

Synthetic-Marijuana Ban Raises Novel Questions for Defense

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A potential client, who we will call Bud Green, advises you the police arrested him for possession of "Optimus Charms." You ask, "What's that?" Green replies that "it gets you high, like marijuana" and it comes in a metal foil container with a label that has a cartoon picture of a Transformer robot in front of a rainbow.

Although somewhat puzzled, you agree to take his case.

A few weeks later, you receive the discovery that shows Green was charged with possessing a Schedule I controlled dangerous substance identified as "JWH-200." What is "JWH-200" and has Green violated the law?

In the 1990s, Clemson University scientist John W. Huffman began to study the effects of cannabinoids on the brain. The most common cannabinoid is tetrahydrocannabinol (THC), which is the primary psychoactive compound of marijuana.

Since he was prohibited by law from using actual marijuana to conduct his research, Huffman invented new chemicals that were similar to the active ingredient of marijuana. The first success, named "JWH-018" (JWH for Huffman's initials), was produced in 1995. Like any good scientist, he published his research. Many similar chemicals were later invented by Huffman and other scientists, and were given names such as "JWH-398," "AM-2201" and "RCS-4," corresponding to the respective inventor's initials.

The publications enabled others to begin manufacturing these chemicals. By 2004, the first commercial synthetic marijuana product, "Spice," was sold. Since then, use has greatly expanded, and synthetic marijuana products have been sold under many brand names, such as "Mr. Nice Guy," "K2" and "Red Dawn X."

Typically, the manufacturer adds the chemical to a benign herb, so it looks like and can be smoked as if it were marijuana. The effects are often reported to be similar to marijuana, although the synthetic chemicals can be far more powerful than all natural herbs and have potentially harmful effects. Their full effects on the brain are still unknown and Huffman has characterized the chemical as dangerous.

On March 1, 2011, the Federal Drug Enforcement Administration (DEA) imposed a one-year emergency ban on five forms of synthetic marijuana. This ban, which added those compounds to the federal list of Schedule I controlled substances, was later extended for another six months.

A permanent and broader ban was passed by Congress, and on July 9, President Barack Obama signed the Synthetic Drug Abuse Prevention Act of 2012. This act adds 31 synthetic compounds to the list of

Schedule I controlled substances, including many varieties of synthetic marijuana. The law also preemptively bans new forms of synthetic marijuana that have yet to be developed.

New Jersey has also moved to ban synthetic marijuana. While a bill is still pending in the Legislature, A-446, the Office of the Attorney General has temporarily added these chemicals to the state list of Schedule I controlled substances, citing authority granted by the New Jersey Controlled Dangerous Substances Act. This order, which went into effect on Feb. 28, bans specific compounds and other chemicals that have yet to be developed but mimic marijuana.

These bans may raise novel and unique questions for the criminal defense lawyer. Most illegal drugs have been illegal for a long time, so that anyone who possesses them must have acquired them while they were illegal. But for a newly banned substance, someone who is charged with possession might not have had the requisite mens rea to be guilty of an offense. A defendant might have acquired "Spice" while it was legal, and then forgot he had it or lost it, only to have the police discover it after the ban went into effect. Can such a person not have intended to possess the drug while it was illegal and therefore claim he did not "knowingly" possess an illegal substance?

Another legal issue relates to statements made by Attorney General Jeffrey Chiesa. News stories from March 1, 2012, reported that he spoke of a 10-day grace period for distributors and manufacturers to surrender the drugs. It is unclear whether Chiesa was referring only to the sellers or to anyone who possessed a newly banned substance. The order itself does not mention a grace period and says it "shall take effect immediately." Is such notice to the public sufficient or could one argue that lack of notice created a violation of due process?

Questions remain about the legal ramifications of the ban on possessing or distributing synthetic marijuana. Attorneys ought to be aware of these issues so as to effectively represent their clients. After all, scientists shouldn't be the only ones to develop creative innovations ... •

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