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MIGUEL DE LA TORRE-JIMENEZ

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. **MIGUEL DE LA TORRE-JIMENEZ**, Defendant.	NO. CR-12-828-GHK **DEFENDANT MIGUEL DE LA TORRE-JIMENEZ'S SUPPLEMENTAL POSITION RE: SENTENCING; EXHIBIT** Sentencing Date: Sept. 3, 2013 Sentencing Time: 11:00 a.m.

Defendant Miguel De La Torre-Jimenez (hereinafter "Mr. De La Torre"), by and through his counsel of record, Deputy Federal Public Defender Firdaus F. Dordi, hereby submits his supplemental position regarding sentencing and his letter to the Court, which is attached hereto as Exhibit A.

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Mr. De La Torre's supplemental position responds to the government's reply to his position re: sentencing (Docket Entry No. 46; filed on August 26, 2013). More specifically, it discusses whether California Health and Safety Code § 11351 is a divisible statute and, if so, can the government establish that Mr. De La Torre's conviction under it constitutes a predicate prior for purposes of the 16-level enhancement of United States Sentencing Guideline § 2L1.2(b)(1)(A).

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: August 30, 2013

By /s/ *Firdaus F. Dordi*
FIRDAUS F. DORDI
Deputy Federal Public Defender

I. INTRODUCTION

The government agrees that Cal. Health & Safety Code § 11351 is broader than the generic definition of "drug trafficking offense," as that term is used in United States Sentencing Guideline (U.S.S.G.) § 2L1.2 and the Controlled Substances Act (CSA). *See* Government's Reply to Defendant's Position re: Sentencing (Govt. Reply, at 6.) The government also agrees that *Descamps v. United States*, --- U.S. --- , 133 S. Ct. 2276, 186 L. Ed. 2d 438 (2013), clarified that "a person convicted under [an indivisible, overbroad] statute is *never* convicted of the generic crime." Govt. Reply, at 6 (quoting *Descamps*, 133 S. Ct. at 2292). The government, however, argues (1) that § 11351 is divisible, and (2) that the documents submitted with its initial sentencing position satisfy the modified categorical analysis. The government is incorrect on both accounts.

II. ARGUMENT

1. Section 11351 Is an Indivisible Statute

The Ninth Circuit has repeatedly held that drug type and quantity are not formal elements under 21 U.S.C. § 841(a), which like Cal. Health & Safety Code § 11351 makes it a crime to distribute/sell or possess/purchase with intent to distribute/sell a "controlled substance." *See, e.g., United States v. Hunt*, 656 F.3d 906, 912 (9th Cir. 2011) (finding a defendant can plead guilty to 21 U.S.C. § 841(a) without admitting the type of drug); *United States v. Thomas*, 355 F.3d 1191, 1195 (9th Cir. 2004) (holding drug quantity is not an element of the offense that must be admitted for the defendant to be guilty of the offense; rather drug quantity is a material fact that needs to comport with *Apprendi's* safeguards as it may expose the defendant to a greater statutory maximum sentence); *United States v. Toliver*, 351 F.3d 423, 430 (9th Cir.2003) (holding that drug type and quantity "do not constitute formal elements of separate and distinct offenses under section 841(b)(1)"); *United States v. Valensia*, 299 F.3d 1068, 1074 (9th Cir.2002) (rejecting defendant's

contention that "the sentencing provisions of § 841 create separate crimes"). Section 841(a), which sets forth the unlawful act, like § 11351 refers to the term "controlled substance" and not any specific drug. In each of the aforementioned Ninth Circuit cases, the government took the position that drug type and quantity are not elements of the offense. Here, the government takes the contrary position—that drug type is an element of a § 11351 offense.

The government's position—that the particular drug at issue is an element of the offense—is not supported by the statute, which specifically utilizes the term "controlled substance," or the California courts interpretation of it. Moreover, the reasoning applied for charging and proving a particular substance and quantity under 21 U.S.C. § 841 does not apply to § 11351. In the federal context, drug type and quantity are charged in the indictment and proved to a jury beyond a reasonable doubt because they enhance the statutory maximum penalties to which the charged individual is subjected. *See Hunt*, 656 F.3d at 911-12. As such, under 21 U.S.C. § 841, drug type and quantity implicate the concerns addressed by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *Id.* at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.") Drug type and quantity, under 21 U.S.C. § 841, determine whether the individual is subjected to a one-year statutory maximum, a twenty-year statutory maximum, a forty-year statutory maximum, or a life sentence. *See generally*, 21 U.S.C § 841.[1]

The same is not true for convictions under § 11351. Any person convicted of a violation of § 11351, irrespective of drug type or quantity, is subjected to the same minimum and maximum sentence. California courts have recognized as much.

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[1] The Supreme Court has recently held that *Apprendi* also applies to facts that increase mandatory minimum penalties. *See Alleyne v. United States*, --- U.S. ---, 133 S. Ct. 2151, 2163, 186 L. Ed. 2d 314 (2013),

In fact, California courts have held there is no fatal variance if the type of drug charged differs from the one proved at trial. *See People v. Martin*, 169 Cal. App.4th 822, 827 (Ct. App. 2008).

In *Martin*, the felony information charging defendant with a violation of Cal. Health and Safety Code § 11350(a), an analogous statute to 11351 in that it references the term "controlled substance" as opposed to a particular substance, named cocaine base as the controlled substance at issue. *Id.* at 824. The witnesses at trial consistently referred to the controlled substance as "cocaine base" or "rock cocaine." *Id.* at 825. In the written jury instruction provided to the jury, "cocaine" was named as the controlled substance at issue. The verdict form also read "cocaine" as the controlled substance at issue. *Id.* at 859-60. On appeal, Martin argued that his due process rights were violated as there was insufficient evidence to support his conviction for cocaine. In rejecting his argument, the California appellate court found that "the conflicting references to cocaine and cocaine base caused no prejudice to appellant, as the penalty in section 11350(a) is the same, whether the controlled substance is cocaine or cocaine base." *Id.* at 827.

If the drug-type was an essential element of the offense, Martin's conviction could not have stood. *See United States v. Hartz*, 458 F.3d 1011, (9th Cir. 2006) (a variance that does not alter the behavior necessary for the defendant to be convicted is not fatal). In *United States v. Garcia-Paz*, 282 F.3d 1212 (9th Cir. 2002), the indictment charged: "defendant IVAN Garcia-Paz, did knowingly import and bring into the United States certain merchandise, to wit, marijuana, contrary to law." *Id.* at 1215. At trial, defendant presented evidence that he did not know he was smuggling marijuana, but believed it was an illegal medicine. *Id*. at 1214. The trial court removed the "to wit: marijuana" language from defendant's proposed jury instruction. *Id.* The Ninth Circuit concluded that "the inclusion of the 'to wit' phrase in the indictment was mere surplusage and did not cause the indictment to

allege that Garcia-Paz had knowledge of the marijuana. The statute prohibited smuggling of "merchandise," which included illegal medicine and marijuana. *Id.* at 1217. As such, it did "not matter under the statute" which substance defendant thought it was." *Id.* at 1217. Thus, the phrase "to wit, marijuana" was mere surplusage, and did "not render the jury's conviction of Garcia-Paz on that charge a violation of Garcia-Paz's Fifth Amendment rights." This is, in essence, what the California Court of Appeals found in *Martin*: "the jury was correctly instructed on the elements of the crime of possession of a controlled substance." *Martin*, 169 Cal. App.4th at 827. Drug type was, therefore, not a fact necessary for the conviction. *See Descamps*, 133 S. Ct. at 2286 n.3 ("[T]he dissent nowhere explains how a factfinder can have 'necessarily found' a non-element—that is, a fact that by definition is not necessary to support a conviction.")

In a similar drug statute, another California appellate court found the charging information was sufficient even though it failed to specify the specific opiate at issue, finding the specification was "mere surplusage." *See People v. Gelardi*, 77 Cal. App.2d 467, 471-72 (1946), *disapproved on other grounds in People v. Perez*, 62 Cal.2d 469 (1965). This is consistent with *Sallas v. Municipal Court*, 86 Cal. App.3d 737 (1978), where the court held that the complaint fell short of due process requirements, but did not "hold, or suggest, that in such prosecutions the charge must pinpoint one of the may controlled substances of the statute." *Id.* at 744. The government's take—that *Sallas* stands for the proposition that California Health and Safety Code violations are divisible crimes—is sophistry. *See* Govt. Reply, at 11.

Similarly, while *People v. Romero*, 55 Cal. App.4th 147 (1997), clarified that a defendant must have knowledge of the object's narcotic character, not the actual substance, it also clarified that the defendant "was guilty of a single offense, sale of a controlled substance," and the pleading requirement did "not transmute the

offense of possession of a controlled substance into as many different offenses as there are controlled substances." *Id.* at 156. From this, the government cannot, as it does, conclude that a particular substance must be pled and proven to sustain a conviction under § 11351. *See* Govt. Reply, at ¶ 11. Rather, *Romero* establishes that the various substances are means by which the element of "controlled substance" may be proven.

In *Ross v. Municipal Court*, 49 Cal. App.3d 575 (1975), the California appellate court affirmed the trial court's overruling of the demurrer to the complaint for failing to specify the controlled substance defendant was under the influence of. *Id*. at 578. Thus, the court necessarily found that the particular substance need not be charged. *Id.* The fact that the court went on to indicate that upon an appropriate pre-trial motion, defendant should promptly be granted discovery of all information bearing on the possible identity of the controlled substance involved did not convert the particular substance into an element of the offense, needing to be pled and proven to the jury beyond a reasonable doubt. In fact, *Ross* holds the contrary to be true. *See id.* The government's argument as to the divisibility of how California courts have interpreted the drug statutes criminalizing possession or sale of a "controlled substance," therefore, fails.

The government overlooks the plain language of the statute, and the California courts' interpretation of it, to find "indicia of divisibility" in the model jury instructions. *See* Govt. Reply, at 8-9. The government claims that because CALJIC 12.01 provides for a blank in the jury instruction as to the type of controlled substance, it is an element. However, as discussed, California courts have not interpreted the type of the substance to be an element, rather it is a means by which the crime may be committed. The model jury instruction is not limited to one type of substance. Moreover, immediately following the blank space for type of substance is the descriptive phrase, "a controlled substance," to let the jury know

that the named substance meets the definition of "controlled substance." *Id.*

The plain language of the statute and the California courts' interpretation of § 11351 and similar statutes demonstrate that it is an indivisible statue that is categorically overbroad. It therefore cannot serve as a predicate offense for the drug trafficking offense enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(i). Mr. De La Torre's 2007 conviction is not a "drug trafficking offense," and he is not subject to the 16-level enhancement as a matter of law.

2. Even If the Court Applies the Modified Categorical Approach, Mr. De La Torre Is Not Subject to the 16-Level Enhancement of § 2L1.2(b)(1)(A) as a Matter of Law

The government correctly does not contest that the charging document, by itself, can ever satisfy the modified categorical approach. The government instead argues that where "an abstract of judgment or minute order specifies that a defendant pleaded guilty to a particular count of the criminal complaint or indictment, [a court] can consider the facts alleged in that count." Govt. Reply, at 14 (citing *Cabantac v. Holder*, --- F.3d ---, 2013 WL 4046052, at *5 (9th Cir. 2013). *Cabantac* runs afoul of *Descamps* and the Sixth Amendment underpinnings of the categorical and modified categorical approaches in that it permits a later court to assume facts that the defendant did not necessarily admit by looking to the charging instrument coupled with a minute order and/or an abstract of judgment, rather than documents that reflect the assent of the defendant. *See Descamps*, 133 S. Ct. at 2288 (In *Shepard* we recognize that "allowing a sentencing court to 'make a disputed' determination 'about what the defendant and state judge must have understood as the factual basis of the prior plea,' or what the jury in a prior trial must have accepted as the theory of the crime.") *See also Shepard v. United States*, 544 U.S. 13, 28 (2005) (THOMAS, J., concurring in part and concurring in judgment) (stating that such a finding would "giv[e] rise to constitutional error, not

doubt"). Even assuming a sentencing court can consider minute orders and abstracts of judgment to ascertain the defendant's assent, *Cabantac* runs a foul of *United States v. Vidal*, 504 F.3d 1072 (9th Cir. 2007) (en banc). "*Vidal* considered what language was necessary to allow consideration of allegations in a criminal complaint when applying the modified categorical approach. 504 F.3d at 1087." *Cabantac*, 2013 WL 4046052, at *3 (9th Cir. 2013) (MURGIA, J., dissenting from the denial of rehearing en banc). *Vidal* explained that "to identify a conviction as the generic offense through the modified categorical approach, when the record of conviction comprises only the indictment and the judgment, the judgment must contain the critical phrase 'as charged in the information.'" *Id.* at 1087. Absent this critical phrase, the record of conviction cannot satisfy the Sixth Amendment underpinnings of *Shepard* and the modified categorical approach. *See id.* (citation omitted).

Although the government ignores *Vidal* in its reply, eight Ninth Circuit judges recently thought that *Cabantac* should be reheard en banc to resolve the conflict it creates with *Vidal*. *See Cabantac*, 2013 WL 4046052, at *1 (9th Cir. 2013) (MURGIA, J., dissenting from the denial of rehearing en banc). Moreover, while the government asserts that these same eight Ninth Circuit judges noted that § 11377, which is structured very similarly to § 11351, appears to be a divisible statute that permits the application of the modified categorical approach, it failed to mention that the same judges, in the same footnote, also noted that "our court has not yet considered the impact of *Descamps* on our prior analysis of § 11377(a)." *Id.* For the reasons stated, *Cabantac* cannot withstand *Descamps* and *Vidal*.

Here, the clerk's minute entry makes no mention of the specific "controlled substance" at issue, and the government has not submitted either a change of plea form or a transcript of the plea colloquy. As a consequence, the Sixth Amendment underpinnings of the modified categorical approach cannot be satisfied by the

clerk's docket entry. The government has not borne its burden of clearly and unequivocally establishing that Mr. De La Torre was convicted of a drug trafficking offense. *See United States v. Kovac*, 367 F.3d 1116, 1119 (9th Cir. 2004). The 16-level enhancement should not apply to Mr. De La Torre. His applicable enhancement is 4 levels, pursuant to § 2L1.2(b)(1)(D). His applicable guideline range at a total offense level 10 and CHC III is 10-16 months.

III. CONCLUSION

Mr. De La Torre has served 13 months, without accounting for good time credits. He respectfully requests the Court sentence him to time-served.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: August 30, 2013

By /s/ *Firdaus F. Dordi*
FIRDAUS F. DORDI
Deputy Federal Public Defender

PROOF OF SERVICE

I, the undersigned, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202; that I am over the age of eighteen years; that I am not a party to the above-entitled action; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the United States District Court for the Central District of California, and at whose direction I served the:

Miguel De La Torre Jimenez's Supplemental Position Regarding Sentencing

On August 30, 2013, following ordinary business practice, service was:

[X] Placed in a closed envelope, for collection and hand-delivery by our internal staff, addressed as follows:

[ ] By hand-delivery addressed as follows:

[ ] Placed in a sealed envelope for collection and mailing via United States Mail, addressed as follows:

[ ] By facsimile as follows:

Adam Sweeney
U.S. Probation Officer
312 N. Spring St. Suite 600
Los Angeles, California 90012
Los Angeles, California 90012

This proof of service is executed at Los Angeles, California, on August 30, 2013.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Rosalinda Lozano
Rosalinda Lozano