NINTH CIRCUIT DEPUBLISHES *LORENZO* METH DECISION

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UPDATE ON *LORENZO V. SESSIONS*

On August 29, 2018, the Ninth Circuit held that, based on the chemical definitions set out in the federal and state statutes, the definition of methamphetamine ("meth") under California law is broader than the definition under federal law, because the California definition specifically includes its geometric isomers, while the federal definition does not.[1] The court held that the California statute is not divisible between different types of meth. Because the California statute defining meth is overbroad and indivisible, the Ninth Circuit panel found that a conviction for possession for sale of meth under California Health & Safety Code § 11378 is not a conviction of a controlled substance offense for immigration purposes. *Lorenzo v. Sessions,* 902 F.3d 930 (9th Cir. 2018).

On January 17. 2019 the panel withdrew that precedent decision, and issued an unpublished decision that reached the same result, finding that the conviction involving meth was not a deportable controlled substance offense for immigration purposes. In withdrawing the published opinion, the panel noted that the government will have the opportunity in a different case to make its chemistry-based argument: that geometric isomers for methamphetamine do not exist, and therefore that the California definition is not overbroad. The government had not raised that argument below in the *Lorenzo* case, so the Ninth Circuit panel declined to consider it.

In both versions of the decision, Mr. Lorenzo's case was remanded back to the Board of Immigration Appeals (BIA). Mr. Lorenzo had been charged with being deportable both for a controlled substance conviction, and for a controlled substance aggravated felony conviction. The immigration judge and BIA had not ruled on the aggravated felony charge, so the case was remanded to consider this.

See *Lorenzo v. Sessions,* 902 F.3d 930 (9th Cir. 2018), withdrawn by http://cdn.ca9.uscourts.gov/datastore/opinions/2019/01/17/15-70814.pdf. See https://cdn.ca9.uscourts.gov/datastore/memoranda/2019/01/17/15-70814.pdf for the unpublished opinion reaffirming that Mr. Lorenzo is not deportable under the controlled substance ground, due to how meth is defined under California law.

[1] For a longer summary of the decision, see our August 2018 advisory, available here: https://www.ilrc.org/advisory-about-immigration-consequences-california-methamphetamine-convictions-lorenzo-v-sessions.

Immigration advocates representing people in removal proceedings can cite to the new, unpublished *Lorenzo* decision[2] and argue that its reasoning is correct. However, currently there is no published precedent finding that meth is not a controlled substance for immigration purposes. ICE might submit expert declarations alleging that the geometric isomers do not exist, that California meth therefore is a federally-defined controlled substance, and that *Lorenzo* was wrongly decided. ICE might seek to reopen removal proceedings on the basis of the withdrawal of the *Lorenzo* precedent decision. Advocates may have to counter with their own declarations by chemistry experts, asserting that the geometric isomers do in fact exist. The argument set out in *Lorenzo* is a valid basis for appeal of any denial, during which time advocates should explore post-conviction relief in case we do not get another published decision in our favor.

Criminal defenders should be extremely wary of relying on a plea to meth as a "safe" immigration disposition. The bad news is that especially for undocumented persons, but in some cases for all immigrants, a single conviction for possessing a controlled substance causes disastrous consequences. These strategies are discussed in more detail in the ILRC advisory on the original *Lorenzo* opinion, which is reprinted below.

- The best course is to figt hard to plead to a non-drug offense like Pen. C. § 32, B&P C §§ 4140 or 4141, or to pretrial diversion under Pen. C. § 1000 or a under less formal arrangement. When pleading to a non-drug offense, check the *California Quick Reference Chart* to see what immigration consequences it may have. Immigration and criminal defenders can sign up for the chart at www.ilrc.org/chart.
- Another good defense, although hard to obtain, is a plea to a specific substance that appears on California drug schedules but not federal ones, such as, for H&S C § 11377-79, chorionic gonadotropin or khat. See discussion of this strategy in *Note: Controlled Substances* at www.ilrc.org/chart.
- A third defense currently works only if the defendant is a lawful permanent resident who is not deportable (due to a prior conviction or some other reason). For that defendant, a plea to certain drug offenses (including H&S C §§ 11350-52 and 11377-79) will not make the person deportable if the entire record of conviction is carefully sanitized of any mention of the specific drug, and refers only to "a controlled substance." Under current Ninth Circuit law it does not help any immigrant who must apply for relief, however, such as undocumented immigrants seeking to apply for a greencard.
- Finally, if the defendant is undocumented or already deportable due to a conviction, and ICE is at the door, counsel might decide to plead to meth in the hopes that the *Lorenzo* issue eventually wins, or else create a vague record of conviction in hopes that the law changes so that a vague record will aid an undocumented person. The defendant will need to find immigration counsel immediately.

AUGUST 2018 ADVISORY ON *LORENZO V. SESSIONS*

This is the text of the advisory the ILRC published in August 2018, discussing the holding of the original *Lorenzo v. Sessions* opinion, which now has been withdrawn. It provides information about the *Lorenzo* issue.

The Ninth Circuit Court of Appeals held that the California definition of methamphetamine ("meth") in its Health and Safety Code is broader than the definition of methamphetamine contained in the federal Controlled

[2] It is permissible to cite to an unpublished Ninth Circuit decision dating after January 1, 2007, although the decision will not be treated as precedent. See Court Rule 36-3 of Federal Rules of Appellate Procedure, Ninth Circuit, https://cdn.ca9.uscourts.gov/datastore/uploads/rules/frap.pdf

Substances Act. The court found that a conviction for possession for sale of meth under Cal H&S § 11378 is not a deportable controlled substance offense under INA § 237(a)(2)(B)(i), since a controlled substance offense for immigration purposes is tied to the definition of controlled substances in the federal Controlled Substances Act. *Lorenzo v. Sessions*, No. 15-70814, F.3d (9th Cir. August 29, 2018), http://cdn.ca9.uscourts.gov/datastore/opinions/2018/08/29/15-70814.pdf

Immigration advocates should quickly consider the possible implications of this decision, as it may be a basis for a motion to terminate or a motion to reopen in some cases, and certain deadlines may apply.

Summary of *Lorenzo v. Sessions*[3]

In *Lorenzo v. Sessions*, the court found that both the California and the federal statutes carefully define controlled substances, including whether the definitions include their salts, isomers, and salts of their isomers. The definition of meth under California law specifically includes its geometric isomers, while the definition of meth under federal law specifically does not. Therefore, the California statute is overbroad. The court found that the definition of meth under California law is not divisible between types of isomers. Accordingly, the court found that the modified categorical approach is not applicable, and an immigration judge or official may not look to the record of conviction to see which type of meth was involved in the California conviction (e.g., whether the it involved a "geometric" or "optical" isomer). Slip. op. at 19. Instead, no conviction for meth in California is a federally-defined controlled substance offense.

In making this decision, the court found that when a statute "explicitly defines a crime more broadly than the generic definition," there is no need to produce cases to show a "realistic probability" of prosecution for conduct that falls outside the federal definition of the offense, citing *United States v. Grisel,* 488 F.3d 844, 850 (9th Cir. 2007) (en banc) and declining to follow *Matter of Ferreira*, 261 I&N Dec. 415 (BIA 2014). Slip. op. at 13-15. In other words, the court did not demand to see prosecutions that involved a geometric isomer of meth, because geometric isomers were specifically included in Cal H&S § 11033 and 11055. The decision is also significant because the court confirmed that the categorical approach applies with full force to a "disjunctive list within a disjunctive list"—in other words, the categorical approach applies a second time to the list of particular substances within the definition of of larger drug types. Slip. op. 15-16.

The court found that Mr. Lorenzo is not deportable for a controlled substance offense but remanded the case to the BIA to give it the opportunity to rule on the alternative basis for removal, i.e., that the conviction is a deportable drug trafficking aggravated felony. The court, however, directed the BIA to consider whether that theory "suffers from the same flaw" as the controlled substance deportation ground. Slip op. at 20. The aggravated felony theory certainly will suffer from the same flaw, because the aggravated felony offense also requires a federally defined controlled substance.

***Impact in immigration cases*.** Immigration advocates should cite *Lorenzo* as a basis to terminate removal proceedings, or assert eligibility to apply for relief, where adverse consequences were based on an allegation that a conviction involving California meth is a removable controlled substance offense or a where a conviction involving meth is being alleged as an aggravated felony.

Immigration advocates also should quickly consider whether they can file a motion to reopen or reconsider where an adverse order has already issued and where that order was based upon a finding that a California conviction involving meth was a removable controlled substance offense or aggravated felony. Check the applicable timetables for filing. For an excellent discussion of motions to reopen based on a change of law, and

[3] Many thanks to Professor Annie Lai, UC Irvine School of Law, and Michael Mehr for their contributions to this advisory.

sample motions, see the recent practice advisory on motions to reopen under *Pereira v. Sessions:* see NIPNLG and IDP, *Practice Advisory: Challenging the Validity of Notices to Appear Lacking Time-and-Place Information* (July 16, 2018), available online.[4]

Look carefully at all Health & Safety Code convictions that may have involved meth. The most common criminal statutes that punish meth possession, transportation, and sale are H&S §§ 11377-11379. But, if your client has a charge or conviction for H&S § 11550 (use/under the influence), H&S § 11370.1 (possession of controlled substance with a firearm), or H&S § 11364 (paraphernalia) and the drug is specified as meth, then it is categorically not a controlled substance offense under *Lorenzo.* Because there may be other Health & Safety charges specifying meth as the drug, advocates should look closely at any Health and Safety Code offense to see if meth is charged or, if no drug is specified, whether meth could be punished by the statute. You can tell if meth is included in the statute if the statute includes drugs specified H&S § 11055(d)(2) or specifies methamphetamine directly.

Note about sale and crimes involving moral turpitude. Even though *Lorenzo* may eliminate the controlled substances grounds of removability for meth offenses, some of those offenses may still trigger other grounds of removability. In particular, drug trafficking under §§ 11378 and 11379 may be charged as a crime involving moral turpitude (CIMT), which can create a separate basis for removability. See discussion at ILRC, *All Those Rules About Crimes Involving Moral Turpitude*.[5] Immigration attorneys should carefully assess whether any of the CIMT grounds of removability apply in their individual's case.

Impact in criminal cases. In criminal cases the best possible tactic always is to avoid a conviction relating to any controlled substance. For immigration purposes, in most but not all cases[6] a plea to offenses such as Pen C §§ 32, 136.1(b)(1), 460(a), 594, or a variety of other non-drug offenses will be better than a plea to even a minor drug offense. If the defendant is capable of completing the program, treatment under pretrial diversion, Pen C § 1000, is an excellent option. See discussion at ILRC, *What Qualifies as a Conviction for Immigration Purposes* (2018) and ILRC, *Note: Controlled Substances* (2015).[7] Note also that the BIA held that a conviction that is on direct appeal on the merits is not a conviction for immigration purposes. *Matter of J.M. Acosta*, 27 I&N Dec. 420 (BIA August 29, 2018) (holding that a conviction does not attain a sufficient degree of finality for immigration purposes until the right to direct appellate review on the merits has been exhausted or waived).

What if the above options are not possible and one must plead guilty to an offense under H&S C §§ 11377-11379? This is where it gets difficult. The best option for an undocumented person would be to plead to a specific substance that is not on the federal list. In that case, the conviction would not be a controlled substance offense for any immigration purpose. The safest plea is to chorionic gonadotropin, because that clearly is not a federally defined substance. However, that plea is very difficult to arrange.

The other two options both carry risks for undocumented defendants. Under current post-*Lorenzo* law, a specific plea to methamphetamine is not a controlled substance offense, and it might be the best course. The *Lorenzo* case is well-reasoned and may survive the expected petition for rehearing *en banc*. If it does, this is one of the few opportunities (other than a plea to chorionic gonadotropin or khat) that an immigrant has to plead to a

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[4] Go to https://nationalimmigrationproject.org/PDFs/practitioners/practice_advisories/gen/2018_5July_PereiraAdvisory.pdf.

[5] *All those rules about Crimes Involving Moral Turpitude, available at:* https://www.ilrc.org/all-those-rules-about-crimes-involving-moral-turpitude

[6] In some cases, for example some lawful permanent residents, an asylee or refugee, or DACA recipient, it is possible that the person can survive a conviction for simple possession, but this never should be undertaken without careful analysis.

[7] *What Qualifies as a Conviction* is available at https://www.ilrc.org/what-qualifies-conviction-immigration-purposes . *Note: Controlled Substances* is available at www.ilrc.org/chart .

specific, non-federal substance and create a disposition that is not a drug offense for immigration purposes. However, there is no guarantee that *Lorenzo* will remain law.

The other option for an undocumented person is to create a vague record of conviction that does not specify the substance. For example, the person could state "On Feburary 17, 2018 at 3:00 a.m., at the corner of 14th and Broadway in Oakland, I possessed a controlled substance in violation of § 11377." (For more on how to create a vague record, see *Note: Drugs, supra*.) The problem with that is that under the current rule in the Ninth Circuit, an immigrant who applies for relief (which all undocumented persons must do) is not helped by a vague record of conviction. But this unhelpful rule might change for the better, in which case a vague record of conviction *will* protect an undocumented person, depending on the outcome of the *Marinelarena* case that is pending before the Ninth Circuit *en banc.* However, there is no certainty as to the outcome of that case.

In other words, there is no guarantee either way because we do not know the final outcomes of the *Lorenzo* or the *Marinelarena* decisions. On balance, because we have the *Lorenzo* case right now, a plea to meth may be the better course. With either option, warn the defendant that there are no guarantees. Above all, the best resolution is, when possible, to plead to a non-drug offense.

The situation is better for lawful permanent residents who are not already deportable. A vague record of conviction as to the controlled substance *will* prevent the LPR from being found deportable, because ICE will not be able to meet its burden to produce a record of conviction that proves that a federally-defined substance is involved. See *Note: Drugs, supra*. However, if the permanent resident already is deportable, or ever becomes deportable in the future, the vague record may not save them.

***Post-conviction relief*.** Post-conviction relief practitioners should examine their case load and determine which cases may benefit from a rigorous immigration defense, rather than post-conviction relief. It is possible that, at the time of the plea the conviction carried certain immigration consequences that no longer apply and perhaps pursuing a motion to terminate or reopen would be a more direct legal route to obtaining relief from removal. Even though entering the conviction triggered certain immigration consequences at the time of the plea, under *Lorenzo*, those consequences may no longer exist. The safest course, however, may be to pursue both.