A GUIDE* FOR NEW YORK STATE CRIMINAL DEFENSE ATTORNEYS: HOW *MELLOULI V. LYNCH* IMPACTS CONTROLLED SUBSTANCE[1] CASES FOR YOUR IMMIGRANT[2] CLIENTS

Introduction

On June 1, 2015, the United States Supreme Court vacated the deportation order of an immigrant convicted in Kansas for possession of drug paraphernalia—in his case, a sock containing four unidentified pills. In *Mellouli v. Lynch*[3], the Court held that where the government seeks to deport an immigrant for a drug paraphernalia conviction, the government must tie the conviction to a substance listed on the federal controlled substance schedules. This short practice advisory explains the *Mellouli* decision's broader implications for categories of controlled substance and drug offenses, including simple possession, possession with intent to distribute, distribution, sale, and certain medical offenses. In cases where your immigrant client cannot avoid a disposition under Article 220, controlled substances, of the New York Penal Law ("NYPL"), *Mellouli* provides that your client *may* still avoid future immigration consequences if you can negotiate a tailored plea agreement and/or allocution. This advisory details what such a plea agreement and/or allocution would look like.

Who Is Mounes Mellouli and Why Was He Deported?

Mounes Mellouli is a lawful permanent resident ("LPR" or green card holder) who lived in the United States first as a college student and later as an actuary and math professor. In 2010, he was arrested in Kansas and charged with possessing four pills of Adderall in his sock. He pleaded guilty to misdemeanor possession of drug paraphernalia—a common plea disposition for low-level drug cases in Kansas and other jurisdictions. He was sentenced to a suspended jail term and one year probation. Relevant to the legal question at issue here, his plea agreement and colloquy contained no reference to Adderall or any other controlled substance. The federal

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 Special thanks to Manny Vargas and Benita Jain for their insightful comments and edits. This advisory was produced for criminal defense attorneys across New York State. It is not a substitute for a client-specific immigration consultation, which remains the most prudent course of action for minimizing the immigration consequences of criminal arrests and convictions.

[1] This advisory uses the term "controlled substances" as defined in NYPL § 220.00(5). It does not address marihuana offenses, which also carry immigration consequences and require a separate analysis.

[2] The reach of this advisory is limited. It primarily provides advice for protecting lawful permanent residents and undocumented people from the reach of the controlled substance grounds of deportability and inadmissibility at 8 U.S.C. §§ 1227(a)(2)(B)(i) (deportability) and 1182(a)(2)(A)(i)(II) (inadmissibility). It does not address the impact of drug arrests and convictions on eligibility for immigrants seeking asylum or other protected status, trafficking victim status, Temporary Protected Status, or administrative relief under President Obama's Executive Action programs: Deferred Action for Childhood Arrivals (DACA) and Deferred Action for Parental Accountability (DAPA).

[3] 133 S. Ct. 1980 (2015).

government subsequently initiated deportation proceedings against Mr. Mellouli, alleging the drug paraphernalia conviction was, under immigration law, a conviction relating to a federally controlled substance. An Immigration Judge ordered deportation, and the Board of Immigration Appeals ("BIA") and the U.S. Court of Appeals for the Eighth Circuit affirmed.

What Did the Supreme Court Decide in *Mellouli v. Lynch*?

The Supreme Court granted certiorari to decide the circumstances under which the federal government may use a State drug or controlled substance conviction as a predicate for a deportation order. In *Mellouli* the Court examined the specific subsection of the Immigration and Nationality Act ("INA") that authorizes deportation based on a conviction "relating to" a controlled substance as defined in the federal Controlled Substances Act, 21 U.S.C. § 802. The Court found that for a State conviction to trigger this deportability provision, the federal government must demonstrate that the conviction involved a substance controlled by federal law. The Court found insufficient the government's argument in *Mellouli* that paraphernalia and similar offenses *generally* relate to the drug trade.

How Does *Mellouli* Interact with Article 220 of the NYPL?

Kansas Controls Substances Not Controlled by Federal Law

Mr. Mellouli was prosecuted and convicted of a drug paraphernalia offense under Kansas law. Kansas, like New York, controls substances that the federal government does not. For example, at the time of Mr. Mellouli's conviction in 2010, Kansas controlled at least nine substances not controlled by federal law, including Salvia divinorum, Datura stramonium (commonly known as gypsum weed or jimson weed), and Butyl nitrite. The record of conviction in Mr. Mellouli's case did not specify the identity of the controlled substance involved in his conviction. Because Kansas controls more substances than the federal government, the Court could not conclude that his conviction related to a federal controlled substance and therefore could not authorize Mr. Mellouli's deportation based on this conviction.

New York Also Controls Substances Not Controlled by Federal Law

Since 1990 New York has controlled at least one substance that is not also controlled by federal law: Human Chorionic Gonadotropin ("HCG"). *See* N.Y. Pub. Health Law § 3306. HCG is located on New York's Schedule III, rendering overbroad (for immigration purposes) the statutory term "controlled substance" as defined in NYPL § 220.00(5).[4]

What Should New York Criminal Defense Lawyers Do in Light of Mellouli?

Because of *Mellouli*, future convictions under the NYPL Article 220 provisions that utilize the term "controlled substance" *may* not trigger deportability and other adverse immigration consequences. Under the "categorical approach"—a methodology created by the

[4] Over time, New York's controlled substance schedules have diverged from the federal schedules in other ways. For example, in 2012 New York started to control a substance called Tramadol which was not added to the federal schedules until 2014. *Compare* 2012 Sess. Law News of N.Y. Ch. 447 (McKinney) *with* 79 Fed. Reg. 37623 (July 2, 2014). It is also possible that Ethylpropion, which is controlled by New York, is not also controlled by federal law, though this possible difference requires further investigation. If you believe a substance controlled by New York State is not controlled by federal law, please contact Andrew Wachtenheim at andrew@immdefense.org.

Supreme Court—an adjudicator is permitted to consult, for purposes of determining whether a criminal conviction may serve as a predicate offense for a federal sentencing enhancement or deportation order, the statutory language of a prior criminal offense and also in some cases a limited range of documents from that defendant's prior criminal case. *See Taylor v. United States*, 495 U.S. 575 (1990) (federal sentencing consequences); *Moncrieffe v. Holder*, 133 S. Ct. 1678 (2012) (immigration consequences). In New York State drug cases, if an immigrant client's record of conviction—most particularly a plea agreement or plea colloquy—leaves out the specific identity of the substance involved in the offense, a correct reading of *Mellouli* mandates that the conviction cannot trigger deportation. This reading of *Mellouli* may, for example, affect the immigration implications of dispositions under the following NYPL provisions within Article 220, which reference the NY "controlled substance" drug term (or no specific term):

§ 220.03	criminal possession of a **controlled substance** 7°;
§ 220.06(1)	criminal possession of a **controlled substance** 5°;
§ 220.31	criminal sale of a **controlled substance** 5°;
§ 220.34(7)	criminal sale of a **controlled substance** 4°;
§ 220.45	criminally possessing a **hypodermic instrument**;
§ 220.65	criminal sale of a prescription for a **controlled substance** or of a controlled substance by a practitioner or pharmacist.

CAUTION: even under *Mellouli*, NYPL drug paraphernalia provisions are ***not*** immigration-safe, as they do not penalize "controlled substances" as defined in NYPL § 220.00(5); they penalize "narcotics,"[5] all of which are controlled under federal law. The argument under *Mellouli* applies to the set of criminal cases where your client cannot avoid conviction under an Article 220 provision—meaning, in practice your client cannot resolve his/her case with an immigration-safer disposition like a plea to NYPL § 140.05 (trespass violation) or § 240.20 (disorderly conduct violation) and must plead guilty to an Article 220 controlled substances section of the NYPL. In such cases, New York criminal defense lawyers should seek to exclude from the record of conviction (particularly the plea colloquy or plea agreement) the specific identity of the controlled substance involved in the case. Even with such a conviction, your client might still be able to avoid immigration consequences, provided her/his defense lawyer can keep the record of conviction from establishing the specific identity of the controlled substance involved in the offense. Your immigrant client *may*, in future immigration proceedings, be able to argue that her/his conviction is not for a federally controlled substance.

CAUTION: Two unresolved principles within immigration law prevent any definite conclusion regarding the future immigration consequences of findings of guilt under the above NYPL provisions: 1) the realistic probability standard, and 2) the immigrant's burden of proving eligibility for discretionary relief from removal or for lawful status in the case of an undocumented individual. The federal government argues that the realistic probability standard requires a sufficient showing of actual prosecutions in New York involving the substances that were not federally controlled at the time of conviction; the arguable obscurity of New York's

[5] *See* NYPL § 220.00(7).

substances could preclude a defense to deportation on this basis depending on how the case law develops on this question.[6] The federal government also argues that in some circumstances the immigrant must affirmatively demonstrate that his/her conviction did not involve a federally controlled substance. Under this theory, an opaque record of conviction would prevent the immigrant from satisfying this burden of proof. These two principles are the subject of active litigation before the immigration agency and the federal courts, and for this reason it cannot be stated conclusively that these penal law provisions are entirely immigration-safe.

Future Changes in New York State Law and Federal Immigration and Controlled Substance Law

The defense to deportation clarified in *Mellouli* depends on New York State continuing to control substances that are not also controlled by federal law. Future legislative and regulatory changes to New York and federal controlled substance schedules could alter the immigration consequences and advisability of controlled substance pleas and other drug pleas for immigrant defendants. And, as noted above, developments within immigration jurisprudence—specifically, with respect to the realistic probability standard and burden of proof in removal proceedings—could similarly affect the recommended strategies for defense attorneys representing immigrant defendants. Defense lawyers are advised to follow developments in the law and future advisories or alerts regarding these topics from the Immigrant Defense Project.

[6] Interestingly, the Supreme Court in *Mellouli* did not address the realistic probability test, indicating that the Court does not consider it necessary for the immigrant to show actual prosecutions/convictions of the non-federal substances to defend against a controlled substance deportability or inadmissibility charge.