

**For Criminal Defenders in the Ninth Circuit:
Effect of Selected Drug Pleas After *Lopez v. Gonzales*ⁱ**

OFFENSE	DEPORTABLE	AGG FELONY	ELIMINATE BY REHABILITATIVE RELIEF
First possession (of a specific controlled substance ⁱⁱ)	YES	NO	YES ⁱⁱⁱ
First poss. flunitrazepam or more than 5 gms cocaine base	YES	YES	YES
Second possession (of a specific CS)	YES	ASSUME YES, in case current law changes ^{iv}	NO
Transportation for personal use (of a specific CS)	YES	NO	NO
First offense less serious than poss, e.g. poss paraphernalia, presence place where drugs used ^v	YES	NO	YES ^{vi}
Second less serious offense	YES	NO	NO
Sale (of a specific CS)	YES	YES	NO
Offer to commit sale or other drug offense (involving a specific CS)	MAYBE NOT ^{vii}	NO ^{viii}	NO
Give away small amount of marijuana	YES	MAYBE NOT ^{ix}	MAYBE
Possession for Sale (of a specific CS)	YES	YES	NO

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ENDNOTES

ⁱ *Lopez v. Gonzales*, 127 S.Ct. 625 (Dec. 5, 2005). This chart was prepared by Katherine Brady of the Immigrant Legal Resource Center. For further information and resources, go to www.ilrc.org/criminal.php.

ⁱⁱ Where possible, have the record of conviction refer only to “a controlled substance” rather than a specific identified substance such as cocaine. Bargain for an amended complaint or make a written plea agreement to this effect; do not stipulate to a factual basis that identifies the substance. Without specific identification, immigration authorities may not be able to prove that the offense involved a controlled substance as defined under federal law, which has a somewhat different definition than under California and many other state laws. See *Ruiz-Vidal v. Gonzales* ___ F.3d ___ (9th Cir. 2007) (because record of conviction under Calif. H&S §11377 does not ID specific substance, there is no controlled substance conviction for immigration purposes); *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965). Note that it is possible that the government will file a petition for rehearing in *Ruiz-Vidal*; stay abreast of developments.

ⁱⁱⁱ *Lujan-Armendariz v. INS*, 222 F.3d 728 (9th Cir. 2000).

^{iv} Currently it is not an aggravated felony. *Oliveira-Ferreira v. Gonzales*, 382 F.3d 1045 (9th Cir. 2004). Avoid this plea only because DHS may seek to persuade the Ninth Circuit to change the rule based on dicta in *Lopez v. Gonzales*, *supra*, and the defendant should not be exposed to future risk.

^v The Ninth Circuit found that Arizona possession of drug paraphernalia is a deportable controlled substance offense even without a specific controlled substance identified on the record. See *Luu-Le v. INS*, 224 F.3d 911 (9th Cir. 2000), distinguished in *Ruiz-Vidal*, *supra*. However, where possible counsel should delete identification of a specific controlled substance from the record of paraphernalia or under the influence cases, in case a beneficial ruling is obtained in future.

^{vi} *Cardenas-Uriarte v. INS*, 227 F.3d 1132 (9th Cir. 2000).

^{vii} ARS §13-1002 is not. *Coronado-Durazo v. INS*, 123 F.3d 1322, 1326 (9th Cir. 1997). Immigration counsel at least can argue that Calif. H&S §11379(a) and similar are not; see discussion in Brady et al, *Defending Immigrants in the Ninth Circuit: Impact of Crimes under California and Other Laws* (2007) (www.ilrc.org), §3.4(G). If the record refers only to “a controlled substance,” this permits an additional argument.

^{viii} *U.S. v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001)(en banc) (California law); *Leyva-Licea v. INS*, 187 F.3d 1147 (9th Cir. 1999) (ARS §13-1002).

^{ix} See 21 USC §841(b)(4), making this offense a misdemeanor and subject to the FFOA, which is the basis for *Lujan*; see discussion at *Defending Immigrants in the Ninth Circuit*, §3.6(C), *supra*.