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In this issue...

Page 1: Feature Article:

Just Say No to Socks: The Evolution of the Immigration and Nationality Act's Drug Removability Statutes Pre- and Post-Mellouli

Page 5: Federal Court Activity

Page 7: BIA Precedent Decision

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Just Say No to Socks: The Evolution of the Immigration and Nationality Act's Drug Removability Statutes Pre- and Post-Mellouli

By Pina N. Cirillo

M*ellouli v. Lynch*, 135 S. Ct. 1980 (2015), added a new rule to an old game: guidance on how to determine when a drug conviction will trigger an alien's removability. The issue has been long litigated, debated and discussed, but the Supreme Court's decision stood in sharp relief against past uncertainty in determining when and what types of drug statutes render an alien removable from the United States. However, though *Mellouli* clarified, in no uncertain terms, that the state drug statute must involve a drug that matches a Federal substance listed in the Controlled Substances Act ("CSA"), other issues surrounding drug removability statutes remained.

This article explores how the Board of Immigration Appeals and circuit courts of appeals have analyzed the Immigration and Nationality Act's drug removability statutes pre- and post-*Mellouli*. First, the article looks at the "relating to a controlled substance" charge—and the removability statute at play in *Mellouli*—and how courts' interpretations of the statute evolved before and after the Supreme Court's *Mellouli* decision. Next, the article briefly discusses the implications *Mellouli* has for other drug removability statutes: the aggravated felony of illicit trafficking in a controlled substance and the "reason to believe" that an alien is a drug trafficker charge. Finally, the article explores the remaining unanswered questions regarding the Act's controlled substance removability statutes, including how to determine whether drugs are elements or means, what types of documents may be considered under the modified categorical approach, and whether courts should employ the realistic probability test when ascertaining whether a drug conviction is a match to a removability charge.

Mellouli v. Lynch

In 2015, the Supreme Court decided *Mellouli v. Lynch*, holding that a misdemeanor Kansas conviction for drug paraphernalia possession did not constitute an offense “relating to a controlled substance” because the Kansas drug schedule included at least nine substances that were not on the Federal schedule. While the complaint stated that the paraphernalia at issue was a sock and the probable-cause affidavit stated that the sock contained four orange tablets, which were Adderall, the respondent’s final conviction described only possession of drug paraphernalia “to . . . store [or] conceal . . . a controlled substance.” *Mellouli*, 135 S. Ct. at 1981. The Supreme Court concluded: “The removal provision is . . . satisfied when the elements that make up the state crime of conviction relate to a federally controlled substance. . . . [T]o trigger removal under § 1227(a)(2)(B)(i), the Government must connect an element of the alien’s conviction to a drug ‘defined in [the CSA].’” *Id.* at 1990–91.

The respondent’s sock forced the Supreme Court to address a very narrow issue: whether and to what extent a drug paraphernalia possession conviction constitutes an offense “relating to” a controlled substance under the Act. However, as the pre-*Mellouli* decisions will highlight, several other residual issues remain which can make determining removability for drug offenses a difficult task.

What *Mellouli* Kept and What It Changed

The Act provides that an alien is inadmissible or removable from the United States when he or she commits or is convicted of certain categories of crimes relating to controlled substances.¹ To determine whether an alien’s drug conviction renders him or her removable, courts apply the categorical approach and, if applicable, the modified categorical approach. See *Mathis v. United States*, 136 S. Ct. 2243 (2016); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013). Under the categorical approach, the adjudicator assesses whether the least criminal conduct criminalized by the statute is a categorical match to the Federal definition. See *Moncrieffe*, 133 S. Ct. at 1684–85. Under the modified categorical approach, the court may look to additional documents within the record of conviction to determine which subsection of the statute forms the basis of the conviction.

An alien who has been convicted of a violation of (or a conspiracy or attempt to violate) any law or

regulation of a State, the United States, or a foreign country relating to a controlled substance as defined in 21 U.S.C. § 802, is inadmissible pursuant to section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II),² and removable pursuant to section 237(a)(2)(B)(i) of the Act, 8 U.S.C. § 1227(a)(2)(B)(i). These two removability sections, with their seemingly broad coverage, form the basis of many removability charges lodged by the Government and were the subject of several Board and circuit court decisions prior to *Mellouli*. The next section of this article will provide an overview regarding when an alien’s drug conviction falls within the Act’s “relating to a controlled substance” removability charge.

Mellouli Upheld What the Board and Circuits Had Mostly Agreed Upon: The Drug Must Be CSA-Listed

On one clear point, *Mellouli* solidified what the Board and most circuit courts had agreed upon for decades: when analyzing a drug conviction under the Act, the drug at issue must be a CSA-listed drug. In 1965, the Board in *Matter of Paulus*, 11 I&N Dec. 274 (BIA 1965), required a correspondence between the Federal and state controlled substance schedules in order for an offense to trigger removability as an offense “relating to” narcotic drugs under former section 241(a)(11) of the Act. The Board held that a California conviction for the unlawful sale, furnishing or transportation of a “narcotic” or “material in lieu of narcotic,” where the record of conviction was silent as to the narcotic involved, was not an offense “relating to” a narcotic. *Paulus*, 11 I&N Dec. at 276. Though not explicitly stating so, the Board applied the categorical approach and compared the California list of controlled substances with the Federal list of controlled substances to conclude that there was a possibility that the alien’s conviction involved a substance not listed under Federal law. The majority opinion in *Mellouli* cited to *Paulus* to support its reasoning. *Mellouli*, 135 S. Ct. at 1989–91.

Many circuit courts followed *Paulus* before *Mellouli* approved its holding. For example, the Ninth Circuit issued several decisions sustaining the “relating to” charge only where the drug referenced in the record of conviction was a drug listed in the CSA. In *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072 (9th Cir. 2007), *abrogated on other grounds by Kwong v. Holder*, 671 F.3d 872 (9th Cir. 2011), the court first determined that the California drug schedule was broader than the Federal drug schedule before

turning to the alien's record of conviction. However, the court determined that there was no way to connect the references to methamphetamine in the charging document to the final conviction and that to do so would be mere speculation. *Id.* at 1079. In *Cheuk Fung S-Yong v. Holder*, 600 F.3d 1028 (9th Cir. 2009), the Ninth Circuit held that a California conviction for the sale or transportation of a controlled substance was not categorically an offense "relating to" a controlled substance because California law regulates the possession and sale of many substances that are not regulated by the CSA. *See also Coronado v. Holder*, 759 F.3d 977, 983 (9th Cir. 2014).

In *Rojas v. Attorney General of United States*, 728 F.3d 203 (3d Cir. 2013), the Third Circuit relied on *Paulus* in part in holding that a Pennsylvania conviction for drug paraphernalia possession only renders an alien removable where the government proves that the conviction involved a substance listed under Federal law. The Government argued that the Pennsylvania drug schedules were a "close enough 'fit'" to the Federally listed controlled substances, thus making the drug paraphernalia conviction one "relating to" a drug violation as defined under the Act. *Id.* at 208. In rejecting the Government's argument, the Third Circuit held that the most straightforward reading of the text specifies that the controlled substance must be one that is "defined in section 802 of Title 21." *Id.* at 220. In *Mellouli*, the majority opinion responded similarly to a nearly identical argument advanced by the Government, stating:

The historical background of §1227(a)(2)(B)(i) demonstrates that Congress and the [Board] have long required a direct link between an alien's crime of conviction and a particular federally controlled drug. . . . The Government offers no cogent reason why its position is limited to state drug schedules that have a "substantial overlap" with the federal schedules.

135 S. Ct. at 1990 (citation omitted).

Mellouli Breaks From the Lower Courts

While *Mellouli* found support for its analysis in the Board's decision in *Paulus*, it departed from the Board's specific stance on drug paraphernalia

offenses. In *Matter of Martinez Espinoza*, 25 I&N Dec. 118, 121 (2009), *abrogated by Mellouli v. Lynch*, 135 S. Ct. 1980 (2015), the Board held that a drug paraphernalia conviction was an offense "relating to a controlled substance" violation because the crime was "associated with the drug trade in general." The Board highlighted the phrase "relating to" as a concept with "a broad ordinary meaning" and noted that the "requirement of a correspondence between the Federal and State controlled substances schedules," as set forth in *Paulus*, had never been extended to convictions involving drug paraphernalia. *Id.* at 120, 122. Thus, the Board held that a conviction for possessing or using drug paraphernalia can render an alien inadmissible for an offense "relating to" a controlled substance.

Several circuit courts upheld the Board's position in *Matter of Martinez Espinoza* and added support to the Board's rationale. In *Escobar Barraza v. Mukasey*, 519 F.3d 388, 390 (7th Cir. 2008), the Seventh Circuit held that a Nebraska conviction for possession of drug paraphernalia constituted an offense "relating to" a controlled substance because the Act's modifier of "as defined in section 802 of title 21" modifies "controlled substance" and nothing else. It concluded that a drug paraphernalia statute "relates to" a controlled substance, but concluded that the respondent would be eligible for a section 212(h) waiver, finding that the conviction also "relates to" a single offense of simple possession for 30 grams or less of marijuana. *See id.* at 393; *see also Barma v. Holder*, 640 F.3d 749 (7th Cir. 2011) (holding that a Wisconsin conviction for possession of drug paraphernalia is a crime relating to a controlled substance under section 212(a)(2)(A)(i)(II) of the Act without additional analysis).

In *Luu-Le v. INS*, 224 F.3d 911, 915 (9th Cir. 2000), *abrogated by Madrigal-Barcenas v. Lynch*, 797 F.3d 643 (9th Cir. 2015), the Ninth Circuit held that a misdemeanor conviction for possession of drug paraphernalia is an offense "relating to" a controlled substance because, although the state statute's definition of "drug" "does not map perfectly the definition of 'controlled substance' as used in the Act, the state statute at issue was "intended to criminalize behavior involving the production or use of drugs" and "an object is not drug paraphernalia unless it is in some way linked to drugs." Notably, in the Eighth Circuit's earlier decision in *Mellouli v. Holder* that was ultimately certified to the Supreme Court, the Eighth Circuit also held that a drug

paraphernalia conviction was categorically a removable offense, following the Board's reasoning in *Matter of Martinez Espinoza*. See *Mellouli v. Holder*, 719 F.3d 995, 1000 (8th Cir. 2013), *vacated and remanded by Mellouli v. Lynch*, No. 12-3093, 2015 WL 4079087 (8th Cir. July 6, 2015).

Mellouli sharply broke from the Board and circuit courts in holding that a drug paraphernalia offense, without a direct link to a controlled substance listed under the CSA, was not a conviction "relating to a controlled substance." In reaching its holding, the majority in *Mellouli* did not address the varied arguments to the contrary set forth in decisions by the lower courts. Rather, the *Mellouli* majority primarily noted the disparate treatment of "possession and distribution offenses" and "drug-paraphernalia offenses," holding that the distinction requiring a link to a CSA substance only for possession or distribution offenses "finds no home in the text" of section 237(a)(2)(B)(i) of the Act. *Mellouli*, 135 S. Ct. at 1988–89. The *Mellouli* majority additionally pointed to the anomalous result that disparate treatment of the offenses creates: "The incongruous upshot [] that an alien is *not* removable for *possessing* a substance controlled only under Kansas law, but he *is* removable for using a sock to contain that substance." *Id.* at 1989.

Some Issues Not Resolved by Mellouli

In several cases prior to *Mellouli*, courts did not focus on the substance at issue in the conviction, but on conduct that may have been linked to a controlled substance. In *Matter of Carrillo*, 16 I&N Dec. 625 (BIA 1978), the Board held that a conviction for unlawful carrying of a firearm during the commission of a felony is not "a law . . . relating to the illicit possession of a narcotic drug" under former section 241(a)(11) of the Act, even though the underlying felony was the illicit possession of heroin. Rather, the Board concluded that "possession of a firearm during the commission of a felony is an offense separate and distinct" from the underlying felony drug offense. *Id.* at 627. In *Matter of Batista-Hernandez*, 21 I&N Dec. 955, 958 (BIA 1997), the Board held that the offense of accessory *after the fact* to a drug-trafficking crime is not considered an inchoate crime and that, "[g]iven the nature of the crime," it is not sufficiently "related to" a controlled substance violation under former section 241(a)(2)(B)(i) of the Act.

However, the Board appeared to broaden the reach of the statute in other cases. In *Matter of Beltran*, 20 I&N Dec. 521, 526 (BIA 1992), the Board stated that the phrase "relating to" has "broad coverage" and that Congress intended offenses "relating to a controlled substance" to encompass the inchoate or preparatory crimes of "attempt, conspiracy, and facilitation when the underlying substantive crime involves a drug offense." Thus, the Board concluded that a conviction for solicitation to possess narcotic drugs under Arizona law constituted an offense "relating to" a controlled substance under former section 241(a)(11) of the Act. Another example can be seen in *Matter of Martinez-Gomez*, 14 I&N Dec. 104 (BIA 1972), where the Board held that a California conviction for opening or maintaining a place for the purpose of unlawfully selling, giving away, or using any narcotic was a violation of law relating to illicit traffic in narcotic drugs or marijuana under former section 241(a)(11) of the Act. In reaching this conclusion, the Board reasoned that the "primary purpose" of the State law was "to eliminate or control" trafficking in narcotics. *Id.* at 105.

Similar to the Board's divergent approaches for determining whether the conduct in a drug statute renders an individual removable, the circuit courts appeared to split on the issue, with some construing "relating to" as broad enough to cover certain inchoate or accessory crimes and others construing it more narrowly. The Sixth Circuit held that a conviction for misprision of the felony of conspiracy to possess heroin was not a conviction relating to possession of or traffic in narcotic drugs. See *Castaneda De Esper v. INS*, 557 F.2d 79, 80, 84 (6th Cir. 1977). In *Coronado-Durazo v. INS*, 123 F.3d 1322, 1323 (9th Cir. 1997), the Ninth Circuit held that a conviction for solicitation to possess cocaine is not a deportable offense within the meaning of former section 241(a)(2)(B)(i) of the Act, notwithstanding the Board's contrary holding in *Matter of Beltran*, because Congress intended to limit deportation for generic drug crimes to conspiracy and attempt. See also *Leyva-Licea v. INS*, 187 F.3d 1147, 1149–50 (9th Cir. 1999) (relying on *Coronado-Durazo* to hold that an Arizona conviction for solicitation to possess marijuana for sale was not a deportable offense under section 241(a)(2)(B)(i) of the Act). Years later, however, the Ninth Circuit reached a seemingly different conclusion in holding that a California law prohibiting "furnish[ing], administer[ing], or giv[ing], or offer[ing] to furnish, administer, or give" marijuana to a minor

continued on page 8

FEDERAL COURT ACTIVITY

CIRCUIT COURT DECISIONS FOR JUNE 2017

by John Guendelsberger

The United States courts of appeals issued 137 decisions in June 2017 in cases appealed from the Board. The courts affirmed the Board in 120 cases and reversed or remanded in 17, for an overall reversal rate of 12.4%, compared to last month's 15.8%. There were no reversals from the First, Fourth, Fifth, Sixth, Eighth, and Tenth Circuits.

The chart below shows the results from each circuit for June 2017 based on electronic database reports of published and unpublished decisions.

Circuit	Total	Affirmed	Reversed	% Reversed
First	1	1	0	0.0
Second	14	10	4	28.6
Third	11	9	2	18.2
Fourth	7	7	0	0.0
Fifth	21	21	0	0.0
Sixth	3	3	0	0.0
Seventh	7	6	1	14.3
Eighth	8	8	0	0.0
Ninth	59	51	8	13.6
Tenth	2	2	0	0.0
Eleventh	4	2	2	50.0
All	137	126	17	12.4

The 137 decisions included 77 direct appeals from denials of asylum, withholding of removal, or protection under the Convention Against Torture; 27 direct appeals from denials of other forms of relief from removal or from findings of removal; and 33 appeals from denials of motions to reopen or reconsider. Reversals or remands within each group were as follows:

	Total	Affirmed	Reversed	% Reversed
Asylum	77	67	10	13.0
Other Relief	27	25	2	7.4
Motions	33	28	5	15.2

The 10 reversals or remands in asylum cases involved credibility (5 cases), protection under the Convention Against Torture (2 cases), well-founded

fear, internal relocation, and fairness of a hearing. The two reversals or remands in the "other relief" category addressed divisibility in applying the categorical approach and a crime involving moral turpitude determination. The five motions cases involved changed country conditions (two cases), equitable tolling (two cases), and eligibility for a section 212(c) waiver.

The chart below shows the combined numbers for January through June 2017 arranged by circuit from highest to lowest rate of reversal.

Circuit	Total	Affirmed	Reversed	% Reversed
Seventh	25	20	5	20.0
Second	151	128	23	15.2
Third	43	38	5	11.6
Ninth	337	299	38	11.3
Fourth	57	51	6	10.5
Eleventh	39	35	4	10.3
Tenth	10	9	1	10.0
Sixth	23	21	2	8.7
First	12	11	1	8.3
Fifth	74	69	5	6.8
Eighth	34	34	0	0.0
All	805	715	90	11.2

Last year's reversal rate at this point (January through June 2016) was 11.0%, with 1,156 total decisions and 127 reversals or remands.

The numbers by type of case on appeal for the first 6 months of 2017 combined are indicated below.

	Total	Affirmed	Reversed	% Reversed
Asylum	404	254	50	12.4
Other Relief	215	190	25	11.6
Motions	186	171	15	8.1

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RECENT COURT OPINIONS

Second Circuit:

Harbin v. Sessions, 860 F.3d 58 (2d Cir. 2017): The court concluded that the petitioner's conviction for criminal sale of a controlled substance in the fifth degree in violation of N.Y. Penal Law § 220.31 does not constitute an aggravated felony drug trafficking offense because the state law reaches the sale of chorionic gonadotropin, which is not a Federally-controlled substance. Although the certificate of disposition in the petitioner's criminal case indicated that the substance involved was cocaine, the Second Circuit concluded that N.Y. Penal Law § 220.31 is not a divisible statute that can be examined using the modified categorical approach. The court concluded that different substances are not regarded as separate elements under the state law.

Centurion v. Sessions, 860 F.3d 69 (2d Cir. 2017): The Second Circuit held that section 101(a)(13)(C)(v) of the Act, 8 U.S.C. § 1101(a)(13)(C)(v), did not require the lawful permanent resident petitioner to seek formal admission after returning from a brief trip abroad based on a drug offense he committed prior to the passage of the Illegal Immigration Reform and Immigrant Responsibility Act ("IIRIRA") of 1996. The petitioner committed his drug offense in 1990, but was not convicted until after the IIRIRA's enactment. The court concluded that application of the IIRIRA's provisions in the petitioner's case would violate the "presumption against retroactive legislation" because the plain text of the statute attaches legal consequences at the time a lawful permanent resident commits a crime, rather than at the time of conviction.

Fourth Circuit:

United States v. Reid, 861 F.3d 523 (4th Cir. 2017): In a sentencing case, the court concluded that assaulting a correctional officer in violation of Virginia Code § 18.2-55 qualifies as a "violent felony" that "has as an element the use . . . of physical force against the person of another." The court relied on the reasoning in *United States v. Castleman*, 134 S. Ct. 1405 (2014), to conclude that the "use of physical force" may include even force employed through indirect means.

Fifth Circuit:

United States v. Reyes-Ochoa, 861 F.3d 582 (5th Cir. 2017): The Fifth Circuit held that the district court committed plain error by imposing a crime-of-violence sentencing

enhancement based on the defendant's prior convictions for statutory burglary under section 18.2-90 of the Virginia Code. The court adopted the Fourth Circuit's analysis of the same statute in *Castendet-Lewis v. Sessions*, 855 F.3d 253 (4th Cir. 2017), and held that the Virginia statute was indivisible and did not categorically qualify as a crime of violence. The court stated that its prior contrary holding in *United States v. Membreno-David*, 650 F. App'x 195 (5th Cir. 2016), is not controlling because it was decided pre-*Mathis* and did not analyze Virginia state law.

Seventh Circuit:

Cojocari v. Sessions, No. 16-3941, 2017 WL 2953043 (7th Cir. July 11, 2017): The Seventh Circuit acknowledged that the record contained some facts that might have supported an adverse credibility determination, but vacated the agency's decision because the Immigration Judge had focused on trivial or illusory inconsistencies as to dates and descriptions of injuries suffered. The Seventh Circuit also held that the Immigration Judge had not articulated any reason for distrusting or giving diminished weight to the alien's many corroborating documents and the unrebutted expert testimony.

Eighth Circuit:

Gomez-Garcia v. Sessions, 861 F.3d 730 (8th Cir. 2017): The Eighth Circuit held that substantial evidence supported the agency's finding that the harm and threats the petitioner suffered from gang members were due to her reporting the gang's burglary of her anti-gang community group's office and the subsequent arrest of a gang member, and not because of her membership in the anti-gang community group. Substantial evidence also supported the conclusion that the petitioner's fear was not objectively reasonable, as she remained unharmed in El Salvador for nearly a year after the threat and her family was not harmed.

Ninth Circuit:

Flores v. Sessions, No. 17-55208, 2017 WL 2855813 (9th Cir. July 5, 2017): The Ninth Circuit concluded that the *Flores* settlement requires that detained, unaccompanied minors be provided with custody hearings before an Immigration Judge. The holding affects minors in the custody of the Office of Refugee Resettlement (ORR), including some minors who have been placed in secure detention facilities because of criminal convictions or the danger they may present to themselves or others. The court noted that an Immigration Judge cannot order

a minor's release because unaccompanied minors can only be released to a safe and secure environment as determined by the Government, but concluded that custody hearings provide unaccompanied minors with "meaningful rights and practical benefits," including a potential finding that a current detention arrangement is improper. The court disagreed with the Government's argument that the *Flores* settlement, which was reached in 1997, has been superseded by the Homeland Security Act and the Trafficking Victims Protection Reauthorization Act.

United States v. Perez-Silvan, 861 F.3d 935 (9th Cir. 2017): In a sentencing case, the Ninth Circuit held that a conviction for aggravated assault under Tennessee Code § 39-13-102(a)(1) is a crime of violence. First, the court applied *Mathis* and held that the statute is divisible because different subsections carry different punishments. Second, the court disagreed with the defendant's argument that he might have been convicted simply of an offensive touching. The court noted that the required assault must have either caused serious bodily injury to another or involved the use or display of a deadly weapon, both of which necessarily entail the use or threatened use of violent force.

Padilla-Ramirez v. Bible, No. 16-35385, 2017 WL 2871513 (9th Cir. July 6, 2017): In reviewing a habeas petition, the Ninth Circuit held that individuals in withholding-only proceedings are not entitled to an initial bond hearing because such individuals are already subject to an administratively final order of removal and therefore are not detained under section 236(a) of the Act "pending a decision on whether the alien is to be removed from the United States." The court stated that its holding is limited to whether an alien is entitled to an "initial" bond hearing, as opposed to the procedural safeguards the court has applied to individuals subject to "prolonged detention."

United States v. Strickland, 860 F.3d 1224 (9th Cir. 2017): The Ninth Circuit held that the defendant's third-degree robbery conviction under section 164.395(1) of the Oregon Revised Statutes was not a predicate "violent felony" under the Armed Career Criminal Act's ("ACCA") force clause. Applying the categorical approach, the court determined that the Oregon statute does not have the requisite element of "the use, attempted use, or threatened use of physical force against the person of another." Specifically, the court noted that Oregon

state cases demonstrate that the Oregon third-degree robbery statute does not require physically *violent* force, and thus, was not a categorical match to the force clause.

Yali Wang v. Sessions, 861 F.3d 1003 (9th Cir. 2017): The court concluded that substantial evidence supported the Immigration Judge's adverse credibility determination. The Ninth Circuit disagreed with the petitioner's arguments that the Immigration Judge erred in reaching an adverse credibility determination without specifically finding either that her documentary evidence was manufactured or by identifying specific internal inconsistencies in her testimony. The court also dismissed the petitioner's argument that the holding in *Ren v. Holder*, 648 F.3d 1079 (9th Cir. 2011), required the Immigration Judge to provide her with an additional opportunity to submit corroborating evidence. The court noted that the applicant in *Ren* had presented a *credible* testimonial account that required corroboration, while the petitioner in the instant case had not set forth a credible account.

Eleventh Circuit:

Gordon v. U.S. Att'y Gen., No. 15-13846, 2017 WL 2918835 (11th Cir. July 10, 2017): The Eleventh Circuit held that section 893.13(1)(a) of the Florida Statutes is a divisible statute because selling and delivering a controlled substance are considered separate offenses under Florida law, the latter of which would not constitute an aggravated felony because it lacked an element of consideration. The court noted that the limited *Shepard* documents in this case did not indicate whether the petitioner was convicted for violating the "sale" element or for violating the "delivery" element. Thus, the court determined that the Board erred in not "presum[ing] that the conviction rested upon nothing more than the least of the acts criminalized" (delivery), and erred in concluding that the petitioner's conviction constituted an "illicit trafficking" aggravated felony.

BIA PRECEDENT DECISION

In *Matter of Izaguirre*, 27 I&N Dec. 67 (BIA 2017), the Board concluded that an offense could be a "specified offense against a minor" within the meaning of section 111(7) of the Adam Walsh Child Protection and Safety Act of 2006, Pub. L. No. 109-248, 120 Stat. 587, 592, even if it involved an undercover police officer posing as a minor, rather than an actual minor.

The Board therefore held that the petitioner's conviction for computer-aided solicitation of a minor under section 14:81.3 of the Louisiana Statutes bars him from obtaining an approved visa petition under section 204(a)(1)(A)(viii)(I) of the Act.

In coming to this conclusion, the Board disagreed with one Federal district court's holding in *United States v. Kahn*, 524 F. Supp. 2d 1278 (W.D. Wash. 2007). First, it noted that section 111(7)(H) of the Adam Walsh Act includes both the use of the Internet to engage in criminal sexual conduct against a minor and the use of the Internet to attempt to engage in such conduct. Additionally, it noted that interpreting section 111(7) to only apply to offenders whose victim was an actual minor, versus those who simply intended for their victim to be a minor, contradicted the purpose of the Adam Walsh Act, which was to protect the public from offenders against children. Finally, the Board noted that Congress had used the term "actual minor" in a statute enacted three years prior to the Adam Walsh Act, and used the word "actual" to modify "human being" in the Adam Walsh Act, but did not use the term "actual" in section 111(7). The Board concluded that Congress' explicit use of "actual" to define a category of individuals in other contexts indicates that Congress knew how to limit the phrase "specified offense against a minor" to an offense against an actual minor, but chose not to do so.

Based on this determination, the Board concluded that the petitioner's conviction—which involved an undercover police officer who the petitioner believed was a 14-year-old girl—bars him from obtaining an approved visa petition unless he can establish that he poses "no risk" to the safety and well-being of the beneficiary. The Board lacked jurisdiction to review the "no risk" determination made by USCIS.

Just Say No to Socks: *continued*

older than fourteen "relates to" a controlled substance, notwithstanding the fact that the statute includes solicitation, because the statute, "by its own terms, is limited to offenses involving marijuana [and is] a state law 'specifically aimed at controlled substance offenses.'" *Guerrero-Silva v. Holder*, 599 F.3d 1090, 1093 (9th Cir. 2010).

The Second and Fifth Circuits have held that the "relating to" provision is broad enough to cover solicitation

offenses. See *Mizrahi v. Gonzales*, 492 F.3d 156, 163 (2d Cir. 2007) (holding that a New York conviction for criminal solicitation of the sale of drugs constitutes a crime "relating to" a controlled substance); *Peters v. Ashcroft*, 383 F.3d 302, 308 (5th Cir. 2004) (holding that an Arizona conviction for felony solicitation to transport marijuana for sale was an offense "relating to" a controlled substance). Both circuits found that the "relating to" provision of the Act was ambiguous or silent concerning the treatment of solicitation offenses and, thus, deferred to the Board's reasonable interpretation in *Matter of Beltran* that the provision encompassed solicitation because the statutory references to conspiracy and attempt are illustrative without being exclusive. See *Mizrahi*, 492 F.3d at 166; *Peters*, 383 F.3d at 308; but cf. *Coronado-Durazo*, 123 F.3d at 1322 (declining to give deference to *Matter of Beltran* and holding that a conviction for solicitation to possess cocaine is not an offense "relating to" a controlled substance).

Mellouli did not address these more nuanced issues of what kind of conduct could be considered "relating to" a controlled substance other than broadly identifying "drug possession and distribution offenses" of the kind covered by *Paulus*. However, as noted above, the Court made clear that no matter what the underlying conduct was, the starting point for the analysis would have to be a direct link to a CSA-listed drug. Thus, while the holdings of some of these cases may remain good law insofar as they address the broad reach of conduct covered by the "relating to" language in the Act, post-*Mellouli*, the analysis would have to focus first on the substance at issue.

Post-*Mellouli* Case Law and Analysis: Circuit Courts Fall in Line

Post-*Mellouli*, circuit courts have fallen in line and upheld drug convictions as offenses "relating to" a controlled substance only after comparing the state drug schedule with the Federal drug schedule and finding that the drug at issue was listed in the CSA. In *Swaby v. Yates*, 847 F.3d 62, 65 (1st Cir. 2017), the First Circuit noted that one drug in the Rhode Island drug schedules did not match the CSA; thus, the conviction was potentially not a removable offense. However, the First Circuit then determined that the statute was divisible and, looking to the plea documents, determined the respondent was removable because his conviction had involved marijuana, a Federally-listed drug. *Id.* at 69. The Second Circuit in

Collymore v. Lynch, 828 F.3d 139, 145 (2d Cir. 2016), citing *Mellouli*, compared the state and Federal drug schedules, and concluded that the Pennsylvania schedule was not overbroad because all of the substances proscribed by the Pennsylvania law were also listed in the Federal schedules of controlled substances. The Fifth Circuit in *Le v. Lynch*, 819 F.3d 98, 110 (5th Cir. 2016), decided that, in light of *Mellouli*, an alien could meet his burden of proving eligibility for relief from removal, and that his conviction did not relate to a controlled substance, by showing that his conviction did not involve a drug listed in the Federal controlled substance schedules. However, it found that the respondent was ineligible for relief as he did not meet his burden to establish that the drug involved was not a CSA-listed drug.

The Ninth Circuit rejected and overruled its prior decisions which conflicted with *Mellouli*, including *United States v. Oseguera-Madriral*, 700 F.3d 1196, 1199–1200 (9th Cir. 2012); *Bermudez v. Holder*, 586 F.3d 1167, 1168–69 (9th Cir. 2009); *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009); and *Luu-Le*, 224 F.3d at 916. In *Madriral-Barcenas v. Lynch*, 797 F.3d 643, 644–45 (9th Cir. 2015), the Ninth Circuit held that a Nevada drug paraphernalia conviction was not categorically a conviction “relating to” a controlled substance because the Nevada drug schedule included some substances not on the Federal schedule. The court stated: “Analytically, it is unimportant whether Nevada regulates sixteen substances that are not controlled substances under [F]ederal law, as Petitioner claims, or only four, as the government concedes; it is the fact, not the degree, of overinclusiveness that matters.” *Id.* at 645.

Although it has been less than two years since *Mellouli* and there are only a handful of precedential decisions which rely on its reasoning, the decision’s narrowing effect on the “relating to a controlled substance” removability charge is evident.

Expansion of the *Mellouli* Holding into “Illicit Trafficking” and perhaps “Reason to Believe”

The Supreme Court’s decision in *Mellouli* also had implications for other drug removability statutes. For the aggravated felony of illicit trafficking in a controlled substance under section 101(a)(43)(B) of the Act, *Mellouli* implies that there is no longer a question that the drug at issue in an alien’s conviction must also be a drug listed in

the CSA. Because the aggravated felony provision also includes the phrase “controlled substance (as defined in [21 U.S.C. § 802]),” there does not appear to be any ambiguity about whether this provision of the Act also requires a correspondence between drug schedules. In *Singh v. Attorney General*, 839 F.3d 273, 285–86 (3d Cir. 2016), the Third Circuit compared the drugs covered by the CSA to the drugs covered by the specific Pennsylvania statute to conclude that the conviction did not “sufficiently match the elements of the generic [F]ederal offense” and was thus not an aggravated felony.

For the “reason to believe” charge, which calls for the removal of an alien whom the Attorney General has reason to believe is or has been an illicit trafficker in any controlled substance or in any listed chemical in section 102 of the CSA, *see* section 212(a)(2)(C)(i) of the Act, there have been no precedential Board or circuit court decisions post-*Mellouli*. However, prior to *Mellouli*, several circuit courts required a match between the drug at issue and the Federal list, given the provision’s direct reference to the CSA. The Fourth Circuit in *Argaw v. Ashcroft*, 395 F.3d 521 (4th Cir. 2005), held that a drug conviction did not trigger removability under the “reason to believe” provision where the drug involved was “khat,” a traditional herbal stimulant widely used in east Africa and the lower Arabian peninsula, because khat itself is not listed in the CSA and because it was not chemically analyzed to determine if it contained a controlled substance. Thus, although arguably the broadest of the Act’s drug removability charges given that a conviction is unnecessary and only a “reason to believe” that the person is a trafficker is required, the requirement that the drug appear on the Federal schedule for this removability provision is consistent with *Mellouli* and may remain unchanged.

Unanswered Questions, with Guidance from *Mellouli*

Elements vs. Means

Mellouli provided insight, but left unanswered several other issues that often emerge when analyzing whether a conviction “relates to” a controlled substance. One of these issues is how to determine whether different controlled substances referenced in a conviction statute constitute individual “elements” of the statute or alternate “means.” *Mellouli* stated, without further elaborating on the issue: “[T]o trigger removal under § 1227(a)(2)(B)(i),

the Government must connect an element of the alien's conviction to a drug "defined in [§ 802]." *Mellouli*, 135 S. Ct. at 1991 (second alteration in original).

Prior to *Mellouli*, some courts employed the modified categorical approach to review the record of conviction and determine what drug was involved in the conviction. See, e.g., *Bedolla Avila v. Att'y Gen.*, 826 F.3d 662, 666 (3d Cir. 2016); *Medina-Lara v. Holder*, 771 F.3d 1106, 1113–15 (9th Cir. 2014); *Alvarado v. Holder*, 759 F.3d 1121, 1130–33 (9th Cir. 2014); *Cabantac v. Holder*, 736 F.3d 787, 793–94 (9th Cir. 2013). Although every state drug statute varies in terms of statutory language, interpretation by state courts, and potential punishments, courts were left with little guidance on how to determine whether the specific drug involved is an element of the statute of conviction. A year after *Mellouli*, however, the Supreme Court issued its flagship decision on elements versus means, *Mathis v. United States*, 136 S. Ct. 2243 (2016). *Mathis* held that courts are not permitted to explore the facts of an offense where the statute of conviction enumerates alternative factual means of satisfying a single element and provided guidance to lower courts on how to determine whether a statute's alternatively listed items are elements or means. *Id.* at 2253–54, 2256–57.

Post-*Mellouli* and *Mathis*, the Second Circuit held that New York Penal Law § 220.31, describing the fifth-degree criminal sale of a controlled substance, is an indivisible statute because the controlled substances listed in the New York drug schedules do not constitute separate elements of the crime, but merely different means by which to commit the single crime created under the statute. See *Harbin v. Sessions*, 860 F.3d 58, 66–67 (2d Cir. 2017). Next, the Second Circuit found that the New York drug schedules include a substance not listed under the CSA, and therefore a conviction under § 220.31 is not categorically an aggravated felony because the statute is overbroad and punishes conduct that is not criminal under the CSA. See *id.* at 68. Previously, the Second Circuit issued a decision upholding a "relating to" charge without reaching the question of divisibility or applying a modified categorical approach, finding that the Pennsylvania drug schedule and CSA proscribed the same substances. *Collymore*, 828 F.3d at 146.

In addition to developments in the Second Circuit, the Third Circuit issued two decisions holding that the type of drug in a Pennsylvania drug statute was

an element of the offense, thus warranting application of the modified categorical approach. See *United States v. Henderson*, 841 F.3d 623, 627–31 (3d Cir. 2016); *Singh*, 839 F.3d at 282. The Fifth and Eleventh Circuits issued decisions which addressed the divisibility of the *conduct* portion of the statute at issue without addressing whether the list of controlled substances make the statute divisible. See *Spaho v. U.S. Att'y Gen.*, 837 F.3d 1172, 1177–79 (11th Cir. 2016); *United States v. Hinkle*, 832 F.3d 569, 575–76 (5th Cir. 2016). Thus, the issue of drug divisibility, while guided by *Mellouli* and clarified by *Mathis*, is still somewhat hazy.

The Modified Categorical Approach and a Review of Documents

Another lingering question after *Mellouli* relates to the types of documents that courts may review under the modified categorical approach. In *Mellouli*, the complaint stated that the paraphernalia at issue was a sock but did not identify the type of controlled substance. *Mellouli* 135 S. Ct. at 1981. In the probable cause affidavit, the respondent acknowledged that the four orange tablets in the sock were Adderall, a controlled substance under Kansas and Federal law. *Id.* at 1985. Nonetheless, given that the Court had declined to decide the divisibility of the statute, it therefore declined to address whether the modified categorical approach applied. Instead, the *Mellouli* court concluded that the Government had not "connect[ed] an element" of the conviction to a CSA-listed drug, and provided no additional analysis as to whether the probable-cause affidavit was a reviewable document under the modified categorical approach. *Id.* at 1991.

The Supreme Court had previously provided lower courts with a non-exhaustive list of reviewable documents under the modified categorical approach, see *Shepard v. United States*, 544 U.S. 13 (2005), and courts have continued to rely on those documents after *Mellouli* to identify the drug at issue. In *Ruiz-Vidal v. Lynch*, 803 F.3d 1049, 1053–54 (9th Cir. 2015), *cert. denied*, 136 S. Ct. 1388 (2016), the Ninth Circuit held that a California conviction for simple possession was an offense relating to a controlled substance because the alien was charged with *sale of methamphetamine* and he pleaded to and was convicted of a "lesser included/reasonably related offense" *to the original charge*. Thus, the conviction was necessarily for possession of methamphetamine, which is

a drug listed under the CSA. In *Swaby*, 847 F.3d at 69, the First Circuit analyzed the “relevant plea documents” to conclude that the conviction involved marijuana, a CSA-listed drug. In *Henderson*, 841 F.3d at 631, the Third Circuit upheld the district court’s reliance on the “charging instrument, change of plea form, sentencing order, and a conviction document” to determine that the alien “pled guilty to and was sentenced for a serious drug offense within the meaning of the ACCA.” In *Flores-Larrazola v. Lynch*, 840 F.3d 234, 238–40 (5th Cir. 2016), the Fifth Circuit reviewed the charging document, judgment, and commitment order to conclude that the petitioner was convicted of possessing marijuana *with intent to deliver*. In *Singh*, 839 F.3d at 284–85, the Third Circuit reviewed the plea agreement and colloquy to conclude that the conviction did not involve a Federally-listed drug. See also *Spaho*, 837 F.3d at 1178–79 (stating that the alien was “adjudged guilty of selling a controlled substance” without specifically stating which document stated so).

Realistic Probability Test

Finally, *Mellouli* left many courts guessing as to the applicability of the realistic probability test, which instructs courts to assess whether there is “a realistic probability, not a theoretical possibility, that the State would apply its statute to conduct that falls outside the generic definition of a crime.” *Matter of Ferreira*, 26 I&N Dec. 415, 419 (BIA 2014) (citing *Moncrieffe v. Holder*, 133 S. Ct. 1678, 1685 (2013)). The Court in *Mellouli* was seemingly aware of the realistic probability issue; both parties and multiple amicus curiae briefed the issue. See, e.g., Brief for the Respondent at 39, n.6, *Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013), 2014 WL 6613094; Brief Amici Curiae of the National Immigrant Justice Center and American Immigration Lawyers Association in Support of Petitioner, *Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013), 2014 WL 4804043. However, the *Mellouli* Court declined to discuss its applicability and instead stated in a footnote: “The Government acknowledges that *Ferreira* assumed the applicability of [the *Paulus*] framework. . . . Whether *Ferreira* applied that framework correctly is not a matter this case calls upon us to decide.” *Mellouli*, 135 S. Ct. at 1988 n.8 (alteration in original) (citation omitted). Thus, it left the future applicability of the realistic probability test unclear: Was the test not needed in this scenario because the *Paulus* framework applied? Or did the Court decline to address the issue for some other reason?

Post-*Mellouli*, the First and Third Circuits have similarly declined to employ the realistic probability test when analyzing whether a drug statute is a categorical match to a Federal crime. The First Circuit cited *Mellouli* for the proposition that a Rhode Island drug offense is “simply too broad to qualify as a predicate offense under the categorical approach, whether or not there is a realistic probability that the state actually will prosecute offenses involving that particular drug.” *Swaby*, 847 F.3d at 66. The Third Circuit held that the Board erred in applying the realistic probability test to a Pennsylvania drug statute, making the following distinction in a footnote: “We recognize *Moncrieffe* approved of something akin to a ‘realistic probability’ inquiry. But in that case (and in *Duenas-Alvarez*), the relevant elements were identical. Here, the elements of the crime of conviction are not the same as the elements of the generic [F]ederal offense. The Supreme Court has never conducted a ‘realistic probability’ inquiry in such a case. Accordingly, we believe this is a case where the ‘realistic probability’ language is simply not meant to apply.” *Singh*, 839 F.3d at 286 n.10. Thus, the trend so far is to follow *Mellouli*’s non-application of the realistic probability test.

Conclusion

Mellouli served to halt the broadening of the “relating to” charge into the realm of drug paraphernalia convictions by clearly holding that for a paraphernalia conviction to trigger removability as an offense “relating to” a controlled substance, the conviction must involve a CSA-listed drug. 135 S. Ct. at 1989–91. This decision provided needed guidance to lower courts on the scope of the “relating to” charge and also spilled over into other drug removability statutes and state conviction statutes. However, *Mellouli* left several key questions unanswered, which opens the door to further development. But for now, the possession of socks as drug paraphernalia must be tied to a CSA-listed substance to constitute a removable offense.

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¹ If the alien has not yet been admitted to the United States or is applying for admission, the Department of Homeland Security (“DHS”) may charge that he or she is inadmissible for being a drug abuser or addict, having a conviction for (or admits having committed, or admits committing acts which constitute the

essential elements of) an offense “relating to a controlled substance,” or for being an illicit trafficker in an controlled substance. Sections 212(a)(1)(A)(iv), (a)(2)(A)(i)(II), (a)(2)(C) of the Immigration and Nationality Act, 8 U.S.C. §§ 1182(a)(1)(A)(iv), (a)(2)(A)(i)(II), (a)(2)(C). If the alien has been admitted to the United States, DHS may charge that he or she is removable for being a drug abuser or addict, having a conviction for an offense “relating to a controlled substance,” or for having a conviction for an “illicit trafficking in a controlled substance” aggravated felony. Sections 237 (a)(2)(A)(iii), (a)(2)(B)(i)-(ii), 8 U.S.C. §§ 1227(a)(2)(A)(iii), (a)(2)(B)(i)-(ii); section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B).

² The inadmissibility provision further provides that an alien is inadmissible when he or she admits having committed or admits committing acts that constitute the essential elements of a violation of law relating to a controlled substance. *See* section 212(a)(2)(A)(i)(II) of the Act.

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