec. at 174.

⁶⁶ 8 U.S.C. 1227(a)(2)(A)(iii); 8 U.S.C. 1101(a)(43)(B).

⁶⁷ *Lopez v. Gonzales*, 127 S.Ct. 625, 630 n.6 (2006).

⁶⁸ *Matter of Carachuri-Rosendo* 24 I. & N. Dec. 382 (B.I.A. 2007); *Matter of Thomas*, 24 I. & N. Dec. 416 (B.I.A. 2007). (The B.I.A. held that due to contrary precedent, this rule will not apply in the Second, Fifth and Seventh Circuits.) “It is not necessary, however, for the structure of the underlying State law to be comparable to the structure of the CSA. *Lopez v. Gonzales*, supra, requires a focus on a counterpart “offense,” not a counterpart law. “[A] conviction under a particular State’s general recidivist statute may correspond to ‘recidivist possession’ under the CSA, provided the relevant prior conviction was for a drug offense that had become ‘final’ as of the date when the second offense was committed.” *Carachuri* at 391.

⁶⁹ RCW § 69.50.408 “Second or subsequent offenses. (1) Any person convicted of a second or subsequent offense under this chapter may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both. (2) For purposes of this section, an offense is considered a second or subsequent offense, if, prior to his or her conviction of the offense, the offender has at any time been convicted under this chapter or under any statute of the United States or of any state relating to narcotic drugs, marihuana, depressant, stimulant, or hallucinogenic drugs. (3) This section does not apply to offenses under RCW § 69.50.4013.”

⁷⁰ Until recently in pre-*Lopez* cases, the Ninth Circuit had a general rule that purely recidivist sentence enhancement could not be taken into account as part of the categorical analysis. The established rule, as set out in *U.S. v. Corona-Sanchez*, 291 F.3d 1201 (9th Cir. 2002) (en banc), was that a recidivist sentence enhancement should not be considered to determine the potential sentence of a prior conviction for sentence enhancement purposes under the ACCA. This was then applied to a second drug possession by the Ninth Circuit in *Oliveira Ferreira v Ashcroft*, 382 F.3d 1045 (9th Cir. 2004) (second possession conviction is not an

The issue of when a second or subsequent drug possession conviction can trigger the aggravated felony definition is probably headed for the Supreme Court. Whenever there is a prior drug possession conviction and a current simple possession charge, counsel should try to avoid having the prior conviction pleaded to, admitted or proved in the current possession case, to avoid a “showing of recidivism within the confines of the State prosecution”⁷¹

3. Defense Strategies and Possible Mitigating Alternatives

(a) Eliminating First-Time Possessory Offenses: The *Lujan-Armendariz* Exception

If the non-citizen has no prior controlled substance convictions, the Ninth Circuit’s *Lujan-Armendariz* decision states that a *first conviction for simple possession* (felony or misdemeanor, including attempt or conspiracy to possess) that is eliminated under a rehabilitative provision, will be deemed eliminated for immigration purposes⁷²; this means the conviction cannot trigger the controlled substance grounds of deportation.

This should work to eliminate inadmissibility for a simple possession drug conviction for someone who has departed and is attempting to reenter the U.S., as long as the person is seeking admission at a port of entry within the Ninth Circuit.⁷³ However, it is imperative to advise all defendants that they must consult with immigration counsel prior to departing the U.S.

This is also true if the dismissed first conviction is for an *offense less serious* than simple possession that is not analogous to a federal drug offense, such as being under the influence or possessing paraphernalia,⁷⁴ or for *giving away a small amount of marijuana* (see 21 U.S.C. § 841(b)(4)).

Other than the *Lujan-Armendariz* exception, a withdrawal of plea for offenses other than simple possession pursuant to rehabilitative relief (e.g. a deferred sentence for a misdemeanor theft offense) **has no effect for immigration purposes and does not eliminate the conviction.**⁷⁵ The

aggravated felony, because a recidivist sentence enhancement is not considered in the determination). However the principle underlying this decision (regarding recidivist sentence enhancements in general) was soundly rejected in a federal criminal sentencing before the Supreme Court, *United States v. Rodriguez*, --- S.Ct. ---, 2008 WL 2078149 U.S., 2008. May 19, 2008, overturning *United States v. Rodriguez* 464 F.3d 1072 (9th Cir. 2006). “The question that we must decide is whether the “maximum term of imprisonment prescribed by law” in this case is, as respondent maintains and the Ninth Circuit held, the 5-year ceiling for first offenses or, as the Government contends, the 10-year ceiling for second or subsequent offenses. See RCW §§ 69.50.401(a)(ii)-(iv), 69.50.408(a).” *U.S. v. Rodriguez* 2008 WL 2078149, 4 (U.S.) (U.S., 2008). Therefore *Oliveira-Ferreira* and *Corona-Sanchez* can be assumed to have been overturned by *Rodriguez*, insofar as they posited a blanket bar to consideration of a recidivist enhancement under the “categorical approach.” Until the Ninth Circuit speaks, post-*Rodriguez*, on “recidivist possession” counsel should be guided by the B.I.A.’s rulings in *Matter of Carachuri*, 24 I. & N. Dec. 382 (B.I.A. 2007); *Matter of Thomas*, 24 I. & N. Dec. 416 (B.I.A. 2007).

⁷¹ *Carachuri* at 393.

⁷² *Lujan-Armendariz v. I.N.S.*, 222 F.3d 728 (9th Cir. 2000), the exception is based on the Federal First Offender Act (FFOA), see 18 U.S.C. § 3607.

⁷³ See State Department’s Foreign Affairs Manual: 9 F.A.M. 40.21(a) N3.2-2 “Expunging Conviction Under U.S. Law.”

⁷⁴ *Cardenas-Uriarte v. I.N.S.*, 227 F.3d 1132 (9th Cir. 2000).

⁷⁵ *Murillo-Espinoza v. I.N.S.*, 261 F.3d 771 (9th Cir. 2001).

Lujan-Aremendariz exception applies only to first-time simple possessory offenses (or less) and it is only recognized by and in the Ninth Circuit.⁷⁶

Several types of Washington State rehabilitative relief can qualify a non-citizen to fall within the *Lujan-Armendariz* rule including:

- Deferred Imposition of Sentence disposition (ie. “a deferred sentence” under RCW 366.067 or 9.95.210);
- Drug Court Agreements. Note that the offense for which the defendant was permitted to enter into drug court must be a qualifying drug offense. Thus, drug court dispositions will not fall under the *Lujan-Armendariz* rule if the offense was for some other type of crime (i.e., theft or property offenses) related to their drug addiction or problem;
- An “immigration-safe” stipulated order of continuance, or continuance for dismissal—if available—or any disposition that results in a dismissal after probation;
- Expungements pursuant to RCW §§ 9.94A.640 and 9.96.060.

Attempt or conspiracy to possess with a deferred sentence is the best option to ensure that a first offense will not be a conviction under immigration law and thus, not a basis for deportation/removal. Unlike solicitation to possess, attempt or conspiracy to possess may be less likely to trigger the “reason to believe” inadmissibility ground. If successfully completed, this disposition will not trigger any grounds of inadmissibility and, thus, will not create statutory bars to applying for immigration benefits (such as citizenship or permanent resident status). This resolution falls under the *Lujan-Armendariz* analysis described above.

Nonetheless, ***solicitation to possess with a deferred sentence would also work***, and would actually gain the benefit of stacking both Ninth Circuit exceptions (*Coronado-Durazo*: solicitation to possess not a drug conviction; and *Lujan-Armendariz*: rehabilitative dismissal eliminates first offense simple possession). However, **with solicitation to possess it is critical to make the record reflect that the offense is linked only to simple possession for personal use, and not to any variety of trafficking**, so as to not inadvertently to trigger the “reason to believe” inadmissibility ground.

ALERT: One risk to this strategy, is that the plea may constitute a conviction under immigration law until the deferral is successfully completed. The Ninth Circuit has not resolved this issue yet. A Ninth Circuit panel recently held that simply having the possibility of future expungement of a simple possession conviction—such as what would be available under RCW §§ 9.94A.640 or 9.96.060—does not count. The defendant must have actually obtained the expungement prior to the initiation or completion of removal proceedings.⁷⁷

Therefore, in pursuing this option, defense counsel should negotiate for the shortest deferral period possible and advise clients to return for possible early dismissal as soon as possible. Counsel should also advise the person to remain in the country and have no contact with

⁷⁶ Matter of Salazar, 23 I. & N. Dec. 223 (B.I.A. 2002). The Board of Immigration Appeals declined to apply the *Lujan-Armendariz* exception in immigration proceedings that arise outside of the Ninth Circuit.

⁷⁷ See *Chavez-Perez v. Ashcroft*, 386 F.3d 1284; (9th Cir. 2004).

immigration authorities until the deferral is successfully completed. The factual situation treated in the above case was of an immigrant who had only a future option to apply under a separate vacatur statute,⁷⁸ and not a person sentenced under a rehabilitative provision.⁷⁹

The Lujan-Armendariz exception only works to eliminate a first conviction for one of these simple possession-type offenses. For any other offense (or for a second offense) any “rehabilitative relief” (i.e., withdrawal of the plea after probation pursuant to a deferred sentence or an expungement pursuant to RCW §§ 9.94A.640 (felony) and 9.96.060 (misdemeanor)) has no effect for immigration purposes, even though state law may consider the conviction to be utterly eliminated.⁸⁰

(b) Drug Court

Drug court agreements, if negotiated with the “immigration safe” language outlined in § I.C.2, can provide non-citizens with two strong avenues to avoid deportation and inadmissibility for a drug offense: 1. They do not constitute convictions under immigration law (and, as such cannot be a basis for deportation/removal); 2. Even where the drug court agreement language is not “immigration safe” they will qualify the non-citizen defendant for the Lujan-Armendariz exception outlined in § II.C.3(a), *supra*.

PRACTICE POINT: Defense counsel must make every effort to use the immigration safe language outlined in § I.C.2 in the drug court agreement.

⁷⁸ Or. Rev. Stat. § 137.225.

⁷⁹ The majority in Chavez-Perez explicitly declined to rule on the question of whether a non-citizen is entitled to FFOA protection before the conviction is eliminated if the disposition were pursuant to a “deferred adjudication” law. It stated:

“We express no opinion about whether this reasoning would apply with equal force to the situation the Lujan-Armendariz court specifically identified, where an alien has a finding of guilt on his record but the actual conviction is deferred pending successful completion of probation.... Aliens sentenced under such schemes do not have a ‘conviction’ on their record at any time during probation. However, because we are not faced with that situation here, that question must continue to remain open for another day.”

Chavez-Perez. at 1293. Immigration counsel, if confronted with such a scenario must argue strongly that Chavez-Perez does not apply to a deferred adjudication that contemplates a rehabilitative dismissal after probation. Chavez-Perez seemingly would apply to a non-citizen who has one conviction for possession of a controlled substance under RCW § 69.50.4013, and is waiting for the 5 years to pass to apply for an expungement under RCW § 9.94A.640(2)(f) (Vacation of offender's record of conviction), but has not yet done so at the time she is put into removal proceedings.

⁸⁰ A prior remedial disposition counts as the “one bite at the apple” even if that first disposition would not amount to conviction under the regular immigration definition. De Jesus Melendez v. Gonzales, 503 F.3d 1019, 1026-27 (9th Cir. 2007) (The equal protection principles that extend the FFOA to state convictions do not demand that the B.I.A. treat an expungement after an earlier pre-plea pretrial diversion as an FFOA disposition, even if that first disposition—on its own terms—was not a conviction under the immigration definition at I.N.A. § 101(a)(48(A)) Cf. Cardenas-Uriarte v. I.N.S., 227 F.3d 1132 (9th Cir. 2000) where the Court remanded to the B.I.A. to make sure that the appellant had not received a prior disposition eliminating him from FFOA benefits. The court stated “We cannot be sure, however, that Cardenas was never convicted of an offense relating to controlled substances that was expunged in another state.”

WARNING: Admission of drug abuse can make an immigrant deportable. A non-citizen found to be a drug addict or abuser can be found inadmissible if the addiction or abuse is “current,” or deportable if the addiction or abuse has occurred anytime after admission.⁸¹ Repeated drug possession findings or a finding in drug court or other contexts that the person is an addict or abuser, can trigger this ground. Although used infrequently by immigration authorities as a basis for deportation, this ground does not require a conviction.

For a longtime (seven years) lawful permanent resident (LPR) who is eligible for “cancellation of removal” under 8 U.S.C. § 1229b(a), having such relief as a backup may make it easier to enter into a deferred adjudication program that requires an admission of drug abuse since the drug abuse ground of deportation can be waived under LPR cancellation. This ground of deportation (applied to persons here after admission) is not often used against legal residents. If a first offense simple possession can receive rehabilitative treatment that will make it come under *Lujan-Armendariz* exception, it will usually be worth it to risk the “drug abuser” ground, especially for an LPR. But any measures that defense counsel can take to limit or qualify such admissions should be taken.

(c) A Plea To Solicitation to Possess Under RCW § 9A.28.030

Solicitation to possess is not a deportable drug offense in the Ninth Circuit, but will likely be treated as a deportable offense in other circuits. See § II.A, *supra*, on solicitation.

In the case of either Ninth Circuit-only exception to removability for a drug conviction: solicitation or the “Federal First Offenders Act (FFOA) exception,” **defense counsel should make a record of the defendant’s reliance on avoiding the immigration consequences in accepting the plea.** This may protect the client in the face of future legislative changes designed to eliminate these exceptions, if such changes are not explicitly retroactive.

(d) Ruiz-Vidal/Paulus Defense: Non-Identification of the Drug

(i) Overview of Ruiz-Vidal/Paulus Defense

If the reviewable record of a state conviction⁸² does not specifically identify what the controlled substance was, immigration authorities cannot establish that the conviction was of an offense relating to a federally defined controlled substance and the conviction can not serve as a basis for deportation/removal or to render a non-citizen inadmissible.

⁸¹ 8 U.S.C. §§ 1182(a)(1)(A)(iv), 1227(a)(2)(B)(ii); I.N.A. §§ 212(a)(1)(A)(iv), 237(a)(2)(B)(ii). The deportation ground, which applies to those here “after admission” is not seen with great frequency.

⁸² The reviewable record of conviction for immigration purposes is a strictly limited set of documents that only includes the charging document of conviction (not dismissed charges), the plea statement, the judgment and sentence. It includes documents such as a transcript of the plea hearing or a written plea agreement. The record of conviction does not include the police report or affidavit of probable cause unless such documents were specifically incorporated into the plea as a factual basis. Consequently, defense counsel should never advise a non-citizen client to do an Alford/Newton plea that incorporates these documents into the plea as a factual basis.

For immigration purposes a controlled substance is defined by federal drug schedules (lists of controlled substances) at 21 U.S.C. § 802. In *Matter of Paulus*⁸³ the B.I.A. held that if the state definition of controlled substances is broader than the federal definition (as is the case under California law, the subject of *Paulus*) and if the substance is not specifically identified on the reviewable record, the conviction is not necessarily of an offense “relating to” controlled substances under the federal definition.⁸⁴

The Ninth Circuit affirmed this rule in its recent decision in *Ruiz-Vidal v. Gonzales*, where it found that conviction of possessing a “controlled substance” as defined under Calif. Health & Safety § 11377(a), where the reviewable record did not specify a substance, was not a basis for deportability as a federally defined drug conviction.⁸⁵ The court noted that if the offense at issue in the state conviction did not involve a federally defined controlled substance, then the conviction is not a basis for deportability, inadmissibility or aggravated felon status under the controlled substance grounds. It found that the California definition of “controlled substance” as used in § 11377(a) is broader than the federal drug schedules. The court refused to look to a dropped charge that named methamphetamine as the substance, and instead conducted a categorical analysis that included all possible offenses included in § 11377(a). The court identified many specific substances such that are listed in the California law but not the federal.⁸⁶

If the record of conviction clearly establishes that the plea was, e.g., to possession of heroin, there is no *Paulus* defense. If neither the statute nor the record place any limit on which controlled substance is involved, there is a *Ruiz-Vidal/Paulus* defense. But if the record refers to an offense that by statutory definition could include dozens or hundreds of substances, for example by identifying a broad category under a state controlled substance schedule, in removal proceedings it is the government’s burden to establish that each of those substances actually appear in the referenced federal schedules.⁸⁷ In *Paulus* the record referred to “a narcotic”; in *Ruiz-Vidal* the offense was possession of a “controlled substance” under Cal. Health & Safety Code § 11377(a).

⁸³ *Matter of Paulus*, 11 I. & N. Dec. 274 (B.I.A. 1965).

⁸⁴ *Matter of Paulus*, 11 I. & N. Dec. 274 (B.I.A. 1965); but see *Matter of Beckford*, 22 I. & N. Dec. 1216 (2000) (where respondent filed an untimely motion to reopen that can be considered only in “exceptional circumstances,” burden passed to respondent to identify the substance of conviction to establish that he would win on the merits), see dissent.

⁸⁵ *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Circuit 2007).

⁸⁶ The court in *Ruiz-Vidal* identified apomorphine, geometrical isomers, androisoxazole, bolandiol, boldenone, oxymestron, norbolethone, stanozolol, and stebnolone as being in Health & Safety § 11377(a) but not the federal schedule. *Id.* at p. 1078 and note 6. Practitioners have suggested that the following additional substances also are listed on the California schedule but not the federal: Difenoxin (CA-Schedule I; 11054(b)(15)), Propiram (CA-Schedule I; 11054(b)(41)), Tilidine (CA-Schedule I; 11054(b)(43)), Drotebanol (CA-Schedule I; 11054(c)(9)), Alfentany (CA-Schedule II; 11055(c)(1)), Bulk dextropropoxyphene (CA-Schedule II; 11055(c)(5)), and Sufentanyl (CA-Schedule II; 11055(c)(25)).

⁸⁷ In addition, the Ninth Circuit has held in other contexts that the government bears the burden of document production to show under the modified categorical analysis that a conviction is a bar to relief. See discussion of *Sandoval-Lua v. Gonzales*, 499 F.3d 1121, 1130-1131 (9th Cir. 2007); *Cisneros-Perez v. Gonzales*, 451 F.3d 1053, 1058 (9th Cir. 2006); *Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006) in the Introduction to Chapter 11. The B.I.A. will disagree. See also *Matter of Beckford*, 22 I. & N. Dec. 1216 (B.I.A. 2000) (in context of an untimely motion to reopen, where the applicant must show “exceptional circumstances,” she has the burden of showing that the state offense is not located on the federal list. “The current posture of this case is critical to our decision. Were this case now before us on direct appeal, we might be inclined to remand for a further hearing”).

It appears that Health & Safety § 11350 also includes at least one substance outside the federal definition, apomorphine.

Washington schedules I through V list an extensive array of controlled substances. While most of these substances are contained in the federal drug schedules, not all of them are. Thus, crafting a plea with the Ruiz-Vidal/Paulus exception in mind will provide a strong basis for a non-citizen to prevail in removal proceedings since the government will not be able to (or will not expend the resources to) meet its burden of proof.

(ii) Strategy for Crafting The Plea/Record

To preserve a Ruiz-Vidal/Paulus defense against removal for a non-citizen, defense counsel must advocate to sanitize as much of the record of conviction as possible of any reference to a specific type of controlled substance. The plea document is the most important document. Rather than listing a specific controlled substance (e.g. cocaine, heroin) counsel should, instead, indicate that the defendant possessed (or delivered, or whatever action required by the statute) “a controlled substance, to wit: a drug, substance or immediate precursor included in Schedules I-V” without referencing a specific drug. Do not do *Alford/Newton* pleas that incorporate the police report or affidavit of probable cause into the plea as a factual basis.

Where possible, counsel should also try to obtain an amended charging document that does not identify the specific controlled substance and avoid “stipulations to real facts” that incorporate the police report into the record for sentencing purposes.

There is no statutory or caselaw prohibition to a disposition that identifies the crime merely as possession, or sale of “a controlled substance, to wit: a drug, substance, or immediate precursor included in Schedules I through V as set forth in federal or state laws,”⁸⁸ as opposed to, “to wit: cocaine.”

Nor do statutes or caselaw require that a specific drug must be identified in order to establish a sufficient factual basis for the plea. While it has been held that the State has the “burden of proving the elements of unlawful possession of a controlled substance as defined in the statute (the nature of the substance and the fact of possession),⁸⁹ it is arguably sufficient that the “nature of the substance” be one that is controlled and listed within the State’s drug schedules I through V.⁹⁰ Guilty knowledge has been found to be intrinsic to the definition of the crime of delivery of a controlled substance.⁹¹ However guilty knowledge may arguably be satisfied by establishing simply that the substance was known to be illegal.⁹²

⁸⁸ RCW § 69.50.101(d).

⁸⁹ *State v. Bradshaw* (2004) 152 Wash.2d 528, 98 P.3d 1190, certiorari denied 125 S.Ct. 1662, 544 U.S. 922, 161 L.Ed.2d 480.

⁹⁰ RCW § 69.50.204-212. See *State v. Marquez* 68 Wash.App. 290, 293, 842 P.2d 969, 971 (Wash.App. Div. 1, 1992) where the defendant argued from the other direction—that an information alleging a specific drug was insufficient because it failed to state “a controlled substance classified in Schedule I or II.” The Court held that “cocaine is a schedule II narcotic drug. RCW § 69.50.206(b)(5). The words ‘a narcotic from schedule I or II’ would add nothing to the amended information.” *Id.* This is at least suggestive that general statutory term and the more specific term can be fungible.

⁹¹ *State v. Boyer* 91 Wash.2d 342, 344, 588 P.2d 1151, 1152 (Wash., 1979).

⁹² See *Boyer* at 383. The defendant knew he was selling a controlled substance, claimed to have thought erroneously it was legal—natural psilocybin—but it was actually LSD. “The jury apparently believed the defendant knew the nature of the product he was selling.” *Id.* See also *State v. Williams* 162 Wash.2d 177,

The main legal objection to this type of more general pleading seems to arise when a person would be convicted of a Class B felony.⁹³ “It is clear under *Apprendi v. New Jersey*⁹⁴ that the identity of the controlled substance is an element of the offense *where it aggravates the maximum sentence with which the court may sentence a defendant*.⁹⁵ A conviction for possessing with intent to deliver a controlled substance other than those carrying the 10-year maximum would result in a lesser maximum term of imprisonment. If the offense is manufacture, deliver or possess with intent to manufacture or deliver a controlled substance that would result in a ten-year maximum, counsel could try to preserve a *Ruiz-Vidal/Paulus* defense by trying to plead only to “a controlled substance, to wit: a drug, substance, or immediate precursor included in Schedules I through II.”⁹⁶

Even where the offense was raised to a Class B felony and the appellate court found that *Apprendi*’s requirement was implicated by a lack of specificity in naming the substance, it upheld the conviction.⁹⁷ The court noted that when a challenge to a vague charging document is not raised at trial, but only on appeal,⁹⁸ the court looks to see if the “[w]ords in a charging document are read as a whole, construed according to common sense, and include facts which are necessarily implied,” and to see if the necessary elements are “found [] or fairly implied in the charging document.”⁹⁹ To attack such a disposition for the first time on appeal, a defendant must also show prejudice,¹⁰⁰ and in testing such a claim the appeals court can look outside the documents that constitute the strict record of conviction for immigration purposes, to see if the

185, 170 P.3d 30, 34 (Wash.,2007) (“[T]he charging language depicting Williams’ crime was sufficient because it identified the particular crime of ‘unlawful possession of a controlled substance’ and alleged a corresponding felony bail jumping violation”).

⁹³ See RCW § 69.50.401(2)(a),(b).

⁹⁴ 530 U.S. at 490, 120 S.Ct. 2348.

⁹⁵ *State v. Goodman* 150 Wash.2d 774, 785-786, 83 P.3d 410, 415 - 416 (Wash.,2004) (emphasis added).

⁹⁶ It might be possible for the government to prove that a conviction was for delivery of amphetamine or methamphetamine by a comparison of the structure of amounts and the fines. Compare RCW §§ 69.50.401(2)(a)(i) and 69.50.401(2)(b)(i). But, after all, this is a last resort strategy.

⁹⁷ “However, this does not compel reversal. *Goodman* never challenged the information at trial, which requires us to construe the amended information under the more liberal standard enunciated in *State v. Kjorsvik*, 117 Wash.2d 93, 102, 812 P.2d 86 (1991).” *State v. Goodman*, 150 Wash.2d 774, 787, 83 P.3d 410, 416 (Wash.,2004).

⁹⁸ “As a prominent commentator in this field has pointed out: The fundamental purpose of the pleading is to inform the defendant of the charge so that he may prepare his defense, and the test for sufficiency ought to be whether it is fair to defendant to require him to defend on the basis of the charge as stated in the particular indictment or information. The stated requirement that every ingredient or essential element of the offense should be alleged must be read in the light of the fairness test just suggested. (Footnotes omitted. Italics ours.) FN36 FN36. 1 C. Wright, *Federal Practice* § 125, at 365-66 (2d ed.1982). Moreover, a state statute, RCW 10.37.050, provides in part:

The... information is sufficient if it can be understood therefrom- (6) That the act or omission charged as the crime is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended; (Italics ours.)

State v. Kjorsvik 117 Wash.2d 93, 109-110, 812 P.2d 86, 94 (Wash.,1991)

⁹⁹ *State v. Goodman* 150 Wash.2d 774, 788, 83 P.3d 410, 417 (Wash.,2004) (citations omitted).

¹⁰⁰ “The second *Kjorsvik* prong requires the defendant to prove he was actually prejudiced as a result of the vague language used in the information, which in this type of case means the defendant did not “actually receive [] notice of the charges he or she must have been prepared to defend against.” *State v. Goodman* 150 Wash.2d 774, 789, 83 P.3d 410, 418 (Wash.,2004).

defendant was put on notice.¹⁰¹ If necessary, perhaps an extra, more explicit stipulation could be made in a plea agreement that the defendant has been apprised or made aware of all the elements of the charged offense. As far as its application to simple possession under RCW § 69.50.4013, *Apprendi* does not seem to present an obstacle.

(e) Relief from Deportation/Removal

In short, **lawful permanent residents (greencard holders)** who have been in lawful status for at least seven years and who have not been convicted of an aggravated felony will qualify to request discretionary relief from an immigration judge known as “cancellation of removal”.¹⁰² The Supreme Court has ruled that a first state felony simple possession is not an aggravated felony.¹⁰³

Defendants convicted of a single possession of controlled substance offense who do not fall within the mitigating strategies listed, *supra*, will still be eligible for cancellation of removal if they have the requisite seven years in lawful status. Defense counsel should advise the client that they will face removal proceedings but can request this relief and should, if possible, seek immigration representation. An immigrant with a conviction for possession of a controlled substance but who is eligible for a waiver may nonetheless be detained for the duration of the hearing process.¹⁰⁴ The ability to seek such relief—as a possible backup or plan B—can make the difference between the ability to live in the US, or being permanently separated from close family. ***This is one reason why identifying your client’s immigration status is always critical.***

A person here with a Refugee visa or who is an asylee, who has not yet become a lawful permanent resident (LPR), can apply for lawful residency while in removal proceedings before an immigration judge. They will be eligible for a special discretionary waiver to overcome the controlled substance ground of inadmissibility in this process.¹⁰⁵

D. RCW § 69.50.4014 Possession of Forty Grams or Less of Marihuana

There is a statutory exception to deportability for one conviction of simple possession of less than 30 grams of marijuana.¹⁰⁶ A non-citizen in the U.S. “after [lawful] admission,” is not deportable for one such conviction. This is the only such statutory exception in the Immigration and Nationality Act.

¹⁰¹ “[T]he court may look outside the information to determine whether the defendant suffered actual prejudice. . . the Kjorsvik court recognized the possibility ‘that other circumstances of the charging process can reasonably inform the defendant in a timely manner of the nature of the charges.’” *Id.*

The Court found that circumstances such as the language of original dropped charge and the arrest warrant established that the defendant had had enough notice not to be prejudiced.

¹⁰² 8 U.S.C. § 1229b(a).

¹⁰³ *Lopez v. Gonzales*, 127 S.Ct. 625 (2006).

¹⁰⁴ People who are deportable or inadmissible for a conviction relating to a controlled substance are subject to “mandatory detention” under 8 U.S.C. 1226(c)(1). Such a waiver may of course be denied, based on the equities of the applicant. “You can beat the rap but you can’t beat the ride.” The deportation hearing ride can be filled with more anxiety and uncertainty than serving a criminal sentence with a release date.

¹⁰⁵ 8 U.S.C. 1159(c). The Refugee waiver is commonly referred to as [I.N.A.] “209(c).”

¹⁰⁶ 8 U.S.C. 1227(a)(2)(B)(i).

There is *no* such one-marijuana-conviction exception to the ground of inadmissibility for a controlled substance conviction.¹⁰⁷ (This means that a legal resident who is not *deportable* for a simple possession of marijuana conviction, can nonetheless be charged with being *inadmissible* if she becomes subject to those grounds, by departing however briefly and seeking re-admission.) However **a single conviction for simple possession of less than 30 grams of marijuana is the *only* drug conviction for which a waiver of inadmissibility may be available** to a non-citizen applying for an immigrant visa through a family visa petition.¹⁰⁸

Since RCW § 69.50.4014 is simple possession of less than *40 grams* of marijuana, it is imperative that defense counsel plead with specificity and make sure that the plea statement—and charging document and judgment and sentence if possible—clearly reflect that the defendant possessed an amount less than *30 grams*.¹⁰⁹ If the criminal complaint does not specify an amount, it should be sufficient to state an amount less than 30 grams on the defendant’s plea statement.

E. RCW § 69.50.403 Obtaining Drugs Through Prescription Fraud

The government might assert that a fraudulent prescription offense is an aggravated felony by being analogous to a federal drug offense. A federal drug statute makes it a felony to obtain or possess a controlled substance by means of deception, fraud or forgery.¹¹⁰ For this reason, *even though the offense may only involve getting drugs for personal use*, the government may charge that a state felony or misdemeanor conviction for obtaining a controlled substance through forged prescriptions is an aggravated felony.¹¹¹

Especially in the case of a lawful permanent resident who has been here long enough to qualify for the discretionary relief of “cancellation of removal” under 8 U.S.C. § 1229b(a).

A conviction under RCW § 69.50.4013 for straight possession, although still a deportable offense, will have fewer adverse immigration consequences because it avoids the aggravated felony and CIMT grounds.

Mitigating Strategies. See also § II.C.3, *supra*, on simple possession.

¹⁰⁷ 8 U.S.C. 1182(a)(2)(A)(i)(II).

¹⁰⁸ 8 U.S.C. §§ 1182(h)(1)(B), (C). The waiver is only available to an immigrant who is a VAWA self-petitioner or to one who is the spouse, parent, son, or daughter of a US citizen or lawful permanent resident (LPR) and can show that denial of admission would result in extreme hardship to the U.S. citizen or LPR spouse, parent, son, or daughter.

¹⁰⁹ Immigration counsel with an inconclusive record of conviction should remember that, in the case of a non-citizen here after admission, the burden is on the government to prove deportability under a “clear, convincing and unequivocal” standard. I.N.A. 240(c)(3)(A); 8 U.S.C. § 1229a(c)(3)(A). An inconclusive record of conviction should also not be enough to bar relief (*Sandoval-Lua v. Gonzales*, 499 F.3d 1121 (9th Cir. 2007)), or demonstrate inadmissibility (*Kepilino v. Gonzales*, 454 F.3d 1057 (9th Cir. 2006)). But defense counsel should do everything possible to avoid making this an issue by specifying a plea to an amount less than 30 grams.

¹¹⁰ 21 U.S.C. § 843(a)(3). Because it is a felony punishable under the Controlled Substances Act, it is within the part of the illicit drug trafficking aggravated felony ground definition (8 U.S.C. § 1101(a)(43)(B)) that incorporates any “drug trafficking crime” as defined in 18 U.S.C. § 924(c), which includes “any felony punishable under the C.S.A.

¹¹¹ RCW § 69.50.403(1)(h).

A conviction under RCW § 9A.28.030 for solicitation, where the underlying substantive offense is Obtaining Drugs through Prescription/Registration Fraud, should avoid being a deportable drug conviction in the Ninth Circuit. See § II.A, *supra*.

Whether or not rehabilitative relief for a first offense of Obtaining Drugs through Prescription Fraud, under the *Lujan-Armendariz* exception (See § II.C.3(a), *supra*) would be effective on the immigration side, may depend on whether a federal conviction under 21 U.S.C. § 843(a)(3) could actually be expunged or treated under 18 U.S.C. § 3607. Because RCW § 69.50.403 has the additional element of fraud, and is not necessarily “less serious” than simple possession, it is safer to assume that it might not fit under the *Lujan-Armendariz* exception.

F. RCW § 69.50.412(1) Use of Drug Paraphernalia

Paraphernalia offenses—including mere use of paraphernalia to ingest under RCW § 69.50.412(1)—are considered controlled substance violations under immigration law.¹¹²

They can make a non-citizen deportable or inadmissible. Washington’s drug paraphernalia statute, RCW § 69.50.412(1) punishes “use” of paraphernalia, for a wide range of purposes all related to a controlled substance, but not possession of paraphernalia.¹¹³

If this is the non-citizen’s first drug offense, the Ninth Circuit has specifically extended its *Lujan-Armendariz*, exception to deportation and inadmissibility for an expunged or vacated first simple possession offense if the offense is akin to mere “possession of [personal] paraphernalia.”¹¹⁴ See § II.C.3(a), *supra*.

WARNING: Using drug paraphernalia “to propagate [or] manufacture” a controlled substance might not come within this exception, while personal “use” of paraphernalia to ingest a controlled substance, if equivalent to mere possession, clearly should fit under the exception.¹¹⁵ Additionally, there is some danger that an offense, such as using paraphernalia to manufacture could be deemed to inherently involve “illicit trafficking in a controlled substance” and thereby be an aggravated felony.¹¹⁶

Defense counsel, if unable to plea bargain to a simple possession charge that takes advantage of one of the exceptions discussed in this chapter (e.g., simple marijuana possession of less than 30 grams; or a first offense that will be remedially dismissed; solicitation to possess) should **craft a plea statement that references only the least serious of the listed activities, such as use of paraphernalia to ingest**—as opposed to manufacture—a controlled substance.

Normally pleading to paraphernalia is *not* an improvement over pleading to possession of marijuana. If it is a first offense and the amount of marijuana could be specified as less than 30 grams, it would be preferable to plead to **RCW § 69.50.4014 Possession of forty grams or less**

¹¹² *Luu-Le v. I.N.S.*, 224 F.3d 911 (9th Cir. 2000).

¹¹³ *State v. Neeley*, 113 Wash.App. 100, 107; 52 P.3d 539, 543 (Wash.App. Div. 3, 2002). RCW § 69.50.102 (b) lists 14 nonexclusive factors to use in considering whether an object is “drug paraphernalia.”

¹¹⁴ *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

¹¹⁵ *Cardenas-Uriarte* at 1138, n 6: “...[W]e can also imagine crime[s] for possession of drug paraphernalia that Congress may consider more serious than simple possession of a controlled substance, if, for example, a defendant were found in possession of the ingredients and machinery to create methamphetamine.”

¹¹⁶ 8 USC 1101(a)(43)(B); 8 USC 1227(a)(2)(A)(iii).

of marihuana. It could prevent removal or preserve eligibility for discretionary relief from removal in some cases.

III. Drug Trafficking Offenses: Selected RCW Offenses

PRACTICE POINT: Regardless of which (if any) of the following strategies is pursued, defense counsel must be careful to **NOT DO** either of these two things: **1. DO NOT DO ALFORD/NEWTON PLEA** agreements that incorporate the police report or affidavit of probable cause into the plea as a factual basis; **2. DO NOT STIPULATE TO REAL FACTS** at sentencing.

A. RCW §§ 9A.28.020, .030, and .040—Anticipatory Offenses: Conspiracy, Attempt, and Solicitation to Deliver, etc.

WARNING: Danger of attempt and conspiracy. Under immigration law, a conviction for attempt and/or conspiracy to commit a controlled substance violation or a drug trafficking aggravated felony will be treated the same as the principal offense.¹¹⁷ As such, a conviction for attempt or conspiracy to commit a drug trafficking offense will make a non-citizen deportable and permanently inadmissible for a drug conviction.

PRACTICE POINT: Solicitation is a possible safe haven for clients with lawful status. In the Ninth Circuit, however, solicitation is distinguishable from attempt and conspiracy offenses. A conviction for solicitation to commit a drug crime under a “generic” or separate solicitation statute,¹¹⁸ such as RCW § 9A.28.030, will not be considered to be a conviction for a controlled substance violation or a drug trafficking aggravated felony.¹¹⁹ See also § II.A, *supra*.

For non-citizen defendants who are lawful permanent residents or refugees/asylees, a conviction for solicitation under RCW § 69.50.401 will avoid deportation/removal as a controlled substance violation and as a drug trafficking aggravated felony.

However, solicitation to commit drug trafficking will be held to be a **crime involving moral turpitude (CIMT)** if the offense solicited would have been so held.¹²⁰ Since **drug trafficking is a CIMT**, a conviction for solicitation to commit a trafficking offense, while not triggering the aggravated felony and controlled substance grounds of deportation, can trigger deportation under

¹¹⁷ 8 U.S.C. 1101(a)(43)(U); 8 U.S.C. 1101(a)(43)(B); 8 U.S.C. 1227(a)(2)(A)(iii).

¹¹⁸ (i.e., solicitation to commit any crime, in this case possession of a controlled substance)

¹¹⁹ *Coronado-Durazo v. I.N.S.*, 123 F.3d 1322, 1323 (9th Cir. 1997). *Leyva-Licea v. I.N.S.*, 187 F.3d 1147 (9th Cir. 1999). The Ninth Circuit has also held that the inclusion of solicitation in the statutory definition of an offense makes it “divisible” as far as being an aggravated felony. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001) (en banc) (solicitation in the form of “offering”). See also *Rendon v. Mukasey*, No. 05-77064, slip op. at 1427-8, 2-15-2008 (9th Cir 2008) finding a Kansas trafficking statute, Kan Stat. Ann. § 65-4163(a), divisible as an aggravated felony because it includes “offering to sell.” See, e.g. RCW § 69.50.4015 for a disjunctive statute that includes solicitation in the statutory definition.

¹²⁰ *Barragan-Lopez v. Mukasey* 508 F.3d 899, 905 (9th Cir. 2007) (offense involves moral turpitude because the underlying offense solicited, drug trafficking, involves moral turpitude). The Court left open the possibility that possession for sale of a “very small” amount of marijuana might not involve moral turpitude. See also, e.g., *Goldeshtein v. I.N.S.*, 8 F.3d 645, 647 n. 6 (9th Cir.1993) (“conspiracy to commit an offense involves moral turpitude only when the underlying substantive offense is a crime involving moral turpitude”).

the CIMT ground(s).¹²¹ However, if the defendant has no prior CIMT convictions, a solicitation conviction will only trigger deportation where it was committed within five years of his admission.¹²² Moreover, even though a drug trafficking solicitation conviction will be a CIMT, it is not an aggravated felony and, thus, would preserve eligibility for relief from deportation/removal.

Additionally, a conviction for solicitation commit any trafficking-related offense will **make the non-citizen inadmissible by giving the government “reason to believe” that the non-citizen is or assisted a drug trafficker.**¹²³ This ground of inadmissibility does not require a conviction and can be satisfied by any reliable evidence that shows the defendant was a knowing and conscious participant in drug trafficking activity.¹²⁴ **This is a permanent ground of inadmissibility, for which there are no immigrant waivers.**

Since the “reason to believe” suspected trafficking ground is only a *ground of inadmissibility* (but not *of deportability*, which technically applies only “after admission”), a legal lawful permanent resident (LPR) who never departs the U.S. and avoids making a new admission to the U.S., will not trigger this ground of inadmissibility.¹²⁵

Although an avenue to avoid deportation, a conviction for solicitation involving drug trafficking will create significant hurdles to obtaining citizenship in the future. Clients should be clearly advised to consult with competent immigration counsel prior to pursuing any application for citizenship.

A defendant who has **refugee status or asylum** will, like LPRs, avoid deportation with a solicitation conviction. However, the “reason to believe” ground of inadmissibility articulated *supra* will permanently preclude her from ever being granted lawful permanent resident status or citizenship. And, like LPRs, she can never depart.

For an undocumented defendant, pleading to solicitation (versus attempt or conspiracy) does not offer substantial benefits since they will face removal for being undocumented and they are, regardless of the specific conviction, permanently inadmissible and barred from ever obtaining lawful status under the “reason to believe” inadmissibility ground discussed above and at § I.B.2, *supra*.¹²⁶ Such clients should be advised that they will face severe sentence enhancement

¹²¹ The Ninth Circuit held that a conviction for solicitation to commit a trafficking offense is a crime involving moral turpitude, because trafficking involves moral turpitude. *Barragan-Lopez v. Mukasey* 508 F.3d 899, 905 (9th Cir. 2007). The case concerned an underlying offense which involved a large amount (at least four pounds) of marijuana. The Court left open the possibility that possession for sale of a “very small” amount of marijuana might not involve moral turpitude. The Court distinguished the ground of deportation for moral turpitude offenses from the controlled substance deportation ground analyzed in *Coronado-Durazo*. Because the deportation ground for moral turpitude does not list certain preparatory offenses to the exclusion of others, the reasoning of *Coronado-Durazo* does not apply. *Id.* at 904.

¹²² See 8 U.S.C. 1227(a)(2)(A)(i).

¹²³ 8 U.S.C. 1182(a)(2)(C); I.N.A. § 212(a)(2)(C).

¹²⁴ See *Pichardo v. I.N.S.*, 188 F.3d 1079 (9th Cir. 1999), vacated on other grounds; *Lopez-Umanzor v. Gonzales*, 405 F.3d 1049 (9th Cir. 2005); *Lopez-Molina v. Ashcroft*, 368 F.3d 1206 (9th Cir. 2004).

¹²⁵ If she departs the U.S., she will become an applicant for admission upon return under 8 U.S.C. 1101(a)(13)(C) and will be denied admission under the “reason to believe” ground. Even if her record is not run and checked at the border, she will become subject to a charge of deportability at any time in the future as someone who was “inadmissible at time of admission”. See 8 U.S.C. 1227(a)(1)(A).

¹²⁶ A conviction for solicitation to deliver can avoid some consequences of an aggravated felony conviction. However for purposes of the potential federal criminal sentence enhancements for re-entry after a removal,

penalties if deported and they illegally reenter and are prosecuted under 8 U.S.C. 1326 (which is likely).

B. RCW § 69.50.401(2) Manufacture, Deliver, or Possess with Intent to Manufacture or Deliver Controlled Substances

1. Overview

A conviction under this statute is one of the most damaging convictions for non-citizens and should be avoided at all costs (particularly for defendants with lawful status). It will subject virtually all non-citizens to deportation/removal since it triggers some or all of the following grounds of inadmissibility and deportability: a conviction for a crime relating to a controlled substance¹²⁷; a drug trafficking aggravated felony¹²⁸; a crime involving moral turpitude¹²⁹; reason to believe the non-citizen has been involved in illicit drug trafficking.¹³⁰

It will also render a non-citizen ineligible for most forms of relief from removal, including asylum and the waiver for lawful permanent residents known as “cancellation of removal”, regardless of how long they have been a resident or any other equities.¹³¹

2. Defense Strategies and Possible Mitigating Alternatives

(a) Rendering Criminal Assistance Under RCW § 9A.76.050-090

RCW § 9A.76.050-090 is Washington’s version of the offense of “accessory after the fact” and is the best alternate plea to an offense under RCW § 69.50.401.

Being an accessory to a drug offense is not considered an offense “relating to controlled substances” and so does not make the non-citizen deportable or inadmissible for having a drug conviction.¹³² Neither is it an aggravated felony, **as long as a sentence of a year or more is not**

while solicitation avoids the enhancement for an aggravated felony, there are still more severe sentence enhancements for returning unlawfully after a felony drug trafficking conviction. 8 U.S.C. 1326(b). See U.S. Sentencing Commission, Guidelines Manual, § 2L1.2(b)(1) (2007).

¹²⁷ 8 U.S.C. 1227(a)(2)(B)(i).

¹²⁸ 8 U.S.C. 237(a)(2)(A)(iii), as an “illicit trafficking” aggravated felony defined in 8 U.S.C. 1101(a)(43)(B).

¹²⁹ 8 U.S.C. 1127(a)(2)(A)(i) and (ii); 8 U.S.C. 1182(a)(2)(A)(i).

¹³⁰ 8 U.S.C. 1182(a)(2)(C)(i). See § I.B.2, supra.

¹³¹ Cancellation of removal for LPRs (under 8 U.S.C. 1229b(a)) is barred by an aggravated felony conviction “at any time.” 8 U.S.C. 1229b(a)(3).

¹³² Matter of Batista-Hernandez, 21 I. & N. 955 (B.I.A. 1997) (The offense of accessory after the fact to a drug-trafficking crime, pursuant to 18 U.S.C. § 3 is not considered an inchoate crime and is not sufficiently related to a controlled substance violation to support a finding of deportability under 8 U.S.C. § 1251(a)(2)(B)(i) 1994).

imposed.¹³³ The Ninth Circuit has ruled that California’s comparable accessory-after-the-fact statute is not a crime involving moral turpitude.¹³⁴

There is some chance, however, that the government will assert that the act of hiding a drug trafficker after he has completed the trafficking is aiding or colluding in the trafficking, and will assert that the conviction gives them “reason to believe” the person is inadmissible under that ground.¹³⁵ See the analysis of the “reason to believe” suspected trafficker inadmissibility ground at § I.B.2, *supra*.

(b) Solicitation to Deliver.

Next to a plea to rendering criminal assistance, a plea to solicitation to deliver will be the most viable option to avoid deportation for non-citizens who are lawful permanent residents.

For non-citizen defendants who are in refugee or asylum status, a plea to solicitation will also avoid deportation. However, it will have the significant consequence of precluding them from pursuing any future application for lawful permanent resident status.

Solicitation to deliver is not a viable option to avoid immigration consequences.

See § II.A and II.C.3, *supra*, for further analysis on using solicitation to deliver as an alternative.

(c) Craft a Plea That Does Not Specify the Controlled Substance

In order to meet its burden to prove that a non-citizen is removable (deportable), the government must establish that the controlled substance at issue in the state conviction falls within the federal definition of controlled substances at 21 U.S.C. § 802. One of the most effective strategies that defense counsel can use for non-citizens charged with drug offenses (including drug trafficking) is to sanitize the relevant conviction record documents, most importantly the plea, so that they do not identify the specific controlled substance at issue.

See § II.C.3(c), *supra* for analysis and strategy for pursuing this avenue.

(d) Delivery that involves giving away a small amount of marijuana.

Under RCW § 69.50.401 a conviction involving the giving away drugs for free will be held an aggravated felony, because it is analogous to the federal drug felony of distribution.¹³⁶ The exception is that a first conviction for giving away a small amount of marijuana is not a federal

¹³³ Matter of Batista-Hernandez, 21 I. & N. 955 (B.I.A. 1997). In Batista-Hernandez the B.I.A. held that an accessory-after-the fact-type of conviction was an aggravated felony under an entirely different provision, 8 U.S.C. 1101(a)(43)(S), as an “offense relating to . . . obstruction of justice . . . for which the term of imprisonment is at least one year.” The Ninth Circuit has deferred to Batista-Hernandez in unpublished decisions dealing with California Penal Code § 32; e.g.: Ramos-Chavez v. Gonzales 2006 WL 63963, 1 (C.A.9) (9th Cir. 2006); Reyes v. I.N.S. 2003 WL 457673, 1 (C.A.9) (9th Cir. 2003).

¹³⁴ Navarro-Lopez v. Gonzales 503 F.3d 1063, 1073 (9th Cir., 2007) (treating C.P.C. § 32).

¹³⁵ 8 U.S.C. 1182(a)(2)(C).

¹³⁶ 21 USC § 841(a) “[I]t shall be unlawful for any person knowingly or intentionally—(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” Distribute means to deliver, which means to transfer a controlled substance, without a requirement for remuneration. 21 USC §§ 802(8), (11).

felony.¹³⁷ Moreover, distribution without remuneration would not be an aggravated felony under the additional “general definition of illicit trafficking” test, for lack of commercial element. Therefore, a conviction under RCW § 69.50.401 that involved giving away a “small” amount of marijuana without remuneration should not be considered to be a drug trafficking aggravated felony. Moreover, such a conviction could possibly be eliminated for immigration purposes if it came under the *Lujan-Armendariz* exception discussed in § II.C.3(a), *supra*.

The Board of Immigration Appeals has ruled that the exception from aggravated felony treatment for the giving away of a small amount of marijuana is akin to an affirmative defense in removal proceedings, and thus the burden is on the defendant to demonstrate that the offense is within the exception.¹³⁸ The Ninth Circuit has not yet ruled as to who has the burden in a removal case where this exception is a possibility.

While such cases are undoubtedly rare, in defending such a charge defense counsel should take any opportunity to make a record that affirmatively supports that the conviction was for only giving away a small amount of marijuana.

C. RCW § 69.50.406 Distribution to Persons Under Age Eighteen

1. Overview

This offense will be a “crime relating to a controlled substance” and an aggravated felony drug trafficking crime that renders a non-citizen defendant deportable, without access to most forms of relief, and permanently inadmissible.

Because it involves distribution of drugs to minors, it is likely that this offense would also be considered to be a crime involving moral turpitude (CIMT). Likewise it would trigger deportation as a “crime of child abuse” (COCA).¹³⁹

See “Mitigating Strategies” under § III.B.2, *supra*, for alternatives that would avoid classification of the conviction as an aggravated felony. This would preserve eligibility for lawful permanent residents to request a “cancellation of removal” waiver from a judge in removal proceedings even if the offense is deemed a CIMT or COCA.

2. Defense Strategies and Possible Mitigating Alternatives

Where possible, negotiate a plea to rendering criminal assistance under RCW § 9A.76.050-090. See § III.B.2(a), *supra*.

A plea to straight solicitation to deliver—where the age of the person to whom the drug was distributed is not given in the record of conviction—should avoid deportability for a drug conviction.

If that were not possible, a plea to RCW § 69.50.4015 for “involving a person under eighteen in unlawful controlled substance transaction” should avoid the conviction being for an aggravated

¹³⁷ See 21 USC § 841(b)(4): “[n]otwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 844 of this title [treating simple possession] and section 3607 of Title 18.”

¹³⁸ *Matter of Aruna* 24 I. & N. Dec. 452, 457 (B.I.A. 2008).

¹³⁹ 8 U.S.C. 1227(a)(2)(E)(i).

felony *if the plea is specifically only to the statutory verb “solicit.”* It is very possible that such a disposition could still be considered to be a “crime involving moral turpitude” and a deportable “crime of child abuse.”

D. RCW § 69.50.4015 Involving a Person Under Eighteen in Unlawful Controlled Substance Transaction

Since it involves manufacturing, selling or delivery of a controlled substance, this offense will be an aggravated felony drug trafficking crime. It will also be a conviction for a crime relating to a controlled substance. A conviction will render a person deportable without access to most forms of relief, and permanently inadmissible.

However, since the statutory definition of **the offense specifically includes the disjunctive method “solicit,” a conviction that is restricted to involving a person** under the age of eighteen years in a transaction unlawfully to manufacture, sell, or deliver a controlled substance **only by soliciting**, should escape being a drug conviction or aggravated felony illicit trafficking conviction.¹⁴⁰

Secondarily—if a safer plea is not available—counsel should seek to sanitize the record of conviction so that “solicit” was a possible ‘conduct of conviction.’ Because it is the government’s burden to prove deportability,¹⁴¹ establishing this ambiguity might prevent the conviction from being found to be a crime relating to a controlled substance or an aggravated felony. The Ninth Circuit has held that solicitation offenses are not drug crimes or aggravated felony drug trafficking crimes. See section on Solicitation at §§ II.A and III.A-B.

Because it involves distribution of drugs to minors, it is likely that this offense will be separately considered to be a “crime involving moral turpitude” (CIMT) and a deportable “crime of child abuse”¹⁴²

Since this offense has the involvement of a minor as an element, it is very likely that—whether or not the offense conduct is restricted to “solicit” and avoids being a drug conviction or aggravated felony conviction— **it will be separately deemed a crime of child abuse (COCA)¹⁴³ and a crime involving moral turpitude (CIMT).**

However **in the case of a long-term lawful permanent resident (LPR)** , since neither COCA nor CIMT are aggravated felonies, **solicitation might still preserve the option of legal**

¹⁴⁰ Coronado-Durazo v I.N.S. 123 F.3d 1322 (9th Cir. 1997); Leyva-Licea v. I.N.S., 187 F.3d 1147 (9th Cir. 1999); U.S. v. Rivera-Sanchez, 247 F.3d 905 (9th Cir. 2001) (en banc) (solicitation in the form of “offering,” part of the statutory definition). See also Rendon v. Mukasey, No. 05-77064, slip op. at 1427,8; 2-15-2008 (9th Cir 2008) finding a Kansas trafficking statute, Kan Stat. Ann. § 65-4163(a), divisible as an aggravated felony because it includes “offering to sell.”

¹⁴¹ In the case of a “deportable alien.” 8 U.S.C. 1229a(c)(3)(A); Woodby v. I.N.S., 385 U.S. 276 (1966).

¹⁴² 8 U.S.C. 1227(a)(2)(E)(i).

¹⁴³ The B.I.A.’s definition of a deportable “crime of child abuse” is: “any offense involving an intentional, knowing, reckless, or criminally negligent act or omission that constitutes maltreatment of a child or that impairs a child’s physical or mental well-being... [T]his definition encompasses convictions for offenses involv[ing] the use or exploitation of a child as an object of sexual gratification or as a tool in the commission of serious crimes, such as drug trafficking. Matter of Velasquez-Herrera 24 I. & N. Dec. 503, 512 (B.I.A. 2008).

eligibility to seek the discretionary waiver called cancellation of removal¹⁴⁴ while in a removal proceeding.

E. RCW § 69.50.407 Felony Conspiracy

Conspiracy to commit a drug offense—whether under RCW § 69.50.407 or under RCW § 9A.28.040—will have the same immigration consequence of making a person deportable or inadmissible as the substantive offense. The same goes for attempt.¹⁴⁵ If the offense conspired at is a drug trafficking crime, or fits the definition of an illicit trafficking aggravated felony, the conspiracy will be an aggravated felony.

F. RCW § 69.50.410 Sell for Profit Any Controlled Substance or Counterfeit Substance in Schedule I

Since a counterfeit substance must actually be a controlled substance,¹⁴⁶ a conviction under either prong of the disjunctive, “controlled substance or counterfeit substance” should be the same for immigration purposes. A conviction here will be an illicit drug trafficking aggravated felony, and also a removable ‘crime relating to a controlled substance’ that renders a non-citizen deportable and permanently inadmissible as an immigrant.

The same mitigating strategies (e.g., solicitation to “sell for profit”) as for any trafficking-type offense could be tried. See § III.B.2. If a plea to this section is unavoidable, defense counsel should try wherever possible to plead to selling a “controlled substance or counterfeit substance” in the disjunctive, **without specifying any particular substance**. See § II.C.3(c).

G. RCW § 69.50.412(2) Deliver, Possess with Intent to Deliver, or Manufacture with Intent to Deliver Drug Paraphernalia

Paraphernalia offenses, including using paraphernalia under RCW § 69.50.412(1), are considered controlled substance violations under immigration law.¹⁴⁷ However, if this is a non-citizen’s first time drug offense, he may fall within the *Lujan-Armendariz* exception analyzed above.¹⁴⁸ See § II.C.3(a). Using drug paraphernalia “to propagate [or] manufacture” a controlled substance logically might *not* come with this exception, while personal “use” of paraphernalia to ingest a controlled substance, if equivalent to mere possession, logically should, under *Cardenas-Uriarte*.¹⁴⁹

¹⁴⁴ 8 U.S.C. 1229b(a).

¹⁴⁵ 8 U.S.C. § 1182(a)(2)(A)(i)(II) (inadmissibility for drug convictions include “a conspiracy or attempt to violate”); 8 U.S.C. § 1227(a)(2)(B)(i) (deportability for drug convictions includes “a conspiracy or attempt to violate”); 8 U.S.C. § 1227(a)(2)(A)(iii), includes 8 U.S.C. § 1101(a)(43)(U) (aggravated felony definition includes attempt or conspiracy to commit a described offense).

¹⁴⁶ E.g. RCW § 69.50.4011(2)(b), treating “[a] counterfeit substance which is methamphetamine . . .”

¹⁴⁷ *Luu-Le v. I.N.S.*, 224 F.3d 911 (9th Cir. 2000).

¹⁴⁸ *Cardenas-Uriarte v. I.N.S.*, 294 F.3d 1132 (9th Cir. 2000).

¹⁴⁹ *Id.* at 1138, n 6: “. . .[W]e can also imagine crime[s] for possession of drug paraphernalia that Congress may consider more serious than simple possession of a controlled substance, if, for example, a defendant were found in possession of the ingredients and machinery to create methamphetamine.”

H. RCW § 69.50.440 Possession of Ephedrine with Intent to Manufacture Methamphetamine; Class B Felony

A conviction under this statute will be an aggravated felony and a crime relating to a controlled substance. It is similar to a felony offense listed in the federal Controlled Substances Act (CSA).¹⁵⁰ See § III.B.2 for possible strategies and alternatives.

I. RCW § 69.53.010 Unlawful Use of Building for Drug Purposes

This offense is likely to be found to be a crime” relating to a controlled substance” that invokes both inadmissibility and deportability.¹⁵¹

It is also likely to be charged as an “illicit trafficking” drug aggravated felony, as a “felony punishable under the CSA” under 21 U.S.C. § 856(a).¹⁵²

However, there is at least one significant difference between the RCW and the analogous federal drug crime: the subsection of the federal provision most analogous to RCW 69.50.010(1)’s “manage and control,” 21 U.S.C. 856(a)(2), has a *mens rea* requirement of “knowingly **and** intentionally.” The *mens rea* of RCW § 69.50.010(1) is “knowingly.”¹⁵³

If this distinction is upheld as meaningful, RCW § 69.53.010(1) might not be a categorical fit with the aggravated felony illicit trafficking definition. Counsel should be cautious in relying on this to avoid an aggravated felony conviction since an offense can also be deemed an aggravated

¹⁵⁰ 21 U.S.C. § 802(34)(C) (Ephedrine is a federal “list I chemical,” under the CSA); 21 U.S.C. § 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; . . . 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.”)

¹⁵¹ See *Matter of Martinez-Gomez*, 14 I. & N. Dec. 104 (B.I.A. 1972), (California conviction for opening or maintaining a place for the purpose of unlawfully selling, giving away or using any narcotic was a violation of a law relating to illicit traffic in narcotic drugs because the “primary purpose” of the California statute was “to eliminate or control” traffic in narcotics. *Id.* at 105)

¹⁵² 21 U.S.C. § 856. Maintaining drug-involved premises. (a) Unlawful acts. Except as authorized by this subchapter, it shall be unlawful to—(1) knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance; (2) Manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

¹⁵³ “Although [Cal. Health & Safety Code §] 11366.5(a) and § 856(a)(2) are very similar, they differ in one important respect: the *mens rea* requirement for section 11366.5(a) is only ‘knowingly,’ while for § 856(a)(2) it is ‘knowingly and intentionally.’ ‘Intentionally’ and ‘knowingly’ are terms with traditional meanings in criminal law, and the meanings are different. . . . Accordingly, Eudave-Mendez’s California conviction does not fall categorically within 21 U.S.C. § 856(a)(2), and thus cannot constitute an ‘aggravated felony’ on the basis of being a “drug trafficking crime,” 18 U.S.C. § 924(c)(2). Because the B.I.A. did not reach any other basis for characterizing Eudave-Mendez’s conviction as an ‘aggravated felony,’ we remand to the B.I.A. Cf. *Chen v. Ashcroft*, 378 F.3d 1081, 1088 (9th Cir.2004) (noting that sometimes, in the face of a novel legal question, ‘the better course... is to remand to the agency for its consideration of the issue in the first instance’). *Eudave-Mendez v. Keisler Slip Copy*, 2007 WL 2859602 (C.A.9 2007).

felony under 8 U.S.C. § 1101(a)(43(B) simply for conviction conduct meeting the generally accepted definition of “trafficking.”

If there is no alternative to pleading to this, counsel should try to **avoid** a plea specifically to making available “for the purpose of. . . manufacturing, delivering, [or] selling”; try to keep out of the record of conviction any indications of commercial motive or advantage from drug activity; and try to a disposition that does not specify the specific controlled substance involved.¹⁵⁴

See §§ II.A and II.C.3 for defense strategies and possible alternatives.

¹⁵⁴ See § II.C.3(d)(i), discussing *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Circuit 2007) and *Matter of Paulus* 11 I. & N. Dec. 274 (B.I.A. 1965) (offense must involve a controlled substance as defined in 21 U.S.C. § 802, and some state controlled substance definitions are more inclusive than the federal definition.) Cf. *Luu-Le v. I.N.S.*, 224 F.3d 911 (9th Cir. 2000). (General drug paraphernalia offense is a crime relating to a controlled substance).