U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

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Name: R[redacted]-N[redacted], R[redacted]

A [redacted]268

Date of this notice: 1/12/2018

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

Sincerely,

Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
Greer, Anne J.
Wendtland, Linda S.
Pauley, Roger

Enclosed
Userteam: Docket

File: [redacted] 268 – Tucson, AZ

Date: JAN 12 2018

In re: R[redacted] R[redacted]-N[redacted]

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Kathryn E. Staples, Esquire

ON BEHALF OF DHS: Joey L. Caccarozzo
Assistant Chief Counsel

APPLICATION: Cancellation of removal

In a decision dated February 15, 2017, an Immigration Judge denied the respondent's application for cancellation of removal under section 240A(b)(1) of the Immigration and Nationality Act, 8 U.S.C. § 1229b(b)(1) (2012), after concluding that he had been convicted of an offense relating to a controlled substance under section 212(a)(2)(A)(i)(II) of the Act, 8 U.S.C. § 1182(a)(2)(A)(i)(II). The respondent, a native and citizen of Mexico, has appealed from that decision. The appeal will be sustained and the record will be remanded for further proceedings.

We review for clear error the findings of fact, including the determination of credibility, made by the Immigration Judge. 8 C.F.R. § 1003.1(d)(3)(i) (2017). We review de novo all other issues, including issues of law, judgment, and discretion. 8 C.F.R. § 1003.1(d)(3)(ii).

The respondent conceded his removability. Thus, the only issue on appeal is whether the respondent's 2015 conviction for possession of drug paraphernalia, in violation of section 13-3415(A) of the Arizona Revised Statutes, is a conviction for an offense relating to a controlled substance under section 212(a)(2)(A)(i)(II) of the Act that bars him from cancellation of removal (IJ at 3-5; Respondent's Br. at 5-6). *See* section 240A(b)(1)(C) of the Act (barring an alien convicted of an offense under section 212(a)(2) from applying for cancellation of removal). The respondent argues that his conviction cannot render him ineligible for cancellation of removal since the elements of his statute of conviction are overbroad and indivisible relative to the definition of a controlled substance offense under section 212(a)(2)(A)(i)(II) of the Act (Respondent's Br. at 5-25).

To determine whether the respondent's conviction under section 13-3415 of the Arizona Revised Statutes is a conviction for an offense relating to a controlled substance, we employ the "categorical approach" to determine whether the elements of his State offense match those of the "generic" Federal definition of a controlled substance offense under section 212(a)(2)(A)(i)(II) of the Act. *See Moncrieffe v. Holder*, 133 S. Ct. 1678, 1684 (2013). An offense categorically falls within the generic definition set forth under section 212(a)(2)(A)(i)(II) of the Act "when the elements that make up the state crime of conviction relate to a federally controlled substance." *Mellouli v. Lynch*, 135 S. Ct. 1980, 1990 (2015).

At the time of the respondent's offense, section 13-3415(A) provided as follows:

> It is unlawful for any person to use, or to possess with intent to use, drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body *a drug* in violation of this chapter.

(Emphasis added.) For purposes of this section, the term "drug" is defined as "any narcotic drug, dangerous drug, marijuana or peyote." *See* Ariz. Rev. Stat. Ann. § 13-3415(F)(1) (2015). The terms "narcotic drug" and "dangerous drug" refer to numerous controlled substances listed in State schedules. *See* Ariz. Rev. Stat. Ann. §§ 13-3401(6), (20).

It is undisputed that section 13-3415(A) is broader than section 212(a)(2)(A)(i)(II) of the Act because Arizona's definitions of "narcotic drug" and "dangerous drug" are categorically broader than the Federal definition of a "controlled substance" (IJ at 3). *See Alvarado v. Holder*, 759 F.3d 1121, 1130 (9th Cir. 2014). We therefore must determine whether the respondent's State statute of conviction is "divisible" relative to the definition of a controlled substance offense, in which case a further "modified categorical" inquiry is appropriate. *Mathis v. United States*, 136 S. Ct. 2243, 2249 (2016).

To determine whether section 13-3415(A) is divisible relative to the definition of a controlled substance offense, we must examine whether the *particular* controlled substance underlying an Arizona drug paraphernalia violation is either "an independent '*element*' of the offense," or "a mere 'brute fact' describing various means or methods by which the offense can be committed." *Matter of Chairez*, 26 I&N Dec. 819, 822 (BIA 2016) (emphasis added) (quoting *Mathis v. United States*, 136 S. Ct. at 2248). If it is the former, the statute is divisible, and we may examine the respondent's record of conviction under a modified categorical approach. *See Marinelarena v. Sessions*, 869 F.3d 780, 785 (9th Cir. 2017). If it is the latter, the respondent's statute of conviction is indivisible, and his offense cannot bar him from applying for cancellation of removal. *See id.* An "element" is any fact that the "prosecution must prove to sustain a conviction," and which "the jury must find beyond a reasonable doubt." *Matter of Chairez*, 26 I&N Dec. at 822-23 (quoting *Mathis v. United States*, 136 S. Ct. at 2248).

The Immigration Judge found that the term "drug" in section 13-3415 is divisible relative to the definition of a controlled substance offense because the relevant jury instructions indicate that "jurors are instructed as to the specific drug involved in a possession of drug paraphernalia conviction" (IJ at 4 (citing RAJI (Criminal) 4th, 430 chp. 34.15, available at http://www.azbar.org/media/1179884/rajicriminal-4thed2016-final.pdf)).

However, these jury instructions do not resolve the issue of divisibility for two reasons. First, these instructions are persuasive rather than binding authority because they do not bear the imprimatur of the Arizona Supreme Court. *See State v. Logan*, 30 P.3d 631, 633 (Ariz. 2001). Second, Arizona case law indicates that a jury need not unanimously agree on the particular controlled substance underlying a violation of section 13-3415(A). *See State v. Lodge*, No. 2 CA-CR 2014-0110, 2015 WL 164070, at *4-6 (Ariz. Ct. App. Jan. 14, 2015) (unpublished) (upholding a defendant's conviction under section 13-3415(A) despite the fact that the jury instructions did not require a connection between the paraphernalia and a specific drug). In a similar context, a

State court has held that possession or sale of a dangerous drug under section 13-3407(A) is "one crime, regardless of whether the drug possessed or sold is methamphetamine, MDMA, or any other substance the statutes define as a dangerous drug." *See State v. Prescott*, No. 1 CA-CR 15-0188, 2016 WL 611656, at *2 (Ariz. Ct. App. Feb. 16, 2016) (unpublished) (holding that a "defendant is not entitled to a unanimous verdict on the precise manner in which the [offense] was committed").[1] We therefore conclude that the particular substance underlying a violation of section 13-3415(A) is not an "element" of the offense of possession of drug paraphernalia under Arizona law.

Even assuming that *Lodge* fails to "definitively answer[]" whether section 13-3415(A) is divisible,[2] we conclude that the respondent's record of conviction reflects that a prosecutor need not prove, and a jury need not find, which substance necessarily underlies a drug paraphernalia violation in Arizona. *See Mathis v. United States*, 136 S. Ct. at 2256-57 (providing that we may "'peek at the [record] documents' . . . for 'the sole and limited purpose of determining whether [a particular item is an] element[] of the offense'" (first alteration in original) (citation omitted)); *see also* 8 C.F.R. § 1003.1(d)(3)(iv) (empowering us to take "administrative notice of . . . the contents of official documents").

In the criminal complaint, the contents of Count 2, of which the respondent was convicted, do not identify the substance underlying his paraphernalia violation (*see* Exh. 19 at Tab A). Instead, it specifies that the respondent's offense involved a "GLASS PIPE" (*see* Exh. 19 at Tab A). This reflects that a prosecutor need only prove, and a jury need only identify, the type of *paraphernalia* involved in a violation of section 13-3415—however, the underlying *substance* need not be similarly identified. *See Mathis v. United States*, 136 S. Ct. at 2257 (noting that a charging document "reveal[s] what the prosecutor has to (and does not have to) demonstrate to prevail").[3]

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[1] Both *Lodge* and *Prescott* are consistent with the view of the United States Court of Appeals for the Ninth Circuit, in whose jurisdiction this case arises, that the particular controlled substance underlying a conviction under section 13-3408 of the Arizona Revised Statutes, which prohibits possessing, selling, manufacturing, administering, procuring, transporting, importing, and offering to transport a "narcotic drug," is not an element of the offense. *See Vera-Valdevinos v. Lynch*, 649 F. App'x 597, 598 & n.1 (9th Cir. 2016) (holding that a violation of section 13-3408 is overbroad and indivisible relative to section 101(a)(43)(B) of the Act, 8 U.S.C. § 1101(a)(43)(B), because a jury need not agree on the particular substance underlying a violation).

[2] The Supreme Court has clarified that, when answering the threshold inquiry of whether a statutory term is an "element" or a mere "means" of commission, we must first consult the statutory text and State court decisions construing the statute, and where "a state court decision *definitively* answers the question," an Immigration Judge "need only follow what it says." *Mathis v. United States*, 136 S. Ct. at 2256.

[3] We note that a handwritten notation on the respondent's plea agreement reflects that his offense involved a "meth pipe" (Exh. 9 at Tab A). However, because this notation is untethered to any factual allegation in a corresponding charging document, it is of limited use in assessing divisibility. *See Matter of Chairez*, 27 I&N Dec. 21, 24 (BIA 2017) ("[W]hile the facts admitted in a plea

We therefore conclude that the particular substance underlying a violation of section 13-3415(A) is not an element of the offense of possession of drug paraphernalia under Arizona law.

We also cannot affirm the Immigration Judge's conclusion that the reference in the respondent's conviction record to section 13-901.01(H)(4) renders the underlying drug an element of section 13-3415(A) of the Arizona Revised Statutes (IJ at 4-5; Exh. 9 at Tab A). Section 13-901.01 provides, in relevant part, as follows:

> A. Notwithstanding any law to the contrary, any person who is convicted of the personal possession or use of a controlled substance or drug paraphernalia is eligible for probation. The court shall suspend the imposition or execution of sentence and place the person on probation.
>
> . . . .
>
> H. A person is not eligible for probation under this section but instead shall be sentenced pursuant to chapter 34 of this title if the court finds the person either:
>
> . . . .
>
> 4. Was convicted of the personal possession or use of a controlled substance or drug paraphernalia and the offense *involved methamphetamine*.

Ariz. Rev. Stat. Ann. § 13-901.01(A), (H)(4) (emphasis added).

Because Arizona law allows for the enhancement of a defendant's sentence after conviction for possession of drug paraphernalia if such an offense involved a Federally controlled substance—namely, methamphetamine—the DHS argues that the Immigration Judge properly found that the particular substance involved in a violation of section 13-3415(A) is necessarily an element of that offense (DHS Brief at 3 (citing *Mathis v. United States*, 136 S. Ct. at 2256 (holding that a statute is divisible if statutory alternatives carry different punishments because those alternatives must be elements)). However, State case law reflects that a sentencing judge—rather than a jury—makes a finding, as a matter of law, as to whether a defendant is ineligible for probation under section 13-901.01 of the Arizona Revised Statutes because his or her offense involved methamphetamine. *See Bolton v. State*, 945 P.2d 1332, 1334 (Ariz. Ct. App. 1997). And since this judicial determination need not be submitted to a jury and proven beyond a reasonable doubt, the specific nature of the substance underlying a conviction for possession of drug paraphernalia under Arizona law cannot be an element of that offense. *See Alleyne v. United States*, 133 S. Ct. 2151, 2155 (2013) (holding that "any fact that increases the mandatory minimum [sentence] is an 'element' that must be submitted to the jury" and found beyond a reasonable doubt).

For the foregoing reasons, we agree with the respondent that his conviction for possession of drug paraphernalia under section 13-3415(A) is overbroad and indivisible relative to the definition of a controlled substance offense under section 212(a)(2)(A)(i)(II) of the Act. As a result, it cannot bar him from applying for cancellation of removal under section 240A(b)(1)(C) of the Act. His appeal will therefore be sustained and we will remand the record for further consideration of his

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agreement may shed light on the divisibility of a State statute when those facts are tethered to what is alleged in a charging document, that is not the case here.").

eligibility for cancellation of removal. On remand, the parties should be given an opportunity to present additional arguments and evidence regarding the respondent's eligibility for cancellation of removal as well as any other form of relief for which he may be eligible. Accordingly, the following orders will be entered.

ORDER: The appeal is sustained.

FURTHER ORDER: The record is remanded for further proceedings consistent with the foregoing opinion.

FOR THE BOARD

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
300 WEST CONGRESS STREET, SUITE 300
TUCSON, ARIZONA 85701

IN THE MATTER OF	)	**IN REMOVAL PROCEEDINGS**
R[redacted]-N[redacted], R[redacted]	)	**FILE NO.:** [redacted]268
Respondent	)	**DATE:** February 15, 2017

CHARGE: Section 212(a)(6)(A)(i) of the Immigration and Nationality Act in that she is an alien present in the United States without being admitted or paroled, or who arrived in the United States at any time or place other than as designated by the Attorney General.

APPLICATION: Cancellation of Removal, Section 240A(b)(1) of the Act

On behalf of the respondent:
Kathryn E. Staples
Law Offices of Matthew H. Green
130 West Cushing Street
Tucson, Arizona 85701

On behalf of the Department:
Joey L. Caccarrozo
Assistant Chief Council
Department of Homeland Security
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DECISION AND ORDER OF THE IMMIGRATION COURT

I. PROCEDURAL HISTORY

The Department of Homeland Security ("the Department") charges the respondent as removable under section 212(a)(6)(A)(i) of the Immigration and Nationality Act ("INA" or "the Act"). [Ex. 1]. The respondent admitted the factual allegations and conceded the charge of removability. The Court has sustained the charge and directed Mexico as the country of removal. In turn, the respondent requests relief in the form of cancellation of removal for certain nonpermanent residents pursuant to 240A(b)(1) of the Act. [Ex. 17].

II. EVIDENCE PRESENTED

The following is a list of documents that have been formally admitted as an exhibit in the Record of Proceeding and considered by the Court in making the present decision: Exhibit 1 is the Notice to Appear; Exhibit 2 is a conditional motion to change venue; Exhibit 3 is a motion for change of venue; Exhibit 4 is an order changing venue to Phoenix, Arizona; Exhibit 5 is a motion to withdraw as attorney of record; Exhibit 6 is an order granting withdrawal of counsel; Exhibit 7 is the Department's non-opposition to respondent's motion to withdraw; Exhibit 8 is a

joint motion to administratively close proceedings; Exhibit 9 is an order granting administrative closure; Exhibit 10 is the Department's motion to recalendar; Exhibit 11 is an order granting the motion to recalendar; Exhibit 12 is a motion to change venue; Exhibit 13 is an order changing venue to Eloy, Arizona; Exhibit 14 is an order granting the respondent's oral request to have his attorney removed; Exhibit 15 is a request to review the case file; Exhibit 16 is a request for a copy of the Notice to Appear; Exhibit 17 is the respondent's Form EOIR-42B, Application for Cancellation of Removal and Adjustment of Status for Certain Nonpermanent Residents; Exhibit 18 is the respondent's brief on eligibility for cancellation of removal in light of *Mellouli v. Lynch*; Exhibit 19 is the Department's brief on eligibility for cancellation of removal; Exhibit 20 is a motion for change of venue and an order changing venue to Tucson, Arizona; Exhibit 21 is the respondent's proposed exhibits, volume one; Exhibit 22 is the respondent's proposed exhibits, volume two, Exhibit 23 is the respondent's brief; Exhibit 24 is the respondent's proposed witness list; Exhibit 25 is the Department's exhibits, including a Form I-213; Exhibit 26 is a motion for administrative closure; Exhibit 27 is the Department's opposition to administrative closure; and Exhibit 28 is a document related to the respondent's criminal conviction.

III. DISCUSSION/ANALYSIS

A. Cancellation of Removal, Section 240A(b)(1) of the Act

An applicant for cancellation of removal under section 240A(b)(1) of the Act must demonstrate that he or she: (1) has been physically present in the United States for a continuous period of not less than ten years immediately preceding the date of the application; (2) has been a person of good moral character during such period; (3) has not been convicted of an offense under section 212(a)(2), 237(a)(2), or 237(a)(3); and (4) that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child who is a citizen of the United States or an alien lawfully admitted for permanent residence. Further, such relief must be warranted as a matter of discretion. *Matter of C-V-T-*, 22 I&N Dec. 7, 10 (BIA 1998).

The Department argues that the respondent is statutorily ineligible for cancellation of removal because he has been convicted of an offense under section 212(a)(2) of the Act, specifically an offense relating to a controlled substance pursuant to section 212(a)(2)(A)(i)(II) of the Act. [*See* Ex. 19]. The respondent disagrees, arguing that his conviction for possession of drug paraphernalia in violation of ARIZ. REV. STAT. ("A.R.S.") § 13-3415 does not constitute an offense relating to a controlled substance due to recent case precedent. [*See* Ex. 18]. Because this question determines the respondent's eligibility for relief, the Court will first address this issue.

Section 212(a)(2)(A)(i)(II) of the Act renders an alien inadmissible to the United States if he or she 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 21 U.S.C. § 802 (i.e., listed in the federal controlled substance schedules). The issue is whether the respondent's conviction for unlawful possession of drug paraphernalia "relates to" a controlled substance as defined in section 102 of the Controlled Substances Act, 21 U.S.C. § 802. *See* A.R.S. § 13-3415.

Until recently, the legal standard for analyzing drug paraphernalia offenses was laid out by the Board in *Matter of Martinez Espinoza*, 25 I&N Dec. 118 (BIA 2009). There, the Board decided that paraphernalia statutes relate to "the drug trade in general," and concluded that a paraphernalia conviction "relates to" any and all controlled substances—whether or not federally listed—with which the paraphernalia can be used. *Id.* at 120–121. Under this reasoning, there was previously no need to show that the type of controlled substance involved in a paraphernalia conviction was one listed as a federally controlled substance under 21 U.S.C. § 802.

The Supreme Court expressly overruled this reasoning in *Mellouli v. Lynch*, 135. S. Ct. 1980 (2015). The Court rejected the premise that a paraphernalia conviction "relates to" any and all controlled substances. Instead, a paraphernalia conviction only "relates to" a federally controlled substance if the offense of conviction necessarily includes as an element of that offense a federally controlled substance. Therefore, that respondent's conviction in Kansas for concealing unnamed pills in his sock did not trigger removal under INA § 237(a)(2)(B)(i) because his record of conviction did not identify the federally controlled substance his sock contained and the Kansas Code defines "controlled substance" to include substances not listed in the federal controlled substance schedules. *Id.* at 1983, 1987-89. The State did not charge, nor seek to prove, that Mellouli possessed a substance listed under 21 U.S.C. § 802. *Id.* at 1984. After *Mellouli*, in order to trigger removal under 237(a)(2)(B)(i), the government must demonstrate that the conviction relates to a substance listed in the federal controlled substance schedules. *Id.* at 1991–94. The Ninth Circuit has reiterated this requirement and extended this logic to the inadmissibility context. *See Madrigal-Barcenas v. Holder,* 797 F.3d 643, 644 (9th Cir. 2015).

The respondent was convicted of unlawful possession of drug paraphernalia in violation of A.R.S. § 13-3415. The term "drug" as used in A.R.S. § 13-3415 means "any narcotic drug, dangerous drug, marijuana or peyote," A.R.S. § 13-3415(F)(1), but Arizona includes several drugs on its schedules that are not listed on the Federal Schedules. *See, e.g.*, A.R.S. §§ 13-3401(20)(n), (cccc). Thus, the issue in this case is whether A.R.S. § 13-3415 is divisible. Where a statute "lists multiple, alternative elements, and so effectively creates 'several different . . . crimes,' " as opposed to "several different methods of committing one offense," it is divisible. *Descamps*, 133 S.Ct. 2276, 2285 & n.2 (2013) (quoting *Nijhawan v. Holder*, 557 U.S. 29, 41 (2009)). A state law contains alternative "elements" and not merely alternative "methods," if a jury has to "unanimously agree," that the applicant "committed a particular substantive offense contained within the disjunctively worded statute." *Rendon v. Holder*, 764 F.3d 1077, 1081 (9th Cir. 2014). Thus, it is necessary to determine whether the specific drug involved in possessing drug paraphernalia under A.R.S. § 13-3415 is an element of the offense.

A.R.S. § 13-3415 contains three elements: "(1) [the defendant] used (or possessed with intent to use); (2) drug paraphernalia; (3) 'to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, store, contain, conceal, inject, ingest, inhale or otherwise introduce into the human body' an illegal drug." *See State v. Castro,* No.1 CA-CR 12-0287, 2013 WL 3327216, at *2 (Ariz. Ct. App. June 27, 2013); *State v. Peasley,* No. 1 CA-CR 06-0620, 2007 WL 5249027, at *7 (Ariz. Ct. App. Nov. 29, 2007); *State v. Welch*, 198 Ariz. 554, 558, 12 P.3d 229, 233 (Ct. App. 2000). Drug paraphernalia is defined as:

> all equipment, products and materials of any kind which are used, intended for use 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 (*name of drug*)[1] into the human body.

REV. ARIZ. JURY INSTRUCTIONS (CRIM.) ("RAJI") § 34.15(2). In determining whether Arizona's statute authorizes a jury to consider the factors listed at A.R.S. § 13-3415(E) to determine if an item was, in fact, "drug paraphernalia," the Arizona Court of Appeals has made clear that it is the "the fact-finder [who] must determine whether a particular item is drug paraphernalia." *State v. Doty*, 307 P.3d 69, 72 (Ariz. Ct. App. 2013). Indeed, in *Doty,* the "fact-finder [was] the jury," and reading the statute any other way "would require [the Arizona Court of Appeals] to conclude the legislature intended to take from juries their basic function to determine factual issues in drug paraphernalia cases." *Id.*

Arizona, like many other states, has also recognized that virtually any object could constitute drug paraphernalia without a link to an illegal substance. *See e.g., State v. Estrada,* 34 P.3d 356, 361 (Ariz. 2001). "Thus, 'intent' to use a piece of equipment to inhale an illegal drug is a *necessary element* of the offense of possession of drug paraphernalia." *See State v. Peasley*, 2007 WL 5249027, at *3; *State v. Stiefel,* No. 1 CA-CR 14-0532, 2015 WL 5309476 (Ariz. Ct. App. Sept. 10, 2015). Since the fact-finder determines whether an object constitutes "drug paraphernalia," it must also find intent to inhale an illegal drug in order to convict. *Id.* Thus, the drug intended to be inhaled is likewise an element and a conviction under A.R.S. § 13-3415 constitutes an offense "relating to" a controlled substance so long as the Department can show that the substance is a drug listed on the Federal Controlled Substance Schedules.

The Court acknowledges that in light of the Ninth Circuit's unpublished decision in *Vera-Valdevinos v. Lynch*, 649 F. App'x 597 (9th Cir. May 11, 2016), Arizona's "dangerous drug" and "narcotic drug" statutes, contained in A.R.S. §§ 13-3407, 13-3408, have been found to be categorically overbroad, indivisible, and not amenable to the modified categorical approach. However, to obtain a conviction under those statutes the jurors do not need to agree on the *specific* drug involved in the offense. Because the jurors are instructed as to the specific drug involved in a possession of drug paraphernalia conviction, the drug is an element of the offense. Accordingly, the Court finds that A.R.S. § 13-3415 is distinguishable from *Vera-Valdevinos.*

Based on the above, the Court therefore moves to the modified categorical approach to determine whether the respondent's conviction necessarily had a federally controlled substance as an element. *See Rendon,* 764 F.3d at 1081 (where statute is overbroad but divisible, the IJ must employ the modified categorical approach). Here, the Department can meet its burden to demonstrate that this conviction relates specifically to a federally controlled substance as defined

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1 This parenthetical notation requesting the jury insert the "name of [the] drug" is a rare format for the RAJI. Indeed, it is only used roughly eight times throughout the pattern jury instructions. Notably, in RAJI § 28.1381(A)(3), the notes instruct the jury to "[i]nsert the name of the particular drug, e.g. 'codeine, amphetamine,.'"

in section 21 U.S.C. § 802. The respondent was convicted of possession of drug paraphernalia in violation of A.R.S. §§ 13-3415, 13-901.01(H)(4). [Ex. 19, Tab A]. Section 13-901.01(H)(4) provides that "a person is not eligible for probation under this section . . . if the court finds . . . [he] was convicted of the personal possession or use of a controlled substance or drug paraphernalia and the offense involved *methamphetamine*." Because the particular controlled substance is clear, the Department is able to connect an element of the respondent's conviction to a drug defined in 21 U.S.C. §802. *Mellouli*, 135. S. Ct. at 1989; *see also* 21 U.S.C. § 812 Schedule II(c) & Schedule III(a)(3). Therefore, the respondent's conviction constitutes an offense relating to a controlled substance.

Based on the documentary evidence in the record, the Court finds that the respondent has been convicted of an offense described in section 212(a)(2)(A)(i)(II) of the Act. Because the respondent is therefore not eligible for cancellation of removal, the Court makes no findings regarding the remaining elements, including good moral character and exceptional and extremely unusual hardship to a qualifying relative. His application will be denied.

IV. CONCLUSION

In light of the foregoing analysis, the following orders shall be entered:

ORDERS: **IT IS HEREBY ORDERED THAT** the respondent's application for cancellation of removal pursuant to section 240A(b)(1) of the Act is **DENIED.**

IT IS FURTHER ORDERED THAT the respondent shall be and hereby is ordered **REMOVED** from the United States to **MEXICO**.

Sean H. Keenan

February 15, 2017
Date

Sean H. Keenan
U.S. Immigration Judge

APPEAL: WAIVED/~~RESERVED~~
APPEAL DUE BY: 3/17/17

CERTIFICATE OF SERVICE
SERVICE BY: Mail (M) Personal Service (P)
TO: [ ] DHS [ ] Alien [ ] ~~Alien's~~ Attorney
Date: 2/15/17 By: (Court Staff)