McFadden v. United States: Deconstructing Synthetic Drug Prosecutions

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One of the great mistakes is to judge policies and programs by their intentions rather than their results.

— Milton Friedman

In order to convict an individual of distribution of a controlled substance analogue, must the government prove that the individual knew that the substance constituted a controlled substance analogue, or is it sufficient merely to prove that the individual distributed the substance with the intention that it be for human consumption?

**Law Enforcement Activity**

Since January 2014, the Drug Enforcement Administration (DEA) has executed *Project Synergy Phase II*, an ongoing operation targeting suspected synthetic drug traffickers throughout the United States. The DEA, Customs and Border Protection, Immigration and Customs Enforcement, Homeland Security Investigations, Federal Bureau of Investigation, Internal Revenue Service, and local authorities have served arrest and search warrants in 35 states and five countries, seizing more than $51 million in cash and assets. Many of these defendants, however, are proclaiming their innocence. Why? They earnestly believed their actions were legal because the drugs they possessed were not listed by the DEA as banned chemical analogues. The government, on the other hand, regards these assertions of innocence as no more than willful ignorance of the law based on loopholes created when underground chemists change one molecule of an otherwise banned substance in order to avoid having it classified as a controlled substance analogue.

The argument concerning the scienter requirement in synthetic drug laws principally involves the interpretation of the Controlled Substances Act (CSA), 21 U.S.C. § 841, and the Controlled Substances Analogue Enforcement Act (Analogue Act), 21 U.S.C. §§ 802, 813. Specifically, the issue is whether the government may convict a defendant of distribution by proving that the defendant knew that the substance constituted a controlled substance analogue (as held by the Second, Seventh, and Eighth Circuits) or whether the government is merely required to prove that the defendant distributed the substance with the intention that it be for human consumption (as held by the Fourth and Fifth Circuits). This question earned the attention of the U.S. Supreme Court in *McFadden v. United States* (No. 14-378). The Court heard oral argument on April 20, 2015.
The issues and arguments by counsel and the justices will form the basis of future judicial interpretations of the scienter requirement under the synthetic drug laws.

Synthetic drugs have existed in the United States since the 1920s. Their chemical structures are designed to mimic the pharmacological effects of the original drug, but “contain slightly modified molecular structures of illegal or controlled substances” to avoid detection by standard drug tests. The term “designer drugs” was coined in the 1980s to refer to various synthetic opioid drugs based mostly on the fentanyl molecule. Some designer drugs were originally synthesized by academic or industrial researchers in an attempt to find more potent analogic derivatives with fewer side effects. These drugs were later co-opted for illicit use. It was hoped that advertising these chemicals for “scientific research” purposes and “not for human consumption” would mask their intended purpose and avoid Food and Drug Administration (FDA) regulatory oversight.

More recently, most designer drugs have included a wide variety of stimulants such as synthetic cathinones, which are fabricated chemicals related to amphetamines and marketed as “bath salts” or “jewelry cleaner.” Also prevalent are designer cannabinoids, commonly known as “synthetic marijuana,” “K2,” or “Spice,” which are sold in legal retail outlets and on the Internet as “herbal incense” or “potpourri.” Synthetic cannabinoids mimic tetrahydrocannabinol (THC), the primary psychoactive ingredient in marijuana. Synthetic cannabinoids are fabricated chemicals that are applied (sprayed) onto plant material or potpourri and marketed as a “legal high.”

**The McFadden Case**

Stephen Dominick McFadden was a small business owner who researched the legality of selling bath salts on the DEA’s website. After finding nothing indicating that they were illegal, he sold small half and full gram packages of various synthetic compounds labeled as “bath salts” and “not for human consumption.” He sold his products at a price significantly higher than actual bath salts, and he behaved furtively by checking the DEA website on a regular basis to see if his products were banned. When the DEA banned the products, McFadden stopped selling them. The government then indicted McFadden under the CSA for the manufacture, sale, and delivery of controlled substances.

In the trial court, the government alleged that McFadden knowingly and intentionally distributed controlled substance analogues because his products were “substantially similar” to illegal controlled substances listed in Schedules I or II of the CSA. The district court refused to instruct the jury that the government was required to prove that McFadden knew, had a strong suspicion, or deliberately avoided knowledge that the alleged CSA possessed the characteristics of controlled substance analogues. The jury convicted McFadden, and the district court denied his motion of acquittal.

McFadden appealed his conviction and the U.S. Court of Appeals for the Fourth Circuit affirmed, holding that the government need only prove the defendant intended the substance to be for human consumption. Moreover, the Fourth Circuit noted that the Act may be applied to a defendant who lacks actual notice that the substance at issue could be a controlled substance analogue.

What scienter requirement is the government required to prove to convict a defendant of distribution of a synthetic drug analogue? This is the question before the U.S. Supreme Court.

**Scienter Requirement of The Synthetic Drug Laws**

The CSA, 21 U.S.C. § 841(a), criminalizes “knowingly and intentionally” manufacturing, distributing, or dispensing “a controlled substance.”

The analogue Act (§ 813) is so vague and poorly drafted that it is unclear exactly what constitutes an “illegal controlled substance analogue.” The analogue Act requires that the government prove the defendant intended that the substance be for “human consumption.” However, the question of what evidence is sufficient to prove this intent only invites greater speculation.

The most striking feature of the CSA and the analogue Act is that “it is not possible for the public to know what substances the United States government does and does not consider to be unlawful.” The CSA does not include “controlled substance analogues” in its Schedules of prohibited or controlled substances. In fact, it explicitly excludes them in its definitional section, stating that “controlled substance analogues” are not “controlled substances.”

The Due Process Clause of the Fifth Amendment requires the law to provide a “definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrarily and discriminatory enforcement.”

In order to compensate for the ambiguity in the law, the DEA has used its emergency scheduling authority to ban substances not clearly falling under the ambit of the CSA or the analogue Act. Congress grants the DEA the ability to add a chemical substance to Schedule I of the CSA on an expedited basis, whenever doing so “is necessary to avoid an imminent hazard to the public safety.” This emergency scheduling process is called “notice of intent” and allows for only a “30-day notice period under 28 C.F.R. pt. 201 (2013)(h) of the CSA (21 U.S.C. § 811(h).” Following the 30 days, the DEA Deputy Administrator issues a final order banning the chemical substance.

This “notice of intent” procedure sidesteps the public notice and comment requirement, which is required before a substance can be designated a controlled substance under the CSA. Eliminating this notice requirement results in the prosecution of individuals for knowing violations of the CSA during periods of time when the substance in their possession was not banned. In these instances, some federal circuits have instructed its juries that the government proves scienter if it proves the synthetic material in the defendant’s possession was “substantially similar” to existing controlled substances listed in Schedule I or II of the CSA under § 802(32)(C).

**The Three-Part Test**

The analogue Act, 21 U.S.C. § 802(32)(A), uses a three-part test to define what constitutes a “controlled substance analogue.” Whether a chemical substance qualifies as an illegal synthetic drug depends upon proof that it is “substantially similar” to a known prohibited drug listed in Schedule I or II of the CSA. This determination depends on the application of the analogue Act, which may be read in the conjunctive or the disjunctive. Some circuits apply an *in pari materia* approach. The DEA and most jurisdictions read 21 U.S.C. § 802(32)(A) in the conjunctive under the rule of lenity. A conjunctive reading requires the government to prove element (i) and either element (ii) or element (iii).

Element (i) requires the government to prove that “the chemical structure of a substance is substantially similar to the chemical structure of a controlled substance in Schedule I or II.” Element (ii) requires the government to
prove that “a substance has a stimulant, depressant, or hallucinogenic effect on the central nervous system, which is ‘substantially similar’ to a Schedule I or II controlled substance.”35 Since controlled substance analogues have different connectivity with brain receptors, element (ii) is quite open to debate. Moreover, it is impossible to know whether a chemical substance has “substantially similar” effects because “there have been no scientific studies of Spice’s effects on the human brain.”36 The scientific conclusions regarding the “substantial similarity” of the designer drugs are derived from “law enforcement encounters reported directly to DEA” and statistical data compiled by the DEA from “emergency department physicians and toxicologists who report the adverse health effects associated with … these substances.”37

Element (iii) requires the government to prove that the defendant represented or intended a substance to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to a controlled substance in Schedule II or I.38

The Conflict Among the Circuits

The circuits are divided along two lines.39 The Seventh, Second, and Eighth Circuits require the government to prove that a defendant “knew that the substance he was dealing constituted a controlled substance analogue.”40 (This approach ignores that analogue drugs are not controlled substances. They are “treated” as controlled substances under the Analogue Act. 21 U.S.C. § 813.) The Fourth and Fifth Circuits have rejected this knowledge requirement and have discarded the mens rea component of the law altogether.

The Seventh Circuit’s approach is aimed at reducing the government’s difficulty in proving scienter: “The question of similar chemical structure is particularly nettlesome since, even if such chemical similarities exist, and even if the defendant is aware of these similarities, the intricacies of chemical science may render it extremely difficult to prove that a defendant had such knowledge. As a provisional remedy for this problem, the court prescribed that, in such cases, if the scienter requirement is met concerning the second part of the analogue definition (knowledge or representation of similar physiological effects), the jury is permitted — but not required — to infer that the defendant also had knowledge of the relevant chemical similarities.”41

The Fourth Circuit has held that the government must prove only that the drugs were analogues within the statutory definition set forth above, and that the defendant intended them for human consumption.”42 In McFadden, the Fourth Circuit followed McKinney’s reasoning in Klecker,43 holding that notwithstanding other significant differences pointed out by the experts, the structural similarities between two substances represented by chemical diagrams were sufficient to put a reasonable person on notice that the substance might constitute an analogue.

The Fifth Circuit concluded in United States v. Desurnia44 that a controlled substance could be defined in terms readily comprehensible to the ordinary reader and therefore “provided adequate notice” of its criminal character. The Fifth Circuit also held that “[i]f a defendant possesses an analogue, with intent to distribute or import it, the defendant need not know that the drug he possesses is a controlled substance analogue. It suffices that he knows what drug he possesses and that he possess it with the statutorily defined bad purpose.”45

Therefore, the Fourth and Fifth Circuits have adopted the premise that the government need not prove that the defendant even knew of the similarities in effect between his substance and a Schedule I or II controlled substance, much less prove (directly or inferentially) that he knew of the similarities in chemical structure.46 Both circuits assert that a reasonable layperson can decide whether the structure of a chemical substance is substantially similar and illegal under the Analogue Act by comparing the chemical diagrams of two substances. The Second, Eighth and Seventh Circuits believe this reasoning to be problematic because of the potential to criminalize innocent conduct and because the CSA requires a knowing and intentional violation.47

The “substantially similar” provisions do not establish an “ascertainable standard of guilt,” nor do they provide sufficient minimal standards to guide law enforcement officers.48 Therefore, many of those arrested by federal agents in Project Synergy Phase II learned for the first time that their “K2,” “Spice” and “Bath Salts” were illegal substances under federal law.

Oral Argument by the Petitioner — McFadden

Kevin Russell, counsel for petitioner McFadden, stated that the petitioner and government agreed about two ways the government can prove scienter under the Analogue Act.

First, the government must show that the defendant knew the substance had a chemical composition similar to that of a controlled substance under the CSA. This knowledge requires that defendant know and understand the chemical composition of the two substances — the one listed on Schedule I or II of the CSA and the one in his possession. However, this type of expertise is rare, unless an individual is a chemist. Consequently, “a traditional reading of the statute does have the effect of making it substantially harder for the government to prove that mens rea for an ordinary layperson.”49

Second, the government must prove that the defendant actually knew the substance was an analogue: for example, if his supplier hands him the material and says, "Here is an analogue of heroin." The government still must prove through expert testimony that the substance is in fact analogue. That is, there must be a determination that the substance is chemically similar to a controlled substance. However, under this standard, the government does not need to prove the defendant knows the chemical structure of either the listed controlled substance or the analogue substance that he is distributing, if he knows that what is in his possession is, in fact, illegal under the Controlled Substances Act.50

Simply knowing the name of the synthetic chemical or the marketed brand name does not meet the government’s burden, although a jury may infer such knowledge from this evidence.51 Or the government can show that the defendant knew the conduct was unlawful under the CSA itself based on circumstantial evidence, including evidence concerning the defendant’s knowledge about the drug’s effect.”52

Therefore, “as a practical matter, in most cases … the proof is going to be what the government described, which is simply that the defendant engaged in some furtive conduct that suggests that he knows that the substance is illegal. And unless the defendant comes forward with some reason for the jury to think that, in fact, he had in mind that it violated some other law, or in fact, that he looked and came to the conclusion it doesn’t violate this Controlled Substances Act, then the jury is very likely to find mens rea established.”53
as to the two ways the government can prove scienter under the Analogue Act.

Harrington said the parties differ with respect to the government’s primary submission that it is sufficient if the government proves that a defendant distributed a drug and that he believed that doing so was illegal under some drug law, i.e., that he knew it was some kind of illegal drug. The government “does not have to prove actual knowledge of a fact to satisfy a knowledge standard in a statute. And again, we think it would be perfectly sufficient for the Court to hold in this case that when the government proved the defendant is distributing an illicit drug for human consumption and he believes that what he’s doing is illegal, and he is correct about that, then that is enough to satisfy the CSA or the Analogue Act.”

Justice Kagan: “So those are two ways of knowing a fact. But you’re saying that in addition to knowing a fact, the mens rea is satisfied if you can just show that the defendant knew he was acting culpably in violation of some law. And that, it seems to me, is a theory that could be put on to any law. That in addition to knowing all the facts that a statute says you have to know, the government has an alternative way of proving its case, which is just to say, oh, look at — look, you were acting culpably. You knew you were doing something wrong.”

The government’s “doctrinal point,” Harrington said, “is that this Court has held that there are other ways to prove knowledge other than that a defendant actually knew a critical fact. For example, the government can prove willful blindness. And the Court has explained, the reason you allow willful blindness to substitute for knowledge is not that being willfully blind to a fact is the same as knowing the fact. It’s because a person who is willfully blind to a fact has the same culpable state of mind as the person who knows the fact. So we would submit that a person who engages in an act intentionally and correctly believes that doing that is illegal is at least as culpable, if not more culpable, than the person who knows all the facts that make his conduct illegal.”

Chief Justice Roberts: “The government’s position makes it much easier to convict people because you don’t have to show that they even knew the facts that made their conduct illegal. All you have to do is say that — under — illegal under the law that they’re being charged. All you have to do is say, they did something that makes it look [as if] they were suspicious. And if we can find any law in the United States Code that makes what they did illegal, we can prosecute them for what we want to prosecute them for, even though they didn’t know that the facts fell under that provision. And what you’re saying is, we can show that simply by showing the jury that they were acting suspiciously.”

**Daubert Challenges to The ‘Substantially Similar’ Requirement**

Because the outcome of McFadden will require the government to prove that the substance in the defendant’s possession was, in fact, and analogue, a jury must decide whether the makeup of a substance has a chemical structure that is substantially similar to a controlled substance currently listed on Schedule I or II. To do this, the jury must be aided by expert testimony. However, the vagueness of the statute makes it technically impossible for the government to prove its precise chemical makeup in each case. Therefore, Daubert challenges are a material aspect of this litigation. Under Daubert, the court acts as “gatekeeper” by ensuring “that any and all scientific testimony or evidence admitted is not only relevant, but reliable.”

Rule 702 provides that testimony of a witness who is qualified as an expert is admissible if the expert’s testimony will help the trier of fact to understand the evidence or determine a fact in issue, if the expert’s opinion is based on sufficient facts or data and reliable principles and methods, and the expert reliably applies the principles and methods to the facts of the case. In making this determination, the court is guided by various factors, including whether the expert’s scientific hypotheses have been subject to objective testing or peer reviewed and published, whether the experimental technique used is subject to a known or potential error rate, whether the expert has complied with relevant professional standards, and whether the opinion is accepted in the pertinent scientific community. However, “since ‘substantial similarity’ is a legal construct, not a scientific term of art, the scientific community cannot even agree on a methodology to use to determine structural similarity.”

It is important to note that when deciding admissibility, a trial court’s focus should not be on the precise conclusions reached by the expert, but on the methodology employed in reaching those conclusions. Once the court has determined that the expert testimony has met the Daubert standards, disagreements with the expert’s conclusions go not to admissibility, but to the weight and credibility of the evidence — questions for the jury to decide.

Since reliability of the scientific process is relevant under Daubert, the strict testing protocols are required for a valid test. The DEA’s lab technicians do not always fully comply with proper testing protocols. For example, quality control protocols require that DEA lab technicians use a control sample of the analogue being tested in order to confirm the validity of an affirmative finding of trace elements of an analogue substance. The lab’s failure to follow these testing protocols nullifies the DEA’s findings.

Other common errors in testing include the possibility that the laboratory equipment is malfunctioning. Likewise, the testing equipment must be calibrated before each test. Therefore, the equipment maintenance schedules can provide useful information when challenging the validity of DEA laboratory reports. Any testing procedure that cannot be observed, or data regarding the testing conditions, measurements, and instrument identification that cannot be produced, is not scientifically reliable.

**Establishing Synthetic Drug Quantities Under USSG § 2D1.1**

The statutory sentencing range for possession or distribution of synthetic drugs under 21 U.S.C. § 841 is 0 to 20 years.

The advisory guideline range will be enhanced based on drug quantity under USSG § 2D1.1. Drug quantities used to enhance the advisory guideline range may be approximated by the sentencing court based on reliable evidence. The defendant must object to the government’s drug quantity approximations or the issue may be “waived.” Synthetic drug quantities are converted to their marijuana equivalent under the Drug Equivalency Table § 2D1.1. The drug quantity is calculated based on the bulk weight of the mixture or compound where the chemical analogue is present. This mix includes, but is not limited to, potpourri for synthetic marijuana and powder for bath salts. The conversion ratio of synthetic drugs to marijuana has been 1:1, where this bulk material has been present. For example, 1 gram of a pure synthetic drug without any adulterants or mixture is equivalent to 1 gram of pure THC. Similarly, 1 kilo
of a potpourri mixture laced with a detectable amount of synthetic THC is equal to 1 kilo of actual marijuana, which typically has a potency of approximately 10 percent of organic THC.

However, recently the DEA’s Office of Diversion Control (ODC), Drug and Chemical Evaluation Section (DCES), concluded that the synthetic cannabinoids found in synthetic marijuana are most similar to organic THC pursuant to the Drug Quantity Conversion Table under USSG § 2D1.1. Furthermore, federal prosecutors and law enforcement argue in sentencing hearings that the bulk substances that serve as the delivery vehicle for the consumption of designer drugs (i.e., powders, liquids or potpourri plant material) should be included in the calculation of the drug quantity. In other words, the federal government is prosecuting defendants like McFadden and those arrested during Project Synergy Phase II and asking the sentencing judge to use a ratio of 1:167, which means that 1 gram of a synthetic analogue mixture will be treated as the equivalent of 167 kilos of marijuana. The effect of this argument is to enhance a defendant’s sentencing range based upon drug quantity alone from an offense level of 8 (0-6 months) to an offense level of 26 (63-78 months).

The DEA’s 1:167 ratio does not present an Alleyne violation. In Alleyne v. United States, the Supreme Court extended the logic of Apprendi v. New Jersey to hold that any fact that raises the maximum or minimum must be charged in an indictment and proved to a jury beyond a reasonable doubt. However, the Sixth Amendment problem is cured by the remedy adopted in United States v. Booker; making the guideline range advisory only and requiring that the sentence be no greater than necessary to satisfy the purposes of sentencing in light of all of the factors and purposes set forth in 18 U.S.C. § 3553(a).

This interpretation of the drug equivalency ratio under the guidelines ignores the fact that the DEA does not set guidelines quantity ratios. Rather, the U.S. Sentencing Commission is charged with that duty. Moreover, the 1:167 ratio ignores the stark difference between the potency levels of pure THC and the relative potency of a controlled substance analogue, which is a differential encouraged by the USSG.

The sentencing court is under no duty to accept such arbitrary ratios because the Sentencing Guidelines are not mandatory. The sentencing judge has the exclusive authority to determine the drug quantity for the sentence. Moreover, sentencing judges may vary from guideline ranges based on a policy disagreement with the government’s overreaching and may express such a difference by varying to a level that corresponds to a different ratio. Defense attorneys remain hopeful that judges will reject the absurd rationale behind the DEA’s synthetic drug sentencing policy.

The manner in which synthetic drugs are produced makes the DEA laboratory results purely speculative. Individuals always dilute chemical analogues with some noncontrolled substance before they package them for sale and consumption. For example, they mix synthetic THC with acetone before spraying the potpourri. The application of the diluted synthetic THC varies and is inconsistent in purity and potency. Therefore, the DEA lab can only test for trace elements of the analogue, which may or may not even exist in some batches due to the random manner in which it is applied to the potpourri. Absent the ability to measure the uniform presence, type, consistency and purity of the analogue, using the DEA’s proposed method of calculating drug quantities is per se arbitrary and capricious.

Conclusion

As Justice Kagan noted in her comments during oral argument in McFadden, the government’s retreat from its burden of proving scienter has “real theoretical difference, which has implications far beyond this case.” The Court has repeatedly held that “knowing distribution” of a prohibited item requires knowledge of the facts underlying the statute of conviction. No precedent exists that gives prosecutors the option of either proving the defendant knew the facts that made the conduct unlawful, or simply that he acted culpably or that he knew that the conduct was unlawful under some law.

It is within the realm of Congress to decide what culpable mental state is required under its criminal statutes. People should be able to rely upon the same meaning of the word “knowingly” that they have relied on in the past. This principle means that the government is required to prove not only the facts underlying the statute of conviction, but also knowledge of the law. As Kevin Russell said during the McFadden oral argument, it is not enough that the government prove the accused simply has some general knowledge of unlawfulness. Rather, the government must also prove the defendant knew the facts that made the conduct unlawful.

The government’s argument in McFadden signals a retreat from the protections of the Fifth Amendment Due Process Clause requiring the public be given sufficient notice of “what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement” of that law.

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Notes

2. The precursor to Project Synergy II was Project Synergy I, which began Dec. 1, 2012. Project Synergy I resulted in 416 search warrants served and more than 227 arrests in 35 states, 49 cities, and five countries, along with more than $51 million in cash and assets seized. Altogether, 9,445 pounds of individually packaged, ready-to-sell synthetic drugs were seized, including 299 kilograms of cathinone drugs (“bath salts”), 1,252 kilograms of cannabinoic drugs (“K2” “Spice” or “herbal incense”), and 783 kilograms of treated plant material (“potpourri”); http://www.dea.gov/divisions/hq/2013/hq062613.shtml
3. DEA Administrator Michele M. Leonhart stated, “Shutting down businesses that traffic in these drugs and attacking their operations worldwide is a priority for DEA and our law enforcement partners.” These series of enforcement actions included retailers, wholesalers, and manufacturers (http://www.justice.gov/dea/divisions/hq/2013/hq062613.shtml)
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23. 28 C.F.R. pt. 201(h) of the CSA (21 U.S.C. § 811(h)(1)) provides for an expedited temporary scheduling action when such action is necessary to avoid a imminent hazard to the public safety. As provided in this subsection, the attorney general may, by order, schedule a substance in Schedule I on a temporary basis. Such an order may not be issued before the expiration of 30 days from (1) the publication of a notice in the Federal Register of the intention to issue such order and the grounds upon which such order is to be issued, and (2) the date that notice of a proposed temporary scheduling order is transmitted to the secretary of HHS. Id. § 811(h)(1).


25. The act of scheduling a substance is traditionally subject to formal rulemaking procedures “on the record after opportunity for a hearing” conducted pursuant to the provisions of 5 U.S.C. §§ 556, 557 (2012). While temporary scheduling orders are not subject to judicial review (21 U.S.C. § 811(h)(6)), the regular scheduling process of formal rulemaking affords interested parties with process and the government with any additional relevant information needed to make a determination. Final decisions that conclude the regular scheduling process of formal rulemaking are subject to judicial review; whereas, similar reviews are not conducted of chemical analogues listed pursuant to the emergency scheduling procedures under 21 U.S.C. § 877.

26. All statutes should be read as harmonious, with separate parts (such as subparts) being interpreted within their broader statutory context in a manner that furthers statutory purpose. This is called in pari materia. Justice Scalia wrote: “Statutory construction, however, is a holistic endeavor. A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme — because the same terminology is used elsewhere in a context that makes its meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.” See, e.g., United Sav. Ass’n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371, 108 S. Ct. 626, 98 L. Ed. 2d 740 (1988) (citations omitted).

27. Lenity principles “demand resolution of ambiguities in criminal statutes in favor of the defendant.” Hughey v. United States, 495 U.S. 411, 422, 110 S. Ct. 1979, 109 L. Ed. 2d 408 (1990) (citations omitted); see also United States v. Granderson, 511 U.S. 39, 54, 114 S. Ct. 1259, 127 L. Ed. 2d 611 (1994) (“In these circumstances — where text, structure, and history fail to establish that the government’s position is unambiguously correct — we apply the rule of lenity and resolve the ambiguity in Granderson’s favor.”); Cleveland v. United States, 531 U.S. 12, 25 (2000) (before choosing a “harsher alternative” interpretation of the mail fraud statute, “it is appropriate … to require that Congress should have spoken in language that is clear and definite”) (citation omitted). If statutory language is ambiguous, then the rule of lenity applies. If statutory language is unambiguous, the rule of lenity does not apply.


29. Id.


32. See Turcotte, 405 F.3d at 527; see also United States v. Sullivan, 714 F.3d 1104 (8th Cir. 2013) (listing whether the defendant “knew he was in possession of a controlled substance analogue” as an element of the offense).

33. Different circuit decisions have held that the scienter requirement under the current state of the law does not require proof that a defendant knew his or her conduct violated the law. See

United States v. Ansaldi, 372 F.3d 118, 128 (2d Cir. 2004) ("For the most part, the prosecution need not show that a defendant knew the illegality of the conduct with which he is charged. ... Knowledge of, or intent to violate, the law is simply not an element of [a controlled substance analogue] offense."); United States v. Rosenthal, 334 F. App’x 841, 842-43 (9th Cir. 2009) (unpublished) (CSA § 841(a)(1) does not “require knowledge of the law or intent to violate the law.”); United States v. Stacy, 734 F. Supp. 2d 1074, 1083-84 (S.D. Cal. 2010) (same). Defendants may not present evidence or argument to the jury that they believed their conduct was legal. Such evidence and argument are irrelevant. Defendant that he was acting lawfully is irrelevant as to criminal liability. United States v. Scarmazzo, 554 F. Supp. 2d 1102, 1105 (E.D. Cal. 2008) (“Defendant’s belief that he was acting lawfully is irrelevant as to criminal liability.”).


35. United States v. Klecker, 348 F.3d 69 (4th Cir. 2003); United States v. Desurra, 865 F.2d 651 (5th Cir. 1989); see United States v. Jewell, 532 F.2d 697, 698 (9th Cir.) (en banc), cert. denied, 426 U.S. 951 (1976).

36. Turcotte, 405 F.3d at 527.


38. Klecker, 348 F.3d at 71.


40. Id. at 653.


42. See 21 U.S.C. § 841(a).


45 Oral Argument at 45.

46. Id. at 25.

74. Id.


76. See Gall v. United States, 128 S. Ct. 586 (2007); Brief for Petitioner at 13 n.3, id. at 597-98.

77. See § 2D1.1. Application Note 5. Types and quantities of drugs not specified in the count of conviction may be considered in determining the offense level. See id. § 1B1.3(a)(2) (Relevant Conduct). Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.


