U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: W[redacted], W[redacted] S[redacted] A[redacted]

Date of this Notice: 4/15/2021

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:

MONSKY, MEGAN
FOOTE
Pepper, S. Kathleen
O'Connor, Blair

Userteam: Docket

File: A[redacted] – Batavia, NY

Date: APR 15 2021

In re: W[redacted] S[redacted] W[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: John Peng, Esquire

APPLICATION: Termination

The respondent appeals from an Immigration Judge's August 26, 2020, decision denying his motion to terminate proceedings and a September 16, 2020, decision ordering him removed from the United States to his native Jamaica.[1] We will sustain the respondent's appeal and terminate proceedings.

We review findings of fact, including credibility findings, for clear error. 8 C.F.R. § 1003.1(d)(3)(i). We review questions of law, discretion, or judgment, and all other issues de novo. 8 C.F.R. § 1003.1(d)(3)(ii).

In May 2017 and again in April 2018, the respondent was convicted of criminal possession of a controlled substance in the fourth degree in violation of N.Y. PENAL LAW § 220.09(1) (hereafter "section 220.09(1)"), which prohibits the possession of one-eighth ounce or more of a "narcotic drug."[2] The issue on appeal, as it was below, is whether either of these convictions render the respondent removable as charged under section 237(a)(2)(B)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1227(a)(2)(B)(i), as an alien convicted of a violation of State law "relating to a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." Upon our de novo review, we conclude that they do not. 8 C.F.R. § 1003.1(d)(3)(ii).

To determine whether a respondent is removable under section 237(a)(2)(B)(i) of the Act, we employ the categorical approach, which requires us to focus on the elements of the offense of conviction rather than the respondent's conduct in committing the offense. *Matter of P-B-B-*, 28 I&N Dec. 43, 45 (BIA 2020). Applying that approach, we agree with the respondent that section 220.09(1) is categorically overbroad because it prohibits the possession of some "narcotic

[1] The Department of Homeland Security's ("DHS") brief filed on January 4, 2021, was rejected as untimely. We also deny the DHS's January 19, 2021, motion to accept late filing, as the motion is not supported by documentary evidence to support its assertions regarding the basis for the untimely filing.

[2] In part of her decision, the Immigration Judge mistakenly refers to the respondent's convictions as being in violation of N.Y. PENAL LAW § 220.16(1) (*Compare* Exh. 1; IJ at 1 *with* IJ at 2-3).

drugs" that are not "controlled substances" as defined in the Controlled Substances Act ("CSA").[3] *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980, 1991 (2015) (holding that, "to trigger removal under [section 237(a)(2)(B)(i) of the Act], the Government must connect an element of the alien's conviction to a drug 'defined in [§ 802]'").

New York law defines the term "narcotic drug" to mean "any controlled substance listed in schedule I(b), I(c), II(b) or II(c) other than methadone." N.Y. PENAL LAW § 220.00(7). When the respondent was convicted in May 2017 and April 2018, New York's schedule II(b)(1) covered "any ... derivative ... of opium" "[u]nless specifically excepted or unless listed in another schedule." N.Y. PUB. HEALTH LAW § 3306, sched. II(b)(1). Then (as today), New York law excepted six opium derivatives from control: "apomorphine, dextrorphan, nalbuphine, nalmefene, naloxone, and naltrexone." *Id.* By contrast, the federal drug schedules in effect in May 2017, which also included all derivatives of opium unless expressly excepted, excluded eight opium derivatives from control: "apomorphine, thebaine-derived butorphanol, dextrorphan, nalbuphine, nalmefene, naloxegol, naloxone, and naltrexone." 21 C.F.R. § 1308.12(b)(1). In September 2017, naldemedine was added as a ninth excluded opium derivative from control. *Id.* Hence, in May 2017, the term "narcotic drug" used in section 220.09(1) included two opium derivatives (thebaine-derived butorphanol and naloxegol) that were not then federally controlled substances, and in April 2018, the term "narcotic drug" used in section 220.09(1) included three opium derivatives (thebaine-derived butorphanol, naloxegol, and naldemedine) that were not then federally controlled substances.

Contrary to the Immigration Judge's conclusion (IJ at 2),[4] naloxegol and naldemedine have not been excluded from control pursuant to a New York State Health Department regulation, under which "chemical preparations and mixtures listed in [21 C.F.R. § 1308.24]" are automatically removed from New York's schedules. N.Y. COMP. CODES R. & REGS. tit. 10, § 80.3(a)(3); *see also* N.Y. PUB. HEALTH LAW § 3307(3). This is because naloxegol and naldemedine are not "chemical preparations and mixtures listed in [21 C.F.R. § 1308.24]." *See* N.Y. COMP. CODES R. & REGS. tit. 10, § 80.3(a)(3).

Under the CSA, the Attorney General (acting through the Drug Enforcement Agency ("DEA")) can exclude from control certain drugs that would otherwise qualify as "controlled substances." One avenue for doing so, authorized by 21 U.S.C. § 811(g)(3)(B), is to exempt a substance that "does not present any potential for abuse" and that is "intended for laboratory, industrial, educational, or special research purposes and not for general administration to a human being or other animal." 21 C.F.R. §§ 1308.23(a), 1208.24. That is the avenue for removal referenced in section 80.3(a)(3) of New York's Health Department regulations.

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[3] Though we use the present tense for ease of reference, the respondent's removability depends on the law in effect at the time of his conviction. *Doe v. Sessions*, 886 F.3d 203, 208 (2d Cir. 2018). Thus, the categorical approach requires us to compare the New York and federal drug schedules as they existed in May 2017 and April 2018.

[4] The Immigration Judge did not discuss thebaine-derived butorphanol.

However, the CSA also allows the DEA, "by rule," to simply "remove any drug or other substance from the schedules if ... the drug or other substance does not meet the requirements for inclusion in any schedule." 21 U.S.C. § 811(a)(2). When the DEA removed thebaine-derived butorphanol, naloxegol, and naldemedine from the federal schedules, it did so in rules which stated that the substances were being "decontrolled" under 21 U.S.C. § 811(a)(2), as opposed to "exempted" under 21 U.S.C. § 811(g)(3). *See* 57 Fed. Reg. 31,126 (July 6, 1992) (thebaine-derived butorphanol); 80 Fed. Reg. 3,468 (Jan. 23, 2015) (naloxegol); 82 Fed. Reg. 45,436 (Sept. 29, 2017) (naldemedine).[5]

In sum, because thebaine-derived butorphanol, naloxegol, and naldemedine were not "exempted" from federal control under 21 U.S.C. § 811(g)(3) and 21 C.F.R. § 1308.24, they are also not exempted from State control under section 80.3(a)(3) of New York's Health Department regulations. Moreover, research has not revealed a New York statute or rule that automatically removes a drug from the State schedules when it is removed from the federal schedules pursuant to 21 U.S.C. § 811(a)(2). Accordingly, it follows that thebaine-derived butorphanol and naloxegol, were "narcotic drugs" under New York law in May 2017, and thebaine-derived butorphanol, naloxegol, and naldemedine were "narcotic drugs" under New York law in April 2018.

Despite this asymmetry between the New York and federal schedules, the Immigration Judge concluded that section 220.09(1) remains a categorical match to section 237(a)(2)(B)(i) of the Act because there is no "realistic probability" that New York would actually prosecute anyone for possessing a substance not included in the federal schedules (IJ at 3-4). While this argument aligns with our own view of the realistic probability test as set forth in *Matter of Navarro Guadarrama*, 27 I&N Dec. 560, 562-68 (BIA 2019), and *Matter of Ferreira*, 26 I&N Dec. 415, 421 (BIA 2014), it is foreclosed by controlling circuit law under which the inclusion of a single non-federally controlled substance in New York's drug schedules has been deemed sufficient to defeat a categorical match to federal laws incorporating the same federal "controlled substance" definition at issue here. *United States v. Townsend*, 897 F.3d 66, 74 (2d Cir. 2018); *Harbin v. Sessions*, 860 F.3d 58, 68 (2d Cir. 2017); *see also Hylton v. Sessions*, 897 F.3d 57, 63 (2d Cir. 2018) (holding that an alien need not identify actual prosecutions for "'. . . conduct that falls outside the generic definition of a crime . . . when the statutory language itself, rather than the application of legal imagination to that language, creates the realistic probability that a state would apply the statute to conduct beyond the generic definition.'") (internal citations omitted).[6]

As section 220.09(1) is categorically overbroad under controlling circuit law,[7] the respondent's May 2017 and April 2018 convictions cannot support his removal unless section 220.09(1) is

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[5] When the DEA exempts a substance from control pursuant to 21 U.S.C. § 811(g)(3) and 21 C.F.R. §§ 1308.23-1308.24, it says so explicitly in the relevant rule. *See, e.g.*, 83 Fed. Reg. 62,347 (Dec. 3, 2018); 78 Fed. Reg. 4,446 (Jan. 22, 2013); 57 Fed. Reg. 5,818 (Feb. 18, 1992).

[6] We discern no basis for distinguishing *Harbin* and *Hylton* on their facts.

[7] Because section 220.09(1) is overbroad based on its application to thebaine-derived butorphanol, naloxegol, and naldemedine, we find it unnecessary to address the respondent's argument that it is also overbroad by virtue of its application to certain "isomers" that are not federally controlled.

"divisible" with respect to the identity of the particular "narcotic drug" a defendant possesses. *Matter of Chairez*, 26 I&N Dec. 819, 819-20 (BIA 2016). Section 220.09(1) is divisible in this sense only if the identity of the particular "narcotic drug" a defendant possesses is an "element" of the offense that must be proved to a unanimous jury beyond a reasonable doubt, as opposed to a mere "brute fact" about which the jury need not agree in order to find a defendant guilty. *Mathis v. United States*, 136 S. Ct. 2243, 2248-49 (2016).

New York case law indicates that section 220.09(1), like other drug possession statutes, "'does not distinguish between the types of narcotics possessed, but treats all drugs classified as narcotics interchangeably.'" *People v. Kalabakas*, 124 N.Y.S.3d 448, 454 (N.Y. App. Div. 2020) (*quoting People v. Martin*, 545 N.Y.S.2d 287, 288 (N.Y. App. Div. 1989)), *leave to appeal denied*, 35 N.Y.3d 1067 (N.Y. 2020).[8] Thus, someone who is arrested for possessing multiple narcotic drugs on the same occasion can only be prosecuted for a single violation of section 220.09(1). *People v. Kalabakas*, 124 N.Y.S.3d at 454; *People v. Miller*, 789 N.Y.S.2d 423 (N.Y. App. Div. 2005); *People v. Maldonado*, 706 N.Y.S.2d 876, 877 (N.Y. App. Div. 2000).[9]

Relying on several of the same cases discussed above, the Second Circuit has concluded in a published opinion that section 220.31 of the New York Penal Law, which prohibits the sale of any "controlled substance," is indivisible as to the identity of the particular drug the defendant sold. *Harbin*, 860 F.3d at 67; *see also Townsend*, 897 F.3d at 70 n.2. We have insufficient grounds for reaching a different conclusion here.

In view of the foregoing, we conclude that the Immigration Judge erred when she found the respondent removable under section 237(a)(2)(B)(i) of the Act on the basis of his May 2017 and April 2018 convictions for violating section 220.09(1). The respondent's appeal will therefore be sustained, the order of removal will be vacated, and the removal proceedings will be terminated.[10] Therefore, we need not and decline to address the respondent's remaining appellate arguments. Accordingly, the following order will be issued.

ORDER: The respondent's appeal is sustained, the order of removal is vacated, and the removal proceedings are terminated.

FOR THE BOARD

[8] *Kalabakas* involved a conviction under section 220.21(1) of the New York Penal Law, which prohibits possession of the same "narcotic drugs" as section 220.09(1), but in larger quantities.

[9] *Miller* and *Maldonado* involved convictions under section 220.16(1) of the New York Penal Law, which prohibits possession for sale of the same "narcotic drugs" as section 220.09(1), but in larger quantities.

[10] No other removal charge has been filed against the respondent, and DHS has not moved to remand the record for the purpose of lodging any additional or substituted charges or allegations, as authorized by 8 C.F.R. §§ 1003.30 and 1240.10(e).

File: A[redacted] – Batavia, NY Date:

In re: W[redacted] S[redacted] W[redacted]

CONCURRING OPINION: Blair O'Connor

I concur with the result in this case because the categorical approach requires me to. I write separately to note that this is one of an increasing number of immigration cases involving New York controlled substance convictions that we are no longer able to find constitute removable offenses because the New York controlled substance schedules contain obscure, rarely heard of substances that have been removed from the federal list of controlled substances. I have serious reservations that Congress could have intended for criminal aliens to escape the immigration consequences of their drug convictions because of the possibility, however remote, that their conviction could have been for an arcane controlled substance that the vast majority of the world has never even heard of.

Moreover, in this case we know for a fact that the respondent did not possess thebaine-derived butorphanol, naloxegol, or naldemedine, and instead possessed heroin. We know this because heroin is the narcotic drug identified in the criminal indictment to which the respondent pled guilty (Exh. 2), and because heroin is the controlled substance identified in the factual allegations that the respondent admitted to on the Notice to Appear (Tr. at 10-11; Exh. 1). So to the casual outside observer, it would beg the question how the respondent cannot be removable for having been convicted of a controlled substance offense. That would be an excellent question for which I am unable to provide a reasonable answer. And that would be because the categorical approach eschews reason and common sense, and instead imposes ridiculous limitations on immigration adjudicators making criminal law determinations, requiring us to close our eyes as to what actually happened and "instead proceed with eyes shut" as to what could have happened, even though we know it did not. *United States v. Chapman*, 866 F.3d 129, 138 (3d Cir. 2017) (Jordan, J., concurring). So instead of simply acknowledging the respondent's admission before the Immigration Judge that he did, in fact, possess heroin, a federally controlled substance, we must engage in an insanely complicated analysis of federal and New York controlled substances laws to determine if New York has exempted thebaine-derived butorphanol, naloxegol, or naldemedine, from its lists of controlled substances. In the process, the respondent "escapes the consequences that Congress intended for [his] conduct." *United States v. Valdivia-Flores*, 876 F.3d 1201, 1211 (9th Cir. 2017) (O'Scannlain, J., specially concurring). I believe the costs of the categorical approach, particularly when applied to criminal law determinations in immigration cases, have long outstripped its benefits, and in the words of Judge Owens, "[a] better mousetrap is long overdue." *Almanza-Arenas v. Lynch*, 815 F.3d 469, 483 (9th Cir. 2016) (Owens, J., concurring) (en banc).