FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

No. 99-10275

Plaintiff-Appellee,

Bram Jacobson, Assistant Federal Public Defender, Phoenix, Arizona, for the appellant.

Virginia C. Kelly, Assistant United States Attorney, Tucson, Arizona, and Tim Holtzen, Assistant United States Attorney, Phoenix, Arizona, for the appellee.

Steven F. Hubacheck, Federal Defenders of San Diego, Inc., San Diego, California, for the amici curiae.

OPINION

THOMAS, Circuit Judge:

We considered this appeal en banc to determine whether a violation of California Health and Safety Code § 11360(a) constitutes an aggravated felony for the purposes of sentencing pursuant to United States Sentencing Guidelines ("U.S.S.G.") § 2L1.2(b)(1)(A). We conclude that it does not and reverse the judgment of the district court.

I

Javier Rivera-Sanchez ("Rivera-Sanchez") was arrested for entering the United States without inspection on September 13, 1998. He pled guilty to illegal reentry after deportation in violation of 8 U.S.C. § 1326.

Three separate Pre-sentence Reports were submitted. The original Pre-sentence Report attributed eight prior convictions to Rivera-Sanchez. Two eventually were removed because the booking photos for the computer-identified crimes were not of the defendant, and the records for those convictions were not fingerprint-based. The other six convictions remained in the final Pre-sentence Report because, according to the probation officer, they were verified by a fingerprint-based identification system. Rivera-Sanchez disputed this assertion.

Most relevant to our inquiry is the inclusion of a 1986 conviction under California Health and Safety Code§ 11360(a), for which Rivera-Sanchez was sentenced to 3 years' probation and 36 days in jail. The district court treated this conviction as an aggravated felony pursuant to U.S.S.G.

also United States v. Sherbondy, 865 F.2d 996, 1009 (9th Cir. 1988). Examining the statutory definition of the offense rather than the defendant's conduct is not a novel concept: We have endorsed Taylor's categorical approach in a variety of sentencing contexts. See, e.g., United States v. Martinez, 232 b)(1)(A));0 Tw 175

endorsed

nish, administer, or give away, or attempts to import into this state or transport any marijuana shall be punished by imprisonment in the state prison for a period of two, three or four years.

> to cover solicitation, we hold that solicitation to possess marijuana for sale is not an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). Thus, Leyva-Licea's solicitation conviction does not render him deportable under § 241(a)(2)(A)(iii) of the INA.

Id. (citation omitted).

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This reasoning applies here. Because California Health and Safety Code § 11360(a) punishes solicitation, the full range of conduct encompassed by the statute does not constitute an aggravated felony under 8 U.S.C. § 1101(a)(43)(B). Therefore, Rivera-Sanchez's 1986 conviction facially does not qualify as an aggravated felony.

judicially noticeable facts in the existing record and to re-sentence Rivera-Sanchez. In view of this result, we need not -- and do not -- reach any other issue urged by the parties.

REVERSED AND REMANDED.