NAMSDL Case Law Update

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In This Issue

This issue of the *NAMSDL Case Law Update* focuses on several recent court decisions, including a federal appellate court and the Supreme Court of Pennsylvania, involving defendants accused of manufacturing and/or selling novel psychoactive substances. Two of the cases involve assertions by defendants that the statutory language in federal or state controlled substance analogue provisions is unconstitutionally vague. The other two decisions address the calculation of federal sentencing guidelines for synthetic cathinones and a challenge to the sufficiency of a federal indictment for analogue violations. The cases discussed in this issue originate from Maine, Pennsylvania, Virginia, and Wisconsin. Cases are divided by the type of court (federal or state) and then listed in approximate descending order of appellate level.

CASES IN THIS ISSUE

Federal Cases

United States v. Leda Giggey, U.S. Court of Appeals for the First Circuit, Case No. 16-2391, --- F.3d ---, 2017 WL 3473643, August 14, 2017. The Defendant, a Maine woman, pled guilty in federal court to conspiracy to distribute and possession with intent to distribute controlled and analogue substances, including the synthetic cathinone alpha-pyrrolidinopentiophenone (alpha-PVP). Alpha-PVP is not one of the drugs listed within the drug tables in federal sentencing guidelines. In such instance, calculating the guideline requires converting the drug "into the marijuana equivalent quantity of the most closely related [listed] controlled substance." At Defendant's sentencing in district court, the government argued that methcathinone (a Schedule I substance) is the appropriate comparator. In contrast, Defendant asserted that pyrovalerone (a Schedule V substance) is more appropriate. The district court chose methcathinone and issued a sentence accordingly. On appeal, the U.S. Court of Appeals for the First Circuit observed

that the case "requires us, for the first time, to pass upon the method and manner in which that conversion is effected with respect to synthetic cathinones." Before the First Circuit, Defendant argued that the district court improperly "limited its search for an alpha-PVP comparator to the universe of Schedule I and II controlled substances." Although the court could have addressed the unsettled question of whether the proper comparator for a controlled substance analogue may be found only in Schedules I or II, the First Circuit concluded that it did not have to resolve that issue because the district court "thoroughly considered" a Schedule V substance (pyrovalerone). Defendant also argued on appeal that the selection of methcathinone over pyrovalerone constituted error. The First Circuit disagreed, after holding that a district court's selection of the most closely related controlled substance is a factual, rather than a legal, determination. Reviewing the district court's factual determination only for "clear error," the First Circuit upheld the decision, finding that the lower court's "rationale rests heavily (and logically) on the similarity in potency between methcathinone and alpha-PVP."

United States v. Charles Ritchie, Benjamin Galecki, et al., U.S. District Court for the Eastern District of Virginia, Case No. 15-CR-18, 2017 WL 2378805, June 1, 2017. Federal prosecutors charged two men with eight criminal counts that included, among other things: (1) distribution and possession with intent to distribute controlled substances and controlled substance analogues; and (2) conspiracy to distribute and possess schedule I controlled substances and controlled substance analogues. Prosecutors alleged that Defendants operated a Florida-based company that manufactured synthetic cannabinoids containing XLR-11 and UR-144 and shipped some of these substances to retail stores in Virginia. Defendants' first trial, held in October 2016, resulted in a hung jury on all counts. Prosecutors retried Defendants in January 2017 and a different jury convicted the men on all eight counts. The court sentenced each Defendant to more than 25 years in prison. Nearly four months after the convictions, one Defendant filed a motion for a new trial and a motion to dismiss the charges. The other Defendant joined both motions. Defendants asserted the need for a new trial because the district court improperly denied testimony by an expert witness. With respect to the motion to dismiss the charges, Defendants argued that the Federal Analogue Act is vague as applied in the case as shown by the hung jury in the first trial and the fact that prosecution's witness analyzed "substantial similarity" using different methods in the second trial. The district court denied both motions on grounds of untimely filing without "excusable neglect." Nevertheless, the court opined that the motion to dismiss would have been denied on the merits anyway, stating that "[w]ith regard to the Federal Analogue Act, courts have generally found that an accepted definition for 'substantial similarity' is not required." Both Defendants appealed their convictions to the U.S. Court of Appeals for the Fourth Circuit under Case Nos. 17-4357 and 17-4377. The Fourth Circuit consolidated the cases. To date, the Fourth Circuit has set no appellate briefing schedule.

United States v. Woody Nahquaddy, et al., U.S. District Court for the Eastern District of Wisconsin, Case No. 17-CR-49, 2017 WL 2275008, May 9, 2017. A grand jury returned a three-count indictment against several defendants. Count One of the charges against one defendant included "'knowingly and intentionally' conspiring 'to distribute and possess with intent to distribute a controlled substance in violation of'" the Federal Analogue Act ("Act"). In addition, Count One provided that this Defendant conspired to "obtain analogues of Schedule I controlled substances." The Defendant moved to dismiss this count, on grounds that it lacked the particular knowledge element that the government must prove in analogue cases, as specified by the U.S. Supreme Court in the *McFadden* case (that is, that the Defendant knew the substance with which he was dealing was a controlled substance). The

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Defendant also asserted that the indictment improperly failed to identify the specific analogue substance involved. In a memorandum issued in May 2017, a federal magistrate judge recommended denial of the motion to dismiss. The magistrate judge first rejected the assertion that the indictment failed to allege an essential element of the analogue charge. In the magistrate's opinion, the indictment "tracks the statutory language" of the Act, and "an indictment is generally sufficient if it tracks the language of the statute itself" as it is not necessary for the government to allege "how it will prove the knowledge requirement." The magistrate also found it "unnecessary for the indictment to articulate the specific characteristics of the analogue" making it subject to the Act. Accordingly, the magistrate concluded that the indictment met constitutional requirements. Despite this conclusion, the magistrate added that "it is probably better practice to name the specific analogue at issue in the indictment and specify which method of proof as to knowledge the government is proceeding under, *i.e.*, whether the government is intending to show either (1) that the defendant knew that the substance was listed or treated as listed by the Analogue Act or (2) that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." The district court judge adopted the magistrate's recommendation in full and denied the motion.

State Cases

Commonwealth of Pennsylvania v. Joey Herman, Supreme Court of Pennsylvania, Case No. 74 MAP 2016, 161 A.3d 194, May 25, 2017. Defendant owned and operated a smoke shop in Pennsylvania. From April to July 2013, police purchased and later seized from Defendant packets containing the chemical PB-22. Based on the presence of PB-22, the Commonwealth charged Defendant with: (1) delivery of / possession with intent to deliver a controlled substance; and (2) possession with intent to deliver a "designer drug." Under Pennsylvania law, a "designer drug" is an uncontrolled substance intended for human consumption that is either "substantially similar" in chemical structure to a Schedule I-III controlled substance or that produces an effect "substantially similar" to a Schedule I-III controlled substance. At the time relevant to the case, Pennsylvania's controlled substance schedules did not expressly list PB-22 as a controlled substance. Prior to July 2, 2013, Pennsylvania's Schedule I applied to certain listed synthetic cannabinoids, including JWH-018, and "their analogues." As of July 2, 2013, the text of Schedule I changed to include 13 specified "chemical designations" of synthetic cannabinoids and analogues of those designations, one of which included JWH-018. Interestingly, Pennsylvania law does not (nor did it then) define the term "analogue," as it relates to controlled substances. As part of the criminal case, the Commonwealth asserted that PB-22 met the definition of "designer drug" because it is substantially similar to JWH-018 and that both before and after July 2, 2013, it fell under the provisions of Schedule I by being an analogue of JWH-018. Before trial, Defendant moved to dismiss all charges asserting that: (1) prior to July 2, 2013, Schedule I was impermissibly vague as applied to PB-22; (2) Schedule I did not prohibit PB-22 after July 2, 2013 because PB-22 is not within the same chemical designation as JWH-018; and (3) the designer drug provision did not apply because the phrase "substantially similar" is impermissibly vague as applied to both PB-22 and JWH-018. After an evidentiary hearing, the trial court agreed with the Defendant and dismissed all charges. The Supreme Court of Pennsylvania took direct review of the decision.

In a lengthy decision issued in May 2017, the Supreme Court of Pennsylvania affirmed in part and reversed in part the trial court's decision. The court first upheld the dismissal of the charges under Schedule I for pre-July 2, 2013 activity. Reviewing expert testimony regarding the meaning and determination of analogues presented at the trial court's evidentiary hearing, the court stated, "scientists in the relevant field have not been able to agree on a method

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to determine analogue status and cannot agree on whether PB–22 is an analogue of JWH–018." In addition, the court reasoned that if such is the case for scientists, "it is difficult to see how the average citizen can be on notice of such status." Accordingly, the court found the pre-July 2013 Schedule I language to be "unconstitutionally vague as applied to PB-22 as an alleged analogue of JWH-018." Next, the court upheld the dismissal of the charges under Schedule I for post-July 2, 2013 activity. Noting that the Commonwealth's expert confirmed that PB-22 is in a different chemical designation than JWH-018, the court held that the Commonwealth "had failed to identify a valid statutory basis" to charge Defendant with delivery or possession with intent to deliver a controlled substance. With respect to the "designer drug" charges, however, the Supreme Court reversed the trial court's dismissal and remanded the case for trial. Contrasting the phrase "substantially similar" with the undefined term "analogue," the court observed that whereas the concept of analogue "may be somewhat nebulous (particularly in a scientific setting)," the "vast weight of authority from other jurisdictions supports the conclusion that 'substantially similar' is not a vague term *per se* when used in comparing two chemical compounds." Moreover, the court added that the "express culpability prerequisite" of Pennsylvania's designer drug provision helps to alleviate vagueness concerns. As a result, the court concluded that allowing a jury to determine if two substances have substantially similar chemical structures "does not give rise to a circumstance in which the average citizen must guess at the types of behavior that are proscribed" by law. Four of the seven Supreme Court justices agreed in full with the decision. The other three justices would have fully affirmed the trial court's decision and concluded that the "designer drug" provision is also unconstitutionally vague as applied to PB-22.

Research is current as of September 11, 2017. In order to ensure that the information contained herein is as current as possible, research is conducted using nationwide legal database software and individual state legislative websites. Please contact Jon Woodruff at (703) 836-6100, ext. 100 or jwoodruff@namsdl.org with any additional updates or information that may be relevant to this document. This document is intended for educational purposes only and does not constitute legal advice or opinion. This project was supported by Grant No. G1599ONDCP03A, awarded by the Office of National Drug Control Policy. Points of view or opinions in this documents are those of the author and do not necessarily represent the official position or policies of the Office of National Drug Control Policy or the United States Government.