



Department of Justice

STATEMENT OF

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BEFORE THE

**CAUCUS ON INTERNATIONAL NARCOTICS CONTROL
UNITED STATES SENATE**

FOR A HEARING ENTITLED

“DANGEROUS SYNTHETIC DRUGS”

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Statement of Timothy J. Heaphy
U.S. Attorney for the Western District of Virginia
Before the Senate Caucus on International Narcotics Control
For a Hearing Entitled “Dangerous Synthetic Drugs”
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Chairman Feinstein, Co-Chairman Grassley, and distinguished members of the Caucus on International Narcotics Control, on behalf of Attorney General Eric H. Holder, Jr. and my colleagues at the United States Department of Justice, I appreciate your invitation to testify today regarding our prosecutorial efforts to combat the emerging challenges presented by synthetic cannabinoids and stimulants.

The proliferation of synthetic drugs in the past several years has presented unique challenges to law enforcement. As you will hear from my colleague Joe Rannazzisi at the Drug Enforcement Administration, these substances are both more available and more dangerous than ever before. Federal prosecutors around the country are working with DEA and other law enforcement agencies to identify and prosecute those who are responsible for this ominous trend. While we have had significant success, we continue to see other substances proliferate that are manipulated to fall outside of the statutory structure.

The Analogue Act

As prosecutors, we use statutes passed by Congress to bring charges against defendants of all kinds, including sellers of illegal drugs. The Controlled Substance Act (CSA), passed in 1970, regulates the manufacture, possession, use, importation, and distribution of certain drugs, substances, and precursor chemicals. Prior to 1986, drug dealers and chemists evaded prosecution by manipulating the molecular structure of a scheduled drug in order to create an analogue that provided the same effects. In response, Congress amended the CSA by passing the Controlled Substances Analogue Enforcement Act in 1986 (Analogue Act). The Analogue Act seeks to "prohibit[s] persons who specifically set out to manufacture or to distribute drugs which are substantially similar to the most dangerous controlled substances from engaging in this activity."¹ Under certain circumstances, the Analogue Act allows us to charge the manufacturing, distribution, dispensation, or possession of substances not specifically scheduled.

Criminal liability depends upon a finding, in each and every particular prosecution, that the substance is both an analogue and is intended for human consumption. A controlled substance analogue, under the CSA is a “designer drug” that resembles a controlled substance in

¹ *United States v. Forbes*, 806 F.Supp. at 235 (quoting S. Rep. No. 99-196, at 5 (1985)).

molecular structure and actual (or purported) physiological effect. Even if a substance is widely regarded as a “controlled substance analogue” under the CSA, each criminal prosecution must establish that fact anew.

The primary prosecutorial challenge to preventing the distribution and abuse of analogues is that analogues are not precisely identified in the law to define their illegal status beyond question. In stark contrast, controlled substances are established by a statute or regulation that unquestionably subjects those drugs to legal controls and criminal repercussions.

Prosecutions Pursuant to the Analogue Act

A review of Analogue Act prosecutions brought by federal prosecutors shows a significant increase in the number of cases from 1986 (when the Analogue Act was introduced) until 2011, and from 2011 (when the new era of designer drug trafficking began) until the present. From 1986 until 2011 there were approximately 62 individuals prosecuted for violations of 21 U.S.C. §§ 802(32)(a) and 813 as relates to the distribution of controlled substance analogues; from 2011 to present, 280 individuals have been similarly charged.

In the Western District of Virginia, we have aggressively used the Analogue Act to prosecute distributors of synthetic drugs. In one such case, we charged several individuals in Charlottesville for selling synthetic “bath salts” which mimicked the effects of methamphetamine and ecstasy. When investigators obtained information about these synthetic drugs being sold in a local video store, they conducted several controlled purchases from the owner of the store, Lois McDaniel, and two of her employees, Dustin Orange and John Collier. When confronted by investigators, McDaniel provided information about her supplier – a New York man named Stephen McFadden. McDaniel recorded several conversations with McFadden in which he indicated awareness of the fact that these synthetic substances were being ingested by purchasers in Charlottesville. That allowed us to charge McFadden, along with McDaniel and her employees, with distribution of analogue substances. McFadden was convicted at trial and sentenced to 33 months in jail.

The McFadden case presented challenging issues of proof that are common in Analogue Act cases. Under the CSA, and as interpreted by various courts, the government must prove that a substance is an analogue if: (1) the chemical structure of the substance is substantially similar to the chemical structure of a schedule I or II controlled substance; AND EITHER that (2) the substance has a similar or greater pharmacological effect on the central nervous system than a schedule I or II controlled substance; OR that (3) with respect to a particular person, that such person represents or intends the substance to have a pharmacological effect substantially similar to or greater than a schedule I or II controlled substance. See 21 U.S.C. § 802(32). In addition,

the government must always prove that the substance was intended for human consumption. See 21 U.S.C. § 813.

While prosecutors must present evidence on these elements, the elements present conceptual difficulties for juries that must find that the government's evidence supports each separate component beyond a reasonable doubt. Whether a substance is "chemically similar" to a scheduled illegal drug is frequently the subject of extensive expert testimony. In a case involving a scheduled drug like cocaine or heroin, prosecutors present the testimony of chemists who describe the chemical composition of the drugs. In a case like *McFadden*, which involves non-controlled synthetic drugs, expert chemists opine about the similarity of the synthetic to specific drugs listed on schedules I and II. Whether compounds are substantially similar or dissimilar are subjective opinions, thereby rendering such testimony open to debate. In these prosecutions, therefore, a battle of the experts on this single element is inevitable. And yet, the prosecution must also prove one of the pharmacological elements. These testimonies also are based on subjective views, subject to opposing opinions and scientific debate at trial.

In *McFadden*, we were able to present the testimony of actual synthetic drug users to prove that ingestion of the "bath salts" distributed at the video store had a similar pharmacological effect upon them as methamphetamine, ecstasy, and cocaine. Whether or not such evidence from actual users is available, and whether or not courts will allow this evidence to be presented to the jury, analogue cases often involve conflicting expert testimony regarding the pharmacological effect of ingesting a particular substance. As with chemical similarity, this testimony is based on complex models that are subject to various interpretations. Lay jurors in the *McFadden* case had to sift through the testimony of experts, evaluate it in context of other evidence, and make these technical findings.

Proving that a substance was intended for human consumption presents another challenge. The *McFadden* case involved controlled purchases and evidence that included conversations about ingestion as well as recorded conversations with a higher-level supplier. Such direct evidence of a supplier's knowledge is difficult to obtain, particularly from manufacturers or individuals higher on the distribution chain. The packaging of the drugs is often marked "not for human consumption," which the trafficker uses to establish a "lack of knowledge" defense that a wholesale distributor or manufacturer was unaware of a user's ultimate intent to ingest the drug. While we present circumstantial evidence of a target's awareness of human consumption, such proof can sometimes be completely unavailable and allow more substantial targets to evade prosecution.

Destruction of these substances after their seizure also presents issues. Uncontested disposal of these drugs is contingent on a number of factors, one of which is whether the substances were the subject of a successful prosecution. Where substances are seized during an investigation, but do not form the basis of a charge, the question remains whether the drugs are illegal and can be destroyed without a guilty finding. This can lead to extensive, additional litigation over the destruction of the substances and/or demands for their return.

Finally, these cases present substantial timing issues. In contrast to a typical drug case, there are no probable cause arrests when someone is arrested with unscheduled synthetic substances. Before law enforcement can take action, the seized synthetic substances must be analyzed by a chemist and identified. Prosecutors must then determine if the elements of the Analogue Act can be satisfied. This process takes considerable time, allowing the dangerous synthetic substances to continue to be sold and abused.

Our experience in cases like McFadden demonstrates that the Analogue Act prosecutions are complex and time-consuming. The challenges presented by these cases, and the exponentially increasing volume and variety of designer drugs, continue to make our enforcement efforts more difficult.

Education and Prevention Efforts

Success in reducing the threat posed by any emerging pattern of criminal activity requires a comprehensive solution. In the areas of violent crime, child exploitation, investor fraud, and numerous others, United States Attorneys augment their enforcement work with support for effective prevention programs. The fight against the abuse of synthetic drugs is no different. As we use the Analogue Act to prosecute traffickers, we must do all we can to educate potential users about the dangers of these volatile substances.

United States Attorneys and their DEA counterparts have been creative in identifying and implementing prevention strategies in this area. In June 2013, DEA sent a letter to each of the top 100 retail convenience store and gas station chain corporations in the United States informing them of the alarming trend of the sale and abuse of synthetic designer drugs masquerading as over-the-counter household items such as bath salts, incense, or jewelry cleaner. The letter discussed why they are marketed and sold at retail, how they are abused, and the health consequences and the dangers associated with the abuse of these substances. The letter requested that these corporations take steps to protect the public by preventing these substances from being sold at their business locations.

Similar letters have been sent to specific locations in areas where synthetic drugs have proliferated. In Roanoke, and other areas of the Eastern District of Virginia, DEA agents and local police delivered a letter from the United States Attorney's Office to over 40 stores that were selling "bath salts" compounds. The letters advised the proprietors of the potential illegality of their sale of "bath salts" compounds. The vast majority of these stores immediately relinquished these substances and ceased selling them to customers. Similar letters were sent to landlords on whose property these compounds were sold. These letters resulted in several evictions.

Prosecutors and investigators are forging partnerships with health care providers, peer educators, schools, and other prevention organizations. In Staunton, Virginia, we have teamed with a local hospital and a youth substance abuse prevention organization to draw attention to the dangerous effects synthetic drugs, or "bath salts," can cause. While prosecutions bring public awareness of the dangers of synthetic drugs, we have used case announcements as opportunities to provide information to students, parents, and entire communities, and to highlight the availability of addiction treatment.

Conclusion

In order to meet the emerging threat of synthetic drugs, we must continue to apply a holistic approach to the problem. We appreciate the tools the Congress has given us thus far, and we have made significant progress against certain synthetic drugs. However, we continue to see other substances proliferate that are manipulated to fall outside of the statutory structure. We look forward to continuing our partnership with Congress in this area. We must inform sellers and users about the illegality and dangerousness of these substances, and find additional ways to augment our enforcement work with education and prevention.