SEAN K. KENNEDY (No. 145632)
Federal Public Defender
(E-mail: Sean_Kennedy@fd.org)
[ ] (No. [ ])
(E-mail: [ ] @fd.org)
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone (213) 894-[ ]
Facsimile (213) 894-0081

Attorneys for Defendant
[ ]

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. **[ ]**, Defendant.	NO. CR [ ] **DEFENDANT [ ] POSITION RE: SENTENCING** Sentencing Date: [ ] Sentencing Time: [ ]

Defendant [ ], by and through his counsel of record, Deputy Federal Public Defender [ ], hereby submits his position regarding sentencing in this matter.

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: September [ ], 2013

By /s/ *[ ]*
[ ]
Deputy Federal Public Defender

III. Objection to +16-Level Enhancement

Mr. [ ] objects to the application of the 16-level enhancement. The 16-level enhancement does not apply to Mr. [ ] under the categorical approach because (a) Section 11352 is not a categorical match to the definition of a drug trafficking offense, (b) pursuant to the Supreme Court's recent decision in *Descamps v. United States*, 133 S. Ct. 2276 (2013), California Health and Safety Code § 11352 is not a divisible offense; and therefore (c) the Court cannot conduct an inquiry into the record of conviction under the modified categorical approach. Because Mr. [ ]'s conviction does not qualify as a "drug trafficking offense" for purposes of the 16-level enhancement of § 2L1.2(b)(1)(A)(i), the 4-level enhancement of § 2L1.2(b)(1)(D) is the appropriate enhancement and the applicable guideline range is [ ] months.

A. Mr. [ ]'s Conviction under Health and Safety Code 11352 Is Not a Categorical Drug Trafficking Offense, Ending the Court's Inquiry

To determine whether a defendant's prior conviction qualifies as a predicate offense for purposes of § 2L1.2(b)(1) the court must apply the "categorical approach" and, where applicable, the "modified categorical approach" set forth in *Taylor v. United States*, 495 U.S. 575 (1990). Under the categorical approach,

> Sentencing courts may look only to the statutory definitions—i.e., the elements—of a defendant's prior offenses, and *not* to the particular facts underlying those convictions. If the relevant statute has the same elements as the "generic" [drug trafficking offense], then the prior conviction can serve as [§ 2L1.2(b)(1)(A)] predicate; so too if the statute defines the crime more narrowly, because anyone convicted under that law is necessarily . . . guilty of all the [generic crime's] elements. But if the statute sweeps more broadly than the generic crime, a conviction under that law cannot count as [a §

2L1.2(b)(2)(A)] predicate, even if the defendant actually committed the offense in its generic form.

Descamps v. United States, 133 S. Ct. 2276, 2283 (2013) (citations and internal quotation marks omitted) (some alterations in original). "[E]ven the least egregious conduct the statute [of conviction] covers must qualify." *United States v. Gonzalez-Aparicio*, 663 F.3d 419, 425 (9th Cir. 2011) (citations omitted).

The Ninth Circuit has already held that Health and Safety Code 11352 is not categorically a drug trafficking offense for purposes of U.S.S.G. § 2L1.2, because it "sweeps more broadly" than the generic definition. *United States v. Rivera-Sanchez*, 247 F.3d 905 (9th Cir. 2001), *superseded on other grounds* by U.S.S.G. § 2L1.2 cmt.5; *United States v. Kovac*, 367 F.3d 1116 (9th Cir 2004) (concluding that 11352 suffers from the same overbreadth as H&S § 11360, interpreted in *Rivera-Sanchez*).

The question, then, is whether resort can be made to the modified categorical approach. Under Ninth Circuit precedent prior to the Supreme Court's recent decision in *Descamps*, if the statute of conviction was facially over-inclusive, that conclusion did not end the inquiry, but instead permitted the employment of the modified categorical approach. *See United States v. Aguila-Montes de Oca*, 655 F.3d 915, 928 (9th Cir. 2011) (en banc), *abrogated by, Descamps*, 133 S. Ct. 2276. *Cf. United States v. Flores-Cordero*, 2013 WL3821604, *4 (9th Cir. July 25, 2013).

In *Descamps*, however, the Supreme Court held that resort to the modified categorical approach is only appropriate when a statute "sets out one or more elements of the offense in the alternative." 133 S. Ct. at 2281. To define an "element," the Court looked to its prior decision in *Richardson v. United States*, 526 U.S. 813, 817 (1999), characterizing "elements" as facts requiring unanimity in a jury. *Id.* at 2288. The Court distinguished these from facts that are merely "amplifying but legally extraneous circumstances," which a jury need not find in

order to secure a conviction. *Id*. (citing *Richardson,* 526 U.S. at 817). The Court clarified that where a fact does not require jury unanimity, the fact "is not an element, or an alternative element." *Id.* at 2293.

Applying this to California burglary, the Court found that an "entry" for purposes of Cal. Penal Code § 459 constituted an "indivisible" element that "does not require the factfinder (whether jury or judge)" to determine whether Mr. Descamps made an unlawful entry, thereby committing generic burglary. *Id.* at 2282, 2293. Thus, "California, to get a conviction, need not prove that Descamps broke and entered." *Id.* at 2285-86. As such, unlawful entry was "not an element, or an alternative element, of § 459," and "a conviction under that statute is *never* for generic burglary." *Id.* at 2293 (emphasis added). Because a jury was not required to find an unlawful entry, Descamps's actual conduct could not be considered and any admission he may have made to breaking and entering was "irrelevant." *Id*. at 2293.

In other words, to determine whether a statute contains "alternative elements," courts may look to whether the statute is divided into subsections, alternative phrases, or discrete lists. But even assuming it is, the disjunctive word or phrase still must qualify as an "element"—i.e. state law must *require that it be found beyond a reasonable doubt by a jury or a factfinder.* Otherwise, it is only a "means" of committing the offense—merely an "amplifying but legally extraneous circumstance[]." *Id.* at 2288.

Even Justice Alito's dissent agreed, stating, "the feature that distinguishes elements and means is the need for juror agreement." *Id.* at 2298 (citing *Richardson,* 526 U.S. at 817); *see also id.* (characterizing an "element" as "something on which a jury must agree by the vote required to convict under the law of the applicable jurisdiction"). On this basis, Justice Alito argued that limiting the modified categorical approach to such circumstances would cause "serious practical

problems" because courts would have to look to case law to determine "whether particular items are alternative *elements* or simply alternative *means* of satisfying an element." *Id*. at 2297, 2301 (emphasis added). Moreover, Justice Alito noted that charging documents could not be relied upon to make this distinction because "the mere fact that state law requires a particular fact to be alleged in a charging document does not mean that this fact must be found by a jury or admitted by the defendant." *Id.* at 2301.

In sum, there was no dispute among the Justices that the "elements" of a statute are those words or phrases listed in the alternative that *require jury unanimity.* This concern about elements, and what the jury had to be unanimous about, evidences the Sixth Amendment bedrock of the *Taylor* approach – unless a Court bases its decision on facts necessarily found by the jury, it strays into judicial fact-finding territory that goes beyond the limited prior conviction exception of *Almendariz-Torres*.

A divisible statute has two components: 1) it contains various offenses listed in the alternative, *and* 2) the particular offense of conviction would have to be established by a unanimous jury. Put another way, "alternative elements" must include both an "alternative" and an "element."

The question, then, is on what basis is California Health & Safety Code § 11352 overbroad. Section 11352 states:

> (a) 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 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.

Cal. Health & Safety Code § 11352(a).

There are two reasons that statute is overbroad: One, because it includes offenses that are not "trafficking," like transportation for personal use, and two, because the California drug schedules are broader than the federal drug schedules. If the Court considers either of these to be different means, not difference elements, it cannot go to the modified categorical approach.

1. *Overbreadth Relating to the Types of Transactions Covered*

Section 11352 criminalizes certain conduct that constitutes trafficking, and other conduct that does not. Selling of drugs certainly constitutes trafficking. But transporting for personal use, giving away, and offering to give away are not trafficking. *United States v. Almazan-Becerra*, 482 F.3d 1085 (9th Cir. 2007); *United States v. Navidad–Marcos*, 367 F.3d 903, 908 (9th Cir. 2004), *modified, in part*, by U.S.S.G. § 2L1.2, app. note. 1(B)(iv). *See also United States v. Gonzalez-Reyes*, 2013 WL 3929606 (9th Cir. 2013). Under *Descamps*, the question is "whether particular items are alternative *elements* or simply alternative *means* of satisfying an element." *Descamps*, 133 S. Ct. at 2297, 2301 (emphasis added) (Alito, J., dissenting).

Using *Richardson*'s definition of "elements," it is clear that the verbs in Section 11352(a) are merely alternate means of committing an offense. *People v. Guiton*, 4 Cal. 4th 1116 (Cal.1993). The jury instruction states:

> Every person who [transports,] sells, furnishes, administers, or gives away (controlled substance), a controlled substance, is guilty of a violation of Health and Safety Code section _____, a crime.

CALJIC § 12.02 (2007-08) (brackets in original). In other words, the jury is not called on to decide whether a defendant sold a controlled substance or merely gave it away or transported it.

In *People v. Lopez*, for example, the jury received the above instruction, and sent out a note: "[W]hy is "ale" [(sic)] listed with transportation?" *Lopez*, 2003 WL 21399779 (Cal. Ct. App. 2003). The Judge pointed the jury to CALJIC § 12.02 and said:

> [I]t gives you the instruction that, as to the second count, every person who transports, sells, furnishes, administers, or gives away methamphetamine, a controlled substance, is guilty of a violation of Health and Safety Code 11379(a). *That is a disjunctive "or" there and means to each words in that sentence.* So it should read transports or sales or furnishes or administers. I think that should answer your question as to [count two].

Id. at *1. While this was not the primary issue in the case, these facts passed without mention by the appellate court.

Where the jury is not called upon to select any particular theory of the case, it certainly cannot be said that it *unanimously* decided which of the options applies. *See People v. Johnson*, 2002 WL 1965605, at *4 (Cal. Ct. App. 2002) (transportation of cocaine base and aiding and abetting its sale "were presented as alternate *theories* under section 11352," but juror unanimity as between these theories was not required). Because unanimity is not required, these various options are means of committing the offense, not element. *Richardson v. United States*, 526 U.S. 813, 817 (1999). And because they are not elements, whatever Mr. [ ] admitted about his conduct is irrelevant, because the statute is not divisible. *Descamps*, 133

S. Ct. at 2293.

2. *Overbreadth Relating to the California Drug Schedules*

Section 11352 is overbroad for a second reason. In *United States v. Leal-Vega*, the Ninth Circuit held that § 11351 "is categorically [over]broad . . . because it criminalizes possession or purchase of certain substances that are not covered by the CSA [Controlled Substances Act]." 680 F.3d 1160, 1167 (9th Cir. 2012). Section 11352 references the same drug schedules.

What's more, the different drugs are not different elements, but simply different means of committing the offense. Under California law, for a defendant to be convicted of violating California drugs statutes, the prosecutor need not allege, the defendant need not admit, and the jury need not find, the precise nature of the controlled substance. *See Sallas v. Municipal Ct.*, 86 Cal. App. 3d 737, 740-44 (Ct. App. 1978) (holding that a state defendant is entitled to know the nature of the controlled substance at issue not because it is an element of a controlled substance offense – indeed, an entire class of controlled substances may be listed as possibilities – but simply to satisfy his due process right to defend against the charge); *People v. Romero*, 55 Cal. App. 4th 147, 156 (Ct. App. 1997) (noting that "[t]here may have been sound reasons, related to due process, for the information to allege which particular controlled substance [the defendant] sold," but clarifying that the defendant "was guilty of a single offense, sale of a controlled substance"); *see also id.* (noting that while due process concerns militate in favor of the information alleging a particular controlled substance, "this pleading requirement does not transmute the offense of possession of a controlled substance into as many different offenses as there are controlled substances."); *Ross v. Municipal Ct.*, 49 Cal. App. 3d 575, 579 (Ct. App. 1975) (explaining that California law does not require that the charging document specify the specific controlled substance because

possession or sale of a particular substance is simply is a "means by which" a defendant commits a controlled substance offense).

In other words, the specific type of controlled substance is not an element of the offense: the relevant element is "controlled substance." This single, indivisible element is all that is required for conviction. *See People v. Garringer*, 48 Cal. App. 3d 827, 835 (Ct. App. 1975) ("The only knowledge that is required to sustain the conviction is knowledge of the controlled nature of the substance."); *cf. Descamps*, 133 S. Ct. at 2283 (noting that the actual facts of the crime of conviction are irrelevant since the court must employ and elements-centric analysis). Consequently, the type of substance, e.g., cocaine, is simply a means by which the defendant committed the indivisible offense of possession for sale of a controlled substance.

Because § 11352 is an indivisible statue that is categorically overbroad because it references the drug schedules, *see Leal-Vega*, 680 F.3d at 1167, it cannot serve as a predicate offense for the drug trafficking offense enhancement under U.S.S.G. § 2L1.2(b)(1)(A)(i). Mr. [ ] conviction, therefore, is not a "drug trafficking offense," and he is not a subject to the 16-level enhancement as a matter of law.

III. CONCLUSION

For the foregoing reasons, Mr. [ ] should be sentenced to [ ].

Respectfully submitted,

SEAN K. KENNEDY
Federal Public Defender

DATED: August 5, 2013 By /s/
[]
Deputy Federal Public Defender