**U.S. Department of Justice**

Executive Office for Immigration Review

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**Name: GALLO OROZCO, GERMAN**

**A 091-922-980**

**Date of this notice: 4/28/2017**

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

Sincerely,

Cynthia L. Crosby
Acting Chief Clerk

Enclosure

Panel Members:
Guendelsberger, John
Kendall Clark, Molly
Liebowitz, Ellen C

Userteam: Docket

File: A091 922 980 – Los Angeles, CA Date: APR 28 2017

In re: GERMAN GALLO-OROZCO a.k.a. German Gallo Orozco a.k.a. German Gallo

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Rosana Kit Wai Cheung, Esquire

CHARGE:

Notice: Sec. 212(a)(2)(A)(i)(II), I&N Act [8 U.S.C. § 1182(a)(2)(A)(i)(II)] – Controlled substance violation

APPLICATION: Cancellation of removal

In an order dated June 24, 2015, the United States Court of Appeals for the Ninth Circuit remanded the record in this case to allow this Board to reconsider our decision, dated February 25, 2015, in which we concluded that the respondent was statutorily barred from applying for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(a). For the following reasons, we conclude that the respondent's 2011 conviction of Sale or Transport of a Controlled Substance in violation of Cal. Health & Safety Code § 11352(a) is not an aggravated felony and therefore is not a statutory bar to cancellation of removal. *See* section 240A(a)(3) of the Act. The record will be remanded to the Immigration Judge.[1]

It is uncontested that the respondent, a native and citizen of Mexico and a lawful permanent resident of the United States, was convicted in 2011 of transporting heroin for sale in violation of Cal. Health and Safety Code § 11352(a).

Cal. Health & Safety Code § 11352(a) provides:

> Except as otherwise provided in this division, every person who transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import

[1] While the issue of the divisibility, with specific respect to a "controlled substance violation," of Cal. Health & Safety Code § 11352(a) is not before us at this time, we note the following. In *United States v. Huitron-Rocha*, 771 F.3d 1183 (9th Cir. 2016), the United States Court of Appeals for the Ninth Circuit held that section 11352(a) is divisible with respect to drug type and that "the modified categorical approach applies". *Id.* at 1184. The defendant's method of violating the statute is not relevant to the question of whether the alien was convicted of a controlled substance violation. In other words, unlike an aggravated felony under section 101(a)(43)(B) of the Act, the method by which the offense can be committed is *not* an element under section 212(a)(2)(A)(i)(II), which merely requires a violation of any law or regulation of a State, the United States, or a foreign country relating to a controlled substance.

> to import into this state or transport (1) any controlled substance specified in subdivision (b), (c), or (e), or paragraph (1) of subdivision (f) of Section 11054, specified in paragraph (14), (15), or (20) of subdivision (d) of Section 11054, or specified in subdivision (b) or (c) of Section 11055, or specified in subdivision (h) of Section 11056, or (2) any controlled substance classified in Schedule III, IV, or V which is a narcotic drug, unless upon the written prescription of a physician, dentist, podiatrist, or veterinarian licensed to practice in this state, shall be punished by imprisonment pursuant to subdivision (h) of Section 1170 of the Penal Code for three, four, or five years.

To determine whether Cal. Health & Safety Code § 11352(a) defines an aggravated felony, we employ the categorical approach, which requires us to focus on the "elements" of the offense, rather than the facts underlying the respondent's particular conviction. *Matter of Chairez*, 26 I&N Dec. 819 (BIA 2016) (holding that the concept of divisibility as embodied in *Descamps v. United States*, -- U.S. --, 133 S. Ct. 2276 (2013), *and Mathis v. United States*, -- U.S. --, 136 S. Ct. 2243 (2016), "applies in immigration proceedings to the same extent that it applies in criminal sentencing proceedings").

Cal. Health & Safety Code § 11352(a) may be violated when a defendant "transports, imports into this state, sells, furnishes, administers, or gives away, or offers to transport, import into this state, sell, furnish, administer, or give away, or attempts to import into this state or transport" a controlled substance. Cal. Health & Safety Code § 11352(a) is not categorically a drug-trafficking offense because it criminalizes the mere solicitation of, offer to sell, or importing into the state of California from another state, a controlled substance, which is not an aggravated felony, as well as the sale of a controlled substance, which is. Therefore, the statute is overbroad in the relevant respect. *Young v. Holder*, 697 F.3d 976, 983 (9th Cir. 2012) (en banc), *abrogated in part by Moncrieffe v. Holder*, 133 S.Ct. 1678 (2013); *see also Rendon v. Mukasey*, 520 F.3d 967, 974 (9th Cir. 2008) (a state controlled substance statute that also criminalizes solicitation is not categorically an aggravated felony under section 101(a)(43)(B) of the Act).

Although the Ninth Circuit has found the statute divisible as to the type of drug involved, it has not addressed whether the statute is divisible as to the act (*e.g.*, transport, import, sell, furnish, administer, give away, *etc.*). *See United States v. Huitron-Rocha,supra*; *see also United States v. Rosales-Aguilar*, 818 F.3d 965, 973 n.3 & 974 (9th Cir. 2016) (noting that *Huitron-Rocha* did not "address whether the act element (*i.e.*, transport vs. sell) is divisible," and "defer[ring] the resolution of this one issue pending the Supreme Court's decision in *Mathis*").

The Supreme Court has explained that disjunctive statutory language does not render a criminal statute divisible unless each statutory alternative defines an independent "element" of the offense, as opposed to a mere "brute fact" describing various means or methods by which the offense can be committed. *See Mathis v. United States*, *supra*, at 2248; *see also Chairez, supra,* at 819-820. Under the approach to divisibility adopted in *Mathis*, Cal. Health and Safety Code § 11352(a) can be regarded as "divisible" into separate offenses, vis-à-vis section 101(a)(43)(B) of the Act, only if California law requires a unanimous jury verdict as to the drug type and act involved. If a California jury can find a defendant guilty of violating the statute without coming to an agreement about the act involved, then it follows that the acts are not alternative "elements." Pursuant to *Mathis*, they are instead mere "brute facts"- alternative means by which the act element can be proven.

In this case, we conclude that the various acts (*e.g.*, transport, import, sell, furnish, administer, give away, *etc.*) described in Cal. Health and Safety Code § 11352(a) are not elements of the crime. Such conclusion is supported by the relevant jury instructions, which do not require the jury to find which action the defendant committed in violating the statute. *See* Cal. Jury Instr.--Crim. 12.02; *see also* Judicial Council Of California Criminal Jury Instruction 2300 (stating that to "prove that the defendant is guilty of this crime, the People must prove that: 1. The defendant (sold/furnished/administered/gave away/transported for sale/imported into California) a controlled substance . . . ."); *see also, e.g., People v. Johnson*, 2002 WL 1965605, at *4 (Cal. Ct. App. Aug. 26, 2002) (unpublished) (holding no unanimity instruction was needed where defendant charged with transport, aiding and abetting a sale, and offering to sell, because they were merely "alternative theories"); *People v. Medina*, 2006 WL 225534, at *7 (Cal. Ct. App. Jan. 31, 2006) (unpublished) (no unanimity instruction required where defendant charged with "sale or transportation"); *People v. Reeves*, 2012 WL 591361, at *2 (Cal. Ct. App. Feb. 22, 2012) (unpublished) (no unanimity instruction required because "the prosecutor clearly told the jury what act proved the sale or furnishing of heroin"); *see also People v. Pierre*, 1 Cal Rptr. 223, 226 (Ct. App. 1959) (holding that trial judge was not required to instruct "the jury on which of the three premises: Sell, Furnish, or Give Away, the prosecution relied upon"). As the *Mathis* Court explained, when a criminal charge alleges all statutory alternatives in this manner, "[t]hat is as clear an indication as any that each alternative is only a possible means of commission, not an element that the prosecutor must prove to a jury beyond a reasonable doubt." *Mathis v. United States, supra*, at 2257.

Under the circumstances, we are satisfied that Cal. Health & Safety Code § 11352(a) is both overbroad and indivisible with regard to the question of whether it qualifies as an aggravated felony under section 101(a)(43)(B) of the Act. As the respondent's conviction does not qualify as an aggravated felony, he is not disqualified from cancellation of removal on that basis.

At the present time, we express no opinion regarding the ultimate outcome of these proceedings. The following order is entered.

ORDER: The record is remanded to the Immigration Court for further proceedings consistent with the foregoing opinion and the entry of a new decision.

FOR THE BOARD