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Warning to Non-citizens Pleading to Solicitation of Drug Offenses under RCW 9A.28.030

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Key Points:

- Solicitation to commit a drug crime under a "generic," or general anticipatory offenses statute is not a deportable drug crime, under 9th Circuit case-law ***only***.

- A lawful permanent resident who has a conviction for solicitation to possess or to deliver or sell drugs must not leave the United States and attempt to re-enter without first getting expert immigration advice.[1]

- Such a person also needs to stay within the nine states of the Ninth Circuit, or be subject to removal. See the warning section below.

- Because there is a Circuit split, and the exception could be eliminated either legislatively or judicially, counsel should make a record of the defendant's reliance on the current case-law of the 9th Circuit in taking a plea.[2] **The cases relied on are *Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997) and *Leyva-Licea* 187 F.3d 1147 (9th Cir 1999)**.

- If the person is pleading only to solicitation to (simple) possess, it is important to try to establish that the solicitation was for personal use only, and not part of any drug-trafficking scheme, however minor, other than as a potential consumer. **Mere "reason to believe" a person was involved with dealing is enough to render a non-citizen permanently inadmissible, *without a conviction*.** So you want to avoid any language that inadvertently signals the solicitation to possess had to do with dealing rather than solicitation to possess **for personal use only**.

- If the person is undocumented, she should know that *there is as yet no case extending Coronado-Durazo to the drug ground of inadmissibility*— which is what is most relevant

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[1] 8 USC 1101(a)(13)(C) controls when a returning permanent resident is an "applicant for admission" subject to the grounds of inadmissibility. It is not 100% clear whether the "reason to believe" ground, *without* a specific drug crime or *conviction*, constitutes an "offense" identified in INA § 212(a)(2) for purposes of 8 USC 1101(a)(13)(C)(v), but the risk that it could be construed that way is obvious.

[2] See *Nunez-Reyes v. Holder*, 646 F.3d 684 (9th Cir. 2011) where a similar drug-deportability exception was reversed by the 9th Circuit *en banc,* but where the new rule was applied *only prospectively*. Establishing reliance in the plea process supports a similar outcome, were *Coronado* to be later reversed.

to a person applying for status-- *so we don't know if the exception applies to someone seeking admission at a port-of-entry to or from within the 9th Circuit*.[3]

- ❖ Since a drug-trafficking offense is considered to be a crime involving moral turpitude (CIMT), attempt or solicitation to commit such an offense will also be so charged.[4] If the underlying offense is delivery or PWID, it is worth specifying the drug as marijuana, since there is now an argument that it is not categorically a CIMT.[5]

Warning: the information given above is based on the current case- law of the Ninth Circuit only. **The Board of Immigration Appeals (BIA) will still apply its specific, contrary decision everywhere else.**[6] For example, the Fifth Circuit (Texas, Louisiana, Mississippi) has ruled directly to the contrary on the "crime relating to a controlled substance" ground.[7]

- This means that a person with a solicitation conviction where the underlying offense was a drug crime is subject to removal, if immigration proceedings are heard by an immigration judge outside of Washington, Idaho, Montana, Oregon, California, Nevada, Alaska, Hawaii, or Arizona.

- Unfortunately even non-citizens residing within the Ninth Circuit are not completely immune, since once a person is detained by ICE (DHS), the venue is set by the government's decision where to file the charging document, and people are often shipped to detention centers far from home, such as Oakdale, Louisiana. (The existence of witnesses, family ties, and above all, of an attorney-client relationship with immigration counsel in the home community, are factors that should be taken into account in a motion

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[3] The parallel drug inadmissibility ground contains language similar to that of the deportation ground, in that it seems to omit the anticipatory offense of solicitation: "a violation of (or a conspiracy or attempt to violate) any law or regulation . . . relating to a controlled substance." INA 212(a)(2)(A)(i)(ii). *But see Mizrahi v. Gonzales* 492 F.3d 156 (2nd Cir.2007) (Deferring to *Matter of Beltran, infra*, on inadmissibility). Local immigration judges have applied *Coronado* to the drug inadmissibility ground.

[4] *Barragan–Lopez v. Mukasey,* 508 F.3d 899, 903 (9th Cir. 2007); *Matter of Khanh Hoang Vo*, 25 I&N Dec. 426, 426 (BIA 2011)

[5] Based on *Moncrieffe v. Holder* 133 S.Ct. 1678 (2013) (delivery of marijuana where statute includes social sharing is not a match to the drug-trafficking aggravated felony definition.)

[6] *Matter of Beltran*, 20 I&N Dec 521, 528 (BIA 1992), *rev'd by Coronado-Durazo v. INS*, 123 F.3d 1322 (9th Cir. 1997). The Board continues to treat *Beltran* as good law outside the 9th Circuit, see e.g., *Matter of Espinoza-Gonzalez*, 22 I&N Dec. 889 (BIA 1999); and most recently reaffirmed *Beltran* in *Matter of Zorilla*-Vidal, 24 I&N Dec. 768 (BIA 2009).

[7] *Peters v. Ashcroft*, 383 F.3d 302 (5th Cir. 2004). Peters had a state solicitation conviction from Arizona, in the 9th circuit, but, because he was detained in Louisiana, his case was heard by an Immigration Judge in the 5th circuit, and he was found deportable. In *Peters* the original charge was an aggravated felony, (*id.* at 304), presumably under 8 USC 1101(a)(43)(B) as either "illicit trafficking" or a "drug trafficking crime," but "the BIA reversed because it did not consider Peter's prior conviction an aggravated felony. INS then withdrew the aggravated felony charge and filed a new charge" under the controlled substance ground. *Id.* So the Court in *Peters* did not reach the aggravated felony issue. If an LPR is outside the 9th Circuit and is found deportable for solicitation as a drug crime, he might still be eligible to seek "cancellation of removal" if its not deemed an aggravated felony, but is deemed a drug crime. In *Peters* the BIA may have agreed that solicitation was not an aggravated felony since "[t]he Controlled Substances Act does not mention solicitation." *Leyva-Licea v. INS*, 187 F.3d 1147, 1150 (9th Cir. 1990). However it is still possible that the BIA and circuit courts outside the Ninth circuit could find drug-related solicitation to be an aggravated felony, as well as a controlled substance offense, given that the Board often contradicts itself in unpublished decisions.

to change venue, but in general it is extraordinarily hard to change venue while in a detention center.[8])

- Therefore, additional advice to legal residents who have these kind of solicitation convictions should include: not changing residence to outside the nine-state area listed above, and avoiding any further actions that would give the police or immigration authorities excuse to take them into custody or initiate proceedings.

- The Ninth Circuit has found that a solicitation conviction where the underlying offense was a drug crime *does* fit the definition of "controlled substance offense" under a federal sentencing guideline for a career offender sentencing enhancement.[9] Thus, it is likely that a felony solicitation conviction could also be used to enhance an unlawful re-entry conviction under 8 USC 1326(b), as a "felony drug trafficking offense," which is defined separately from "aggravated felony."

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[8] See, e.g., *Corona-Garcia v Gonzales*, 128 Fed Appx.77 (10th Cir. 2005); 2005 U.S. App. LEXIS 6702 (Petitioner convicted in Idaho, taken into custody by DHS and sent to detention center in Colorado, in the 10th Circuit. He sought to avail himself of 9th Circuit law, but a change of venue was denied. In dismissing his petition the 10th Circuit ruled that Corona could not have prevailed even if another, now-overturned, 9th Circuit-only exception (*Lujan-Armendariz)* applied.)

[9] *United States v. Shumate*, 329 F.3d 1026 (9th Cir. 2003); USSG § 4B1.2(b). The definition is substantially similar to the one for a "felony drug trafficking offense" used to enhance reentry after deportation convictions, at USSG §§ 2L1.2(b)(1)(A, B), comment n.1(B)(ii), which is a bigger upward departure than that given for an aggravated felony. *Cf*, re-entry enhancement at USSG §§ 2L1.2(b)(1)(C). Solicitation can also be used to enhance a drug crime, as a "prior felony drug offense" under 21 U.S.C. § 841(b)(1)(B).