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Capital Area Immigrants' Rights

Working to ensure all immigrants are treated with fairness, dignity and respect for their human and civil rights.

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PRACTICE ADVISORY[1]
DEFENDING IMMIGRANTS FACING CONTROLLED SUBSTANCE CHARGES

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This practice advisory provides a summary of defense strategies that Virginia criminal defense attorneys can use when representing immigrant defendants facing controlled substance-related charges. As a general matter, defense attorneys should bear in mind that avoiding any controlled substance convictions should remain a very high priority. With one very limited exception involving marijuana, controlled substances convictions constitute mandatory grounds of removal[2] and many such offenses are also considered "aggravated felonies"[3] if they involve sale or distribution. Accordingly, even low-level controlled substance offenses can have severe immigration consequences. The following defense strategies can be used to defend against some of those consequences.

(1) **Seek a deferred disposition under Virginia Code § 18.2-251 with not guilty plea**: For first time offenders, certain deferred dispositions under § 18.2-251 will not be considered "convictions" for immigration purposes[4] and therefore will not give rise to the controlled substance grounds of removability. In order to obtain a disposition under § 18.2-251 that is not a conviction for immigration purposes, the defendant must plead **not guilty and leave it to the judge to find facts justifying a finding of guilt without making any admissions.** Under those circumstances, the U.S. Court of Appeals for the Fourth Circuit has ruled that an immigrant will not have a conviction. *Crespo v. Holder*, 631 F.3d 130 (4th Cir. 2011). Thus, a § 18.2-251 disposition consistent with *Crespo* will provide a strong immigration defense no matter the controlled substance involved in the offense.

(2) **For immigrants with no prior controlled substance convictions facing a marijuana offense, establish in the record that the offense involved 30 grams or less of marijuana**: The controlled substance ground of deportability (which applies to lawful permanent residents and other lawfully admitted immigrants) has a narrow exception for a **single**

[1] This practice advisory does not constitute legal advice. It is intended for the use of legal professionals and is not meant to serve as a substitute for a lawyer's obligation to conduct independent analysis and provide legal advice tailored to the facts and circumstances of a client's case.
[2] Both the grounds of deportability (applicable to those who have been lawfully admitted) and the grounds of inadmissibility (applicable to those who have not been lawfully admitted) contain very broad controlled substances grounds of removal. *See* 8 U.S.C. § 1227(a)(2)(B) (deportability); 8 U.S.C. § 1182(a)(2)(C) (inadmissibility).
[3] 8 U.S.C. § 1101(a)(43)(B).
[4] 8 U.S.C. § 1101(a)(48)(A).

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offense involving possession of 30 grams or less of marijuana.[5] Thus, when applicable, defense attorneys should make sure that the record clearly states that the offense in question involves 30 grams or less of marijuana. Importantly, an immigration judge can look to *any* facts or documents in the record to establish that an offense did, or did not, meet the 30 grams exception.[6] Although this defense strategy is particularly important for lawful permanent residents, it should be implemented for any immigrant with no prior controlled substance convictions.[7]

(3) **When taking a plea under Virginia Code § 18.2-248.1, plea explicitly to subpart "(a)"**: If a defendant has no option other than to take a plea under § 18.2-248.1 (possession, distribution, sale, etc. of marijuana), make clear in the record, if applicable, that the offense involved only possession and seek a plea to subpart (a), which states that the marijuana involved was less than one-half ounce. Such a plea preserves two immigration defense arguments. First, for immigrants who do not have a prior drug offense, it preserves the argument that the offense falls within the 30 grams exception to the controlled substance ground of deportability (see #2, above). Second, for all immigrants, it preserves the argument that they should not be charged as "drug trafficker" aggravated felons because the offense necessarily involves a small amount of marijuana.[8]

(4) **For other controlled substance offenses, keep the name of the drug out of the record of conviction to preserve a defense under *Mellouli*:** In June 2015, the U.S. Supreme Court decided *Mellouli v. Lynch*[9] and confirmed that when a state's drug schedules criminalize more controlled substances than the federal schedules, state convictions may be overbroad and therefore cannot support the federal controlled substance grounds of removability. As described in Appendix A, Virginia criminalizes certain substances that are not included in the federal drug schedules. Thus, immigration lawyers have strong grounds to argue that, under the "categorical approach," at least some Virginia controlled substance offenses should not make an immigrant removable due to the overbreadth of the drug schedules. However, the degree to which overbreadth provides a defense largely depends on whether Virginia's controlled substance statutes – such as Virginia Code § 18.2-250 – are "divisible." The question of divisibility is very complex and has not been resolved with respect to Virginia's controlled substance statutes. Nevertheless, defense attorneys can adopt three strategies to help preserve *Mellouli*-related defenses for their clients in immigration court:

- First, keep the name of the controlled substance out of the record of conviction because doing so preserves a potential overbreadth argument consistent with *Mellouli*. For this purpose, the "record of conviction" constitutes the statutory definition of the offense, the charging document, the written plea agreement, the transcript of the plea colloquy and any explicit factual finding by the trial judge to which the defendant consented.[10] Thus, for example, if the name of the controlled

[5] 8 U.S.C. § 1227(a)(2)(B)(i).
[6] *Matter of Davey*, 26 I&N Dec. 37 (BIA 2012).
[7] Immigrants who are subject to the grounds of inadmissibility (because they have not been lawfully admitted) also benefit from this strategy because, although there is no 30 gram exception to the grounds of inadmissibility, a first marijuana offense involving 30 grams or less may be "waived" by means of a 212(h) waiver. *See* 8 U.S.C. § 1182(h). A 212(h) waiver may be an important defense for certain inadmissible immigrants facing removal proceedings or seeking to obtain lawful status.
[8] *See Moncrieffe v. Holder*, 133 S. Ct. 1678 (2013).
[9] 135 S. Ct. 1980 (2015).
[10] *Shepard v. United States*, 544 U.S. 13 (2005).

substance has already been specified in the indictment, consider asking the prosecutor to strike the name of the controlled substance. Similarly, ensure that the defendant does not specify any particular controlled substance during the plea colloquy or otherwise stipulate to a particular substance.

- Second, as shown by Appendix A, Virginia's Drug Control Act Schedule I, Virginia Code § 54.1-3446, contains substances that are not on the federal drug schedules. Thus, in circumstances where it is necessary to designate a drug schedule, it may best serve the client's interest to designate schedule I (as opposed to schedules II-VI) because doing so preserves an immigration defense argument that the conviction is overbroad with regard to the controlled substance grounds of removability. Of course, the potential immigration benefit from such a plea must be balanced against the higher criminal penalty that results from a plea to a schedule I.

- Third, under the rationale of the Court in *Mellouli*, there may be circumstances when it is advisable for a defendant to plead to possession of paraphernalia under Virginia Code § 54.1-3466. This will be the case when it is impossible to plea to a controlled substance offense without specifying the particular controlled substance in the record. In that circumstance, if it is possible to enter an alternate plea to a paraphernalia offense that does not require specifying the name of the controlled substance, the paraphernalia offense is more likely to preserve a defense under the holding of *Mellouli*.

For any questions about this advisory, please contact Morgan Macdonald at morgan@caircoalition.org. For further information about CAIR Coalition's work on the immigration consequences of crimes, please visit this page.

Appendix A
Schedule I Virginia Controlled Substances Not In Federal Schedules
(as of June 2015)[11]

Salvinorin A

4-methoxymethcathinone (other names: methedrone; bk-PMMA)

3,4-methylenedioxyethcathinone (other name: ethylone)

4-methoxy-alpha-pyrrolidinopropiophenone (other name: MOPPP)

3,4-methylenedioxy-alpha-pyrrolidinopropiophenone (other name: MDPPP)

6,7-dihydro-5H-indeno-(5,6-d)-1,3-dioxol-6-amine (other name: MDAI)

Methoxetamine (other names: MXE, 3-MeO-2-Oxo-PCE)

4-Fluoromethamphetamine (other name: 4-FMA)

4-Fluoroamphetamine (other name: F-4A)

(2-aminopropyl)benzofuran (other name: APB)

(2-aminopropyl)-2,3-dihydrobenzofuran (other name: APDB)

Acetoxydimethyltryptamine (other names: AcO-Psilocin, AcO-DMT, Pscilacetin)

Benocyclidine (other names: BCP, BTCP)

N-1-benzyl-4-piperidyl]N-phenylpropanamide (other name: benzylfentanyl), its optical isomers, salts and salts of isomers

N-1-(2-thienyl)methyl-4-piperidyl]-N-phenylpropanamide (other name: thenylfentanyl), its optical isomers, salts and salts of isomers

[11] This list is meant to be illustrative of Virginia controlled substances currently not included in the federal schedules. However, practitioners should confirm that specific Virginia substances relevant to a defendant's case were not included in the federal schedules during the time periods pertinent to analyzing the immigration implications of a particular criminal charge/conviction. Practitioners should note that state and federal drug schedules change regularly.