SUPREME COURT OF THE UNITED STATES
MELLOULI V. LYNCH

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I. BACKGROUND OF THE CASE

a. The Petitioner Moones Mellouli was a lawful permanent resident who in 2010, pleaded guilty to a misdemeanor offense under state law (Kansas) for the possession of drug paraphernalia. The paraphernalia involved in his criminal conviction was a sock which Mellouli used to place four unidentified orange tablets. According to the record, Mellouli had acknowledge that the tablets were Adderall – the criminal charge and plea agreement did not identify the controlled substance.
b. Mellouli was sentenced to a suspended term of 359 days and 1 year probation.
c. After the probation was successfully completed in 2012, Mellouli was arrested by ICE officers and charged as removable under §1227 of the INA.
d. The Immigration Judge ordered him deported under 8 U.S.C §1227(a)(2)(B)(i) and the BIA affirmed.
e. The Eight Circuit denied Mellouli's petition for review.

II. REMOVAL UNDER 8 U.S.C. §1227(a)(2)(B)(i)

a. Section 1227 (a)(2)(B)(i) of the Immigration and Nationality Act (INA) authorizes the removal of an alien "convicted of a violation of…any law or regulation of a State, the United States, or a foreign country relating to a controlled substance (**As defined in section 802 of Title 21).**

b. Section 802 defines a controlled substance as a drug or other substance, or immediate precursor included in schedule I, II, III, IV, or V of part B of this subchapter.[1]

III. HISTORY OF DEPORTABLE CONTROLLED SUBSTANCES OFFENSES

a. Originally, the removal statute specifically listed offenses and also substances.
    i. For example it made an alien deportable if convicted of importing, buying, or selling any narcotic drug defined as opium, cocoa leaves, cocaine, or any salt, derivative, or preparation or opium or coca leaves, or cocaine[2]

b. The 1956 version of the statute allowed the removal of any alien "who at any time has been convicted of a violation of, or a conspiracy to violate any law or regulation relating to the illicit possession of or traffic in narcotic drugs…….has been convicted of a violation of, or a conspiracy to violate, any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving

[1] (1) SCHEDULE I.— (A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has no currently accepted medical use in treatment in the United States. (C) There is a lack of accepted safety for use of the drug or other substance under medical supervision. (2) SCHEDULE II.— (A) The drug or other substance has a high potential for abuse. (B) The drug or other substance has a currently accepted medical use in treatment in the United States or a currently accepted medical use with severe restrictions. (C) Abuse of the drug or other substances may lead to severe psychological or physical dependence. (3) SCHEDULE III.— (A) The drug or other substance has a potential for abuse less than the drugs or other substances in schedules I and II. (B) The drug or other substance has a currently accepted medical use in treatment in the United States. (C) Abuse of the drug or other substance may lead to moderate or low physical dependence or high psychological dependence. (4) SCHEDULE IV.— (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule III. (B) The drug or other substance has a currently accepted medical use in treatment in the United States. (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule III. (5) SCHEDULE V.— (A) The drug or other substance has a low potential for abuse relative to the drugs or other substances in schedule IV. (B) The drug or other substance has a currently accepted medical use in treatment in the United States. (C) Abuse of the drug or other substance may lead to limited physical dependence or psychological dependence relative to the drugs or other substances in schedule IV.

[2] Ch. 202, 42 Stat. 596-597.

away, importation, exportation, or the possession….of opium, or coca leaves, marihuana, any salt derivative or preparation of opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate.[3]

c. The Anti-Drug Abuse Act of 1986 replaced the increasingly long list of controlled substances and replaced it by making a reference to section §802.

IV. STATE STATUTES vs. FEDERAL STATUTES – IN THE CONTEXT OF REMOVAL FOR CONTROL SUBSTANCE CONVICTIONS

a. This case involves the interplay of several federal and state statutes.

   i. §1227(a)(2)(B)(i) incorporates 21 U.S.C. §802 which **limits the term controlled substance to a drug or other substance included in one of the five federal schedules.**

   ii. The State (Kansas) statute – Kan. Stat. Ann. §21-5701(a) includes at least nine substances that are not included in the federal lists of controlled substances.

   iii. Kansas State law under §21-5709(b) criminalizes the use or possession with intent to use drug paraphernalia (in this case a sock) to store, conceal, contain, inject, ingest, inhale or otherwise introduce into the human body a controlled substance

   iv. Federal Law **only** criminalizes the sale of or commerce in drug paraphernalia, **NOT** possession. Possession or drug paraphernalia is not criminalized at all under federal law. §863(a)-(b). Also drug paraphernalia under federal law does not include a sock, it includes equipment, product or material primarily *intended or designed* for the use in connection with various drug-related activities.

[3] Narcotic Control Act of 1956, §301(b).

b. In this case, it is important to note that ultimately, although Adderall is found in both State and Federal lists of controlled substance, Mellouli was charged and convicted only for a misdemeanor paraphernalia offense.

V. CATEGORICAL APPROACH

a. The categorical approach is used to determine whether a state conviction renders an alien removable under the immigration statute.
b. Congress established deportation / removal on convictions and not conducts.[4]
c. Very important to understand that this approach looks to the statutory definition of the offense of conviction and **not** the behavior of the alien.[5]
d. As attorneys, a benefit of knowing this is to formulate a plea agreement that would be beneficial to our clients.

VI. THE INCONSISTENCY OF BIA PRECEDENT

a. *Matter of Paulus,* 11 I. & N. Dec. 274 – California controlled certain narcotics not listed as narcotic drugs under federal law. So the BIA concluded that an alien's California conviction for offering to sell an "unidentified narcotic" could not trigger §1227 and therefore is not a removal offense.
    i. Note that under this precedent, Mellouli would also not be deportable since the controlled substance was not identified in the charging document or conviction.

[4] This ideology dates back to 1913. Courts examining the statute concluded that Congress intended to limit the immigration adjudicator's assessment of past criminal convictions to a legal analysis of the statutory offense, y trying immigration penalties only to convictions. *Mellouli v. Lynch,* 575 U.S. (2015).
[5] This is not to be confused with the "Modified Categorical Approach" which applies to state statutes that contain several different crimes describes separately. *Moncrieffe v. Holder,* 569 U.S. (2013). In this version of the approach, a court can look at the charging document and jury instructions, plea agreements or plea colloquy or any other judicial record of the factual basis for the plea. However, any inquiry as to the particular facts / behavior of the case is still off-limits.

b. *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (2009) – The BIA made a distinction of between drug-paraphernalia offenses from drug possession and distribution offenses.
    i. The BIA considered paraphernalia statutes as relating to the entire drug trade.
    ii. It reasoned that a paraphernalia conviction relates to any and all controlled substances, whether or not listed in section §802.

VII. MUST A CONTROL SUBSTANCE BE INCLUDED IN §802 AFTER THE RULING IN MELLOULI?

a. **YES.**
b. The Supreme Court criticized the reasoning of the BIA adopted conflicting positions on the meaning of §1227(a)(2)(B)(i).
c. Essentially the BIA treated more harshly a simple misdemeanor paraphernalia possession offense then a drug possession or drug distribution conviction.
    i. In this case, Mellouli was essentially deported not because of possessing or distributing drugs, but for using a sock to store a controlled substance.
d. The Supreme Court held that there must be a direct link for the Government to connect an element of the alien's conviction to a drug defined in §802.

VIII. CONCLUSION

a. This case overruled the BIA precedent in *Matter of Martinez Espinoza*, which made a distinction between convictions of paraphernalia from possession and distribution. Prior to Mellouli, a conviction for paraphernalia did not require a link between an identified controlled substance as listed in §802 and the paraphernalia. In fact it did not require any identification of a drug at all since the BIA considered any control substance even substances

unidentified as “general drug trade”. As such, convictions for minor crimes of paraphernalia were treated much harsher than convictions for possession and distribution.

b. The Court made it very clear that simply overlapping state and federal drug schedules does **NOT** support the removal of aliens convicted of any drug crime. Removal is only triggered when there is a direct link between an alien’s crime of conviction and a particular federally controlled drug as listed in section §802.

c. It helps us understand the importance of predictability in the administration of immigration law. It helps us understand and predict the immigration consequences of guilty pleas in criminal court so that we as attorneys can fight for pleas that do not expose our clients to the risk of immigration sanctions.