U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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J.J. Hamlyn III
55 River Street, Suite 240
Santa Cruz, CA 95060-0000

DHS/ICE Office of Chief Counsel - SFR
P.O. Box 26449
San Francisco, CA 94126-6449

Name: ZENDEJAS-SANCHEZ, FRANCISCO **A036-176-508**

Date of this notice: 3/8/2011

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Wendtland, Linda S.

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A036-176-508
215 5TH STREET
MARYSVILLE, CA 95901

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Name: ZENDEJAS-SANCHEZ, FRANCISCO **A036-176-508**

Date of this notice: 3/8/2011

Enclosed is a copy of the Board's decision in the above-referenced case. This copy is being provided to you as a courtesy. Your attorney or representative has been served with this decision pursuant to 8 C.F.R. § 1292.5(a). If the attached decision orders that you be removed from the United States or affirms an Immigration Judge's decision ordering that you be removed, any petition for review of the attached decision must be filed with and received by the appropriate court of appeals within 30 days of the date of the decision.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Pauley, Roger
Wendtland, Linda S.

File: A036 176 508 - San Francisco, CA Date: MAR - 8 2011

In re: FRANCISCO ZENDEJAS-SANCHEZ a.k.a. Francisco Sanchez-Zendejas

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: J.J. Hamlyn III, Esquire

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

APPLICATION: Termination

The respondent, a lawful permanent resident and a native and citizen of Mexico, has appealed the September 3, 2010, decision of the Immigration Judge finding the respondent removable as charged and denying his motion to terminate. The appeal will be sustained.

The Immigration Judge found that in October 2006 the respondent was convicted of possession of methamphetamine in violation of Cal. Health & Safety Code § 11377(a) (I.J. at 1). On appeal, the respondent argues that he was convicted of possession of a controlled substance, not specifically methamphetamine, because the statute is divisible and the conviction documents in the record are insufficient to prove that methamphetamine was the controlled substance involved.

Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), defines the term "controlled substance" by reference to section 102 of the federal Controlled Substances Act (CSA). This is significant because California law regulates the possession of substances not listed under the CSA. *See Mielewczyk v. Holder*, 575 F.3d 992, 995 (9th Cir. 2009) (citing *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1078 (9th Cir. 2007)). Thus, the statutory definition of § 11377(a) is broader than the CSA, which renders a categorical approach inapplicable to this case. *See, e.g., Mielewczyk v. Holder*, *supra*, at 994. Consequently, we turn to a modified categorical approach to determine whether the respondent's charge can be sustained. *See, e.g., id.* at 995.

In the instant case, the record contains a (1) Complaint for case number CR-06-00883, (2) a proceedings disposition notice of the respondent's plea relating to case number CR-06-00883, and (3) an abstract of judgment. The language of the Complaint indicates in count 1 that the respondent "did unlawfully possess a controlled substance, to wit, Methamphetamine" in violation of § 11377(a), and in count 2 that he "did unlawfully use and be under the influence of an illegal controlled substance, to wit, Methamphetamine" in violation of Cal. Health & Safety Code § 11550(a). *See* 8 C.F.R. § 1003.1(d)(3)(iv) (2010) (stating that the Board may take administrative

notice of official documents in the record). However, the proceedings disposition notice indicates that the respondent pled "no contest" to counts 1 and 2 of the Complaint per *People v. West*, 477 P.2d 409 (Cal. 1970). *See id.* Furthermore, the abstract of judgment states, *inter alia*, that the respondent pled to "Possession of a controlled" in violation of § 11377(a). *See id.*[1]

The United States Court of Appeals for the Ninth Circuit has held that where a defendant has entered a *West* plea, a conviction document merely indicating a finding of guilt as to a particular count does not incorporate the specific factual allegations in the charging document because, under a *West* plea, a defendant does not admit the specific details about his conduct alleged in the counts to which he pled. *United States v. Vidal*, 504 F.3d 1072, 1089 (9th Cir. 2007) (en banc); *see also Fregozo v. Holder*, 576 F.3d 1030, 1040 (9th Cir. 2009) (stating that a *West* plea does not establish factual guilt, and unless the record of the plea proceeding reflects that the defendant admitted to facts, a *West* plea, without more, is insufficient to establish the factual predicate to support a determination that the conviction was generic). As a result, in this case, while the Complaint states that the controlled substance possessed and used was methamphetamine, given the respondent's *West* plea, he did not plead "as charged," without further indication in the conviction documents. Moreover, as the respondent points out, the record does not contain a plea colloquy which would state the basis of the respondent's plea and the specific crime to which he is pleading.

Furthermore, we agree with the respondent that contrary to the Immigration Judge's determination, *United States v. Snellenberger*, 548 F.3d 699 (9th Cir. 2008) (en banc), does not address the specific circumstances presented in this case. Although *Snellenberger* held that a notation on a California minute order reflecting a plea to a particular count of a charging document was sufficient to establish that the plea in question was to the facts alleged in the corresponding count, *Snellenberger* does not state that the defendant had entered a *West* plea. As such, in the instant case, under controlling Ninth Circuit precedent, the conviction documents in the record are insufficient to establish the respondent's offenses as generic for purposes of a modified categorical analysis.

Based on the foregoing, we find that the DHS has not met its burden of proving by clear and convincing evidence that the respondent is deportable as charged. *See* section 240(c)(3)(A) of the Act, 8 U.S.C. § 1229a(c)(3)(A). Accordingly, upon our *de novo* review, we reverse the decision of the Immigration Judge denying the respondent's motion to terminate. *See* 8 C.F.R. § 1003.1(d)(3)(ii) (stating that the Board reviews questions of law, judgment, and discretion *de novo*).

ORDER: The respondent's appeal is sustained, and removal proceedings are terminated.

FURTHER ORDER: The Immigration Judge's decision of September 3, 2010, is vacated.

Linda S. Wendtland

FOR THE BOARD

[1] The abstract of judgment does not identify the controlled substance forming the basis of the respondent's conviction.

File: A036 176 508 Date: MAR - 8 2011

In re: FRANCISCO ZENDEJAS-SANCHEZ a.k.a. Francisco Sanchez-Zendejas

DISSENTING OPINION: Roger A. Pauley Board Member

I respectfully dissent. There can be little if any doubt that the substance underlying the respondent's conviction was methamphetamine, a federally controlled drug. Nor is there any question but that the California law under which the respondent was convicted almost exclusively covers substances that are defined at 21 U.S.C. § 802. In my view, the statutory provision at issue, section 237(a)(2)(B)(i), properly construed, does not require a showing that a conviction be for a substance that is defined in the Controlled Substances Act at 21 U.S.C. § 802. Rather, the statute is worded to require only that the "alien has been convicted of a violation of ... any **law** or regulation of a State, the United States, or a foreign country **relating to** a controlled substance (as defined [in 21 U.S.C.§ 802])."

Thus a natural reading of the statute identifies the dispositive issue, for removability purposes, as whether the *law* relates to federally defined substances, not whether a particular conviction is proved to have involved such a substance. Congress was presumably aware that, given the myriad of State and foreign statutes criminalizing the possession of and other transactions involving drugs, some variations between those statutes and the substances classified as controlled substances in federal law would exist, and intended to reach convictions under such statutes notwithstanding those differences, without the need to demonstrate the particular substance involved. Indeed, since in many jurisdictions it is irrelevant for punishment purposes what the substance was, there is a lack of need or incentive for prosecutors to identify it in charging documents, or even for it to be referenced in plea colloquies. In such cases, proof of the actual substance, within the confining parameters of the categorical and modified categorical approaches, becomes impossible, and aliens whom Congress believed it was targeting for removal based on their drug-related convictions escape that fate.

Furthermore, the chances that a conviction under the California statute at issue here involved a non-federally controlled substance are statistically remote. The few substances that the Ninth Circuit has identified (in some instances incorrectly) as not falling under federal cognizance in 21 U.S.C. § 802 are rarely the subject of prosecution so on a purely mathematical calculus, a showing of a conviction under a State's drug law would likely meet a "clear and convincing evidence" standard for proof that the actual substance was covered by 21 U.S.C. § 802.

The majority correctly observes that, under the law of the Ninth Circuit, a finding of the respondent's removability in this case is foreclosed and an opposite result is ordained. The Ninth Circuit is not primarily to blame, for its precedent in *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), adopting a construction of the statute that demands proof that the substance was one falling within 21 U.S.C. § 802, merely follows in the footsteps of the Board's misguided ruling in

Matter of Paulus, 11 I&N Dec. 274 (BIA 1965).[1] I am no longer willing to participate in such a tortured misinterpretation, with its resultant adverse consequences for the nation's well-being.[2] I would accordingly overrule *Matter of Paulus* and invite the courts of appeals to follow our new precedent to reach more sensible results.[3]

Accordingly, I respectfully dissent.[4]

BOARD MEMBER

[1] *Matter of Paulus* involved similar language in former section 241(a)(11) of the Act. *See also Matter of Mena*, 17 I&N Dec. 38, 39-40 (BIA 1979) stating in *dicta* that *Matter of Paulus* requires that the controlled substance be identified).

[2] The courts of appeals, including the Ninth Circuit, have generally found convictions to be "relating to" federally controlled substances where the offense is for possession not of drugs themselves but other things such as drug paraphernalia used not only for federally defined controlled substances, or even look-alike substances that are merely represented to be controlled substances but may be innocuous substances like flour. *E.g., Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000); *Desai v. Mukasey*, 520 F.3d 762 (7th Cir. 2008); *see also Matter of Sanchez-Cornejo*, 25 I&N Dec. 273 (BIA 2010). It is difficult to reconcile holdings that (in my view correctly) find such convictions to be "relating to" controlled substances with the line of authority at issue here that mandates a showing that the substance of possession was a federally controlled drug.

[3] At least in the Ninth Circuit, we can only at present invite reconsideration rather than invoke deference to such a decision because the court in *Ruiz-Vidal*, *supra*, found that the "plain language of this statute requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by [21 U.S.C. § 902]." *See* 473 F.3d, at 1076. As previously noted, this is clearly at odds with a natural reading of the statute. Indeed, to the extent the language of section 237(a)(2)(B)(i) is "plain," it is "plain" the other way.

[4] To be sure, in theory, a literal interpretation such as I propose, requiring only a showing that the "law" be one relating to controlled substances, would permit a finding of removability for a drug-related conviction where a State combined in a single statute a non-drug-related offense, like gambling, with a comprehensive law prohibiting possession of drugs, and where the conviction was for gambling. But I am not aware of any State laws that mix apples with oranges in the drug arena such that this is a realistic prospect or basis for declining to hew to a natural construction of the provision at issue.

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CA 94104

HAMLYN III, J.J.
55 RIVER ST STE 240
SANTA CRUZ, CA 95060

IN THE MATTER OF
ZENDEJAS-SANCHEZ, FRANCISCO

FILE A 036-176-508 DATE: Sep 3, 2010

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

X ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c)(3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c)(3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c)(6), 8 U.S.C. SECTION 1229a(c)(6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOUR MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
120 MONTGOMERY ST., SUITE 800
SAN FRANCISCO, CA 94104

__ OTHER: _____

_____
NMC
COURT CLERK
IMMIGRATION COURT FF

CC: JOHNSTON, STEPHEN A.
120 MONTGOMERY STREET, STE 200
SAN FRANCISCO, CA, 941040000

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
SAN FRANCISCO, CALIFORNIA

In Re	)	
	)	
Francisco Zendejas Sanchez	)	**File Number: A 036 176 508**
	)	
	)	**In Removal Proceedings**
	)	
Respondent	)	**MEMORANDUM**
	)	

Respondent is a native and citizen of Mexico and a lawful permanent resident of the United States. In 1995 he was convicted for petty theft. In 1996 he was convicted for inflicting corporal injury on his spouse. In 1998 he was convicted for delivering or making a check with insufficient funds. He was placed in removal proceedings in 2003. He applied for cancellation of removal for permanent residents, *see* Immigration and Nationality Act (INA) Section 240A(a). He was granted that relief on March 23, 2006. *See* Ex. 3, copy of IJ order granting cancellation of removal.

On October 4, 2006 respondent was convicted for possession of methamphetamine in violation of Cal. Health and Safety Code Section 11377(a). Count 1 of the charging document in case number CR-06-00883, states that respondent "did unlawfully possess a controlled substance, to wit: **Methamphetamine**." The San Benito Superior Court Abstract of Judgment shows that respondent was found guilty of Count 1 in case number CR-06-00883. Ex. 2, conviction documents. Respondent was placed in removal proceedings again and charged as removable under INA Section 237(a)(2)(B)(i) (violation of a law related to a controlled substance). Ex. 1. As respondent had previously received cancellation of removal, he could not make that application a second time. INA Section 240A(c)(6). Respondent instead moved to terminate, asserting that the evidence is insufficient to show that he was convicted in 2006 for possession of methamphetamine.

In *United States* v. *Snellenberger*, 548 F.3d 699, 701 (9th Cir. 2008) (*en banc*) the defendant pled *nolo contendere* to Count One of a complaint "which charged him with 'enter[ing] an inhabited dwelling house and trailer coach and inhabited portion of a building occupied by Peter MacPherson, with the intent to commit larceny and any felony.'" The *en banc* court held that the complaint and the minute order reflecting the no contest plea "establish that Snellenberger committed burglary of a dwelling." *Id.* at 701. Further, "[h]aving failed to challenge or correct the minute order in state court-perhaps because there wasn't a basis for doing so-Snellenberger is now bound by what it says: He pleaded *nolo contendere* to the burglary of a dwelling. . . ." *Id.* at 702; *accord, Ramirez-Villalpando v. Holder*, 601 F.3d 891, 895 - 96 (9th Cir. 2010); *Retuta v. Holder*, 591 F. 3d 1181, 1184 - 85 (9th Cir 2010).

There is no principled distinction between the documents submitted by the government here and the documents found sufficient in *Snellenberger*. As the most recent decision by the *en banc* court, *Snellenberger* controls over prior panel and prior *en banc* circuit decisions.

The fact that respondent pled *nolo contendere* makes no difference. As noted above, the plea in *Snellenberger* was a plea of *nolo contendere*. In addition, under California law a trial court must ensure that a defendant "completely understands that a plea of *nolo contendere* shall be considered the same as a plea of guilty and that, upon a plea of *nolo contendere*, the court *shall find the defendant guilty*." Cal. Penal Code Section 1016 (emphasis added). Thus the record in this case reflects, at a minimum, a judicial finding that respondent was guilty of the charged offense.

Respondent invites the court to speculate that perhaps he pled to something other than what is reflected in the conviction record. But respondent, like Mr. Snellenberger, has never challenged the accuracy of or moved to correct the record in state court.

At the last hearing respondent submitted a document purporting to show that, in March 2010, he filed an appeal of an alleged denial of custody credits under Cal. Penal Code Section 4019. Ex. 4. Respondent has cited no authority, and the court could find none, indicating that this appeal in any way affects the finality of the 2006 judgment of guilt. Penal Code Section 4019 addresses only the allocation of work performance and good behavior credits to incarcerated persons. It has nothing to do with the substance of respondent's conviction, which occurred 4 years earlier. Indeed the notice of appeal submitted by respondent states that the appeal is being brought under Penal Code Section 1237(b), which concerns orders made "after judgment" while section 1237(a) concerns appeals from "a final judgment of conviction."

Based on the foregoing, the court finds that respondent has been convicted for possession of methamphetamine.

ORDERS: Respondent's motion to terminate is denied. Respondent is ordered removed to Mexico.

Dated: September 3, 2010

Anthony S. Murry
Immigration Judge