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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[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]

How Does Mellouli *Impact the Immigration Implications of Controlled Substance Cases in New York?*

Because of *Mellouli*, future convictions under the NYPL Article 220 provisions that utilize the term "controlled substance" *may* not trigger deportability and other adverse

[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.

immigration consequences. Under the "categorical approach"—a methodology created by the 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

[5] *See* NYPL § 220.00(7).

were not federally controlled at the time of conviction; the arguable obscurity of New York's 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.

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

To effectively represent an immigrant client charged with a controlled substance offense, the Immigrant Defense Project recommends the following steps:

1) Ask every client at the initial meeting where the client was born.
2) If the answer is a country other than the United States, collect information about the client's immigration history and status.
3) Promptly assess the strength of the state's case and the likelihood of success at trial, including the strategic impact of any pre-trial motions. It is critical to make this assessment early on in the case, as this assessment, combined with the immigration implications of various potential dispositions, will guide the negotiation strategy.
4) **As soon as practicable after steps 2 & 3**, **seek a consult with an expert in the intersection of criminal and immigration ("crim-imm") law.**[7]
5) Formulate a negotiation strategy. The following factors will typically inform your strategy: 1) the immigration implications of various dispositions, 2) the

[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.

[7] New York is in the process of creating Regional Immigration Assistance Centers to provide expertise in the intersection of criminal and immigration law to all attorneys providing mandated representation. These Centers will provide plea consults in individual cases. If your Regional Center has not yet been established, defense attorneys may call the IDP hotline for a plea consult. For information to collect prior to making the call, *see* http://immigrantdefenseproject.org/hotline.

client's goals relative to the case, 3) the strength of pre-trial motions/trial defenses, 4) the client's equities, and 5) the plea bargaining practices and parameters in your jurisdiction. If avoiding removal from the U.S. is the client's top priority, then the negotiation strategy will focus on attaining that goal.

6) If it is not feasible to avoid a plea disposition under Article 220, given the circumstances of the individual case, consider attempting to achieve the type of disposition described in this advisory: a plea to one of the Article 220 controlled substance offenses on the above list, keeping the identity of the controlled substance out of the record of conviction, particularly the plea agreement and colloquy. It is critical to consult with a "crim-imm" expert on the details of the disposition.
7) Advise the client, relying on the information received from the "crim-imm" expert, as to the immigration (and criminal) consequences of the disposition. This advice will vary depending on the client's unique situation. **Your advice should not change based on a disposition that keeps the identity of the controlled substance out of the record of conviction.** This is a strategy that may prove successful in the immigration context, but at the time of this writing it is premature to advise an immigrant client that he or she has a chance of avoiding deportation or a permanent bar to lawful status based on this strategy.
8) If the client chooses to accept the disposition and does so, you should still immediately file a notice of appeal. Defense attorneys should file a notice of appeal in every case where an immigrant client pleads guilty to a disposition that may trigger immigration consequences. The very existence of a direct appeal, even if ultimately unsuccessful, may substantially improve the client's immigration situation. The best practice is to file a notice of appeal in every immigrant client's case at disposition.