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Fast Times in Federal Court and the Need for Flexibility

Erratum

Law; Criminal Law; Evidence; Courts; Judges

FAST TIMES IN FEDERAL COURT AND THE NEED FOR FLEXIBILITY

*Hon. K. Michael Moore**

As one might expect, the Southern District of Florida—once home to the “Cocaine Cowboys”—sees its fair share of narcotics cases. The number of indictments alleging cocaine and marijuana possession and distribution remains steady, but there has recently been an increase in criminal prosecutions involving synthetic drugs.

Synthetic drugs, also known as “New Psychoactive Substances,” are becoming alternatives to more commonplace drugs such as marijuana, cocaine, and heroin.¹ Some of these substances are referred to as fentanyl, flakka,² “spice,” MDMA, cannabinoids, or bath salts.³ The list goes on as new drugs are created and introduced to the market. According to the U.S. Department of Justice’s Drug Enforcement Administration (DEA), law enforcement has encountered over three hundred different types of synthetic drugs.⁴ The Centers for Disease Control and Prevention (CDC) reported that between 2014 and 2015, the synthetic-opioid death rate increased by a staggering 72.2 percent.⁵ With the introduction of each new synthetic drug comes the challenge of identifying and criminalizing that particular substance.

Designer drugs are commonly the result of ever so slightly altering the chemical compounds of existing or naturally produced narcotics. There are three primary categories of synthetic drugs: synthetic cannabinoids, synthetic cathinones, and synthetic phenethylamines.⁶ Synthetic

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1. See *About Synthetic Drugs*, DRUG ENFORCEMENT ADMIN., https://www.deadiversion.usdoj.gov/synthetic_drugs/about_sd.html [https://perma.cc/9W5G-2ALY] (last visited Feb. 14, 2018).

2. *Id.* “Flakka” is a psychoactive stimulant technically known as alpha-PVP. *Id.*

3. *Id.*

4. *Id.*

5. *Synthetic Opioid Data*, CENTERS DISEASE CONTROL & PREVENTION, <https://www.cdc.gov/drugoverdose/data/fentanyl.html> [https://perma.cc/U77J-DRFK] (last visited Feb. 14, 2018).

6. See *About Synthetic Drugs*, *supra* note 1.

cannabinoids are man-made chemicals that are packaged in two different forms for consumption: (1) chemicals sprayed on dried and shredded plant material for smoking and (2) liquid form for vaporization and inhalation.⁷ Synthetic cathinones are designed to mimic the pharmacological effects of cocaine, methamphetamine, and other stimulants.⁸ Synthetic phenethylamines are chemically produced drugs with hallucinogenic effects.⁹ One of several reasons for the rise in synthetic drugs was to avoid the classification of a particular substance as illicit and thereby evade criminal liability for possession and distribution.

Over the past several decades, there have been numerous efforts to simplify the identification and criminalization of newly introduced or newly created narcotics. The Controlled Substance Act of 1970 identified certain drugs and chemicals as controlled substances and divided them into schedules. There are five schedules, with Schedule I substances being the most dangerous class of drugs and Schedule V the least.

In 1986, Congress enacted the Controlled Substance Analogue Enforcement Act (the “Analogue Act”),¹⁰ which identifies substances that are substantially similar to those listed on the federal controlled substances schedules.¹¹ As a result, a substance that is not listed as a Schedule I or II controlled substance receives the same treatment as a Schedule I or II controlled substance if (1) it shares a substantially similar chemical structure; (2) it has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the controlled substance; or (3) “with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar or greater than [the scheduled substance].”¹²

In 2011, the Attorney General, through the Food and Drug Administration (FDA), placed five synthetic cannabinoids and three synthetic stimulants on Schedule I.¹³ The Synthetic Drug Abuse Prevention Act of 2012 added five structural categories of synthetic cannabinoids and eleven synthetic stimulants and hallucinogens to Schedule I.¹⁴ The Act also expanded the timeframe of temporary scheduling.¹⁵ Essentially, the Attorney General has the discretion, by order, to add a substance to Schedule I on a temporary basis if it is “necessary to avoid an imminent hazard to the public safety.”¹⁶

7. *What Are Synthetic Cannabinoids?*, NAT’L INST. ON DRUG ABUSE (Nov. 2015), <https://www.drugabuse.gov/publications/drugfacts/synthetic-cannabinoids> [<https://perma.cc/6NDJ-JE7A>].

8. *See About Synthetic Drugs*, *supra* note 1.

9. *Id.*

10. Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (codified as amended at 21 U.S.C. § 813 (2012)).

11. *See* 21 U.S.C. § 802(32)(A) (2012).

12. *Id.* § 802(32)(A)(iii).

13. *See* LISA N. SACCO & KRISTIN FINKLEA, CONG. RESEARCH SERV., R42066, SYNTHETIC DRUGS: OVERVIEW AND ISSUES FOR CONGRESS (2016).

14. 21 U.S.C. § 812(c) (2012).

15. *Id.* § 811(h)(2).

16. *Id.* § 811(h)(1).

The sentencing of individuals convicted of possession or distribution of synthetic drugs, particularly analogues that are not specifically listed on the schedules, is also working its way through the federal courts. The U.S. Sentencing Commission (the Commission) is presently conducting a two-year study of synthetic drugs.¹⁷ In April 2017, the Commission held a public hearing on the prevalence and effect of synthetic drugs and, since that hearing, began “a study of specific categories of synthetic drugs, including fentanyl.”¹⁸ The Commission is focusing on the “chemical structure, pharmacological effects, potential for addiction, legislative and scheduling history,” as well as other related issues.¹⁹

The legislative approach to combating and criminalizing synthetic drugs is to provide a flexible framework. The judiciary’s approach in addressing related evidentiary issues should be no different. One way in which this need for malleability presents itself is in the admissibility of expert testimony. Rule 702 of the Federal Rules of Evidence and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁰ provide the court, as the gatekeeper, with discretion regarding the admissibility of expert testimony.

Rule 702 provides that an expert opinion is admissible if it is “based upon sufficient facts or data; the testimony is the product of reliable principles and methods; and the expert has reliably applied the principles and methods to the facts of the case.”²¹ In *Daubert*, the U.S. Supreme Court set forth factors for courts to consider in determining whether an expert’s methodology is sufficiently reliable: (1) whether the methodology can and has been tested; (2) whether it has been subjected to peer review and publication; (3) what its known or potential rate of error is; and (4) its general acceptance in the field.²²

The application of Rule 702 and *Daubert* analysis is a frequent topic of debate. Some suggest that Rule 702 should impose upon the courts more stringent standards for the admissibility of expert testimony. One reason for doing so is that additional guidance in this area would assist judges who, more frequently than not, lack a background in the technical spheres in which expert testimony is proffered. But maintaining the status quo and providing courts with a high level of discretion furthers the public’s interest in the swift administration of justice. Synthetic-drug cases are but one example where adherence to rigid constructs would hinder prosecutions, perhaps significantly.

Because these synthetic drugs are being altered at a rapid rate, it comes as no surprise that the defense of a criminal defendant will likely involve challenging the admissibility of expert testimony. For example, while a

17. Press Release, U.S. Sentencing Comm’n, U.S. Sentencing Commission Announces 2017–2018 Policy Work, Proposes Guideline Amendments: Structural Reform and Synthetic Drugs Among Top Priorities (Aug. 17, 2017), <https://www.ussc.gov/about/news/press-releases/august-17-2017> [<https://perma.cc/2YFL-6RNG>].

18. *Id.*

19. *Id.*

20. 509 U.S. 578 (1993).

21. FED. R. EVID. 702.

22. *Daubert*, 509 U.S. at 593–94.

chemist may employ sound testing procedures, the reliability of the chemist's methodology might be called into question by a dearth of peer-reviewed articles. *Daubert* provides much needed flexibility to gatekeepers in the emerging area of synthetic drugs.

In 2015, I presided over a six-day jury trial that resulted in the conviction of a defendant on one count of conspiring to possess with intent to distribute controlled substances and controlled substance analogues.²³ The defendant appealed his conviction arguing, in part, that the court clearly erred in finding that the most closely related substance referenced in the drug equivalency tables in the Sentencing Guidelines was THC, not marijuana.²⁴ The defendant argued that the government's expert's opinions were not reliable because they were not based on human testing.²⁵ The expert, whose testimony I admitted, opined on the effects of the alleged analogues on the human central nervous system and represented that his opinions were based on the structure of the chemicals, in vitro testing, in vivo testing in rodents, and case reports.²⁶ The Eleventh Circuit affirmed and noted that the defendant's objections went to the weight of the testimony, not the admissibility.²⁷ This was a fairly straightforward case. Because of the flexibility provided by *Daubert*, I considered the expert's methodologies and reliability without being constrained by the lack of a particular kind of study or the lack of peer-reviewed articles, for example. However, motions to exclude expert testimony are not always this clear cut.

In 2013, in *United States v. Fedida*,²⁸ Judge Roy Dalton of the Middle District of Florida addressed the reliability of the prosecution's experts. There, the defendant was indicted for knowingly possessing and conspiring with others to knowingly possess UR-144,²⁹ a controlled substance analogue.³⁰ The government proffered testimony of expert witnesses who intended to opine on the pharmacologic effects of UR-144 and the substance to which it is analogous under the schedule—XLR-11.³¹

At a hearing, the government's experts opined that UR-144 and XLR-11 have similar effects on the central nervous system.³² The court stated that these opinions were based on "little more than the experts' review of the available scientific literature, which was limited to a few articles containing reports of UR-144's binding affinity to cannabinoid receptors."³³ The court also noted that the experts' opinions had not been subjected to peer review or

23. See *United States v. Nahmani*, 696 F. App'x 457, 461 (11th Cir. 2017).

24. *Id.*

25. *Id.* at 474.

26. *Id.*

27. *Id.*

28. 942 F. Supp. 2d 1270 (M.D. Fla. 2013).

29. UR-144 is a synthetic cannabinoid receptor. See WORLD HEALTH ORG., UR-144 CRITICAL-REVIEW REPORT: AGENDA ITEM 4.8, at 7 (2014), http://www.who.int/medicines/areas/quality_safety/4_8_Review.pdf [<https://perma.cc/F7P4-XZ2Y>].

30. *Fedida*, 942 F. Supp. 2d at 1271.

31. *Id.* at 1281.

32. *Id.*

33. *Id.*

publication. Further, there was no evidence concerning the known or potential error rates of the experts' methodology, which "amounted to little more than the deduction of a working hypothesis supported by a general knowledge of chemistry and biochemistry."³⁴ The court declined to rule on the issue of admissibility at that particular juncture but noted that it was not inclined to permit the expert testimony.³⁵

The shifting landscape of criminal prosecutions involving designer drugs presents several novel legal issues. There are different ways to address these issues when they are the result of the production, possession, or distribution of as-of-yet unregulated substances. One way is for the legislature to enact appropriate legislation as quickly as the need for regulation or criminalization arises—a lofty, if not unrealistic, goal. The other is to guide the courts with general principles of applicability—the approach adopted by Congress through the enactment of the Analogue Act.³⁶

This small but unfortunately quickly expanding area of federal criminal law supports the notion that providing the courts with flexibility is necessary and ultimately consistent with the legislative approach in this field.

34. *Id.*

35. *Id.* at 1281–82.

36. 21 U.S.C. § 813 (2012).