Transportation under H&S §§ 11352 and 11379 will no longer be an immigration safe plea beginning January 1, 2014[1]

A plea to transportation for personal use or a vague plea to "transport or sale" under Health & Safety Code §§ 11352(a) or 11379(a) was an important defense strategy for noncitizen individuals facing drug sales charges. Such a plea would avoid an aggravated felony drug trafficking conviction and could even avoid deportability altogether with the record sanitized of the specific controlled substance. A charge of possession for sale, which is automatically an aggravated felony, could be pled up to transportation to avoid the devastating consequences of an aggravated felony conviction. A conviction for an aggravated felony has the harshest immigration consequences including ineligibility for most forms of relief resulting in mandatory deportation, no bond immigration detention, and permanent banishment from the U.S.

Beginning January 1, 2014, a conviction for transportation under H&S 11352 and 11379 will automatically qualify as a drug trafficking aggravated felony if the record identifies a federally listed controlled substance. AB 721, which was signed into law on October 3, 2013, redefines transport to include only transportation for sale and now excludes transportation for personal use. This supersedes case law that has held that a conviction for transportation pursuant to 11352 and 11379 does not require an intent to sell, but rather encompasses transportation for personal use.[2] AB 721 did not change the definition of transport in other statutes such as H&S §§ 11360 and 11379.5, which should continue to cover transportation for personal use. Both, however, will be deportable and inadmissible as a controlled substance offense because these statutes identify drugs listed on the federal schedules.

A. Alternative Defense Strategies to Avoid an Aggravated Felony Drug Trafficking Offense for Clients with Lawful Status, e.g., LPRs (and some asylees and refugees)

Below are plea options that can avoid a drug trafficking aggravated felony. In some cases, it may also avoid the controlled substance ground of ***deportability*** if the record does not identify the specific drug.[3] Sanitizing the record of conviction of the drug, however, will not

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[1] Su Yon Yi of the Immigrant Legal Resource Center wrote this practice advisory. Many thanks to Katherine Brady, and Angie Junck of the ILRC, and to Norton Tooby, Graciela Martinez and Mike Mehr.

[2] See *People v. Rogers*, 5 Cal.3d 129 (Cal. 1971); *People v. Ormiston*, 105 Cal.App.4th 676 (Ct.App.1st 2003).

[3] This strategy of creating a vague record of conviction involving an unspecified controlled substance is called the *Paulus* defense. *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). This defense works if the offense covers some drugs that are not on the federal schedules. For example, H&S §§ 11350-52 includes drugs that are not on the federal list. Where the record does not identify the drug the government will be unable to meet it burden to prove the immigrant is deportable for an offense involving a federally listed drug.

avoid the controlled substance ground of ***inadmissibility*** under current law. See **Part B**, *infra*, for strategies for undocumented clients, deportable LPRs and others who need status.

1. Non-drug offenses, such as P.C. §§ 32, 136.1(b)(1): With a sentence imposed of 364 days or less, P.C. §§ 32 and 136.1(b)(1) will not be aggravated felonies and they will not trigger the controlled substance ground of inadmissibility or deportability. P.C. § 32 may be a crime involving moral turpitude (CIMT) if the record shows that the underlying conduct is CIMT, such as a drug trafficking offense. Thus, the best plea would be to accessory after the fact to possession of a controlled substance since mere possession is not a CIMT. But even if P.C. § 32 is a CIMT, a single CIMT offense may not be deportable or inadmissible. See CIMT formula in *California Quick Chart and Notes, N. 7 Crimes Involving Moral Turpitude.* Defense counsel should assume that § 136.1(b)(1) might be charged as a crime involving moral turpitude. As a strike, felony P.C. § 136.1(b)(1) may be a useful option where counsel needs a substitute plea for a serious charge. Counsel should be sure to obtain a sentence of 364 days or less on any single count.

2. Possession of controlled substance under H&S C §§ 11350 or 11377. With a few exceptions possession is not an aggravated felony.[4] Where the record of conviction does not identify the controlled substance, this plea will avoid deportability as a controlled substance offense.[5] If the record identifies a federally listed drug, a conviction under 11350 or 11377 will be deportable as a controlled substance offense.

3. Transportation for personal use under H&S C §§ 11352 or 11379 for conduct prior to January 1, 2014. If the offense was committed prior to January 1, 2014, plead to the language of the statute as it was written on the date that the offense was committed and specify such in the record of conviction. If possible, specify transportation for personal use, but a plea to transportation should also work. The best plea would be to transportation for personal use of an ***unidentified controlled substance***. This will prevent the offense from qualifying as deportable controlled substance offense and an aggravated felony. A conviction for transportation for personal use of a federally listed drug will be deportable as a controlled substance offense, but it will not be an aggravated felony.

4. Transportation for personal use under H&S C § 11360(a) or (b). Although this is deportable as a controlled substance offense because the statute specifies marijuana, a conviction for transportation for personal use will avoid an aggravated felony conviction.

5. Offer to sell, distribute or transport an unidentified controlled substance under H&S C §§ 11352 or 11379. This will not be deportable as a drug offense or as an aggravated felony. A conviction for offering to sell, distribute or transport for sale can bring an LPR within the

[4] A conviction for possession of flunitrazepam or recidivist possession where the prior drug possession conviction is pled or proven is an aggravated felony. These offenses are punished as felonies under the federal drug laws and thus are aggravated felony as analogues to the federal felonies.

[5] The Ninth Circuit upheld the *Paulus* defense for Calif. H&S C §§ 11377-79 (*Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007)) and for H&S C §§ 11350-52 (*Esquivel-Garcia v. Holder*, 593 F.3d 1025 (2010) (11350) and *U.S. v. Leal-Vega*, 680 F.3d 1160 (9th Cir. 2012) (§ 11351 is divisible, but a review of the record identified tar heroin which is on the federal list)).

inadmissibility ground based on ICE having "reason to believe" that the person is a drug trafficker. A plea to distribution without remuneration may avoid the reason to believe ground. For refugees and asylees, the reason to believe ground is particularly bad because it will prevent them from adjusting their status to lawful permanent residence. See Warning in Box, *infra*.

6. Giving away a small amount of marijuana under H&S C § 11360(b) (or offering to do so). Giving away a small amount of marijuana is a deportable and inadmissible offense, but at least it is not an aggravated felony. This is because giving away a small amount of marijuana without remuneration is not treated as a felony under federal law. A plea to giving away marijuana under subsection (b) would be best, but a plea to giving away under subsection (a) specifying that the amount was 30 grams or less should also work to avoid an aggravated felony.

7. Offer to sell, distribute or transport a named controlled substance on the federal list under H&S C §§ 11352 or 11379. A plea to "offering" will not be a drug trafficking aggravated felony ***in the Ninth Circuit only***. If a noncitizen is transferred outside the Ninth Circuit and placed in deportation proceedings, for example in Texas, a conviction for offering to sell, distribute, or transport will be held an aggravated felony. It can also trigger the "reason to believe" the person engaged in drug trafficking inadmissibility ground. See discussion in #5, *supra.*

8. Possession for sale, sale or distribution of an Unspecified Controlled Substance. This plea will protect LPRs who are not yet deportable based on priors or will not become deportable. Possession for sale, sale, and distribution are aggravated felonies. Where the record does not identify the controlled substance, the offense will not be deportable as a drug offense or an aggravated felony. Under *Young v. Holder*,[6] however, if the noncitizen is already deportable based on other convictions, this vague plea will not help the LPR who needs to apply for relief from removal. This vague record is insufficient to show that the conviction was not for an aggravated felony and thus the noncitizen would be ineligible for relief, such as cancellation of removal and asylum. These offense will also will give ICE "reason to believe" the person engaged in drug trafficking and also will be a crime involving moral turpitude.

Warning!! A plea to offering (#5 & #7 above) or possession for sale (#8 above) is very bad for ***refugees and asylees*** because the government would have ***reason to believe*** the person engaged in drug trafficking. Such a conviction will prevent a refugee/asylee from adjusting status to that of a LPR because this is a ground of inadmissibility that cannot be waived.

TRAVEL WARNING TO YOUR CLIENTS. Warn your LPR clients who plead to one of the non-deportable offense above not to travel outside the U.S. This is especially important if the person could be inadmissible under the "reason to believe" the person engaged in drug trafficking ground. Other grounds of inadmissibility could apply as well. Even where the substance is unnamed, drug offenses could be inadmissible as controlled substance offenses and trafficking offenses could be inadmissible as a crime involving moral turpitude.

[6] *Young v. Holder*, 697 F.3d 976 (9th Cir. 2012) (*en banc*).

B. Defense Priorities for Undocumented Clients

It is crucial for undocumented clients who want to preserve eligibility for legal status to ***avoid an inadmissible drug conviction, especially the "reason to believe" inadmissibility ground***. If at all possible, try to negotiate a plea to a non-drug offense such as P.C. §§ 32 or 136.1(b)(1) with a sentence imposed of less than one year. Be sure to analyze these offenses for other immigration consequences.

Under current law, only a drug conviction where the record designates a drug that is on the California list but not on the federal list will avoid controlled substance ground of inadmissibility. See *California Quick Reference Chart and Notes, N. 8 Controlled Substa*nce, available at www.ilrc.org/crimes. If in the future the Ninth Circuit overrules *Young v. Holder*, a vague record that does not identify the drug may be helpful.

It is also important for undocumented clients to ***avoid an aggravated felony conviction***. See Part A, *supra* for plea options. Such a conviction is likely to bar the person from applying for lawful status or relief. If the person is deported and then re-enters the U.S. illegally, an aggravated felony conviction will trigger severe sentence enhancement for the federal offense of illegal re-entry.

C. Post-Conviction Relief: Transportation for personal use under H&S C §§ 11352 and 11379 for offenses committed prior to January 1, 2014.

Transportation for personal use should be available as a safe haven for those who seek post-conviction relief to vacate a drug trafficking aggravated felony committed prior to January 1, 2014. The ex post facto clause freezes the elements of the offense to those that existed on the day that the offense was committed. After successful vacation of the conviction, a noncitizen may enter a new plea to transportation for personal use under 11352 or 11379 as long as the offense was committed prior to the effective date of January 1, 2014. The record must reflect that the new plea is to the pre-2014 elements in the statute and as the statute was written on the day that the offense was committed.