FILED
United States Court of Appeals
Tenth Circuit

April 6, 2023

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

JOSE ANTONIO CABALLERO-ACEVES,

Petitioner,

v.

MERRICK B. GARLAND,
United States Attorney General,

Respondent.

No. 22-9531
(Petition for Review)

ORDER AND JUDGMENT*

Before **HARTZ**, **KELLY**, and **EID**, Circuit Judges.

Petitioner Jose Caballero-Aceves petitions for review of an order of the Board of Immigration Appeals (BIA or Board) that affirmed the Immigration Judge's (IJ) decision pretermitting his application for cancellation of removal. The IJ found that Petitioner's 2019 California drug conviction made him ineligible for cancellation relief. We deny the petition for review.

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* After examining the briefs and appellate record, this panel has determined unanimously to honor the parties' request for a decision on the briefs without oral argument. *See* Fed. R. App. P. 34(f); 10th Cir. R. 34.1(G). The case is therefore submitted without oral argument. This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

1. Petitioner was placed in removal proceedings and sought cancellation relief.

Petitioner is a native and citizen of Mexico. His parents brought him to the United States when he was a toddler. He was formerly married to a United States citizen and has four United States citizen children. He has struggled for many years with drug addiction and has a lengthy criminal history.

In November 2012 the Department of Homeland Security issued Petitioner a Notice to Appear, which charged that he was removable as an alien present in the United States who had not been admitted or paroled. He conceded the charge in the Notice but sought various forms of relief to prevent his removal, including adjustment of status, asylum, withholding of removal, protection under the Convention Against Torture, waiver of inadmissibility, and cancellation of removal. Over the next decade the agency conducted extensive proceedings concerning Petitioner's removal and the relief he had requested. The parties are familiar with the lengthy and complicated history of those proceedings, and we need not describe them here in detail.

A single form of relief remains at issue in this petition for review: cancellation of removal. And only a single issue pertaining to that relief is before us: whether Petitioner's 2019 conviction for unauthorized possession of a controlled substance under California Health & Safety Code § 11377(a) made him ineligible for cancellation of removal.

The IJ concluded the 2019 conviction made him ineligible for relief because Petitioner failed to show it was not a disqualifying controlled substance offense. He appealed to the BIA. Applying the "modified categorical approach," the BIA concluded § 11377(a) is divisible with respect to the substance possessed. The Board agreed with the IJ that the record was inconclusive concerning which drug Petitioner possessed, and he therefore failed to show that he had not been convicted of a disqualifying offense. It therefore dismissed his appeal.[1] He petitioned for review.[2]

2. Petitioner has raised a legal issue that we review de novo.

"We review de novo the BIA's conclusions on questions of law, including whether a particular state conviction results in ineligibility for discretionary relief." *Zarate-Alvarez v. Garland*, 994 F.3d 1158, 1161 (10th Cir. 2021).

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[1] The BIA also denied his motion to remand to the IJ to pursue a U-visa petition. That part of the BIA's decision is not at issue in this petition for review.

[2] The BIA noted that Petitioner had also been convicted of other crimes and he had not argued they were not disqualifying "crimes involving moral turpitude" under 8 U.S.C. § 1227(a)(2)(A)(i). It stated "[t]he respondent's complete criminal history record further dissuades us that he has met his burden of proof to establish eligibility for cancellation of removal." R. at 6. Petitioner asserts he argued to the Board that these other crimes did not bar relief and that the government "took no issue" with his other crimes. Pet'r Opening Br. at 5 n.3. But he does not argue that the crimes are not disqualifying crimes involving moral turpitude. Ordinarily, a litigant's failure to challenge the agency's alternative, sufficient basis for denial of a benefit forecloses his success on appeal. *See, e.g.*, *Murrell v. Shalala*, 43 F.3d 1388, 1390 (10th Cir. 1994). But here it would be inappropriate to deny the petition summarily based on the unchallenged crimes, for two reasons. First, the BIA only mentioned these other convictions in passing and did not perform a complete statutory analysis concerning any of them. Second, the government has not argued that we should deny the petition on that basis.

3. Petitioner's 2019 conviction is not categorically a controlled substance violation.

To obtain relief under the cancellation of removal statute, a noncitizen must not have been convicted of an offense identified in 8 U.S.C. §§ 1182(a)(2) or 1227(a)(2). *See* 8 U.S.C. § 1229b(b)(1)(C). These sections refer to disqualifying offenses that involve a "controlled substance . . . as defined in [21 U.S.C. § 802]." 8 U.S.C. §§ 1182(a)(2)(A)(i)(II), 1227(a)(2)(B)(i).

Where "the [Immigration and Nationality Act] refers to generic crimes, we apply the categorical approach to determine whether a state conviction falls within the generic federal definition." *Zarate-Alvarez*, 994 F.3d at 1161. "Under the categorical approach, we compare the elements of the statute of conviction with the generic federal definition of the crime to determine whether conduct that would satisfy the former would necessarily also satisfy the latter." *Id.*

The federal definition is found in the Controlled Substances Act, 21 U.S.C. § 802, which contains a list of federally controlled substances. *See Mellouli v. Lynch*, 575 U.S. 798, 813 (2015) (stating §1227(a)(2)(B)(i) "limits the meaning of 'controlled substance,' for removal purposes, to the substances controlled under § 802"). The BIA determined, and the government concedes, that a violation of California Health & Safety Code § 11377(a) is not categorically a controlled-substance offense under the federal definition. This is because it is

possible to violate § 11377(a) by possessing a substance that the federal definition in § 802 does not criminalize.[3]

4. Section 11377(a) is divisible under the modified categorical approach.

The fact that the state statute criminalizes more activity than its federal counterpart does not end our analysis, however. Under the "modified categorical approach," if § 11377(a) is "divisible" and therefore creates different crimes based on the specific controlled substance possessed, and if the specific substance Petitioner was convicted of possessing is a controlled substance under federal law, his conviction could still disqualify him from cancellation relief. *See Mathis v. United States*, 579 U.S. 500, 505-06 (2016) (describing the "modified categorical approach"). But this modified categorical approach applies only where the alternative phrases listed in a divisible statute form the *elements* of separate crimes and are not just different *means* of committing the same crime. *United States v. Titties*, 852 F.3d 1257, 1267 (10th Cir. 2017).

"Elements are the constituent parts of a crime's legal definition—the things the prosecution must prove to sustain a conviction." *United States v. Cantu*, 964 F.3d 924, 927 (10th Cir. 2020) (internal quotation marks omitted). "Means, in contrast, spell out various factual ways of committing some component of the offense. . . ." *Id.* at 928 (brackets and internal quotation marks omitted).

[3] The BIA only applied the categorical approach to § 1227(a)(2)(B)(i), but the analysis applies equally to the effect of a controlled-substance conviction under § 1182(a)(2)(A)(i)(II).

We have several tools available to determine whether § 11377(a) meets the "elements" test and is therefore divisible. First, the answer may be facially clear from the language of the statute. *Titties*, 852 F.3d at 1267. Second, "state-court decisions may answer the question." *Id.* at 1268. Finally, "when state law fails to provide clear answers" we may examine "the record of a prior conviction itself." *Id.* (internal quotation marks omitted). In applying this test, our analysis should lead us to "certainty" that the statute contains alternative elements. *Id.* That is, we must "be *at least* more certain than not that a statute's alternatives constitute elements" rather than means. *United States v. Degeare*, 884 F.3d 1241, 1248 n.1 (10th Cir. 2018).

A. **Language of the statute**

Section 11377(a) provides:

> (a) Except as authorized by law . . . every person who possesses any controlled substance which is (1) classified in Schedule III, IV, or V, and which is not a narcotic drug, (2) specified in subdivision (d) of Section 11054, except paragraphs (13), (14), (15), and (20) of subdivision (d), (3) specified in paragraph (11) of subdivision (c) of Section 11056, (4) specified in paragraph (2) or (3) of subdivision (f) of Section 11054, or (5) specified in subdivision (d), (e), or (f) of Section 11055 . . . shall be punished by imprisonment in a county jail for a period of not more than one year, except that such person may instead be punished pursuant to subdivision (h) of Section 1170 of the Penal Code if that person has [certain] prior convictions . . . .

Cal. Health & Safety Code § 11377(a).

In a 2014 decision, the Ninth Circuit concluded that § 11377(a) was facially divisible because it "identifies a number of California drug schedules and statutes and organizes them into five separate groups, which are listed in the disjunctive . . . thus effectively creat[ing] several different crimes." *Coronado v. Holder*, 759 F.3d 977,

984-85 (9th Cir. 2014) (ellipsis and internal quotation marks omitted). But *Coronado* was decided before the Supreme Court's decision in *Mathis*, which instructed courts not to assume that a statute is divisible merely because it contains a disjunctive list, because such a list may only "enumerate[] various factual means of committing a single element." *Mathis*, 579 U.S. at 506; *see also, e.g.*, *Johnson v. Barr*, 967 F.3d 1103, 1108-09 (10th Cir. 2020) (concluding statute that referred to schedules of controlled substances was not facially divisible as to individual substances, because jury only had to agree that defendant possessed a drug covered by one of the schedules, thus agreeing on the "element" of possessing a controlled substance but not necessarily on the "means" represented by the individual substance).

After *Mathis*, the Ninth Circuit analyzed a similar California statute and reached a similar result (albeit using a slightly different approach) than in *Coronado*. *United States v. Martinez-Lopez*, 864 F.3d 1034, 1039 (9th Cir. 2017) (en banc). In *Martinez-Lopez*, the court concluded that California Health & Safety Code § 11352, which like § 11377(a) criminalizes activities related to controlled substances by referring to other code provisions, was divisible by controlled substance. *See id.* at 1039-41. But it did not reach this result, as it had in *Coronado*, by relying on the statute's facial language. Instead, it examined California state-court decisions. *See id.*

The same approach is appropriate here. The language of § 11377(a), which prescribes a single penalty for possessing various substances described in various statutes and schedules, does not facially resolve whether possession of a particular

substance is an "element" of the crime or a "means" of committing it. Although Petitioner ultimately concedes "the statutory text does not clearly answer the question of whether the statutory alternatives are means or elements," Pet'r Opening Br. at 25, he does make two arguments that § 11377(a) may facially describe alternative means of commission rather than elements. But neither argument is persuasive.

First, he argues that (except where the offender has certain prior convictions) the plain text of § 11377(a) assigns a single penalty to the possession of any of the identified substances. But although a statute that prescribes different penalties for violating different elements is generally considered divisible, *see Mathis*, 579 U.S. at 518 ("If statutory alternatives carry different punishments, . . . they must be elements."), the reverse is not necessarily true, *see United States v. Wilkins*, 30 F.4th 1198, 1207 (10th Cir. 2022) ("The presence of the same punishment suggests characterization as means, but that suggestion isn't dispositive.").

Second, he argues that "the California schedules, in particular schedule II—including the portions that §11377(a) references—are [themselves] overbroad." Pet'r Opening Br. at 25. If true, such a fact might preclude the agency from simply arguing that all drugs within a given schedule are federally controlled substances under § 802. But it does not resolve whether the statute is divisible by the individual controlled substances.

We conclude the facial language of § 11377(a) does not resolve the issue of whether the statute is divisible as to substance. We therefore examine California state-court decisions to determine whether they provide an answer to this question.

B. **California state-court decisions**

As noted, the Ninth Circuit considered a similar issue en banc in *Martinez-Lopez*. The majority there concluded that divisibility by substance was "an easy case because a state court decision definitively answers the question." *Martinez-Lopez*, 864 F.3d at 1040 (internal quotation marks omitted). Relying on a 1975 California Supreme Court case, *In re Adams*, 536 P.2d 473 (Cal. 1975), and citing other persuasive California authority, it concluded that § 11352 is "divisible with regard to its controlled substance requirement." *Martinez-Lopez*, 864 F.3d at 1040-41. A subsequent Ninth Circuit case suggests that this same analysis should also apply to § 11377(a). *See Tejeda v. Barr*, 960 F.3d 1184, 1186-87 (9th Cir. 2020) (noting that *Martinez-Lopez* agreed with *Coronado* "that insofar as the California list of controlled substances is concerned, the list establishes elements, not merely means of committing the offenses" and that taken together, *Coronado* and *Martinez-Lopez* required treating the controlled-substance requirement in another California statute, California Health & Safety Code § 11550(a), as divisible).

To be sure, the en banc Ninth Circuit did not speak with a single voice. A separate opinion, authored by Judge Berzon, found the question to be more difficult than the majority did. Although she agreed that *Adams* permitted separate convictions for each controlled substance, Judge Berzon expressed "a caveat" that more recent decisions from the California Supreme Court might have undermined the reasoning in *Adams*. *See Martinez-Lopez*, 864 F.3d at 1057-58 (Berzon, J., concurring and dissenting). And another dissenting opinion concluded, for similar

reasons, that the divisible-by-controlled-substance issue was "far from clear" and should be certified to the California Supreme Court. *Id.* at 1059-60 (Reinhardt, J., dissenting). Finally, as alluded to in Judge Berzon's opinion, *see id.* at 1057, the majority opinion in *Martinez-Lopez* relied upon negative language and implicit assumptions in *Adams* rather than an affirmative and definitive holding on this issue, *see id.* at 1040 (noting that *Adams* "did not disapprove of earlier cases imposing multiple sentences for simultaneous possession of different drugs" and "implicitly approved of multiple convictions" in cases involving multiple drugs (brackets, emphasis, and internal quotation marks omitted)).[4]

Citing this divided Ninth Circuit en banc decision, the BIA concluded that "California State law does not 'definitively' answer whether the identity of the specific controlled substance involved in . . . section 11377(a) . . . is an 'element' or alternative 'means' of committing the crime." R. at 5. Having independently considered *Martinez-Lopez* and other Ninth Circuit authority for its persuasive

[4] The Ninth Circuit also relied on *People v. Jones*, 278 P.3d 821 (Cal. 2012). *See Martinez-Lopez*, 864 F.3d at 1040. In *Jones*, the California Supreme Court, to support a proposition that "a single physical act might not always be easy to ascertain" and that some "physical acts might be simultaneous yet separate," cited as an example its prior decision holding that "[t]he possession of each separate item [of contraband] is . . . a separate act of possession" and went on to say it did "not intend to cast doubt on the cases so holding." *Jones*, 278 P.3d at 827 (internal quotation marks omitted)). We note, however, that *Jones* concerned separate punishments for firearms-related offenses and did not specifically address the appropriate analysis to be used for possession of multiple controlled substances.

value,[5] along with California case law that bears on this issue,[6] we agree that although California law points strongly in the direction of divisibility it fails to provide a definitive answer to this inquiry. As the Board did, we therefore consider the record of Petitioner's conviction.

C. Record of Petitioner's conviction/pattern jury instructions

If neither the facial language of the statute nor state case law resolves the issue, "we may consider conclusive records made or used in adjudicating guilt, such as the charging document, jury instructions, or a plea agreement." *United States v. Winrow*, 49 F.4th 1372, 1379 (10th Cir. 2022) (internal quotation marks omitted). "Where, as here, no jury instructions exist because the defendant did not go to trial, we [may] also apply these principles to the state's uniform pattern jury instructions."

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[5] The government cites several other Ninth Circuit cases for the proposition that California law treats the identity of a controlled substance as an element and that § 11377(a) is therefore divisible. *See* Resp. Br. at 20-21. These cases all predate *Martinez-Lopez*, however, and we do not find them highly persuasive on this issue. The government also cites several post-*Martinez-Lopez* Ninth Circuit decisions, *see id.* at 22, but the decisions cited are unpublished and therefore add little authoritative weight. We discuss a published Ninth Circuit case, *Lazo v. Wilkinson*, 989 F.3d 705 (9th Cir. 2021), which the government has also cited, *infra*.

[6] *See, e.g.*, *People v. Vidana*, 377 P.3d 805, 817 (Cal. 2016) (concluding, in a case that did not involve controlled substances, that a defendant may not be subject to "multiple convictions for a different statement of the same offense"); *Jones*, 278 P.3d at 827; *Adams*, 536 P.2d at 477; *People v. Romero*, 64 Cal. Rptr. 2d 16, 22 (Cal. Ct. App. 1997) (noting the "long line of cases holding that a defendant may be subject to multiple convictions for the simultaneous possession of multiple drugs"). Further complicating the picture, Petitioner cites California cases where the prosecution was permitted to modify the indictment to change the drug charged, on the theory that the "offense charged" had not changed. *See* Pet'r Opening Br. at 25-27.

Id.[7] Having done so, the BIA concluded that "[b]ecause these instructions require a jury to find the specific substance underlying a violation of section 11377(a), [they] suggest the identity of the controlled substance is an 'element' rather than a 'means' of violating [that section]" and "the statute is [therefore] divisible with respect to the identity of the specific substance possessed." R. at 5-6.

The instruction on which the BIA relied, California Criminal Jury Instruction (CALJIC) 12.00, instructs the jury that "[e]very person . . . who possesses (controlled substance), is guilty of a violation of Health and Safety Code section [11377(a)]." It states that the relevant elements of this offense include:

> 1. A person exercised control over or the right to control an amount of (controlled substance), a controlled substance;
>
> 2. That person knew of its presence;
>
> 3. That person knew of its nature as a controlled substance; [and]
>
> 4. The substance was in an amount sufficient to be used as a controlled substance . . . .

CALJIC 12.00.

This instruction requires that the specific controlled substance be identified. Indeed, an accompanying "Use Note" states, "Insert the name of the controlled substance as alleged in the information for violations charged under . . . § 11377." *Id.* (Use Note). This seems to indicate that the specific substance is an element of the crime, rather than merely a means with which to commit it.

[7] Petitioner pled no contest to the § 11377(a) offense.

Petitioner argues, however, that long before he was convicted the California Judicial Council withdrew its endorsement of the CALJIC instructions, including CALJIC 12.00, and instead adopted a different set of instructions known as the California Criminal Jury Instructions (CALCRIM). *See People v. Thomas*, 58 Cal. Rptr. 3d 581, 582 (Cal. Ct. App. 2007) ("The California Judicial Council withdrew its endorsement of the long-used CALJIC instructions and adopted the new CALCRIM instructions, effective January 1, 2006."). These new instructions include CALCRIM 2304, which applies to § 11377 prosecutions. He therefore argues CALCRIM 2304, not CALJIC 12.00, should govern our inquiry.

The government contends Petitioner failed to exhaust this argument because he did not make any argument to the BIA about California's pattern jury instructions. Petitioner concedes he failed to discuss this issue before the Board, *see* Reply Br. at 2, but he argues the BIA sua sponte exhausted the issue. We agree. The Board "clearly identified [the] issue" of whether the California pattern jury instructions were indicative of divisibility, "exercise[d] its discretion to entertain that matter," and "explicitly decide[d] that matter in a . . . substantive discussion." *Garcia-Carbajal v. Holder*, 625 F.3d 1233, 1235 (10th Cir. 2010) (discussing requirements for sua sponte exhaustion). In conducting our review, we may therefore consider the legal issue of *which* set of jury instructions apply to our inquiry and whether the applicable instruction indicates divisibility. For the reasons we will explain, we conclude that the result is the same under either instruction.

CALCRIM 2304 informs the jury that "[t]he defendant is charged . . . with possessing _____<*insert type of controlled substance*>, a controlled substance [in violation of _____<*insert appropriate code section[s]*>]." It identifies the following elements the jury must find:

> 1. The defendant [unlawfully] possessed a controlled substance;
>
> 2. The defendant knew of its presence;
>
> 3. The defendant knew of the substance's nature or character as a controlled substance;
>
> . . .
>
> 4A. The controlled substance was _____<*insert type of controlled substance*>;
>
> AND
>
> 5. The controlled substance was in a usable amount.

CALCRIM 2304.

Petitioner cites *Johnson*, 967 F.3d at 1109-10, where we found it significant that the Colorado Supreme Court had adopted an amended model jury instruction that went from using the definite article "the" to the indefinite article "a," which "suggest[ed] that the specific identity of a controlled substance [was] not an element under the [relevant] statute." He argues, similarly, that the instruction for possession in violation of § 11377 went from a requirement in CALJIC 12.00 that "the" substance be specified to merely requiring in CALCRIM 2304, that the defendant possessed "a" controlled substance, or a "type of" controlled substance. First, both instructions use the phrase "*a* controlled substance," and the changes in where and how that indefinite article is used do not appear to be significant. Instead, we focus

on the potentially more significant difference, which lies in CALCRIM 2304's twice-stated requirement to "insert *type of* controlled substance." (emphasis added). Does "type of" here refer to something other and broader than the identity *of a specific substance*?

Although we have found no California case specifically on point, we conclude that "type of," used in this context, continues to refer to a specific controlled substance. If "type of" required the court giving the instruction to specify something more general—for example, to identify the schedule on which a particular substance was found, or whether the substance was a stimulant, depressant or hallucinogen—surely the instruction or its usage notes would explain what more general designation was to be used. But instead, no guideline is provided other than a reference to the "controlled substance" itself.

In sum, we conclude, as the Ninth Circuit did in an analogous case, *see Lazo v. Wilkinson*, 989 F.3d 705, 713-14 (9th Cir. 2021), that under either CALJIC 12.00 or CALCRIM 2304, the type of controlled substance is an element of the offense that must be found by the jury. Thus, § 11377 is divisible by controlled substance.

5. Petitioner failed to carry his burden to show he was not convicted of possessing a federally controlled substance.

Because § 11377 is divisible, the final step in our analysis requires Petitioner to prove that his conviction was not for an offense related to a substance designated in § 802. *See Pereida v. Wilkinson*, 141 S. Ct. 754, 763 (2021) ("[W]here . . . the alien bears the burden of proof and was convicted under a divisible statute containing

some [disqualifying] crimes . . ., the alien must prove that his actual, historical offense of conviction isn't among them."); *see also* 8 U.S.C. § 1229a(c)(4)(A)(i) (placing burden on alien seeking relief from removal to establish that he satisfies eligibility requirements). As the BIA determined and Petitioner concedes, *see* Pet'r Opening Br. at 3-4, the record is inconclusive on this point, and Petitioner has therefore failed to meet that burden. The BIA therefore properly dismissed his appeal.

6. Conclusion

The petition for review is denied.

Entered for the Court

Allison H. Eid
Circuit Judge