UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2535

United States of America

Appellee

v.

Charles Wolfe, also known as Chuck Wolfe

Appellant

No: 18-2536

United States of America

Appellee

v.

Charles Wolfe, also known as Chuck Wolfe

Appellant

Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cr-00152-AGF-5)
(4:14-cr-00175-AGF-4)

ORDER

Appellant's motion to reconsider this case for oral argument has been considered by the court and is denied.

June 12, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For The Eighth Circuit
Thomas F. Eagleton U.S. Courthouse
111 South 10th Street, Room 24.329
St. Louis, Missouri 63102

Michael E. Gans
Clerk of Court

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August 06, 2019

Mr. Talmage E. Newton
NEWTON & BARTH
Suite 420
555 Washington Avenue
Saint Louis, MO 63101

RE: 18-2535 United States v. Charles Wolfe
18-2536 United States v. Charles Wolfe

Dear Counsel:

The court has issued an opinion in these cases. Judgment has been entered in accordance with the opinion.

Please review Federal Rules of Appellate Procedure and the Eighth Circuit Rules on post-submission procedure to ensure that any contemplated filing is timely and in compliance with the rules. Note particularly that petitions for rehearing and petitions for rehearing en banc must be received in the clerk's office within 14 days of the date of the entry of judgment. Counsel-filed petitions must be filed electronically in CM/ECF. Paper copies are not required. No grace period for mailing is allowed, and the date of the postmark is irrelevant for pro-se-filed petitions. Any petition for rehearing or petition for rehearing en banc which is not received within the 14 day period for filing permitted by FRAP 40 may be denied as untimely.

Michael E. Gans
Clerk of Court

AMT

Enclosure(s)

cc: Mr. Kyle Timothy Bateman
Mr. James C. Delworth
Ms. Erin Granger
Mr. Gregory J. Linhares
Ms. Jennifer Winfield
Mr. Charles Wolfe

District Court/Agency Case Number(s): 4:14-cr-00152-AGF-5
4:14-cr-00175-AGF-4

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No: 18-2535

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Plaintiff - Appellee

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Defendant - Appellant

No: 18-2536

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Plaintiff - Appellee

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Defendant - Appellant

Appeals from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cr-00152-AGF-5)
(4:14-cr-00175-AGF-4)

JUDGMENT

Before GRUENDER, STRAS, and KOBES, Circuit Judges.

These appeals from the United States District Court were submitted on the record of the district court and briefs of the parties.

After consideration, it is hereby ordered and adjudged that the judgment of the district court in these causes is affirmed in accordance with the opinion of this Court.

August 06, 2019

Order Entered in Accordance with Opinion:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

United States Court of Appeals
For the Eighth Circuit

No. 18-2535

United States of America

Plaintiff - Appellee

v.

Charles Wolfe, also known as Chuck Wolfe

Defendant - Appellant

No. 18-2536

United States of America

Plaintiff - Appellee

v.

Charles Wolfe, also known as Chuck Wolfe

Defendant - Appellant

Appeals from United States District Court
for the Eastern District of Missouri - St. Louis

Submitted: June 13, 2019
Filed: August 6, 2019
[Unpublished]

Before GRUENDER, STRAS, and KOBES, Circuit Judges.

PER CURIAM.

Charles Wolfe appeals the district court's[1] denial of his motions to dismiss indictments for conspiracy, *see* 21 U.S.C. § 846, to violate the Controlled Substance Analogue Act ("Analogue Act"), *see id.* §§ 802 and 841. He also appeals the district court's grant of a motion *in limine* preventing him from presenting an advice-of-counsel defense at trial. We affirm.

Wolfe claims that the district court should have dismissed the indictments because the Analogue Act is unconstitutionally vague. We review the denial of a motion to dismiss an indictment *de novo*. *United States v. Askia*, 893 F.3d 1110, 1116 (8th Cir. 2018). The Analogue Act states that "[a] controlled substance analogue shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I." 21 U.S.C. § 813. A controlled substance analogue is a substance that is "substantially similar" to a controlled substance in schedule I or II with respect to either its chemical structure or its "stimulant, depressant, or hallucinogenic effect." 21 U.S.C. § 802(32)(A).

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[1] The Honorable Audrey J. Fleissig, Unites States District Judge for the Eastern District of Missouri.

Wolfe contends that the phrase "substantially similar" renders the act unconstitutionally vague because it "lends itself to arbitrary enforcement and does not put an individual of average intelligence on notice of what substances are illegal." He relies on *United States v. Johnson*, in which the Supreme Court voided the residual clause of the Armed Career Criminal Act ("ACCA") as unconstitutionally vague. 135 S. Ct. 2551, 2556-57 (2015). "The same vagueness and arbitrariness, the same inability to discern what the ordinary version of an offense looks like that plagues the [ACCA]," he argues, "exists within the Analogue Act." But we rejected this very argument in an appeal brought by Wolfe's co-conspirators. *United States v. Palmer*, 917 F.3d 1035, 1038 (8th Cir. 2019). In *Palmer*, we determined that *Johnson* did not affect prior precedent upholding the constitutionality of the Analogue Act. *Id.*; *see also McFadden v. United States*, 135 S. Ct. 2298, 2306-07 (2015) (holding that the Analogue Act is not unconstitutionally vague); *United States v. Carlson*, 810 F.3d 544, 550 (8th Cir. 2016) (rejecting the argument that "the Analogue Act is unconstitutional because it does not provide notice of which acts are criminal and permits arbitrary enforcement contrary to the Due Process Clause"). The district court therefore properly denied Wolfe's motions to dismiss.

Wolfe also claims that he should have been permitted to present an advice-of-counsel defense at trial. "We review the district court's denial of a proffered legal defense de novo." *United States v. Yan Naing*, 820 F.3d 1006, 1011 (8th Cir. 2016). "A defendant is entitled to a jury instruction on an affirmative defense if he can demonstrate an underlying evidentiary foundation for each of its elements." *Id.* (internal quotation marks omitted). "The evidence of each element must be sufficient for a reasonable jury to find in the defendant's favor." *Id.* "[T]o rely upon the advice of counsel in his defense, a defendant must show that he: (i) fully disclosed all material facts to his attorney before seeking advice; and (ii) actually relied on his counsel's advice in the good faith belief that his conduct was legal." *United States v. Rice*, 449 F.3d 887, 897 (8th Cir. 2006).

In support of his proffered defense, Wolfe submitted to the district court letters from his former attorney analyzing whether the substances Wolfe conspired to distribute were considered controlled substances "under the varying legal parameters used by each individual state in defining Scheduled substances." He claims that his reliance on those letters, which indicated that the substances were legal in some states and under some federal laws, should have entitled him to an advice-of-counsel defense.

But a reasonable jury could not have found that Wolfe both (1) fully disclosed all material facts to his attorney before seeking the legal opinion and (2) relied on that opinion in "the good faith belief that his conduct was legal." Each letter, for instance, stated that it did not offer an opinion about the "safety or efficacy" of the substances or "recommend them for human consumption." Nevertheless, the conspiracy depended on people purchasing the substances for human consumption. Thus, either Wolfe failed to disclose to his attorney that the substances would be used for human consumption or Wolfe failed to rely on his attorney's recommendation not to distribute the substances for the purpose of human consumption. The letters also do not mention the Analogue Act and say nothing about what information Wolfe provided to his attorney in connection with his request for the letters. Even when the district court gave Wolfe the opportunity to provide a "full proffer of evidence to be offered, including the testimony of [his former attorney] and the information provided to counsel in connection with the opinion," Wolfe offered no additional evidence. The district court therefore properly granted the Government's motion *in limine* to prohibit Wolfe from raising an advice-of-counsel defense at trial.[2]

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[2] Wolfe also claims that he "should have been allowed to present evidence of the advice he received and what impact that [advice] had on his mens rea for the crime alleged." To the extent that this is an argument for admission of the letters into evidence unrelated to his proffered advice-of-counsel defense, our review is for an abuse of discretion. *See United States v. Jirak*, 728 F.3d 806, 813 (8th Cir. 2013). The district court concluded that the probative value of the letters was "far

For these reasons, we affirm.

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outweighed by their prejudicial impact and the risk of misleading the jury." This conclusion supports the exclusion of the letters from evidence, *see* Fed. R. Evid. 403, and is one that we accord "great deference" to the district court when reviewing. *See United States v. Pumpkin Seed*, 572 F.3d 552, 558 (8th Cir. 2009). Applying this deferential standard and considering our above discussion about the many evidentiary issues presented by the letters, we conclude that the district court did not abuse its discretion by excluding them from evidence.

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Appeal from U.S. District Court for the Eastern District of Missouri - St. Louis
(4:14-cr-00152-AGF-5)
(4:14-cr-00175-AGF-4)

ORDER

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

September 18, 2019

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit.

/s/ Michael E. Gans

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MARK PALMER, SAMUEL LEINICKE, and CHARLES WOLFE, Defendants.	)	Case No. 4:14CR00175AGF

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES WOLFE, Defendant.	)	Case No. 4:14CR152AGF

ORDER

This matter came before the Court on the Government's Motion to preclude Defendant from asserting an Advice of Counsel Defense in Case No. 4:14CR175 AGF (the "Palmer" case), and Case No. 4:14CR152AGF (the "Wolfe" case). This Order summarizes decisions made by the Court at various pretrial hearings at which the issue was addressed.

The Government first asserted the matter in the Government's Motion to Preclude the Use of Certain Defenses (Palmer, ECF No. 346). The Court heard argument and permitted the parties to file supplemental briefs, which were filed on August 25, 2017. (Palmer, ECF Nos. 374, 375 and 379).

On September 13, 2017, the Court held a hearing related to the trial, and denied without prejudice the Government's motion to preclude the advice of counsel defense, to the extent the Government was asserting such defense was precluded as a matter of law. For the reasons stated more fully on the record, the Court found that following the Supreme Court's opinion in *McFadden v. United States*, 135 S. Ct. 2298 (2015), which specified the type of knowledge required with respect to controlled substance analogue charges, case law suggests such a defense could be asserted in appropriate circumstances. *See United States v. Reulet*, No. 14-40005-DDC, 2016 WL 126355, at *4-5 (D. Kan. Jan. 11, 2016); *United States v. McConnell*, No. 2:14CR00001, 2015 WL 4633669, at *4 (W.D. Va. Aug. 3, 2015). Though not precluding the defense as a matter of law, the Court could not, however, determine whether Defendants could offer such a defense or evidence of such a defense without a proffer by Defendants of the evidence they were seeking to offer. And Defendants were advised that they would need to make such a proffer in a timely manner prior to offering such evidence.

The Government thereafter filed a Motion for an Expedited Hearing and Motion in Limine to Preclude Mention of the Advice-of-Counsel Defense Until Ruling on Scope Has Been Made (Palmer, ECF No. 396; Wolfe, ECF No. 918), to which Defendants responded (Palmer, ECF No. 406; Wolfe, ECF No. 926). On September 19, 2017, the parties appeared for a final pretrial conference and hearing. Defendant Mark Palmer was present and represented by his attorneys R. Tyson Mutrux and Shelby Cowley. Defendant Samuel Leinecke was present and represented by his attorney Jason Korner. Defendant Charles Wolfe was present and represented by his attorneys Chris Threlkeld and J. William Lucco. The Government was represented by Assistant United States Attorneys Jim Delworth, Erin Granger, and Jennifer Winfield.

For the reasons stated more fully at the hearing, the Court held that on the current record it would not permit any advice of counsel defense or evidence of the legal opinions offered by Defendants. The Court expressed numerous concerns based on the limited information offered by Defendants. For example, by their terms, the four sample opinions state they are valid only as of the date of the opinions, and purport to express opinions only as to state law. It is difficult to determine what, if any, opinion as to federal law is being offered, or the basis of any such opinion, and the language used makes them quite misleading. The opinions also do not appear to reference the Controlled Substance Analogue Enforcement Act ("Analogue Act") – which is the statute primarily at issue here – and Defendants were unable to state whether the Analogue Act was mentioned in any of the opinions received. More importantly, the opinions provided plainly contemplate that the substances were not recommended for human consumption. Further, Defendants were unable to provide any information whatsoever with respect to the information provided to the attorney in connection with the opinions. As such, on this limited record, any probative value of the opinions of attorney Timothy Dandar would be far outweighed by their prejudicial impact and the risk of misleading the jury.

Accordingly, Defendants were advised at the pretrial hearing that no evidence related to an advice of counsel defense based on the opinions of Timothy Dandar could be presented until Defendants made a full proffer of the evidence to be offered, including the testimony of Timothy Dandar and the information provided to counsel in connection with the opinion. Although a proffer hearing had been scheduled for October 6, 2017, on that date, Defendants advised that attorney Dandar would not appear for the proffer. On October 11, 2017, Defendants further advised that, if called to testify, Dandar would invoke his Fifth Amendment rights.

Thus, for the foregoing reasons and the reasons stated more fully at the various pretrial hearings, on the current record, Defendants will not be permitted to offer an advice of counsel defense, or to discuss or offer the opinions of attorney Timothy Dandar.

Accordingly,

IT IS HEREBY ORDERED, on the current record, that the motions of the United States for a hearing regarding the Advice of Counsel defense, and to preclude mention and evidence of such Defense, is **GRANTED**. Case No. 4:14CR00175AGF, ECF Nos. 346 & 396; Case No. 4:14CR00152AGF, ECF No. 918.

Dated this 11th day of October, 2017.

Audrey G. Fleissig

AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE

B 63

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. MARK PALMER, SAMUEL LEINICKE, and CHARLES WOLFE, Defendants.	)	Case No. 4:14CR00175AGF

UNITED STATES OF AMERICA, Plaintiff, vs. CHARLES WOLFE, Defendant.	)	Case No. 4:14CR152AGF

ORDER DENYING MOTION FOR NEW TRIAL

This matter is before me on the Joint Motion for a New Trial filed by Defendants Mark Palmer, Samuel Lienicke, and Charles Wolfe. (ECF No. 463.) Defendants raise five grounds in support of their motion. Defendants contend the Court erred in: (1) granting the government's motion *in limine* barring Defendants from raising the issue of advice of counsel; (2) disallowing Defendants' expert from presenting his entire slideshow exhibit; (3) giving jury instruction 32; (4) denying Defendants' motion to exclude evidence regarding the Defendants' failure to file tax

returns[1]; and further contend (5) the government presented an improper burden-shifting argument in closing argument in commenting that if Defendants wanted certain witnesses to testify, such as Greg Sloan, Elizabeth Pogue and others, Defendants could have called them to testify. The government has opposed Defendants' motion.

After careful review of the grounds asserted, I will deny Defendants' motion for a new trial. The first four grounds raised by Defendants were raised at trial, and the reasons for the rulings were stated on the record. Defendants have not raised any new arguments that provide any basis to reconsider those decisions.

Further, with respect to the first ground asserted, it is not correct that Defendants were barred from raising the defense of advice of counsel. To the contrary, I denied the government's motion to disallow the defense as a matter of law, and simply required that Defendants make a proffer prior to presenting such evidence, for the reasons stated in open court and in my prior written Orders. Defendants, ultimately, failed to make such a proffer when their attorney failed to appear for his proffer and indicated he would not testify at trial. With respect to the second ground, I also note that I did permit Defendants to use some portions of the expert's exhibit that would have permitted the expert to make some of the arguments that Defendants wished to present, and Defendants apparently elected not to present some of that information.

The fifth ground raised by Defendants also fails to provide grounds for a new trial. As the government noted in its response, Defendants did not object to this statement during closing argument. In any event, where, as here, a defendant makes arguments to the jury regarding the government's failure to call certain witnesses, thereby implying that the prosecutors are

[1] The government did not make any such argument with respect to Defendant Lienicke, who instead argued that the fact that he did report his income on his income tax returns provided evidence that he did not believe his conduct was unlawful.

somehow hiding or withholding evidence, the prosecutors are permitted in rebuttal to refer to the defendant's subpoena power to call those witnesses. *United States v. Ziesman*, 409 F.3d 941, 954 (8th Cir. 2005).

Accordingly, for the foregoing reasons, and the reasons stated in my prior rulings on these issues,

IT IS HEREBY ORDERED that Defendants' Joint Motion for a New Trial (ECF No. 463) is **Denied**.

Dated this 2nd day of February, 2018.

Audrey G. Fleissig

AUDREY G. FLEISSIG
UNITED STATES DISTRICT JUDGE