



LITIGATING CONTROLLED
SUBSTANCE CONVICTIONS
IN REMOVAL CASES

Introduction

- Background
- Categorical Approach/Mathis Framework
- Minnesota State Law
- Identification and Use of Criminal Records

The Categorical Approach

- Does State Statute of Conviction match Generic Federal Crime?
 - *Element-based inquiry*
 - *Not based on conduct*

Federal Generic Offenses

- INA 237(a)(2)(B)(i) - 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.
- INA 212(a)(2)(A)(i)(II) In general Except as provided in clause (ii), any alien convicted of, or who admits having committed, or who admits committing acts which constitute the essential elements of-
 - *(II) 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**).*

Section 802 of Title 21

■ Definitions

- *E.g.: (14) The term “isomer” means the optical isomer, except as used in schedule I(c) and schedule II(a)(4). As used in schedule I(c), the term “isomer” means any optical, positional, or geometric isomer. As used in schedule II(a)(4), the term “isomer” means any optical or geometric isomer.*

■ Schedules

- *(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.*

Minnesota Controlled Substances Statute

- Minnesota Statute §152
 - § 152.01 definitions
 - § 152.02 schedules I–V (Minnesota lists more drugs than are on 802)
 - who has the power to manage schedules?
 - §§ 152.021 – 152.027 crimes (possession and sale crimes)

Fifth Degree Possession – § 152.025

- Minnesota § 152.025 Subd. 2: A person is guilty of controlled substance crime in the fifth degree and upon conviction may be sentenced as provided in subdivision 4 if:
 - (1) the person unlawfully possesses one or more mixtures containing a controlled substance classified in Schedule I, II, III, or IV, except a small amount of marijuana;

Does a 5th Degree Conviction Make a Person Removable?

- Are elements of § 152.025 related to 802?
 - *Is the conviction necessarily for a substance controlled in 802?*
 - *Mellouli*: not removable if statute is overbroad
 - *Is it sufficient to prove possession of a “controlled substance” or do need to prove exact identity of drug possessed (i.e. methamphetamine)?*
 - If identity of drug possessed is necessary, statute is divisible and if drug possessed is related to 802 noncitizen is removable

Mathis Framework – Distinguishing Elements from Means

- Statute
- State Case law
- Peek

Mathis Step 1

- The statute

Framework

- Umbrella terms
- Separate statutory lists

Chemical Definitions

- Is there a match in the chemical properties of substances?
- Isomers and the *Lorenzo* case

Sentencing

- Different punishment for different substances?
- Fifth degree–no distinction in sentencing regardless of substance possessed

Mathis Step 2

- Review of Statute doesn't answer, look to state case law
- Theory of Elements/Mean Distinction vs. Practice
 - *Schad v. Arizona*, 501 U.S. 624 (1991)
- What type of case law is relevant?

Cases defining elements possession charge, involving double jeopardy, possession of multiple drugs at the same time, burden of proof, sufficiency of the evidence, and jury unanimity

Minnesota Law Regarding Elements

- “Minnesota law requires proof of the actual identity of the substance”
 - *State v. Vail*, 274 N.W.2d 127, 134 (Minn. 1979)
 - *State v. Dick*, 253 N.W.2d 277 (Minn. 1977)
 - Cases quoting jury instructions, e.g. *State v. Oltz*, No. A16-1228, 2017 WL 2332722 (Minn. App. May 30, 2017); *State v. Papadakis*, 643 N.W.2d 349 (Minn. App. 2002)
 - Cases involving possession of multiple drugs at the same time, e.g. *State v. Lubovich*, No. A05-1777, 2006 WL 25296109 (Minn. Ct. App. Sept. 5, 2006),

Case Law on *Mens Rea*

- *State v. Ali*, 775 N.W.2d 914 (Minn. App. 2009) – sufficient if defendant knows a substance is controlled
- Minnesota Courts have relied on *Ali* to find identity of the substance not required for a plea

Jury Instructions for 5th Degree Possession

- The elements of possession of a controlled substance in the fifth degree are:
 - First, the defendant knowingly possessed one or more mixtures containing _____.
 - [(The law recognizes two kinds of possession: “actual possession” and “constructive possession.” A person is in actual possession of (the controlled substance) if (he) (she) has it on (his) (her) person or is exercising direct physical control over _____ (the controlled substance) if _____ (the controlled substance) was in a place under (his) (her) exclusive control to which other people did not normally have access, or if found in a place to which others had access, the person knowingly exercised dominion and control over _____ (the controlled substance). You may find that the element of possession, as that term is used in these instructions, is present if you find beyond a reasonable doubt that the defendant had actual or constructive possession.]
 - The Board omitted the footnote at the end of this sentence in the MN Jury Instruction Guide. The footnote states: “A Schedule I, II, III or IV controlled substance except a small amount of marijuana.”
- Parentheses, Brackets and Blanks

Case Law on Legislative Authority

- Non-delegation
- *State v King*, 257 N.W.2d 693 (Minn. 1977)
 - *Scheduled substances are facts*

Case Law on Charging Documents

- Charging practice: use of “to wit:”
- *State v. Heck*, 23 Minn. 549 (1877)
 - *To wit identifies a fact*

Mathis Step 3

- The “peek”
- Look to limited set of documents to identify elements (*Shepard* documents)

Law Unclear?

- Rule of Lenity

Creating a Record

- Work with defense counsel - limit admissions
- Raise arguments before IJ (bond and merits)
- Document the case with favorable records

Questions?