No. _____

In the Supreme Court of the United States

MOONES MELLOULI,
Petitioner,
v.

ERIC H. HOLDER, JR., Attorney General,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

JON LARAMORE
Counsel of Record
D. LUCETTA POPE
DANIEL E. PULLIAM
FAEGRE BAKER DANIELS LLP
300 North Meridian Street
Suite 2700
Indianapolis, IN 46204
(317) 237-0300
jon.laramore@FaegreBD.com

Counsel for Petitioner

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[additional counsel listed inside cover]

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

KATHERINE EVANS
BENJAMIN CASPER
UNIVERSITY OF MINNESOTA LAW SCHOOL
CENTER FOR NEW AMERICANS
FEDERAL IMMIGRATION LITIGATION CLINIC
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-5515
evans407@umn.edu

MICHAEL SHARMA-CRAWFORD
SHARMA-CRAWFORD, ATTYS AT LAW, LLC
515 Avenida Cesar E. Chavez
Kansas City, MO 64108
(816) 994-2300
michael@sharma-crawford.com

JOHN KELLER
SHEILA STUHLMAN
IMMIGRANT LAW CENTER OF MINNESOTA
450 North Syndicate Street, Ste. 200
St. Paul, MN 55104
(651) 641-1011
john.keller@ilcm.org

QUESTION PRESENTED

Under 8 U.S.C. § 1227(a)(2)(B)(i), a noncitizen may be removed if he has been convicted of violating "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) . . . ." Regarding removal based on a state conviction for possessing drug paraphernalia, the circuits are split on whether the paraphernalia must be related to a substance listed in Section 802 of Title 21, the Controlled Substances Act.

To trigger deportability under 8 U.S.C. § 1227(a)(2)(B)(i), must the government prove the connection between a drug paraphernalia conviction and a substance listed in section 802 of the Controlled Substances Act?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Moones Mellouli petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eighth Circuit (Pet. App. 1-14) is reported at 719 F.3d 995. The administrative decisions of the Immigration Judge (Pet. App. 23-28, 29-35) and the Board of Immigration Appeals (Pet. App. 17-19) are unreported.

JURISDICTION

The Eighth Circuit had jurisdiction under 8 U.S.C. § 1252(a)(2)(D) (providing judicial review for questions of law). The Eighth Circuit issued its decision on July 9, 2013. Pet. App. 1. On October 28, 2013, the Eighth Circuit denied by a 7-4 vote Petitioner's timely petition for panel rehearing or rehearing *en banc*. Pet. App. 36-37. On January 17, 2014, Justice Alito extended the time to file a petition for a writ of certiorari to and including February 25, 2014. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The relevant portions of the Immigration and Nationality Act, 8 U.S.C. § 1227, are reproduced at Pet. App. 38. The relevant portion of the Controlled Substances Act, 21 U.S.C. § 802, are reproduced at Pet. App. 39. The relevant portions of Kansas law, Kan.

Stat. Ann. §§ 21-5701, 21-5709, are reproduced at Pet. App. 39-41.

STATEMENT OF THE CASE

This petition presents the same question as *Madrigal-Barcenas v. Holder*, 507 Fed. App'x 716 (9th Cir. 2013), *pet. for reh'g denied* (July 29, 2013), *cert. pet. filed* (Dec. 6, 2013, No. 13-697), in which the government's response is currently due March 12, 2014.

I. Statutory Background

The Immigration and Nationality Act renders deportable a noncitizen who has been admitted to the United States if after admission the noncitizen:

> 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 section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana . . . .

8 U.S.C. § 1227(a)(2)(B)(i). Title 21 in turn defines "controlled substance" as "a drug or other substance, or immediate precursor, included in" one of the Controlled Substance Act's five schedules of controlled substances. 21 U.S.C. § 802(6); 21 C.F.R. §§ 1308.11-1308.15. The schedules are updated and republished annually. 21 U.S.C. § 812(a). Substances are placed on a particular schedule based on potential for abuse and the degree to which accepted medical uses exist. 21 U.S.C. § 812(b).

Kansas's Criminal Code makes it "unlawful for any person to use or possess with intent to use any drug paraphernalia to . . . store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." Kan. Stat. Ann. § 21-5709(b)(2). Kansas law in turn defines "drug paraphernalia" as "all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance …. " Kan. Stat. Ann. § 21-5701(f). "Controlled substance" is defined as "any drug, substance or immediate precursor included in any of the schedules designated in" five separate Kansas statutory provisions. Kan. Stat. Ann. § 21-5701(a). Not all of the controlled substances identified in the Kansas schedules are included in the federal schedules at 21 U.S.C. § 812.[1]

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[1] There are currently approximately twenty-one substances listed on the Kansas schedules that do not appear on the federal schedules. At the time of Mellouli's offense, the Kansas schedules contained twelve substances that did not appear on the federal schedules, including salvia divinorum or salvinorum A (Kan. Stat. Ann. § 65-4105(d)(30)); datura stramonium, commonly known as gypsum weed or jimson weed (Kan. Stat. Ann. § 65-4105(d)(31)); 1–Pentyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(33)); 1–Butyl–3–(1–naphthoyl)indole (Kan. Stat. Ann. § 65-4105(d)(34)); 1–(3–[trifluoromethylphenyl]) piperazine (Kan. Stat. Ann. § 65-4105(d)(36)); Methandranone (Kan. Stat. Ann. § 65-4109(f)(12)); Methandrostenolone (Kan. Stat. Ann. § 65-4109(f)(14)); Stanolone (Kan. Stat. Ann. § 65-4109(f)(23)); butyl

The government must establish the basis for removability under 8 U.S.C. § 1227 by clear and convincing evidence. 8 U.S.C. § 1229a(c)(3)(A). "No decision on deportability shall be valid unless it is based upon reasonable, substantial, and probative evidence." *Id.*

II. Factual and Procedural History

1. Petitioner Moones Mellouli entered the United States in 2004 on a student visa and later was granted lawful permanent resident status. C.A. Admin. Rec. 290. He graduated magna cum laude from Drury University in 2006 and received two master's degrees (applied mathematics and economics) in 2009 from the University of Missouri-Columbia. C.A. Admin. Rec. 224-26. Mellouli taught mathematics at the University of Missouri-Columbia for three years before starting a career as an actuary. C.A. Admin. Rec. 183. In April 2010, Mellouli was detained for driving under the influence and later charged with the Kansas state felony offense of "trafficking in contraband in a jail." C.A. Admin. Rec. 150. These charging documents referenced four tablets of Adderall.[2] *Id.* The charge

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nitrite and its salts, isomers, esters, ethers or their salts (Kan. Stat. Ann. § 65-4111(g)); Propylhexedrine (Kan. Stat. Ann. § 65-4113(d)(1)); any compound, mixture or preparation containing any detectable quantity of ephedrine, its salts or optical isomers, or salts of optical isomers (Kan. Stat. Ann. § 65-4113(e)); any compound, mixture or preparation containing any detectable quantity of pseudoephedrine, its salts or optical isomers, or salts of optical isomers (Kan. Stat. Ann. § 65-4113(f)).

[2] Adderall is a Schedule II federally controlled substance. *See* 21 C.F.R. § 1308.12(d)(1) (amphetamine salts).

was amended to a misdemeanor crime of "possession of drug paraphernalia" involving "a sock" used "to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body a controlled substance" in violation of Kan. Stat. Ann. § 21-36a09 (now Kan. Stat. Ann. § 21-5709(b)(2)) on April 4, 2010. C.A. Admin. Rec. 152. The amended charge did not reference a particular substance. *Id.* Mellouli pled guilty in July 2010 to the amended charge and was sentenced to 359 days in jail unimposed with twelve months of probation. C.A. Admin. Rec. 153-58.

2. The government arrested Mellouli in February 2012 and charged him with removability under 8 U.S.C. § 1227(a)(2)(B)(i). C.A. Admin. Rec. 288-90. The conviction documents submitted by the government (the amended complaint, the plea agreement, and the entry of judgment and sentencing document) did not specify the controlled substance involved in Petitioner's misdemeanor conviction. C.A. Admin. Rec. 152-58, 290.

Mellouli argued to the Immigration Judge that the conviction record failed to "specify the controlled substance at issue, and that therefore the government has not shown that his conviction involved a controlled substance as defined in section 102 of the Controlled Substances Act." Pet. App. 30-31. The Immigration Judge concluded that the government did not have to identify the controlled substance at issue to establish by clear and convincing evidence that Mellouli was convicted of a crime encompassed by 8 U.S.C. § 1227(a)(2)(B)(i). Pet. App. 33. The Immigration Judge relied on *Matter of Martinez Espinoza*, 25 I. & N. Dec. 118 (B.I.A. 2009), to conclude that the Kansas

definition of controlled substances did not have to "map perfectly" with the federal definition in 21 U.S.C. § 802 because the Kansas drug paraphernalia law "is plainly intended to criminalize behavior involving the production or use of drugs." Pet. App. 33-34. Because the conviction involved "other conduct associated with drug trade in general," the particular controlled substance involved in his conviction was irrelevant. Pet. App. 26.

The Board of Immigration Appeals affirmed the Immigration Judge's decision by finding that a "conviction for possession of drug paraphernalia involves drug trade in general, and thus, is covered under" 8 U.S.C. § 1227(a)(2)(B)(i). Pet. App. 18.

3. Mellouli filed a petition for review with the Eighth Circuit on September 5, 2012. C.A. Pet. Br. 7. He argued that the government failed to meet its burden to prove that he was convicted of violating a law related to a controlled substance, as defined by 21 U.S.C. § 802, because (1) the record of conviction did not specify the substance associated with the paraphernalia, (2) the paraphernalia – a sock – lacked connection with any particular substance, and (3) Kansas law includes substances that are not included on the federal controlled substance list. *See* n.1 *supra;* C.A. Pet. Br. 15. The government argued that Mellouli's conviction under the Kansas statutory scheme undoubtedly involved "the drug trade in general, and that is all that is needed to establish that his possession of drug paraphernalia conviction is a violation of a state law relating to a controlled substance." C.A. Resp. Br. 14.

The Eighth Circuit denied the petition for review, finding it was reasonable for the Board to conclude that any Kansas conviction for misdemeanor possession of drug paraphernalia was categorically a violation of a law relating to a controlled substance within the meaning of 8 U.S.C. § 1227(a)(2)(B)(i). Pet. App. 10. After asking for and receiving a response from the government, the Eighth Circuit denied Petitioner's petition for panel rehearing and rehearing *en banc*, despite the split created by the Third Circuit's decision in *Rojas v. Attorney General*, 728 F.3d 203, 219 n.18 (3d Cir. 2013) (en banc). Pet. App. 36-37. Four judges voted to grant the petition for rehearing *en banc*. Pet. App. 36.

REASONS FOR GRANTING THE PETITION

I. This decision and the Ninth Circuit's decision conflict irreconcilably with decisions of the Third and Seventh Circuits on an important and recurring issue of immigration law.

The Eighth Circuit's decision allows Mellouli's removal based on a drug paraphernalia offense with no connection in the record to any substance listed in 21 U.S.C. § 802. Had Mellouli's appeal been decided by the Third or Seventh Circuit, the outcome would have been different—those courts would have reversed the removal order because the paraphernalia conviction was not linked to a substance listed on the federal schedules. The Third Circuit *en banc* addressed the identical statutory question just weeks after the Eighth Circuit's decision in *Mellouli*. *Rojas*, 728 F.3d at 219 n.18. The Third Circuit acknowledged *Mellouli* and explicitly declined to follow it. *Id.*

When he petitioned for rehearing and rehearing *en banc*, Mellouli raised the conflict with the Third Circuit. But the Eighth Circuit denied rehearing nonetheless, entrenching the circuit split. Additionally, the Ninth Circuit declined *en banc* review of a case currently before this Court that interprets the nearly identical controlled substance offense definition in 8 U.S.C. § 1182(a)(2)(A)(i)(II) consistent with the Eighth Circuit and in conflict with the Third and Seventh. *Madrigal-Barcenas*, 507 F. App'x at 715-16.

The circuit conflict addresses an issue that occurs frequently and is fundamental to noncitizens and their families. Tens of thousands of noncitizens are removed annually for offenses relating to dangerous drugs. In 2012, 42,620 noncitizens were removed for offenses relating to dangerous drugs, amounting to 21.4% of all those removed. John F. Simanski & Lesley M. Sapp, *Immigration Enforcement Actions: 2012* at 7 (Dec. 2013).[3] Reflecting the importance of this removability ground, the meaning of the controlled substance offense provision is the subject of three published Board precedents. *Matter of Davey*, 26 I. & N. Dec. 37, 39 (B.I.A. 2012); *Martinez Espinoza*, 25 I. & N. Dec. at 121; *Matter of Paulus*, 11 I. & N. Dec. 274, 276 (B.I.A. 1965) (interpreting prior version of the statute codified at 8 U.S.C. § 1251(a)(11)).

It is likely that resolution of this issue will equally affect admissibility of aliens under 8 U.S.C. § 1182(a)(2)(A)(i)(II), which has nearly identical

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[3] Available at: https://www.dhs.gov/sites/default/files/publications/ois_enforcement_ar_2012_0.pdf (last visited Feb. 24, 2014).

language: "any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements 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 section 802 of title 21) … is inadmissible."

A. The Third and Seventh Circuits read the text of Section 802 to require a paraphernalia conviction to be related to a substance listed on a federal schedule.

In *Rojas*, the Third Circuit by a 12-2 vote held that a state conviction for possessing drug paraphernalia did not make a noncitizen removable because it did not indicate that the paraphernalia was related to a federally controlled substance. 728 F.3d at 204. The court based its decision on the text of 8 U.S.C. § 1227(a)(2)(B)(i), which states that an alien is deportable if he "has been 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)" other than certain marijuana offenses. *Id.* at 208-09.

Rojas's plea and colloquy did not reveal the drug involved in his conviction. The initial charging instrument stated that it was "loose cigar paper and [a] plastic baggie" containing marijuana, but (like Mellouli) Rojas's plea was to an amended charging instrument that did not specify the drug involved. *Id.* at 206. Rojas argued at each level of his deportation proceeding that the conviction did not satisfy Section 1227(a)(2)(B)(i) because it did not relate to a substance

"defined in section 208 of Title 21," but he was unsuccessful before the Immigration Judge and Board of Immigration Appeals. *Id.* at 206-07.

The Third Circuit reversed, ruling that the unambiguous statutory language mandates a showing that the paraphernalia conviction relates to a federally listed controlled substance. "[T]he most straightforward reading of § 1227(a)(2)(B)(i) is that to establish removability the Department must show that 'a controlled substance' included in the definition of substances in section 802 of Title 21 was involved in the crime of conviction at issue." *Id.* at 209. The Court performed detailed statutory analysis: "Reading the statute as written, it is clear that the parenthetical '(as defined in section 802 of Title 21)' is a restrictive modifier that affects only its immediate antecedent term, 'a controlled substance.'" *Id.* "Parsing the different clauses with the aid of the 'last antecedent' canon reveals that, as a whole, § 1227(a)(2)(B)(i) requires the Department to establish that the individual it seeks to remove (1) is an alien (2) who at any time after entering the country violated or attempted to violate a law relating to a controlled substance and (3) that the controlled substance is defined as such by federal law." *Id.*

To allow a broader reading, thereby permitting deportation based on convictions relating to substances not listed in 21 U.S.C. § 802, would allow states to make noncitizens deportable by criminalizing substances excluded from the federal law, violating "the cardinal principle that we do not cripple statutes by rendering words therein superfluous . . . ." *Id*. The court rejected as "atextual" the government's argument

that it had to prove a federally controlled substance only when the proceedings were based on "'possessory' offenses," *id.* at 211, and deemed the government's argument that a particular state's schedules as a whole may "relate to" controlled substances listed on the federal schedules to be inconstant with plain grammar and leading to results Congress could not have intended, *id.* at 212.

The Third Circuit recognized that, for removal based on drug *possession*, the circuits had uniformly required that the noncitizen be convicted of possessing a drug on the federal schedule. *Id.* at 211. It found no statutory support for treating other crimes—such as paraphernalia crimes—any differently than possession offenses, noting that there is no support in the text of the law "for the proposition that the Department's burden of proof changes depending on the type of drug offense involved in the removal proceeding." *Id.* The court rejected the government's interpretation, which applies a different analysis to drug possession offenses than to drug paraphernalia offenses. This two-pronged approach would make a noncitizen deportable for possessing paraphernalia associated with a drug, although possessing the drug itself would not be a deportable offense. *Id.* at 211. The "Department's reading," the court warned, "would result in a patchwork of removability rules dependent on the whims of the legislatures of the fifty states—effectively permitting them to control who may remain in the country via their controlled-substances schedules—not to mention the laws of all foreign nations, which may ban substances that are commonplace in the United States, such as poppy seeds." *Id.* at 213.

The Third Circuit determined that because Section 1227(a)(2)(B)(i) "requires the Department to establish that a foreign national's conviction is both (1) under a law relating to a controlled substance, and (2) involved or implicated a drug defined in section 802 of Title 21" and Rojas's conviction record did not establish the drug involved, his removal order was defective. *Id.* at 214. The court remanded for the Board to determine whether the government should be allowed to satisfy the statute's requirements through the record of conviction or other permissible documents. *Id.* at 219-20.

The Seventh Circuit took the same approach, holding that a paraphernalia conviction had to relate to a substance listed at 21 U.S.C. § 802 to justify removal under Section 1227(a)(2)(B)(i). *Desai v. Mukasey*, 520 F.3d 762 (7th Cir. 2008). Desai's state conviction was for selling a "look-alike" substance, namely candy that Desai believed contained Psilocybin, a hallucinogen defined by the Controlled Substances Act as a controlled substance. *Id.* at 763-64. Although the candy did not actually contain the drug, the Seventh Circuit found that the crime met the statutory definition because it was "relat[ed] to a controlled substance (as defined in section 802 of Title 21)." *Id.* at 765. The court said that its "task is simply to examine whether the state law is one relating to a federal controlled substance." *Id.* at 766. *Desai* construes "controlled substance (as defined in section 802 of Title 21)" consistently with the Third Circuit's statutory construction—but contrary to the Eighth Circuit's in this case—that the "parenthetical can only be read to modify 'controlled substance,' its immediate

antecedent." *Id.*; *see also Rojas*, 728 F.3d at 209 (construing the language identically).

The Seventh Circuit concluded that the statutory term "related to" allowed States to criminalize a wide range of conduct "related to" a federally controlled substance, but if Congress had wanted a direct correspondence between the state crimes and federal crimes supporting exclusion, "it would have used a word like 'involving' instead of 'relating to. . . . '" *Id.* at 766. At the same time, the statutory language dictates that the substance involved in the crime must be on the federal schedule: "If a state decides to outlaw the distribution of jelly beans, then it would have no effect on one's immigration status to deal jelly beans, because it is not related to a controlled substance listed in the federal [Controlled Substances Act]." *Id*. Desai was removable because he was convicted of violating "a state law that is related to a federal controlled substance." *Id.* at 765.

When addressing state convictions for drug *possession*, the Ninth Circuit has construed the statute in the same way as the Third and Seventh Circuits, requiring that the drug at issue be covered by the Controlled Substances Act. *Ruiz-Vidal v. Gonzales*, 473 F.3d 1072, 1076 (9th Cir. 2007) (stating that "[t]he plain language of this statute requires the government to prove that the substance underlying an alien's state law conviction for possession is one that is covered by Section 102 of the [Controlled Substances Act]."), *abrogation on other grounds recognized by Cardozo-Arias v. Holder*, 495 Fed. App'x 790, 792 n.1 (9th Cir. 2012). The Board of Immigration Appeals takes this same approach to possession convictions. *See Paulus*,

11 I.& N. Dec. 274. But as explained below, the Ninth Circuit and Board have taken a different interpretive tack when addressing paraphernalia convictions.

B. The Eighth and Ninth Circuits' approach to paraphernalia convictions, like that of the Board of Immigration Appeals, conflicts irreconcilably with the Third and Seventh Circuits.

The Eighth and Ninth Circuits have developed a different approach to paraphernalia convictions that does not require proof that the paraphernalia is related to a substance on the schedules at 21 U.S.C. § 802, an approach the Third Circuit labeled "atextual." *Rojas*, 728 F.3d at 211; *see Mellouli v. Holder*, 719 F.3d 995 (8th Cir. 2013); *Luu-Le v. INS.*, 224 F.3d 911 (9th Cir. 2000). The Ninth Circuit initiated this approach in *Luu-Le*, which was the first reported federal appellate decision to address the immigration consequences of a paraphernalia conviction. 224 F.3d at 914.

The Ninth Circuit noted that the state statute under which Luu-Le was convicted "does not map perfectly the definition of 'controlled substance' as used in [8 U.S.C. 1227(a)(2)(B)(i)]," but the state statute, the court stated, "is clearly a law 'relating to' a controlled substance" and "is plainly intended to criminalize behavior involving the production or use of drugs—at least some of which are also covered by the federal schedules" in 21 U.S.C. § 812. *Id.* at 915.[4] Unlike the

[4] The Ninth Circuit has used this approach in other paraphernalia cases. *United States v. Oseguera-Madrigal*, 700 F.3d 1196, 1198-99

Third and Seventh Circuits, the Ninth Circuit focused solely on its view of the state statute's purpose, not the conviction at issue. *Id.* at 913-14. *Luu-Le* held that any conviction under Arizona's drug paraphernalia law necessarily makes a noncitizen deportable under Section 1227(a)(2)(B)(i). *Id.* at 915-16.

Without supplying a different textual analysis, the Ninth Circuit applies a different rule to paraphernalia offenses than to possession offenses. As explained above, *see supra* § I.A, the Ninth Circuit requires that a possession conviction must be connected to a federally listed substance to justify removal under Section 1227(a)(2)(B)(i). *Ruiz-Vidal*, 473 F.3d at 1076.

In *Martinez Espinoza*, the Board of Immigration Appeals followed *Luu-Le*'s approach to paraphernalia crimes. 25 I. & N. Dec. at 122. The agency stated that it had "long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in general." *Id.* at 121. The Board declined to require "a correspondence between the Federal and State controlled substance schedules" as it requires for possession offenses "because the primary purpose of the law was to eliminate or control traffic in narcotics." *Id.* (internal quotations omitted).

Like the Ninth Circuit, the Board applies a different standard to paraphernalia offenses than to possession offenses without offering any different interpretation of

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(9th Cir. 2012); *Estrada v. Holder*, 560 F.3d 1039, 1042 (9th Cir. 2009); *Bermudez v. Holder*, 586 F.3d 1167, 1168-69 (9th Cir. 2009) (per curiam).

the statutory text. Since its 1965 decision in *Paulus*, the Board has required a possession offense to be related to a substance on the federal schedule to support removal, 11 I. & N. Dec. at 276, but its self-labeled "common-sense" approach disregards that requirement for "drug trade" crimes, *Martinez Espinoza*, 25 I. & N. Dec. at 121-22, despite the identical statutory language governing both types of offenses.

The Eighth Circuit followed the approaches of the Ninth Circuit and Board in this case. The documents reflecting Mellouli's conviction did not reveal any federally controlled substance, but the Eighth Circuit concluded that significant overlap between the state and federal schedules left "little more than a 'theoretical possibility' that a conviction for a controlled substance offense under Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802." *Mellouli*, 719 F.3d at 997 (citations omitted). The court found the statutory language ambiguous (contrary to the Third Circuit) then quoted and deferred to *Martinez Espinoza*'s statement about the longstanding distinction between possession offenses and those involving "the drug trade in general" to conclude that all offenses involving "the drug trade in general," including Mellouli's paraphernalia offense, are covered by 8 U.S.C. § 1227(a)(2)(B)(i). *Id.* at 999-1000 (citing deference principles in *Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837 (1984)). Because the Eighth Circuit ruled that paraphernalia offenses like Mellouli's are "categorically" violations of Section 1227(a)(2)(B)(i), it rejected as irrelevant Mellouli's argument that the record of conviction submitted by the government failed to establish the substance

involved, even under the modified categorical approach. *Id.* at 1000;[5] *see Descamps v. United States*, 133 S. Ct. 2276, 2282, 2285 (2013) (explaining modified categorical approach).

In *Rojas*, the Third Circuit explained that it construed the statutory language differently than these courts:

> To be sure, this line of cases would provide the proper rubric of analysis if the question at issue was whether paraphernalia statutes "relate to" controlled substances, which neither party contests. But the Department asks us to extrapolate the "relating to" cases to conclude that so long as a state's controlled-substances schedules "show[ ] substantial (and obviously intentional) overlap" with the federal schedules, a drug-paraphernalia conviction satisfies the removability provision of § 1227(a)(2)(B)(i) even if the actual substance involved is not evident from the record of conviction. This we decline to do. The proposed use of the "relating to" cases is merely a repackaged version of the argument that "relating to" modifies both "controlled substance" as well as the "as defined" parenthetical, a reading we have already

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[5] The Eleventh Circuit also has affirmed removal based on a paraphernalia conviction, but the petitioner in that case did not present any argument relating to the statutory reference to 21 U.S.C. § 802. *Alvarez Acosta v. U.S. Att'y Gen.*, 524 F.3d 1191, 1196 (11th Cir. 2008). In an unpublished per curiam opinion without analysis of the statutory language, the Fourth Circuit also affirmed removal based on a paraphernalia conviction. *Castillo v. Holder*, 539 Fed. App'x 243 (4th Cir. 2013).

> rejected. In other words, the invitation to read "relating to" as modifying the parenthetical is but a thinly-veiled suggestion that we permit those words to excise the parenthetical entirely.

728 F.3d at 217 (internal citations omitted).

II. The Eighth Circuit's decision is incorrect for reasons in addition to those set forth by the Third and Seventh Circuits.

A. The evolution of the statutory language supports the approach of the Third and Seventh Circuits.

The evolution of the relevant federal statutory language demonstrates congressional intent that immigration consequences attach only to convictions associated with federally controlled substances. Before 1986, the controlled substance offense provision made deportable a noncitizen who:

> is, or hereafter at any time after entry has been, a narcotic drug addict, or who at any time has been convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana, or who has been convicted of a violation of . . . any law or regulation governing or controlling the taxing, manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, exportation, or the possession for the purpose of the manufacture, production, compounding, transportation, sale, exchange, dispensing, giving away, importation, or exportation of opium, coca leaves, heroin, marihuana, any salt derivative or preparation of

> opium or coca leaves or isonipecaine or any addiction-forming or addiction-sustaining opiate.

8 U.S.C. § 1251(a)(11) (1982); Pub. L. 99-570, § 1751, 100 Stat. 3207 (Oct. 27, 1986) (amending statute); Pub. L. 104-208, § 108, 110 Stat. 3009 (Sept. 30, 1996) (redesignating statute).

In its prior form, the statute specified not only the substances justifying deportability, but also the very crimes supporting deportability—the "manufacture, production, compounding, transportation," etc. Congress changed that approach in 1986, when it removed the specification of prohibited conduct and replaced it with "any law or regulation of a State, the United States, or a foreign country." Pub. L. 99-570, § 1751(a)(1). The 1986 amendment also eliminated the list of substances with which that conduct must be associated and replaced it with "a controlled substance (as defined in section 102 of the Controlled Substances Act (21 U.S.C. 802))." *Id.*

These amendments allowed the States to specify which drug-related offenses could support deportability while retaining for the federal government the power to define the substances with which those offenses must be tied. Congress continued to define the substances that must be implicated by a state offense, limiting them to those that are federally controlled. *See, e.g.*, *Lopez v. Gonzalez*, 549 U.S. 47, 55-58 (2006) (rejecting an interpretation of the aggravated felony definition for illicit trafficking that depends on the States' classification of an offense as a felony instead of the federal classification). The Eighth Circuit's rule, which does not require evidence that the state conviction involved a federally controlled substance,

cuts the mooring to the federal list of substances that Congress retained when amending the statute.

Other provisions in the Immigration and Nationality Act demonstrate congressional intent to specify the substances that can result in removal. Section 1182(a)(2)(C)(i) renders a noncitizen inadmissible if there is reason to believe she "is or has been an illicit trafficker in any controlled substance or in *any listed chemical* (as defined in section 802 of title 21)." 8 U.S.C. § 1182(a)(2)(C)(i) (emphasis added). Here Congress has included a broader list of substances rendering an individual inadmissible—a list that includes ephedrine and pseudoephedrine, which are absent from Section 1227(a)(2)(B)(i). By distinguishing among the substances that carry immigration consequences in different parts of the immigration statutes, Congress has evidenced its intent to retain authority over and maintain uniformity across the substances that trigger removability, while delegating to the States the authority to define the prohibited conduct associated with those substances.

B. Kansas's law exemplifies the problem arising when federal courts apply a different standard to paraphernalia convictions than to possession convictions.

Kansas's laws well-illustrate the problem that arises when federal courts untether their Section 1227(a)(2)(B)(i) analysis from the requirement that each conviction relate to a substance on the federal schedule. Kansas's pre-2009 laws relating to ephedrine and pseudoephedrine are a good example. Before 2009, Kansas state law prohibited possession with intent to

use "any drug paraphernalia to … manufacture, compound, convert, produce …. sell or distribute a controlled substance in violation of the uniform controlled substances act." Kan. Stat. Ann. § 65-4152(a)(3) (repealed by L. 2009, ch. 32, § 64). It also prohibited possession of ephedrine and pseudoephedrine. Kan. Stat. Ann. § 65-7006 (repealed by L. 2009, ch. 32, § 64). Ephedrine and pseudoephedrine can be used to manufacture methamphetamine and are currently listed in Kansas's Controlled Substance schedules. Kan. Stat. Ann. § 65-4113; *State v. Campbell*, 106 P.3d 1129, 1129 (Kan. 2005). They are also active ingredients in over-the-counter products such as Advil Cold & Sinus and herbal ephedra.[6] The drugs are included as "List I" chemicals in the federal Controlled Substance Act, but are not on the federal schedules of "controlled substances." 21 U.S.C. § 802(6), (34)(C) & (K).

Under Kansas's prior law, possession of ephedrine or pseudoephedrine could support convictions both for a possession offense (Kan. State. Ann. § 65-7006) and for possession of the drugs that also constituted methamphetamine paraphernalia (Kan. Stat. Ann. § 65-4152(a)(3)). *See, e.g.*, *State v. Snellings*, 273 P.3d 739, 742 (Kan. 2012); *State v. Schoonover,* 133 P.3d 48, 59 (Kan. 2006); *Campbell*, 106 P.3d at 1134.

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[6] *See* National Institutes of Health, U.S. National Library of Medicine, Daily Med, Advil Cold and Sinus Drug Facts, *available at* http://dailymed.nlm.nih.gov/dailymed/lookup.cfm?setid=0da9ed22-bfb4-d61b-110b-0c7760332a98; National Institute of Health's National Center for Complementary and Alternative Medicines, Ephedra Fact Sheet, *available at* http://nccam.nih.gov/health/ephedra.

Consequently, even though the same conduct could underlie both offenses, under the Eighth Circuit's rule a possession conviction would not trigger deportability while the paraphernalia conviction would. This inconsistency illustrates the practical problem arising from the Eighth Circuit's attenuation of paraphernalia convictions from the specification of substances in the Controlled Substances Act.

III. This case presents an appropriate opportunity for the Court to address this issue.

1. This issue has been presented to the Court in *Madrigal-Barcenas v. Holder*, No. 13-697, in which the petition for certiorari remains pending as of the date Mellouli's petition is filed. If the Court grants certiorari in *Madrigal-Barcenas*, Mellouli asks that this Court defer the disposition of his petition until *Madrigal-Barcenas* is resolved on the merits.

This case presents at least as good an opportunity as *Madrigal-Barcenas* to resolve the question presented. Proper application of Section 1227(a)(2)(B)(i) is Mellouli's only barrier to returning to his life in the United States as a lawful permanent resident; he needs no relief that would involve discretionary determinations for which he would bear the burden of proof. Further, Mellouli's case presents a thorough, published panel decision, which the Eighth Circuit declined to revisit *en banc* after considering the parties' arguments against the approach taken by the Third and Seventh Circuits.

Additionally, although Mellouli's initial charging instrument and a probable cause affidavit referred to

Adderall, the amended charging instrument (to which he pled) alleged a paraphernalia offense and made no mention of the substance involved. The record submitted by the government did not include the plea colloquy, and there is no dispute that the other evidence submitted by the government and available for consideration using the categorical method failed to establish the substance that underlay Mellouli's conviction. *See Nijhawan v. Holder*, 557 U.S. 29, 42 (2009). Because Kansas's law criminalized several substances in addition to those listed at 21 U.S.C. § 802, the present record cannot establish that his paraphernalia conviction involved a federally listed illegal drug. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013) (stating that the Court must "presume that the conviction 'rested upon nothing more than the least of the acts' criminalized" (alterations omitted)).

2. Further proceedings are required to determine whether Mellouli's conviction necessarily violated Section 1227(a)(2)(B)(i) if the modified categorical approach applies. *Descamps* limited use of the modified categorical approach, which allows judicial examination of certain documents to situations where (1) a defendant was convicted under a statute containing alternative crimes and (2) the removability determination depends on which elements underlay the crime for which that defendant was convicted. 133 S. Ct. at 2285.

3. The Eighth Circuit determined that Kansas Statutes § 21-5709(b)(2) was a categorical match with Section 1227(a)(2)(B)(i) under *Moncrieffe*, reasoning incorrectly that variance between the state and federal definitions of "controlled substance" did not render the

Kansas statute overbroad because the phrase "relating to" brought any drug offense in a state that controlled most of the same substances controlled federally within the scope of the federal statute. *Mellouli*, 719 F.3d at 1001-02. This interpretation commits the same error as the Eighth Circuit in *Lopez v. Gonzalez*, 417 F.3d 934 (8th Cir. 2005). Construing 18 U.S.C. § 924(c)(2), the Eighth Circuit had affirmed the government's interpretation of the words "any felony punishable under the Controlled Substances Act" to mean, in this Court's words, any "felony punishable under the [Controlled Substance Act] whether or not as a felony." *Lopez*, 549 U.S. at 56. This Court corrected the Eighth Circuit's misinterpretation of the generic federal definition of illicit drug trafficking in 8 U.S.C. § 1101(a)(43)(B) and remanded. *Id.* at 60. The same result is required here.

Under the categorical approach, a state conviction for paraphernalia associated with jimson weed or pseudoephedrine, for example – substances unlawful in Kansas but not on the federal schedule – would not trigger removability, while paraphernalia associated with a substance controlled by both the state and federal governments would. Regarding the modified categorical approach, neither the Board nor the Eighth Circuit determined whether the Kansas statute prohibiting possession drug paraphernalia in connection with a controlled substance is divisible by substance and therefore subject to analysis under the modified categorical approach. As in *Lopez*, this Court should establish the proper interpretation of the federal statute so that the Board can determine in the first instance whether the government can meet its burden to show that Mellouli's paraphernalia

conviction under Kansas law fits within the federal definition. *See Gonzales v. Thomas*, 547 U.S. 183, 187 (2006) (per curiam) (holding that agency, not the court of appeals, must apply the law to the facts in the first instance).

CONCLUSION

For the reasons provided above, the petition for writ of certiorari should be granted.

Respectfully submitted,

JON LARAMORE
Counsel of Record
D. LUCETTA POPE
DANIEL E. PULLIAM
FAEGRE BAKER DANIELS LLP
300 North Meridian Street, Suite 2700
Indianapolis, IN 46204
Telephone: (317) 237-0300
Facsimile: (317) 237-1000
jon.laramore@FaegreBD.com

KATHERINE EVANS
BENJAMIN CASPER
UNIVERSITY OF MINNESOTA LAW SCHOOL
CENTER FOR NEW AMERICANS
FEDERAL IMMIGRATION LITIGATION CLINIC
190 Mondale Hall
229 19th Avenue South
Minneapolis, MN 55455
(612) 625-5515
evans407@umn.edu

MICHAEL SHARMA-CRAWFORD
SHARMA-CRAWFORD, ATTYS AT LAW, LLC
515 Avenida Cesar E. Chavez
Kansas City, MO 64108
(816) 994-2300
michael@sharma-crawford.com

JOHN KELLER
SHEILA STUHLMAN
IMMIGRANT LAW CENTER OF MINNESOTA
450 North Syndicate Street, Ste. 200
St. Paul, MN 55104
(651) 641-1011
john.keller@ilcm.org

Counsel for Petitioner

February 25, 2014

APPENDIX

APPENDIX

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APPENDIX A

United States Court of Appeals
For the Eighth Circuit

No. 12-3093

[Filed July 9, 2013]

Moones Mellouli

Petitioner

v.

Eric H. Holder, Jr., Attorney General of the United States

Respondent

Petition for Review of an Order of the Board of Immigration Appeals

Submitted: February 13, 2013
Filed: July 9, 2013

Before RILEY, Chief Judge, LOKEN and SHEPHERD, Circuit Judges.

LOKEN, Circuit Judge.

Section 237(a) of the Immigration and Nationality Act ("INA"), 8 U.S.C. § 1227(a), lists classes of aliens lawfully present in this country who are removable (deportable) from the United States. One subsection provides:

> Any alien who at any time after admission 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 section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added). Moones Mellouli, a citizen of Tunisia and a lawful permanent resident of the United States, petitions for review of an order of the Board of Immigration Appeals ("BIA") that he is removable because his July 2010 conviction for violating a Kansas drug paraphernalia statute was a conviction "relating to a controlled substance" within the meaning of § 1227(a)(2)(B)(i). Mellouli argues on appeal, as he did to the BIA, that he is not removable because the state court record of conviction does not identify the controlled substance underlying his state paraphernalia conviction, and therefore the government failed to prove that the conviction related to a *federal* controlled substance, as § 1227(a)(2)(B)(i) requires. We have jurisdiction to review this issue of law. See Bobadilla v. Holder, 679 F.3d 1052, 1053 (8th Cir. 2012), applying 8 U.S.C. § 1252(a)(2)(D). Although the question is not free from doubt, compare Moncrieffe

v. Holder, 133 S. Ct. 1678 (2013), with Nijhawan v. Holder, 557 U.S. 29 (2009), we join our sister circuits that have upheld the BIA's application of the "relates to" provision in § 1227(a)(2)(B)(i) and deny the petition for review.

I. The Statutory Landscape

The government has the burden to establish removability by clear and convincing evidence. See 8 U.S.C. § 1229a(c)(3)(A); Bobadilla, 679 F.3d at 1058. The primary issues presented by this appeal are whether the government must prove that a specific controlled substance defined in 21 U.S.C. § 802 was the basis for a state drug paraphernalia conviction, and if so, what evidence the government may use to prove that aspect of the conviction. In our view, proper resolution of these issues requires an understanding of a complex federal and state statutory universe.

Congress in the Controlled Substances Act of 1970 established five lengthy schedules of controlled substances, see 21 U.S.C. § 812, and defined controlled substance as meaning a drug or precursor included in those schedules, see 21 U.S.C. § 802(6), the statute cross-referenced in 8 U.S.C. § 1227(a)(2)(B)(i). That same year, the National Conference of Commissioners on Uniform State Laws approved the Uniform Controlled Substances Act, describing as its purpose:

> The 1970 Uniform Act was designed to complement the federal Controlled Substances Act, which was enacted in 1970. . . . This Uniform Act was drafted to maintain uniformity between the laws of the several States and those of the federal government. It has been designed

> to complement the federal law and provide an interlocking trellis of federal and state law to enable government at all levels to control more effectively the drug abuse problem.

Unif. Controlled Substances Act (amended 1994), 9 U.L.A. 5, Pt. II. The Uniform Act has the same five schedules as 21 U.S.C. § 812. Nearly all States have adopted the Uniform Act. Some States added a small number of substances not listed on the federal schedules. In addition, not every State amended its schedules to adopt revised versions of the Uniform Act in 1990 and 1994, or to incorporate changes to the federal schedules over the years. Thus, the drugs listed on a State's schedules may not "map perfectly" with the federal schedules. In re Huerta-Flores, A092-444-014, 2010 WL 5808899 (BIA Aug. 27, 2010) (unpublished), quoting Luu-Le v. INS, 224 F.3d 911, 915 (9th Cir. 2000). In that decision, the BIA noted that the Arizona and federal schedules at issue were identical except for the continued listing on Arizona's Schedule I of two drugs whose federal listing had expired.

Kansas adopted the Uniform Act in 1972. Kansas Schedules I-V, now appearing in Kan. Stat. Ann. §§ 65-4105 to 65-4113, list, for each controlled substance that is also a controlled substance under federal law, the corresponding code number from the federal schedules. Of the hundreds of substances currently listed, less than a handful have no federal code number. A controlled substance for purposes of Kansas criminal drug offenses means a substance listed in the Kansas Schedules I-V. Kan. Stat. Ann. § 21-5701(a). Thus, there is little more than a "theoretical possibility" that a conviction for a controlled substance offense under

Kansas law will *not* involve a controlled substance as defined in 21 U.S.C. § 802. Gonzalez v. Duenas-Alvarez, 549 U.S. 183, 193 (2007).

At issue in this case is a Kansas drug paraphernalia conviction. These statutes, too, have a relevant history. In 1979, concerned that the availability of drug paraphernalia "has reached epidemic levels," the Drug Enforcement Administration at the request of the President's Domestic Policy Council "prepared the Model Drug Paraphernalia Act . . . as an amendment to the Uniform Controlled Substances Act."[1] Kansas adopted this Model Act in 1981; Mellouli was convicted of violating an amended version of that statute. Because many States in enacting drug paraphernalia criminal offenses have adopted the Model Act, the question whether a conviction for a particular State's drug paraphernalia statute "relates to" a federal controlled substance is not likely to involve relevant differences in state statutory language. See Luu-Le, 224 F.3d at 915 (Arizona Drug Paraphernalia law); Bermudez v. Holder, 586 F.3d 1167, 1168-69 (9th Cir. 2009) (Hawaii); Estrada v. Holder, 560 F.3d 1039, 1042 (9th Cir. 2009) (California) United States v. Oseguera-Madrigal, 700 F.3d 1196, 1198-99 (9th Cir. 2012) (Washington).

II. The BIA's Decision

Following Mellouli's April 2010 arrest for driving under the influence of alcohol, detention center

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[1] Thomas Regnier, "Civilizing" Drug Paraphernalia Policy: Preserving Our Free Speech and Due Process Rights While Protecting Children, 14 N.Y.U. J. Legis. & Pub. Pol'y 115, 124 (2011) (quotations omitted).

deputies discovered four orange tablets in his sock bearing the inscription, "M Aphet Salts 30 mg." Mellouli admitted the tablets were Adderall, a drug listed on both the Kansas and federal controlled substance schedules. He was charged with the level 6 felony of "trafficking in contraband in a jail." On July 13, he pleaded guilty to the lesser offense charged in an amended complaint, misdemeanor possession of drug paraphernalia in violation of Kan. Stat. Ann. § 21-36a09(b), now recodified at § 21-5709(b). The amended complaint did not identify the controlled substance Mellouli stored in the paraphernalia, his sock.[2]

In Matter of Paulus, 11 I. & N. Dec. 274, 276 (BIA 1965), construing prior federal controlled substance and immigration laws, the BIA concluded that the alien was not deportable under then § 241(a)(11) of the INA[3] because his conviction for violating the Health and Safety Code of California "could have been for an offer to sell a substance which though a narcotic under

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[2] The statute provides, in relevant part: "It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to . . . (2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body." It seems surprising to call a sock "drug paraphernalia," but using a sock to store and conceal a controlled substance falls within the statute's literal prohibition. Pleading guilty to a reduced paraphernalia offense after being charged with a serious controlled substance offense was also the fact pattern in Oseguera-Madrigal, 700 F.3d at 1198, so this type of paraphernalia conviction may be neither uncommon nor unfairly punitive.

[3] This statute made deportable an alien who "has been convicted of a violation of . . . any law or regulation relating to the illicit possession of or traffic in narcotic drugs or marihuana." Paulus, 11 I. & N. Dec. at 275, quoting former 8 U.S.C. § 1251(a)(11).

California law is not a narcotic drug under federal laws [and therefore] we cannot say that the Service has borne its burden of establishing that [the alien] has been convicted of a violation of a law relating to narcotic drugs."

In this case, Mellouli argued to the BIA, Paulus is controlling BIA authority, so a state drug paraphernalia conviction does not fall within § 1227(a)(2)(B)(i) unless the paraphernalia was connected to a federal controlled substance. Because the Kansas schedules include a few controlled substances not on the federal schedules, such as jimson weed, there is a possibility, however remote, that a Kansas drug paraphernalia conviction did not involve use in connection with a federal controlled substance. Mellouli further argued that this evidentiary issue must be decided using the "categorical" and "modified categorical" analysis applied by the Supreme Court in Taylor v. United States, 495 U.S. 575, 599-602 (1990), and Shepard v. United States, 544 U.S. 13, 26 (2005), criminal cases interpreting the Armed Career Criminal Act, 18 U.S.C. § 924(e), an analysis often but not uniformly applied in interpreting various provisions of the INA. Here, the Kansas statutes and the only documents reflecting his Kansas conviction that may be considered in applying the modified categorical approach did not identify a particular controlled substance. Therefore, Mellouli's argument concluded, the government failed to prove by clear and convincing evidence that he was convicted of an offense "relating to a controlled substance (as defined in section 802 of Title 21)."

Adhering to its prior decision in Matter of Martinez Espinoza, 25 I. & N. Dec. 118 (BIA 2009), the BIA rejected the initial premise underlying this complex argument -- that a drug paraphernalia conviction is not "related to" a federal controlled substance within the meaning of § 1227(a)(2)(B)(i) unless the conviction identified a particular controlled substance with which the paraphernalia was used. As the BIA explained in Martinez Espinoza:

> we have long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in general. Thus, the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by Matter of Paulus . . . for cases involving the possession of particular substances, has never been extended to other contexts by the Board. For example, in Matter of Martinez-Gomez, 14 I&N Dec. 104, 105 (BIA 1972), we held that an alien's California conviction for opening or maintaining a place for the purpose of unlawfully selling, giving away, or using any narcotic was a violation of a law relating to illicit traffic in narcotic drugs under former section 241(a)(11) of the Act . . . even though the California statute required no showing that only *Federal* narcotic drugs were sold or used in the place maintained, because the "primary purpose" of the law was "to eliminate or control" traffic in narcotics.

> The common-sense approach of Matter of Martinez-Gomez accords with the broad "relating to" language of current law and has largely been embraced by the courts.

Id. at 121-22, citing Luu-Le, 224 F.3d at 915, and Desai v. Mukasey, 520 F.3d 762, 764-65 (7th Cir. 2008). Relying on Martinez Espinoza, the BIA concluded that Mellouli's "conviction for possession of drug paraphernalia involves drug trade in general and, thus, is covered under [8 U.S.C. § 1227(a)(2)(B)(i)]."

III. Discussion

On appeal, Mellouli does not challenge prior decisions that state drug paraphernalia statutes may constitute laws "relating to a controlled substance" within the meaning of § 1227(a)(2)(B)(i). See Barma v. Holder, 640 F.3d 749, 751 (7th Cir. 2011); Alvarez Acosta v. U.S. Att'y Gen., 524 F.3d 1191, 1195-96 (11th Cir. 2008); Escobar Barraza v. Mukasey, 519 F.3d 388, 391-92 (7th Cir. 2008); Luu-Le, 224 F.3d at 914-15. Given the extensive federal involvement in preparing and urging States to enact the Model Drug Paraphernalia Act as part of "an interlocking trellis of federal and state law . . . to control more effectively the drug abuse problem," we have no doubt that these state laws "relate to" federal control of illicit drugs.

Mellouli more narrowly argues (i) the BIA arbitrarily and capriciously ignored what should have been its own controlling decision in Paulus; (ii) the record-of-conviction documents that may be considered under the Supreme Court's modified categorical approach did not identify a federal controlled substance; (iii) the BIA erred in considering other

documents that referred to the controlled substance in his sock as Adderall; and therefore (iv) the government failed to prove he is removable under § 1227(a)(2)(B)(i). We reject this contention for three reasons.

First. In Martinez Espinoza, the BIA concluded that a state court drug paraphernalia conviction "relates to" a federal controlled substance because it is a crime "involving other conduct associated with the drug trade in general." 25 I. & N. Dec. at 121. We "must defer" to this interpretation of an ambiguous statute if it is neither arbitrary nor manifestly unreasonable. Popescu-Mateffy v. Holder, 678 F.3d 612, 615 (8th Cir. 2012), citing Chevron U.S.A. Inc. v. Nat'l Res. Def. Council, Inc., 467 U.S. 837 (1984). The BIA's conclusion is a reasonable interpretation of the term "relating to," a term that reflects congressional intent to broaden the reach of the removal provision to include state offenses having "a logical or causal connection" to federal controlled substances. See Webster's Third New International Dictionary 1916 (1961).

While the "map" may be imperfect, there is nearly a complete overlap between the definition of controlled substance in 21 U.S.C. § 802 and in the statutes of States such as Kansas that adopted the Uniform Controlled Substances Act. It was therefore reasonable for the BIA to conclude that any drug paraphernalia conviction in these States was, categorically, a violation of a law "relating to a controlled substance" within the meaning of 8 U.S.C. § 1227(a)(2)(B)(i). Accord Luu-Le, 224 F.3d at 915. "If Congress wanted a one-to-one correspondence between the state laws and the federal [schedules], it would have used a word like 'involving' instead of 'relating to.'" Desai, 520 F.3d at 766

(concluding that state statute prohibiting distribution of "look-alike" drugs was related to federal controlled substances; the "look-alike" substance was illegal because of its relation to a federally scheduled substance).

As the BIA correctly concluded that a conviction for violating the Kansas paraphernalia statute is, categorically, related to a controlled substance within the meaning of § 1227(a)(2)(B)(i), use of the modified categorical approach as urged by Mellouli is unnecessary. "All the modified approach adds is a mechanism for [comparing the elements of the state offense with the generic federal offense] when a statute lists multiple, alternative elements, and so effectively creates 'several different crimes.'" Descamps v. United States, No. 11-9540, slip op. at 8 (U.S. June 20, 2013), quoting Nijhawan, 557 U.S. at 41.

Second. We reject Mellouli's premise that Paulus was controlling agency authority the BIA arbitrarily ignored. While the BIA has not explicitly overruled Paulus, that case involved pre-1970 controlled substance and INA statutes and was ignored by the BIA in Huerta-Flores, where the BIA concluded that a state drug conspiracy conviction is a "categorically removable offense" when the state statute has "a list of narcotic drugs that is substantially identical to the federal one, and indeed was drafted with the obvious intent to match precisely with the federal schedules." 2010 WL 5808899 (unpublished). Given the close relationship between drug possession and drug conspiracy offenses, Huerta-Flores strongly signals that the BIA does not consider Paulus controlling in the post-1970 statutory era.

Third. The government's burden of proof included the need to establish by clear and convincing evidence that Mellouli's drug paraphernalia conviction did not fall within the exception in § 1227(a)(2)(B)(i) for "a single offense involving possession for one's own use of 30 grams or less of marijuana." To meet this burden, the government submitted documents *outside* the record of conviction, namely, the original Kansas complaint, to which Mellouli did not plead guilty, and a probable-cause affidavit. These documents established that his drug paraphernalia conviction did not implicate the personal use exception because Mellouli used his sock to conceal Adderall, a federal Schedule II controlled substance, not marijuana. Employing the "circumstance specific" approach adopted in Martinez Espinoza, 25 I. & N. Dec. at 123-24, the BIA concluded that the personal use exception did not apply because these documents established that Mellouli's paraphernalia conviction was connected to Adderall. On appeal, Mellouli does not challenge the BIA's conclusion that the exception did not apply. Rather, he argues that it was error to admit and rely on evidence outside the record of conviction.

In Nijhawan, the Supreme Court considered an INA provision defining "aggravated felony" to include "an offense that . . . involves fraud or deceit in which the loss to the victim or victims exceeds $10,000." 8 U.S.C. § 1101(a)(43)(M)(i). The Court concluded that this monetary threshold was a specific circumstance underlying the conviction, not an element of the crime, and therefore immigration judges may consider evidence outside the record of conviction to determine whether the threshold was satisfied. 557 U.S. at 41-42. In our view, the BIA properly applied this

"circumstance specific" approach in determining that Mellouli's conviction fell outside the personal use exception. As the BIA explained in a subsequent decision:

> The language of the [personal use exception] is exceedingly narrow and fact-specific. It refers not to a common generic crime but rather to a specific type of conduct (possession for one's own use) committed on a specific number of occasions (a "single" offense) and involving a specific quantity (30 grams or less) of a specific substance (marijuana). Read in its most natural sense, this narrow language calls for what the Supreme Court has referred to as a "circumstance-specific" inquiry, that is, an inquiry into the nature of the alien's conduct.

Matter of Davey, 26 I. & N. Dec. 37, 39 (BIA 2012) (citations omitted). We agree. "Locating this exception in the INA proper suggests an intent to have the relevant facts found in immigration proceedings." Moncrieffe, 133 S. Ct. at 1691.

Mellouli argues, in effect, that this evidence was inadmissible until the government *first* proved that his conviction related to a federal controlled substance with record-of-conviction documents permitted by Shepard. But this ignores the need for efficient administrative proceedings. The government must prove its entire case in one submission, not by some artificial, bifurcated procedure. The government's case must include proof that the personal use exception does not apply. Evidence related to that issue is therefore admissible at the outset of the proceeding.

Mellouli more or less concedes that circumstance-specific evidence he concealed Adderall would be admissible to prove the personal use exception did not apply. His real objection is that the BIA may not rely on this type of evidence in deciding that his paraphernalia conviction was "related to" a federal controlled substance because it *in fact* involved a federal controlled substance. This objection is based upon categorical and modified categorical approaches that have generated persistent uncertainty and confusion; it therefore raises an interesting and potentially difficult evidentiary issue.[4] But this case does not present the question because (i) the BIA did not use circumstance-specific evidence for this purpose, and (ii) we have affirmed the BIA's categorical determination that Mellouli's drug paraphernalia conviction was within § 1227(a)(2)(B)(i), without regard to whether the paraphernalia was used in connection with a federally scheduled drug. The general rule that we do not decide academic questions is particularly wise in this situation, as we have no hint how the BIA would address this evidentiary issue in a case where the answer mattered to the ultimate issue of removability. Thus, we leave the issue for another day.

For the forgoing reasons, we deny the petition for review.

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[4] "[W]hen deciding how to classify convictions under criteria that go beyond the criminal charge -- such as the amount of the victim's loss, or whether the crime is one of 'moral turpitude,' the agency has the discretion to consider evidence beyond the charging papers and judgment of conviction." Ali v. Mukasey, 521 F.3d 737, 743 (7th Cir. 2008), cert. denied, 129 S. Ct. 2853 (2009); accord Matter of Silva-Trevino, 24 I. & N. Dec. 687, 700-02 (A.G. 2008).

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 12-3093

[Filed July 9, 2013]

Moones Mellouli	)
	)
Petitioner	)
	)
v.	)
	)
Eric H. Holder, Jr., Attorney General of the United States	)
	)
Respondent	)
	)

Petition for Review of an Order of the
Board of Immigration Appeals
(A087-317-931)

JUDGMENT

This cause was submitted on petition for review of an order from the Board of Immigration Appeals, on the original record and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the petition for review is denied in accordance with the opinion of this court.

July 09, 2013

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review

Decision of the Board of Immigration Appeals

Falls Church, Virginia 22041

File: A087 317 931 - Kansas City, MO Date: AUG 07 2012

In re: MOONES MELLOULI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Michael Sharma-Crawford, Esquire

ON BEHALF OF DHS:
Jayme Salinardi
Acting Deputy Chief Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance violation

APPLICATION: Termination

On March 27, 2012, the Immigration Judge found the respondent removable as charged. The respondent

filed a motion to reconsider on April 17, 2012. The Immigration Judge denied the respondent's motion to reconsider on May 1, 2012. The respondent timely appeals that decision. The respondent argues on appeal that the Immigration Judge erred in finding him removable under section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("Act"), 8 U.S.C. 8 U.S.C. § 1227(a)(2)(B)(i). The Department of Homeland Security ("DHS") argues that the Immigration Judge was correct in finding that DHS met their burden of establishing removabilty. The appeal will be dismissed.

We have considered the respondent's arguments regarding (1) DHS's burden to establish that his conviction for possession of drug paraphernalia related to a controlled substance under the Controlled Substance Act, (2) the applicability of *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), and (3) the applicability of the circumstance-specific approach to the "single offense involving possession for one's own use of thirty grams or less of marijuana" exception. Upon review of controlling case law, we conclude that the Immigration Judge correctly denied the respondent's motion to reconsider. The respondent's conviction for possession of drug paraphernalia involves drug trade in general and, thus, is covered under 237(a)(2)(B)(i) of the Act. *See Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009). Additionally, the language of section 237(a)(2)(B)(i) of the Act, requiring that the conviction be other than "a single offense involving possession for one's own use of thirty grams or less of marijuana," invites an inquiry into the underlying facts of the case. A "circumstance specific" rather than a modified categorical approach is the

appropriate means for determining the nature of the crime. *See Nijhawan v. Holder*, 557 U.S. 29 (2009); *Matter of Martinez Espinoza*, *supra.* Conducting a circumstance-specific inquiry into the respondent's actions, the original complaint and probable cause affidavit sufficiently ties the respondent's conviction to an offense involving a controlled substance other than marijuana (Bond Exh. 2).

The respondent additionally argues on appeal that DHS should not have submitted the probable cause affidavit because (1) such documents are not made available under Kansas law without a written order of the court and (2) such documents are not part of the record of conviction. (Respondent's brief at 16). The respondent has not persuaded this Board that the DHS obtained the respondent's probable cause affidavit through illegal means. Additionally, under the circumstance-specific inquiry, an Immigration Judge may look to documents outside the record of conviction. *See Nijhawan v. Holder*, *supra*; *Matter of Martinez Espinoza, supra.* Finally, we find that the Immigration Judge exhibited no bias by considering the above argument as part of the "circumstance specific" analysis. (Respondent's brief at 18).

ORDER: The appeal is dismissed.

/s/Roger A. Pauley
FOR THE BOARD

APPENDIX C

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2345 GRAND BLVD., STE 525
KANSAS CITY, MO 64108

Case No.: A087-317-931

[Filed May 8, 2012]

In the Matter of:	)
MELLOULI, MOONES	)
	)
DETAINED	)
	)
RESPONDENT	)
	)

Docket: KANSAS CITY IMMIGRATION COURT - IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon the basis of respondent's admissions, I have determined that the respondent is subject to removal on the charge(s) in the Notice to Appear.

~~Respondent has made no application for relief from removal.~~ JOM

It is HEREBY ORDERED that the respondent be removed from the United States to TUNISIA on the charge(s) contained in the Notice to Appear.

It is FURTHER ORDERED that if the aforenamed country advises the Attorney General that it is unwilling to accept the respondent into its territory or fails to advise the Attorney General within 30 days following original inquiry whether it will or will not accept respondent into its territory, respondent shall be removed to TUNISIA.

If you fail to appear for removal at the time and place ordered by the DHS, other than because of exceptional circumstances beyond your control (such as serious illness of the alien or death of an immediate relative of the alien, but not including less compelling circumstances), you will not be eligible for the following forms of relief for a period of ten (10) years after the date you were required to appear for removal:

(1) Voluntary departure as provided for in section 240B of the Immigration and Nationality Act;

(2) Cancellation of removal as provided for in section 240A of the Immigration and Nationality Act; and

(3) Adjustment of status or change of status as provided for in section 245, 248 or 249 of the Immigration and Nationality Act.

/s/John R. O'Malley
JOHN R. O'MALLEY
Immigration Judge

Appeal: RESERVED/WAIVED (A/I/B) Date: May 8, 2012

[*Certificate of Service Omitted in Printing of this Appendix*]

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APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2345 GRAND BOULEVARD, SUITE 525
KANSAS CITY, MISSOURI 64108

File No. A087-317-931

[Filed May 1, 2012]

IN THE MATTER OF	)
	)
Monnes MELLOULI	)
	)
RESPONDENT	)
	)

IN REMOVAL PROCCEEDINGS

CHARGE: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended: Alien who at any time after admission has been convicted of any law or regulation relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana.

APPLICATION: Motion to Reconsider

ON BEHALF OF THE RESPONDENT:
Michael Sharma-Crawford, Esq.
Sharma-Crawford Attorneys at Law
515 Avenida Cesar E. Chavez
Kansas City, MO 64108

ON BEHALF OF THE GOVERNMENT:
Jayme Salinardi, Esq.
Immigration and Customs Enforcement
2345 Grand Boulevard, Suite 500
Kansas City, MO 64108

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On July 13, 2010, the respondent was convicted of Possession of Drug Paraphernalia in violation of K.S.A. § 21-36a09 in Johnson County, Kansas. *See* Group Exhibit 2, Tab C. On February 17, 2012, the Department of Homeland Security (DHS) personally served the respondent with a Notice to Appear (NTA), charging him with being removable pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act ("Act"), as amended. *See* Exhibit 1. After the respondent, through counsel, denied removability at a master hearing held March 20, 2012, this Court issued a written decision, dated March 27, 2012, sustaining the removal charge under 237(a)(2)(B)(i).

On April 17, 2012, the respondent filed a timely Motion to Reconsider Finding of Removability. *See* INA § 240(c)(6)(B) (establishing 30 day deadline for motions to reconsider). In his motion the respondent "dispute[s] that DHS met its burden of proving that he was convicted of a ... violation related to a substance that

appears on the *federal* controlled substances list." *See* Respondent's Motion to Reconsider, pg. 7. The respondent further contends that the Court erred in relying on *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), which he believes "is wholly inapplicable here." *Id.* Finally, the respondent argues that the Court erred in applying a circumstance-specific approach to determine whether the respondent was convicted of "a single offense involving possession for one's own use of thirty grams or less of marijuana." *Id.* at 8; *see also* INA § 237(a)(2)(B)(i). The DHS filed its Opposition to the Respondent's Motion to Reconsider on April 27, 2012.

II. Analysis

At the outset, it is important to point out that many of the arguments raised in the respondent's Motion to Reconsider were addressed in the Court's previous order of March 27, 2012. For example, in regard to his first argument—that DHS failed to establish his conviction for Possession of Drug Paraphernalia related to a substance covered by the CSA—this Court observed that the Board had considered an identical argument in *Matter of Martinez Espinoza*, *supra.* Specifically, the alien argued that "a drug paraphernalia conviction cannot support a finding of inadmissibility unless the paraphernalia was tied to a specific, federally controlled substance." *Matter of Martinez Espinoza* at 121. The Board disagreed, explaining that

> we have long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in

> general. Thus, the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by *Matter of Paulus* ... for cases involving the possession of particular substances, has never been extended to other contexts by the Board.

This reasoning is equally applicable here. The respondent's conviction does not involve the possession or distribution of a *particular* drug; rather, it involves other conduct associated with drug trade in general. Hence, the requirement of a correspondence between the Federal and State controlled substance schedules does not apply. The Ninth Circuit's decision in *Luu-Le v. INS*, 224 F.3d 911, 915 (9th Cir. 2000), further illustrates this point. In *Lue-Le*, the court held that an alien was deportable based on his Arizona conviction for possessing drug paraphernalia, even though Arizona's definition of a "drug" did not "map perfectly" with the Federal controlled substance definition. In reaching this conclusion the Ninth Circuit did not find it necessary to identify the *particular* controlled substance at issue, perhaps in recognition of the aforementioned distinction between crimes relating to the possession or distribution of a *particular* drug and more generalized crimes such as possession of drug paraphernalia.

As for the respondent's second argument—that *Matter of Martinez Espinoza* is "wholly inapplicable here"—the Court would simply record its disagreement. In his Motion to Reconsider the respondent points out that the alien in *Martinez Espinoza* was required to prove his admissibility, whereas in this case DHS must prove the respondent is removable as charged. This

Court is aware of the distinction between these burdens of proof. Nonetheless, the Court does not believe that this variation in procedural posture renders *Matter of Martinez Espinoza* irrelevant, especially insofar as it addresses a nearly identical provision of the Act and many of the same issues raised here.

Finally, with respect to the respondent's final argument—that the Court erred in applying a circumstance-specific approach to determine whether the respondent was convicted of "a single offense involving possession for one's own use of thirty grams or less of marijuana"—the Court will refer to its previous order. *See also Matter of Martinez Espinoza*, 25 I&N Dec. at 124 (determining that a "circumstance-specific" inquiry must be used to determine whether a drug offense involved thirty grams of less marijuana for one's own use for purposes of section 212(h)). The Court would also emphasize that the respondent did not bear the burden of showing that his crime related to thirty grams or less of marijuana; rather, the Court specifically found that documents *submitted by DHS* constituted "clear and convincing evidence that [his] offense did not involve the possession of thirty grams or less of marijuana."

For these reasons, the Court finds that the respondent's Motion to Reconsider has failed to identify "errors of law or fact in the previous order." *See* INA § 240(c)(6). In reaching this conclusion the Court renews and incorporates the findings of its order dated March 27, 2012, in conjunction with the additional observations set forth above.

Accordingly, after careful consideration, the following order is entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the respondent's Motion to Reconsider is **DENIED.**

May 1, 2012 /s/John R. O'Malley
John R. O'Malley
United States Immigration Judge

[*Certificate of Service Omitted in Printing of this Appendix]*

* * *

APPENDIX E

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
2345 GRAND BOULEVARD, SUITE 525
KANSAS CITY, MISSOURI 64108

File No. A087-317-931

[Filed March 27, 2012]

IN THE MATTER OF	)
	)
Monnes MELLOULI	)
	)
RESPONDENT	)
	)

IN REMOVAL PROCCEEDINGS

CHARGE: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended: Alien who at any time after admission has been convicted of any law or regulation relating to a controlled substance, other than a single offense involving possession for one's own use of thirty grams or less of marijuana.

APPLICATION: Contested Removal

ON BEHALF OF THE RESPONDENT:
Michael Sharma-Crawford, Esq.
Sharma-Crawford Attorneys at Law
515 Avenida Cesar E. Chavez
Kansas City, MO 64108

ON BEHALF OF THE GOVERNMENT:
Jayme Salinardi, Esq.
Immigration and Customs Enforcement
2345 Grand Boulevard, Suite 500
Kansas City, MO 64108

WRITTEN DECISION OF THE IMMIGRATION JUDGE

I. Procedural History

On July 13, 2010, the respondent was convicted of Possession of Drug Paraphernalia in violation of K.S.A. § 21-36a09 in Johnson County, Kansas. *See* Group Exhibit 2, Tab C. On February 17, 2012, the Department of Homeland Security (DHS) personally served the respondent with a Notice to Appear (NTA), charging him with being removable pursuant to section 237(a)(2)(B)(i) of the Immigration and Nationality Act, as amended (the Act). *See* Exhibit 1.

At a master calendar hearing held March 20, 2012, the respondent, through counsel, admitted to the factual allegations contained in the NTA but denied that his conviction for Possession of Drug Paraphernalia rendered him removable under section 237(a)(2)(B)(i). Specifically, he argued that his conviction record does not specify the controlled substance at issue, and that therefore the DHS has not shown that his conviction involved a controlled substance as defined in section 102 of the Controlled

Substances Act. For the reasons discussed below, the Court finds that the Department has established by clear and convincing evidence that the respondent was convicted of a crime encompassed by section 237(a)(2)(B)(i). *See* INA § 240(c)(3). Therefore, the removal charge will be sustained.

II. Analysis

Section 237(a)(2)(B)(i) of the Act provides that any alien who at any time after admission has been 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 102 of the Controlled Substances Act (21 U.S.C. 802), other than a single offense involving possession for one's own use of thirty grams or less of marijuana, is deportable. In *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009), the Board of Immigration Appeals (Board) maintained a broad reading of the phrase "relating to" and determined that an alien may be rendered inadmissible under section 212(a)(2)(A)(i)(II)—a provision that mirrors the language of section 237(a)(2)(B)(i)—on the basis of a conviction for possession or use of drug paraphernalia. There, the alien had argued that "a drug paraphernalia conviction cannot support a finding of inadmissibility unless the paraphernalia was tied to a specific, federally controlled substance." *Matter of Martinez Espinoza* at 121. In rejecting this argument, the Board pointed out that

> we have long drawn a distinction between crimes involving the possession or distribution of a *particular* drug and those involving other conduct associated with the drug trade in

> general. Thus, the requirement of a correspondence between the Federal and State controlled substance schedules, embraced by *Matter of Paulus* ... for cases involving the possession of particular substances, has never been extended to other contexts by the Board.

Id. The Board also cited approvingly to several circuit court decisions that adopt a similarly broad reading of the phrase "relating to." *See Desai v. Mukasey*, 520 F.3d 762, 764-65 (7th Cir. 2008) (holding that an Illinois conviction for the knowing distribution of a "look-alike" controlled substance was a violation of a State law "relating to a controlled substance," even though "look-alike" substances are not listed on the Federal controlled substance schedules); *Luu-Le v. INS*, 224 F.3d 911, 915 (9th Cir. 2000) (holding that an alien was deportable based on his Arizona conviction for possessing drug paraphernalia, even though Arizona's definition of a "drug" did not "map perfectly" with the Federal controlled substance definition).

Given the breadth of the Kansas drug paraphernalia statute, it is helpful to consult the respondent's record of conviction to identify the exact statutory subsection at issue. *See* K.S.A § 21-36a09 (transferred to K.S.A. § 21-5709). According to his Journal Entry of Judgment, the respondent pled guilty to Count 1 of the Amended Complaint. *See* Group Exhibit 2, pg. 10. This count alleges that the respondent "did ... unlawfully, knowingly, and wilfully use or possess with intent to use *drug paraphernalia* ... to store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body *a controlled substance* .... " *Id.* at 9 (emphasis added). This charge

tracks the language of subsection (b)(2) of the Kansas drug paraphernalia statute, making it clear the respondent was convicted under that subsection.

Turning to some of the relevant statutory definitions, K.S.A. § 21-5701(f) defines "drug paraphernalia" as

> all equipment and materials of any kind which are used, or primarily intended or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling or otherwise introducing into the human body a controlled substance.

Further, a "controlled substance" is defined by Kansas law as "any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto." *See* K.S.A. § 21-5701(a). Notably, many of the controlled substances identified in the Kansas schedules are also covered by the federal schedules as printed in 21 U.S.C. § 812(c).

Upon consideration of the Board's decision in *Matter of Martinez Espinoza*, *supra*, as well as the other circuit decisions cited therein, the Court finds that the DHS has established by clear and convincing evidence that the respondent was convicted of a State law relating to a controlled substance. Even though the Kansas definition of "controlled substance" does not "map perfectly" the definition of that term as used in

section 102 of the Controlled Substances Act, the Kansas drug paraphernalia statute "is plainly intended to criminalize behavior involving the production or use of drugs." *Matter of Martinez Espinoza*, 25 I&N Dec. at 122 (quoting *Luu-Le v. INS*, 224 F.3d at 915). Moreover, similar to the Arizona statute addressed in *Luu-Le*, K.S.A. § 21-5711 sets forth sixteen factors that a court shall consider in determining whether an object is drug paraphernalia. These factors include statements by the owner or person in control of the object, the proximity of the object to drugs, the existence of any drug residue on the object, and direct or circumstantial evidence of the owner or user's intent and knowledge. *See* K.S.A. § 21-5711. Considered in its entirety, this statutory framework "makes abundantly clear that an object is not drug paraphernalia unless it is in some way linked to drugs." *Luu-Le v. INS*, *supra.*

The Court must next consider whether the respondent's conviction was an "offense involving possession for one's own use of thirty grams or less of marijuana." *See* INA § 237(a)(2)(B). In *Matter of Martinez Espinoza*, 25 I&N Dec. at 124, the Board addressed nearly identical language in section 212(h) of the Act and determined that "the term 'offense' ... refer[s] to the specific unlawful acts that made the alien inadmissible, rather than to any generic crime." Thus, a "circumstance-specific" inquiry must be used to determine whether a drug offense involved thirty grams of less marijuana for one's own use. *Id.* Unlike the modified categorical approach, such an inquiry permits an immigration judge to consult evidence outside the record of conviction. *See Nijhawan v. Holder*, 129 S. Ct. 2294, 2298 (2009).

Here, the Affidavit filed in the respondent's criminal case states that "deputies found four orange tablets in his sock .... The drugs had the inscription 'M Aphet Salts 30 mg' which is identified as Adderall." *See* Group Exhibit 2, pg. 8. The original complaint filed against the respondent also refers to Adderall. *See* Group Exhibit 3, pg. 22. The Court finds these documents to be clear and convincing evidence that the respondent's offense did not involve the possession of thirty grams or less of marijuana.

Based on the foregoing, the removal charge under section 237(a)(2)(B)(i) of the Act will be sustained. This matter has been scheduled for a master calendar reset hearing on April 3, 2012, at 10:30 am. The respondent should be prepared to identify what forms of relief, if any, he intends to pursue at that time.

Accordingly, after careful consideration, the following order is entered:

ORDER OF THE IMMIGRATION JUDGE

IT IS HEREBY ORDERED that the charge of removal under section 237(a)(2)(B)(i) is **SUSTAINED**.

March 27, 2012 /s/John R. O'Malley
John R. O'Malley
United States Immigration Judge

[*Certificate of Service Omitted in Printing of this Appendix]*

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APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 12-3093

[Filed October 28, 2013]

Moones Mellouli	)
	)
Petitioner	)
	)
v.	)
	)
Eric H. Holder, Jr., Attorney General of the United States	)
	)
Respondent	)
	)

Petition for Review of an Order of the
Board of Immigration Appeals
(A087-317-931)

ORDER

The petition for rehearing *en banc* is denied. The petition for panel rehearing is also denied.

Judges Wollman, Murphy, Bye and Kelly would grant the petition for rehearing *en banc*.

October 28, 2013

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

_____

/s/ Michael E. Gans

APPENDIX G

STATUTES

8 U.S.C. § 1227. Deportable aliens

(a) Classes of deportable aliens

Any alien (including an alien crewman) in and admitted to the United States shall, upon the order of the Attorney General, be removed if the alien is within one or more of the following classes of deportable aliens:

* * *

(2) Criminal offenses

* * *

(B) Controlled substances

(i) Conviction

Any alien who at any time after admission 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 section 802 of Title 21), other than a single offense involving possession for one's own use of 30 grams or less of marijuana, is deportable.

* * *

21 U.S.C. § 802 - Definitions

* * *

(6) The term "controlled substance" means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986.

* * *

Kan. Stat. Ann. § 21-5701. Definitions

(a) "Controlled substance" means any drug, substance or immediate precursor included in any of the schedules designated in K.S.A. 65-4105, 65-4107, 65-4109, 65-4111 and 65-4113, and amendments thereto.

* * *

Kan. Stat. Ann. § 21-5709. Unlawful possession of certain drug precursors and drug paraphernalia

(a) It shall be unlawful for any person to possess ephedrine, pseudoephedrine, red phosphorus, lithium metal, sodium metal, iodine, anhydrous ammonia, pressurized ammonia or phenylpropanolamine, or their salts, isomers or salts of isomers with an intent to use the product to manufacture a controlled substance.

(b) It shall be unlawful for any person to use or possess with intent to use any drug paraphernalia to:

(1) Manufacture, cultivate, plant, propagate, harvest, test, analyze or distribute a controlled substance; or

(2) store, contain, conceal, inject, ingest, inhale or otherwise introduce a controlled substance into the human body.

(c) It shall be unlawful for any person to use or possess with intent to use anhydrous ammonia or pressurized ammonia in a container not approved for that chemical by the Kansas department of agriculture.

(d) It shall be unlawful for any person to purchase, receive or otherwise acquire at retail any compound, mixture or preparation containing more than 3.6 grams of pseudoephedrine base or ephedrine base in any single transaction or any compound, mixture or preparation containing more than nine grams of pseudoephedrine base or ephedrine base within any 30-day period.

(e)(1) Violation of subsection (a) is a drug severity level 3 felony;

(2) violation of subsection (b)(1) is a:

(A) Drug severity level 5 felony, except as provided in subsection (e)(2)(B); and

(B) class A nonperson misdemeanor if the drug paraphernalia was used to cultivate fewer than five marijuana plants;

(3) violation of subsection (b)(2) is a class A nonperson misdemeanor;

(4) violation of subsection (c) is a drug severity level 5 felony; and

(5) violation of subsection (d) is a class A nonperson misdemeanor.

(f) For persons arrested and charged under subsection (a) or (c), bail shall be at least $50,000 cash or surety, unless the court determines, on the record, that the defendant is not likely to reoffend, the court imposes pretrial supervision or the defendant agrees to participate in a licensed or certified drug treatment program.