



The Commonwealth of Massachusetts
Committee for Public Counsel Services
Immigration Impact Unit
21 McGrath Highway, Somerville, MA 02143

TEL: 617-623-0591
FAX: 617-623-0936

ANTHONY J. BENEDETTI
CHIEF COUNSEL

WENDY S. WAYNE
DIRECTOR

Controlled Substances Update: *Mellouli v. Lynch*
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On June 1, 2015, the U.S. Supreme Court issued a decision in *Mellouli v. Lynch*, 575 U.S. ____ (2015), which clarifies how and when state drug convictions result in immigration consequences for noncitizens. The opinion may provide new avenues to protect our clients from the harsh immigration consequences of controlled substance convictions.

Mr. Mellouli is a lawful permanent resident (LPR – green card holder) who was found to have four non-prescribed Adderall tablets in his sock after being arrested for OUI. He was charged under Kansas state law with possession of drug paraphernalia (i.e. the sock) used to conceal a controlled substance as defined under Kansas law. Neither the complaint nor the plea agreement identified the controlled substance involved. Under federal immigration laws, a person is deportable if he has been “convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation...relating to a controlled substance (*as defined in section 102 of the Controlled Substance Act (21 U.S.C. §802).*” 8 U.S.C. §1227(a)(2)(B)(i)(*emphasis added*). **The question before the Court was whether the Kansas conviction for using paraphernalia to conceal unnamed pills was a controlled substance violation under the federal grounds of removal.**

The Court began by affirming that in order to determine whether a state conviction matches a federal ground of removal, the Court applies the “categorical approach.” Under this approach, the elements of the state offense must match the elements of the federal ground of removal. In this case, the Kansas statute prohibited the possession of paraphernalia used to conceal a “controlled substance,” but defined “controlled substance” as any drug included on the Kansas controlled substance schedules. The statute made no reference to the federal schedules. At the time of Mr. Mellouli’s conviction, the Kansas schedules included nine substances not on the federal schedules. Therefore, the Kansas statute was broader than the federal removal ground, and a conviction under the state statute was not a categorical match with the federal removal ground.

Because the state of Kansas did not charge, or seek to prove, that Mr. Mellouli possessed a substance listed on the federal schedules, there was no way to know (using the categorical approach) whether his conviction was predicated upon the concealment of a federally controlled substance. Since it could have been a conviction for concealing one of the substances listed only in the Kansas schedules, the Court held that the government could not meet its burden of showing that Mr. Mellouli was removable under 8 U.S.C. §1227(a)(2)(B)(i).¹

¹ For a more detailed discussion of this decision and application of the categorical approach, *see, Mellouli v. Lynch: Further Support for a Strict Categorical Approach for Determining Removability under Drug Deportation and Other Conviction-Based Removal Grounds* (June 8, 2015) *at* http://www.nationalimmigrationproject.org/legalresources/practice_advisories/Mellouli_Advisory_6-8-15.pdf

What this means for criminal defense attorneys:

The Court's opinion offers support for fighting removal based on any drug conviction where the state statute at the time of conviction covered any substance(s) not listed in the federal schedules. The analysis provides additional ways to protect our clients who are not able to avoid convictions (or admissions to sufficient facts) for drug offenses. When representing noncitizen clients charged with drug offenses, these are some possible ways to structure a safer plea:

1. Check whether the substance your client is charged with possessing is actually on the federal schedule. If not, then the offense cannot make your client deportable².

Example: In Massachusetts, Class E includes prescription strength ibuprofen and gabapentin. Neither of these is on the federal schedules. If your client is charged with either of these substances, a conviction will not be a deportable offense. You should make clear on the record that this was the substance charged.

2. Check the state schedule for the class your client is charged under and see if there are ANY substances that are not on the federal schedule. If the state list includes some substances that are not on the federal schedule, plead to the generic offense (e.g. "did possess with intent to distribute a Class E substance") and keep all information about the actual substance out of the record of conviction.

Example: If your client is charged with Class E, but the complaint and the plea agreement/colloquy do not indicate the actual substance involved, the government will not be able to show whether your client was charged with a substance that is also on the federal schedule. Since the statute is overbroad, it is not a categorical match with the ground of removal.

Note: While the decision in *Mellouli* presents a clear method for analysis of controlled substance offenses under immigration law, we have not seen how it will be applied by immigration judges and the Department of Homeland Security. In addition, there remain questions about drug analogues and about application of the categorical approach in other contexts that the decision left open. The IIU is working with the Forensic Services Unit to compare the current Massachusetts classes with the current federal controlled substances schedules. We plan to issue a more detailed advisory in the next few weeks about *Mellouli*, its impact and a comparison of the Massachusetts and federal controlled substances. As always, however, it is important to consult with us or another immigration expert prior to resolving a criminal case for assistance in analyzing and trying to minimize the immigration consequences to your client.

² *Mellouli* involved the controlled substance ground of deportability. The controlled substance ground of inadmissibility is also impacted by this decision and may involve additional issues that will be addressed in a subsequent practice advisory.