



**ARIZONA SUPREME COURT  
ORAL ARGUMENT CASE SUMMARY**



***Jorge Romero-Millan, Ernesto Hernandez Cabanillas, and Marco Antonio Garcia-Paz v. Attorney General of the United States***  
**CV-20-0128-CQ**

**CERTIFYING COURT:** United States Court of Appeals for the Ninth Circuit

**PARTIES:**

*Petitioners:* Jorge Romero-Millan, Ernesto Hernandez Cabanillas, and Marco Antonio Garcia-Paz

*Respondent:* Attorney General of the United States

**FACTS:**

Petitioner **Romero-Millan** is a native and citizen of Mexico and has resided in the United States since 1984. On August 8, 2014, he accepted a plea bargain and was convicted of possessing or using drug paraphernalia in violation of A.R.S. § 13-3415. While Romero-Millan was serving his sentence, the Department of Homeland Security (DHS) served him with a Notice to Appear, charging him with removability under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without admission or parole, and § 1182(a)(2)(A)(i)(II), as an alien convicted of a controlled substance offense.

Initially, Romero-Millan conceded both charges of removal. After the decision of the United States Supreme Court in the *Mellouli* case, he withdrew his concession on the second charge. *Mellouli v. Lynch*, 575 U.S. 798 (2015)(conviction for paraphernalia possession did not trigger removal under federal statute authorizing removal for violating law related to a controlled substance).

Both of Romero-Millan's charges were sustained by the Immigration Judge, and removal was ordered. He appealed the decision to the Board of Immigration Appeals (BIA). The BIA upheld his removal, and he subsequently appealed to the Ninth Circuit.

Petitioner **Cabanillas** is also a native of Mexico. He became a lawful permanent resident of the United States in 2004. In 2016, he entered a plea agreement and was convicted of possessing a narcotic drug for sale in violation A.R.S. § 13-3408. DHS now seeks to remove him as a result of this crime. Based on this conviction, Cabanillas was ordered to be removed by an Immigration Judge. He appealed this decision, but it was upheld by the BIA. He then appealed to the Ninth Circuit.

Petitioner **Garcia-Paz** is a native and citizen of Mexico. He has lawfully resided in the United States since 1973. In 2014, he also entered a guilty plea and was convicted of attempted possession for sale of a narcotic drug in violation of A.R.S. § 13-3408. DHS now seeks to remove him. Garcia-Paz appealed this decision to the BIA, but it was upheld. Like the other Petitioners, Garcia-Paz then appealed to the Ninth Circuit.

For all three individuals, the question of the statute’s divisibility is of great consequence. If ARS § 13-3415 and ARS § 13-3408 are divisible as to drug type, then DHS is likely permitted to permanently remove them from the United States. If the statutes are not divisible, then DHS may not remove the petitioners.

In its May 4, 2020 “Order Certifying Questions to the Supreme Court of Arizona,” the Ninth Circuit stated that the outcome of these appeals turns on the Arizona Supreme Court’s answer to the three questions presented (see below). The Ninth Circuit noted that, in *Mellouli*, the United States Supreme Court clarified that, to demonstrate that an offense is related to a controlled substance, “the Government must connect an element of the alien’s conviction to a drug defined in [21 U.S.C. § 802].” *Mellouli*, 575 U.S. 798. The Ninth Circuit also discussed the United States Supreme Court’s three-step process for determining whether this connection exists. See *Descamps v. United States*, 570 U.S. 254, 260–63 (2013); *Taylor v. United States*, 495 U.S. 575, 602 (1990).

At the first step, the “categorical approach” is applied. *Villavicencio v. Sessions*, 904 F.3d 658, 664 (9th Cir. 2018), and the Ninth Circuit then defined the criteria applied in the categorical approach. If the statute is not a “categorical” match, a court must move on to determine whether the statute is “divisible,” namely whether it “sets out one or more elements of the offense in the alternative” as opposed to listing alternative methods of committing the crime. *Descamps*, 570 U.S. at 257. If the statute is not divisible, the analysis stops, as the alien’s state law conviction cannot be found to be related to a controlled substance under federal law. However, if the statute is divisible, the court proceeds to the third step and applies the “modified categorical approach.”

Under this approach, courts may “consult a limited class of documents . . . to determine which alternative formed the basis of the defendant’s prior conviction.” *Descamps*, 570 U.S. at 257. “These documents include ‘the charging document, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or . . . some comparable judicial record of this information.’” *United States v. Marcia-Acosta*, 780 F.3d 1244, 1250 (9th Cir. 2015) (quoting *Shepard v. United States*, 544 U.S. 13, 26 (2005)). If, using the modified categorical approach, a court determines that the state law is related to a controlled substance under federal law, the alien is removable.

The Ninth Circuit held that the three cases at bar turn on the second step of the analysis, namely whether A.R.S. § 13-3415 and § 13-3408 are divisible as to drug type. This issue comes up rarely in state criminal cases because of how infrequently it is disputed. Ordinarily, there is evidence that the substance involved was a particular narcotic drug. While a defendant might dispute that the substance involved was a narcotic drug, the defendant is unlikely to claim that the substance was in fact a different narcotic drug, and the jury will not be asked to decide which drug it was. Examples are rare in which the prosecutor claims a defendant possessed heroin, and the defendant counters by arguing that he instead possessed cocaine.

The question, therefore, is not a factual one—whether, in most cases, a jury will tend to agree on the underlying drug a defendant possessed—but a legal one—whether a jury must agree, as a matter of law, on what drug the defendant possessed.

The Ninth Circuit stated that the answers to the presented questions are difficult to determine from existing Arizona case law. Therefore, it certified the questions regarding the divisibility of A.R.S. § 13-3415 and A.R.S. § 13-3408, as well as the question regarding jury decision on the type of drug, to the Arizona Supreme Court pursuant to A.R.S. § 12-1861 and Ariz. R. Sup. Ct. 27.

#### **ISSUES:**

1. Is Arizona's possession of drug paraphernalia statute, A.R.S. § 13-3415 divisible as to drug type?
2. Is Arizona's drug possession statute, A.R.S. § 13-3408, divisible as to drug type?
3. Put another way, is jury unanimity (or concurrence) required as to which drug or drugs listed in A.R.S. § 13-3401(6), (19), (20), or (23) was involved in an offense under either statute?

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