No. _____

In The

Supreme Court of the United States

Douglas Jason Way, Petitioner

v.

United States Of America, Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

W. Scott Quinlan
Counsel of Record
2333 Merced Street,
Fresno, Ca 93721
wsquinlan@att.net
(559) 442-0634

Roger T. Nuttall,
Nuttall and Coleman,
2333 Merced Street,
Fresno, Ca 93721

The Questions Presented For Review

1. Whether the Ninth Circuit Court of Appeals contradicted the holding of McFadden v. United States 576 U.S. 186 (2015) by ruling irrelevant petitioner's rebuttal, to government evidence of his implied knowledge of federal regulation of a drug analogue, that he was only aware of and complying with state law regulation of that substance.

2. Whether such error is never harmless error when it prohibits petitioner from offering a rebuttal to government evidence of his knowledge of federal regulation of a drug, through defense witnesses, by cross-examination of government witnesses, by admitting defense exhibits, by petitioner's testimony, and through defense counsel summation.

TABLE OF CONTENTS

INDEX OF APPENDIX

TABLE OF AUTHORITIES

Supreme Court Cases

Appellate Cases

Constitutional Provisions

Federal Statutes

Federal Rules of Criminal Procedure

PETITION FOR A WRIT OF CERTIORARI

Petitioner Douglas Jason Way respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in case number 18-10427 (Pet.App. 1a) is unpublished, but available at 2020 WL 865372. The district court's rulings in case number CR-F-14-0101 DAD before the United States District court for the Eastern District of California are included in the Appendix to the petition. Judgment was entered in the District Court on October 29, 2018.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2020. Pet.App. 1a. The Court of Appeals denied petitioner's timely petition for rehearing and rehearing en banc on April 30, 2020. Pet. App.22a. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

Fifth Amendment

"No person shall . . .be compelled in any criminal case to be a witness against himself, . . . nor be deprived of life, liberty, or property, without due process of law"

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to. . . trial, by an impartial jury. . ., to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

RELEVANT STATUTORY PROVISIONS

Federal Rules of Criminal Procedure, Rule 52, provides in relevant part:

"(a) Harmless Error: Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

Legal Background

This case presents a clear conflict of the Ninth Circuit Court of Appeals with this Court's ruling in McFadden v. United States 576 U.S. 186, 135 S.Ct. 2298 (2015), as followed by the Fifth Circuit Court of Appeals in United States v. Bays 680 Fed.Appx. 303 (2019) unpublished.

Petitioner was charged by indictment with crimes involving federal criminal controlled substance analogue violations, and controlled substance violations. He was also charged with one count of conspiracy to mislead the government and a related count of misbranding drugs. He was convicted of all counts involving controlled substance analogues, conspiracy to mislead the government, and misbranding drugs. He

was not convicted of crimes involving controlled substances.

The Controlled Substance Analogue Enforcement Act of 1986 identifies criteria of analogues of controlled substances under federal law (21 U.S.C. §802(32)(A)), and if intended for human consumption, treats them as controlled substances under federal law (21 U.S.C. §813).

This Court held in McFadden v. United States 576 U.S. 186, 135 S.Ct. 2298 (2015) that under the Controlled Substance Analogue Enforcement Act of 1986, a defendant must know that he is dealing with an analogue of a substance controlled under the federal Controlled Substance Act.

To establish a defendant's knowledge, the government must prove that he knew of the physical features of the substance that make it an analogue of a controlled

substance or knew that the substance was treated as a controlled substance under federal law (id). It is not sufficient to only prove that the defendant knew he was dealing with an illegal or regulated substance under state laws (McFadden at 135 S.Ct. 2306 and footnote 3).

Factual Background

Petitioner was hired for three months to manage a business while it was in the process of being sold. That business manufactured the product at issue, claimed to contain an analogue of a controlled substance intended for human use.

The government presented evidence that petitioner was aware that the substance was regulated by law. Petitioner believed such regulation was only under some states laws

(ER 843, Pet.App. 51a).[1] He disputed knowledge of any federal seizure of company product occurring before petitioner's employment began. The government produced no evidence of federal seizures during his employment. Federal seizures of product or product components occurred after petitioner left employment on January 30, 2013.[2]

Petitioner sought to defend against the indictment charging him with federal criminal controlled substance analogue violations with evidence that he believed that the product was legal under federal law and that any seizures of the product manufactured and sold were unrelated to

---

[1] ER refers to Excerpts of Record submitted to the Ninth Circuit Court of Appeals included in the Appendix.

[2] This is set forth in the United States District Court for the Eastern District of California trial court Docket in case number CR-F-14-0101 DAD at Doc. 753, pages 478, 485; Doc. 745, page 711, 752, 772; Doc. 754, pages 870, 871, included in the Appendix at 69a, 71a, 73a, 75a, 77a and 78a.

federal regulation. As far as he knew, such seizures were only pursuant to some states laws. This defense evidence pertaining to state law regulation was ruled irrelevant by the trial court and affirmed by the Ninth Circuit Court of Appeals (Pet.App.13a).

The government successfully moved to exclude and to strike evidence of state law regulation on the fifth day of trial,[3] although the government sought to present evidence of seizures. Petitioner informed the trial court that the government intended to mislead the jury by arguing that seizures made under state laws were federal law seizures, thus supporting an argument that petitioner had knowledge of federal law regulation because the substance was seized under federal law.[4] The government indeed

---

[3] Pet.App. 25a at 27a

[4] Pet.App. 29a, defense counsel's representation

argued that misleading inference to the jury.[5]

The Ninth Circuit Court of Appeals cited to some of this objectionable rebuttal closing argument made by the prosecutor, ruled that it was misleading, but found it to be harmless error (Pet.App. opinion at 13a-17a).

As a result of this ruling, excluding reference to state laws, petitioner had been prohibited from confronting government witness Rachel Templeman by cross-examining her concerning the state-law nature of seizures she testified to.[6] She testified on direct examination about seizures without identifying if they were state or federal seizures.

---

[5] Pet.App. 45a-50a.

[6] Ms. Templeman was one of the salespeople copied with e-mail setting forth that they could no longer sell product in some states on the advice of counsel (Pet.App. 53a, 57a, 59a).

Petitioner was prohibited from exercising his right to cross-examine on the nature of the seizures or to call employee witnesses who would corroborate that the seizures they were aware of were under state laws, not federal law. [7] He was not allowed to introduce corroborating e-mail from petitioner to sales staff regarding complying with states laws in selling the product.

Petitioner was barred from testifying in his own defense that the only seizures that he was aware of pertained to state law regulation.[8] He was prohibited from introducing an opinion from an attorney conveyed to him that the substance being

---

[7] Salespeople such as Ms. Templeman, called by the government, would have so testified (Pet.App. 53a, 57a, 59a).

[8] Pet.App. 30a-31a, trial court ruling prohibiting petitioner from testifying about his efforts to comply with state law, Pet.App.51a, petitioner's proffer post-trial; Pet.App. 42a-44a trial court ruling during trial further prohibiting eliciting testimony from a defense witness regarding state law compliance.

manufactured was legal under federal law, because the opinion also referenced compliance with states laws.[9]

REASONS FOR GRANTING THE WRIT

A. The Circuit Conflict Created By The Ninth Circuit Court of Appeal's Failure To Follow A Decision Of This Court

By failing to follow this Court's reasoning in McFadden v. United States 576 U.S. 186, 135 S.Ct. 2298, 2306 and footnote 3, the Ninth Circuit Court of Appeals denied to petitioner his primary defense to the assertion that he knew he was selling a product containing a substance controlled under federal law.

Knowledge of the substantial similarities of the chemical structure and pharmacological effect of a substance,

---

[9] Opinion at Pet.App. 63a-68a, argument and trial court ruling at Pet.App. 32a-38a.

compared to a controlled substance, is one of the ways to prove knowledge of federal analogue status under McFadden. This method of proof was disputed at trial.[10]

The other method of proving a defendant's knowledge is by proving that defendant knew that a substance is treated as listed as a federally controlled substance. This is the method that the government focused on at Mr. Way's trial.

As to this method, the Fifth Circuit Court of Appeals held in United States v. Bays 680 Fed.Appx. 303 at 309 (2017) unpublished, that the defendant put in issue his lack of "knowledge" by his assertion that evidence produced by the government related only to his knowledge that a substance was an analogue under a state

---

[10] Petitioner disputed at trial knowledge of the chemical structure and pharmacological effect of the suspected analogue and the controlled substance it was compared to (Pet.App. 39a-41a).

law; but not to knowledge that he was aware that it was an analogue under federal law. That distinction was drawn by this Court in McFadden at 2306 and footnote 3, when it held that a defendant must know that the substance in question was a controlled substance under the Controlled Substance Act or Analogue Act, "as opposed to under any other federal or state laws."

The Ninth Circuit Court of Appeals ruled that petitioner's explanation that his actions were taken to comply with states laws and were not evidence of knowledge of federal regulation, was irrelevant, thereby conflicting with the Fifth Circuit Court of Appeals, and with this Court's decision in McFadden v. United States 576 U.S. 186, 135 S.Ct. 2298 (2015).

B. The Refusal To Allow Petitioner To Defend Against One Of The Two Methods To Prove His Knowledge of Federal Regulation Cannot Be Harmless Error

Petitioner Douglas Jason Way did not receive the jury trial guaranteed to him by the Sixth Amendment to the United States Constitution. He was prohibited from offering his defense to one of the two methods available to the government to prove his knowledge of federal controlled substance status of the substance contained in the product he manufactured. He was not allowed to explain that his actions were taken for reasons unrelated to knowledge of federal regulation.

The government produced evidence of a seizure policy at the business petitioner supervised whereby if product was seized during shipment by law enforcement the customer would be reimbursed. Petitioner was aware of this policy. The government

also produced evidence of seizures during petitioner's three-month employment; but none of them were seizures by federal law enforcement officers. One federal seizure that petitioner disputed knowing about occurred several months before his employment and several occurred months after his employment.

Petitioner was not allowed to testify in his own defense that all of the seizures that he was aware of were state seizures made under state laws. He was not allowed to testify that as far as he knew the company policy on refunding customers for seized product pertained only to seizures under state laws. He was denied the right under the Fifth and Sixth Amendment to testify in his defense to this pursuant to Rock v. Arkansas 483 U.S. 44, 52-53 (1987).

Petitioner had a Sixth Amendment right to confront witnesses against him, to call

witnesses to present a defense, and to present his version of the facts to the jury so it may decide where the truth lies, pursuant to Washington v. Texas 388 U.S. 14, 18-19 (1967).

Petitioner was not allowed to introduce into evidence an e-mail from the company attorney to him opining that the product petitioner manufactured and sold was legal under federal law, and allowed in some states but not in others. This was corroborating evidence to his testimony that he believed that the product did not contain a substance prohibited under the Controlled Substance Act or the Analogue Act. This attorney opinion also corroborated petitioner's belief that only specific state laws regulated the company product, which he passed on to sales staff in e-mail. Petitioner was not allowed to present any evidence of state law compliance.

Petitioner had a Sixth Amendment right under Herring v. New York 422 U.S. 853 (1975) to have his counsel summarize the facts of the case to the jury so that it may decide whether the government proved that petitioner knew that the product he manufactured contained a controlled substance analogue under federal law. Petitioner was substantially denied that right when the trial court excluded all evidence supporting his belief that only some state laws regulated his product.

As has been held by this Court; "Most constitutional mistakes call for reversal only if the government cannot demonstrate harmlessness. Only the rare type of error- in general, one that 'infect[s] the entire trial process' and "'necessarily render[s] [it] fundamentally unfair'"- requires automatic reversal" (Glebe v. Frost 574 U.S. 21, 23

(2014)). Petitioner submits that this is such a case.

Because the Ninth Circuit Court of Appeals has clearly failed to follow this Court's decision in McFadden v. United States, a conflict between the Ninth Circuit and the Fifth Circuit Court of Appeals exists when there should be no such conflict. The failure to follow McFadden has resulted in the substantial violation of at least four trial rights guaranteed by the Constitution as set forth above; the right to testify on one's own behalf, the right to confront witnesses, the right to call witnesses and to present other evidence on one's behalf, and the right to the assistance of counsel to summarize these facts to the jury. The failure to follow McFadden has deprived petitioner of the Sixth Amendment guarantee of a meaningful opportunity to present a complete defense set forth in

(Holmes v. South Carolina 547 U.S. 319, 324 et seq (2006). Most importantly, the violation of petitioner's trial rights, as detailed, denied petitioner of the right to a fair trial under Chambers v. Mississippi 410 U.S. 284, 302-303 (1973).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: July 24, 2020

Respectfully submitted,

/s/ W. Scott Quinlan
W. Scott Quinlan

NINTH CIRCUIT MEMORANDUM OPINION

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DOUGLAS JASON WAY, AKA Jason Way, Defendant-Appellant	No. 18-10427 D.C. No. 1:14-cr-00101-DAD-BAM-1 MEMORANDUM Filed Feb. 21,2020 Molly C. Dwyer, Clerk U.S. Court of Appeals

Appeal from the United States District Court for the Eastern District of California

Dale A. Drozd, District Judge, Presiding

Argued and Submitted November 13, 2019

San Francisco, California

Before: W. FLETCHER and BADE, Circuit Judges, and MOSKOWITZ,[1] District Judge.

---

[1] This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

A jury convicted Defendant-Appellant Douglas Jason Way ("Way") of seven charges (1) conspiracy to manufacture, distribute, and/or possess with intent to distribute a controlled substance analogue, 21 U.S.C. §841(a)(1); (2) manufacture of a controlled substance analogue, §841(a)(1); (3) distribution of a controlled substance analogue, §841(a)(1); (4) attempted possession with intent to distribute for human consumption a controlled substance analogue, §841(a)(1); (5) conspiracy to possess a listed chemical with reasonable cause to believe that it would be used to manufacture a controlled substance analogue, §841(c)(2); (6) conspiracy to defraud and/or to commit offenses against the United States, 18 U.S.C. §371; and (7) introduction into interstate commerce of misbranded drugs, 21 U.S.C. §331(a).

Way's first five convictions are under the Controlled Substances Act ("CSA"). The Controlled Substances Analogue Enforcement Act ("Analogue Act") treats a controlled substance "analogue" – one that is substantially similar to a controlled substance but not scheduled itself – as though it were a Schedule I controlled substance. 21 U.S.C. §§802(32)(A), 813. A jury convicted Way of the CSA charges under the theory that the synthetic cannabinoid 5-F-UR-144 was an analogue of JWH-018, which is a scheduled controlled substance, 21 C.F.R. §1308.11(g)(3). Way challenges his convictions, raising fourteen reasons why we should reverse. We hold none of them to be meritorious and affirm.

1. The district court appropriately denied Way's motion to dismiss counts of the Second Superseding Indictment ("Indictment") for duplicitous and

disjunctive pleading. The district court's denial of a motion to dismiss an indictment is reviewed *de novo*. *United States v. Marguet-Pillado*, 560 F.3d 1078, 1081 (9th Cir. 2009). Its findings of fact are reviewed for clear error. *Id* To pass constitutional muster, an indictment must give the defendant fair notice of the charges against him and protection against double jeopardy. *Hamling v. United States*, 418 U.S. 87, 117 (1974) (citing *Hagner v. United States*, 285 U.S. 427 (1932); *United States v. Debrow*, 346 U.S. 374 (1953)). An indictment is "generally sufficient" if it "set[s] forth the offense in the words of the statute itself," if that phrasing includes all elements of the offense. *Id.*

Counts 1, 2, 3, 5, 11, and 12 of the Indictment tracked the statutory language and set forth the essential elements of the charged offenses, and also provided fair

notice and protection against double jeopardy. The use of "and/or,""or," and "one or more" in the charging language in Counts 1, 2, 3, 5, 11 (renumbered as Count 6 in the verdict form), and 12 (renumbered as Count 7 in the verdict form) is not fatal, because these counts gave Way clear notice of the charges against him. *See United States v. Zavala*, 839 F.2d 523, 526 (9th Cir. 1988); *United States v. Alsop*, 479 F.2d 65, 66 (9th Cir. 1973). Taken in context, it is clear that the majority of grand jurors found probable cause as to all of the allegations in the charges. While use of "or" or "one or more" in an indictment is ill-advised and can result in insufficient notice to the defendant, *see United States v. Aguila-Montes de Oca*, 655 F.3d 915, 967-70 (9th Cir. 2011) (en banc) (Berzon, J., concurring), *abrogated by Descamps v. United States*, 570 U.S. 254 (2013), we see

no such problem here. The Indictment clearly gave Way notice of the charges and was sufficient for him to raise the bar of double jeopardy.

2. The district court did not err when it did not order further discovery into internal Drug Enforcement Agency ("DEA") decision making. Discovery rulings are reviewed for abuse of discretion. *United States v. Soto-Zuniga*, 837 F.3d 992, 998 (9th Cir. 2016). The government must turn over to the defendant items that are "within the government's possession, custody, or control" and if they are "material to preparing the defense." Fed.R.Crim.P. 16(a)(1)I—I(i). First, based on the testimony of Dr. Terrence Boos, there was substantial evidence that the items Way sought were not in the government's possession. Second, Way did not establish materiality because the Analogue Act cases require the jury to

decide whether a substance is a controlled substance analogue based on the expert testimony presented at trial. DEA's internal decisions to treat the substances at issue as analogues would thus not help Way prepare a defense. *See United States v. Hernandez-Meza*, 720 F.3d 760, 768 (9th Cir. 2013). The district court acted within its discretion when it affirmed the magistrate judge's denial of Way's discovery request on this ground.

3&4. The district court did not err in not allowing testimony about DEA's internal processes for controlled substance analogue determinations. Evidentiary rulings are reviewed for abuse of discretion. *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 141 (1997). District judges receive substantial deference in their evidentiary rulings. *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008). The district court ruled that since

the jury would decide what was a controlled substance analogue, any internal DEA disagreement as to whether 5-F-UR-144 was an analogue was irrelevant. We agree with the district court.

5. The district court did not err in denying Way's motion to prevent the government from calling DEA scientists as rebuttal witnesses. The evidentiary ruling is reviewed for abuse of discretion. *Gen.Elec.Co.*, 522 U.S. at 141-42. Way argues the government was judicially estopped from calling these witnesses after the government stated it would "not rely[] at trial on the expert opinion of DEA."

A court has discretion to invoke judicial estoppel based on the test set forth in *United States v. Ibrahim*, 522 F.3d 1003, 1009 (9th Cir. 2008). All of the *Ibrahim* factors weigh heavily against invoking judicial estoppel here. The government's

statements were not "clearly inconsistent" with its decision to call DEA experts as rebuttal witnesses, the government did not appear to have "successfully persuaded" the magistrate judge that it would not call such witnesses, and the government did not "derive an unfair advantage or impose an unfair detriment" because Way's counsel was on notice of this possibility. *See id.* The district court did not abuse its discretion.

6&7. The district court committed harmless error by failing to conduct a *Daubert* hearing or make any reliability findings on the record about the government's expert witnesses. This evidentiary ruling is reviewed for abuse of discretion. *Gen. Elec.Co.*, 522 U.S. at 141-42. District courts must admit only relevant and reliable expert testimony. Fed.R.Evid. 702; *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993). A *Daubert* hearing

is not necessary, *Estate of Barabin v. AstenJohnson, Inc.*, 740 F.3d 457, 463-64 (9th Cir. 2014) (en banc), but the court must make some explicit finding that an expert witness is qualified, see *United States v. Flores*, 901 F.3d 1150, 1165 (9th Cir. 2018). In so doing, the court should expressly analyze the *Daubert* factors to some extent on the record. *See id.* The district court failed to hold a *Daubert* hearing or make explicit findings that the government's experts' testimony was based on reliable science. But this error was harmless because the record clearly demonstrates that the admitted expert testimony was relevant and based on reliable scientific methodology given the experts' academic

and professional experience and the nature of their testimony. *See United States v. Ruvalcaba-Garcia*, 923 F.3d 1183, 1190-91 (9th Cir. 2019) (per curiam). Accordingly, the district court did not abuse its discretion in admitting the government's expert testimony.

8. Way appeals the district court's denial of his motion to strike reference to XLR11[1] as an analogue from the Indictment and to dismiss prosecution of Way relating to it for the DEA's alleged failure to comply with the Administrative Procedure Act, 5 U.S.C. §552(a)(1)(D). This issue is reviewed *de novo*. *Marguet-Pillado*, 560 F.3d at 1081. The Analogue Act sets forth two requirements for a substance to be a controlled substance analogue: it must be

[1] The Indictment referred to the substance as XLR11, whereas the verdict from referenced 5-F-UR-144. Based on the record, the parties appeared to treat these substances interchangeably due to their marginal differences.

"substantially similar" in both (1) chemical structure and (2) pharmacological effect to a Schedule I or II controlled substance. 21 U.S.C. §802(32)(A). Way argues that the DEA engaged in interpretive rulemaking, without complying with the Administrative Procedure Act, through (1) the process by which it determines substantial similarity of chemical structure and (2) its opinion XLR11 is substantially similar in chemical structure to JWH-018.

An interpretive rule is an "interpretation[] of general applicability formulated and adopted by the agency," 5 U.S.C. §552(a)(1)(D), which "advise[s] the public of the agency's construction of the statutes and rules which it administers," *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015)). DEA opinions on controlled substance analogues are not interpretive rulemaking because the factfinder at trial,

rather than the DEA, makes these determinations based on the language of the Analogue Act and the expert testimony presented at trial.

9. The district court did not err in excluding evidence of Way's compliance with state law governing the substances in this case. This evidentiary ruling is reviewed for abuse of discretion. *Gen. Elec.Co.*, 522 U.S. at 141-42. A district court may exclude irrelevant evidence and any relevant evidence whose probative value is substantially outweighed by its potential to confuse the issue. Fed.R.Evid. 402, 403. The district court found evidence of state law compliance irrelevant to a case involving only federal law charges. We agree that the defendant's efforts to comply with state law are irrelevant to charges of violating federal law.

10. The prosecutor erred in her rebuttal closing argument, but Way's substantial rights were not affected. In her rebuttal closing argument, the prosecutor, in arguing that there was circumstantial evidence that Way knew his products contained analogues of a controlled substance, said:

> Circumstantial evidence from which you are entitled to infer the defendant knew what he was doing and knew that the 5-F-UR-144 was a controlled substance analogue also includes knowledge that a substance is subject to seizure by law enforcement. Which is the subject of the attempted possession count, the 12 kilos of 5-F-UR-144 that was seized here by Fresno County Sheriffs.

> And there's a lot of evidence of seizures in this case. A lot of evidence. There were seizures to Up In Smoke in January of 2013 . . .
>
> You heard from Rachel Templeman that these seizures kept escalating and they didn't get their product back. Knowledge that their product is subject to seizure by law enforcement is strong circumstantial evidence that the defendant knew that 5-F-UR-144 was a controlled substance analogue.

This short statement in a rather long rebuttal argument was misleading because not all of the seizures were for violations of federal law.

But, because the error was harmless, Way does not prevail on this issue. *See*

Fed.R.Crim.P. 52(a). The trial record reveals overwhelming evidence of Way's knowledge of analogue status, such that his substantial rights were not affected by the government's remarks. *See McFadden v. United States*, ___U.S._, 135 S.Ct. 2298, 2303-04, 2307 (2015) (setting forth the ways to prove knowledge under the CSA and Analogue Act and remanding for harmless error analysis). Way gave a sworn statement to the U.S. Attorney's Office, in which he highlighted his familiarity with "spice," the street term for synthetic cannabis, and the "counterculture industry," He explained his extensive experience with smoke shops, which comprised his company's customer base, and showed he was aware of the likely illegal products such stores carry. He admitted familiarity with marijuana and agreed that his company's 5-F-UR-144 products looked similar to it. Other

circumstantial evidence of Way's knowledge included his unusually high compensation, his admission that it was possible his customers were smoking his products, a series of unusual business practices, and his role as the "executive leader" of the company. The circumstantial evidence also showed that Way participated in business practices designed to evade law enforcement detection and that he knew of the unlawful nature of his company's products. *See McFadden*, 135 S.Ct. at 2304 n.1. The government's error in rebuttal closing argument was harmless. *See United States v. Vargas-Rios*, 607 F.2d 831, 838 (9th Cir. 1979).

11. The district court did not err in denying Way's Rule 29 motion for acquittal for insufficiency of evidence. A district court's denial of a motion for judgment of acquittal is reviewed *de novo*. *United States*

v. Wanland, 830 F.3d 947, 952 (9th Cir. 2016). Way argues that, with respect to the CSA charges, the government failed to establish (1) that Way had the requisite knowledge under the CSA and (2) that 5-F-UR-144 was substantially similar in pharmacological effect to JWH-018. But the evidence at trial (1) established knowledge and (2) included considerable expert testimony by government witnesses about the pharmacological similarity of the substances. We hold that, by "viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *United States v. Gonzalez*, 528 F.3d 1207, 1211 (9th Cir. 2008).

12. The district court did not err in denying Way's Rule 33 motion for a new trial. A district court's denial of a motion

for a new trial is reviewed for abuse of discretion. *United States v. King*, 660 F.3d 1071, 1076 (9th Cir. 2011). The interest of justice did not require a new trial, since no "serious miscarriage of justice may have occurred." *United States v. Kellington*, 217 F.3d 1084, 1096 (9th Cir. 2000); Fed.R.Crim.P.33(a). A new trial was not warranted because, contrary to Way's position, the government's expert testimony was admissible and the evidence of state law compliance was properly excluded. The district court did not abuse its discretion.

13. The district court did not err in denying Way's motion for acquittal based on unconstitutional vagueness. This issue is reviewed *de novo*. *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993). The Analogue Act is not unconstitutionally vague as applied to 5-F-UR-144 and JWH-018. A criminal law is

"void-for-vagueness" if it fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Beckles v. United States*, ___ U.S. _____, 137 S.Ct. 886, 892 (2017) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983)). In *McFadden v. United States*, the Supreme Court found the Analogue Act to be an unambiguous statue." 135 S.Ct. at 2307. The Court reasoned that even if the Analogue Act were ambiguous, the statute's scienter requirement "alleviate[s] vagueness concerns." *Id.* (quoting *Gonzales v. Carhart*, 550 U.S. 124, 149, 150 (2007)). *McFadden* forecloses Way's argument that the Analogue Act is unconstitutionally vague. Accordingly, the district court did not err in not setting aside the verdict.

14. Way argues that the errors as to Counts 1, 2, 3, and 5 affected the jury's evaluation of his credibility and therefore should result in vacating the conviction on Counts 6 and 7 (originally Counts 11 and 12 in the Indictment). Because we find no error, we reject Way's argument to vacate the conviction on Counts 6 and 7.

AFFIRMED.

NINTH CIRCUIT ORDER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. DOUGLAS JASON WAY, AKA Jason Way, Defendant-Appellant	No. 18-10427 D.C. No. 1:14-cr-00101-DAD-BAM-1 ORDER Filed Apr. 30, 2020 Molly C. Dwyer, Clerk U.S. Court of Appeals

Before: W. FLETCHER and BADE, Circuit Judges, and MOSKOWITZ* District Judge.

Appellant filed a petition for panel rehearing and rehearing en banc on March 3, 2020 (Dkt. Entry 60). The panel has voted to deny the petition for rehearing. Judges W. Fletcher and Bade have voted to deny the

* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

petition for rehearing en banc, and Judge Moskowitz so recommends.

The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on whether to rehear the matter en banc.

Fed.R.App.P.35.

The petition for panel rehearing and rehearing en banc is DENIED.

NINTH CIRCUIT ORDER

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee v. DOUGLAS JASON WAY Defendant-Appellant	No. 18-10427 D.C. No. 1:14-cr-00101-DAD-BAM-1 **MANDATE** Filed May 8, 2020 Molly C. Dwyer, Clerk U.S. Court of Appeals

The judgment of this Court, entered February 21, 2020, takes effect this date.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

FOR THE COURT:

MOLLY C. DWYER

CLERK OF THE COURT

By: Rhonda Roberts

Deputy Clerk

Ninth Circuit Rule 27-7

Activity in Case 1:14-cr-00101-DAD-BAM

USA v. Way et al Jury Trial.

From:

caed_cmecf_helpdesk@caed.uscourts.gov

To: CourtMail@caed.uscourts.dcn

Date: Tuesday, June 26, 2018 04:50 PM PDT

This is an automatic e-mail message generated by the CM/ECF system. Please DO NOT RESPOND to this e-mail because the mail box is unattended.

NOTE TO PUBLIC ACCESS USERS

Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of

each document during this first viewing. However, if the referenced document is a transcript, the free copy and 30 page limit do not apply.

U.S. District Court

Eastern District of California-Live System

NOTICE OF ELECTRONIC FILING

The following transaction was entered on 6/26/2018 at 4:49 PM PDT and filed on 6/26/2018

Case Name: **USA v. Way et al**

Case Number: 1:14-cr-00101-DAD-BAM

Filer:

Document Number:565 (No document attached)

Docket Text:

MINUTES (Text only) for proceedings before District Judge Dale A. Drozd: JURY TRIAL (Day 5) as to Douglas Jason Way (1) held on 6/26/2018. All parties, twelve jurors, and two alternate jurors present, government

witness Dada Cheam completed his testimony. Government witnesses Anthony Luis Berke, Craig Mitchell Walters, Lourie Capps Jaradat, Allen Denton, Manish Chander Sohani, Ricky Cathey, Jennifer Keels, Andrew Coop, Douglas Lamont Doss, Tina Maria Carlson, Troi Jolivette, Garrett Well, and Christopher Coleman sworn and testified. Exhibits received into evidence. Jurors admonished, excused for the evening, and ordered to return at 8:30 am tomorrow morning. Outside the presence of the jury, court granted governments motion in limine subject to reconsideration; evidence regarding compliance with state law is irrelevant. Court heard oral argument and denied defense motions for mistrial. Jury Trial (Day 6)CONTINUED to 6/27/2018, at 08:30 AM in Courtroom 5 (DAD) before District Judge Dale A. Drozd. Government Counsel: Karen Escobar and Vincenza

Rabenn present. Defense Counsel: Roger Nuttall and Scott Quinlan present. Custody Status: Bond, present. Court Reporter: Karen Hooven. (Gaumnitz, R) 1:14-cr-00101-DAD-BAM-1 Notice has been electronically mailed to:

THE COURT: Well, then what's the relevance of the evidence?

MR. QUINLAN: Well, they've already put in evidence of shipments being seized. But they were not seized under federal law, they were seized under state law. And to allow them to put that evidence on without the explanation is misleading. It's misleading -- I mean, they have evidence that shipments were seized. Okay? And to just leave it there without the explanation that they were seized pursuant to such and such a state, it's misleading as to the purpose that they were seized. And you can bet that they're going to argue that he had knowledge of the federal law because it was seized under federal law or something like that. And so they've put this in. And to not allow us to correct it, we think, would be misleading.

MR. NUTTALL: Oh.

MS. ESCOBAR: The reason it is not there is it referenced compliance with state laws.

MR. QUINLAN: I understand the Court's position, and I just want to make clear our objection to the Court's position.

THE COURT: I think you have made it.

MR. QUINLAN: Well, but that was in relation to other witnesses, in relation to Jason, his intent is to comply with all laws.

And his intention, as demonstrated in numerous documents, to comply with state law is part of his state of mind to comply with all laws, including federal laws.

And so he is a little bit different than the witnesses your Honor has ruled on previously. And I want to make that clear, that this is irrelevant. That's what *Makkar* was pointing out.

THE COURT: *Makkar* only did so because of the government's theory of liability in that particular case.

MR. QUINLAN: But the point was that they found that asking state - - in that case, asking state officers, you know, "if we have done anything wrong, let us know."

And in this case - - and that's a federal case.

And in this case, he is putting out these messages, "We want to comply with all laws."

I submit it. I'm not - -

THE COURT: as long as it is stated that "our intention is to comply with the law or all laws," I don't think that's going to run afoul of my ruling.

THE COURT: We are outside the presence. With respect to Exhibit D-23, you want to move it into evidence?

MR. NUTTALL: I will, but I'm going to leave a lot of it out, and redact the first part of it.

THE COURT: Does the government have any objection, if it's redacted to eliminate all reference to state law? Which is going to make it somewhat nonsensical.

MR. QUINLAN: I was going to ask for some help on this. Because, for example, I think some of the states, if they don't have their own law, it says, "Default to federal law," and then you look over and it says, "Legal."

THE COURT: Well, what's the government's position about this exhibit?

MS. ESCOBAR: I think any reference to state law should be redacted.

THE COURT: I tend to agree. And I think after the third page, there is nothing left that's relevant. And even on the - -

Mr. Dandar is not going to testify, is he?

MR. QUINLAN: No.

THE COURT: Too bad. I would love to ask him some questions - -

MR. NUTTALL: That's why he probably chose not to testify.

THE COURT: - - legal status for all 50 states. And he starts off by talking about Congress.

MR. QUINLAN: If you would - -

(Parties spoke simultaneously.)

THE COURT: - - where Mr. Dandar went to law school.

MR. QUINLAN: If you could look at Bates page, ending in 965, talking about Maine and Maryland.

THE COURT: Right. But why is that relevant?

MR. QUINLAN: Because, arguably, if you were just looking at the first page, talking about "U.S. Congress," "legal," I imagine the government could argue that he is only talking about the addition of the Synthetic Drug Abuse Prevention Act of 2012, but then if you look at what I just referenced, the default is to all federal law.

THE COURT: It doesn't say that.

MR. QUINLAN: Well, on Maine, it says, "Default Federal." It is not limited in any way. And then the - -

THE COURT: Mmmmm - - no.

MR. QUINLAN: The status - -

THE COURT: No, not in my view.

MR. QUINLAN: Just for the record, your Honor, we would object to not including those that are defaulted, but submit it.

THE COURT: What's the government's position about what ought to come in of this letter?

MS. ESCOBAR: Only what is federal law. And that "default," it makes no sense, since federal law preempts state. So any state, even reference to defaulting to federal, should be out.

MR. QUINLAN: I think the reference is if there is no state law, then you automatically default to whatever the federal law is, which, of course, controls, and if, under federal law, he is saying it is legal.

THE COURT: All he said about federal law is what he said in pages 2 on to 3.

MR. QUINLAN: I respectfully disagree.

THE COURT: What else did he say?

MR. QUINLAN: He said, where I pointed out in Maine and Maryland, there is no federal law - - state law to address, so you

default to what the federal law is, and he is saying that the status is legal.

MS. ESCOBAR: It's just like marijuana. Just because a state has some form of legality of marijuana, does not mean it is legal federally. So the whole "state" reference is inappropriate, it is ambiguous, it is confusing.

THE COURT: And it doesn't add anything to whatever it is he said above, which is borderline absurd in any event, but.

MR. QUINLAN: Well, I submit it, your Honor.

THE COURT: All right. All reference to state law, including the heading "re," I don't know - - I don't really know how you are going to - -

MR. NUTTALL: I'm just going to have to take out for all 50 states and "legal."

THE COURT: And it says below, "Each state has been categorized," and if you take each state out, I'm not sure how the rest of the sentence makes any sense.

MR. NUTTALL; I can take just out "state" and "each state," and we will just go on to that one aspect of it.

THE COURT: And then from mid page, at 958 Bates stamp, down, I don't think any of the rest of it should - - is appropriately admitted, given my earlier ruling, and I recognize it is over Mr. Quinlan's objection that I should allow those states where the lawyer has indicted - - he doesn't say as much as Mr. Quinlan says. He merely says, "Maine, legal, default, federal."

Not very descriptive. I don't know what that means.

MR. QUINLAN: If I may, I would also like, on the very last page, I don't have it in front of me, but I know on the very last

page, there is a couple lines down there, where - -

THE COURT: Yes. There is one sentence.

MR. QUINLAN: Yes. I think that's important.

THE COURT: But that has to be redacted. Yeah, that's fine. That and his signature can go in.

MR. QUINLAN: Okay.

Q. I'm going to ask you just a couple of questions, and if I'm being repetitive, I apologize to the Court and counsel and the jury, but did you know what the chemical molecular structure was of 5-F-UR-144?

A. No.

Q. Was that molecular structure, chemical molecular structure ever even brought to your attention?

A. No.

Q. Were you caused to be, in your role there at the time, even concerned about chemical molecular structures?

A. No.

Q. Was that at all a part of your head in terms of what you were doing to help facilitate the transition of this business?

A. No. Diving into the product components at that level was not what I was there to do.

Q. Did you even know during the time that you were there what the chemical molecular structure was of JWH-018?

A. No.

Q. Did you even know what JWH-018 was?

A. No.

Q. At the time, did you - - did you know or were you ever presented with any information as to the stimulant, hallucinogenic, or depressant effect of JWH-018?

A. No.

Q. Did you know whether or not 5-F-UR-144 had any relationship whatsoever to JWH-018?

A. No.

Q. Did you know whether 5-F-UR-144 had a stimulant, depressant, or hallucinogenic effect that was substantially similar or greater than JWH-018?

A. No.

Q. Most importantly, did you even understand the concept of substantial molecular similarity?

A. No.

Q. At that time?

A. No.

Q. At that time, did anybody suggest to you that you should be aware of the hallucinogenic effect of 5-F-UR-144?

A. No.

Q. Was that even an issue at any time during the 90-day period that you specifically assisted in the transition of the business?

A. No, it was not.

MR. QUINLAN: Would you do me a favor, your Honor, and look at page 8, at the top of the page, the bolded paragraph E. I don't think that that's really referring specifically to state law. That's just an indication of an intent that all laws must be complied with.

THE COURT: Just so that Mr. Ritchie is advised - - and I will get the government's view with respect to page 8 - - I have previously ruled, Mr. Ritchie, in this trial that compliance with state or local law is irrelevant. That the charge here is a violation of federal laws with respect to controlled substances and controlled substance analogues, and, therefore, I've prohibited counsel from eliciting testimony regarding compliance with state laws.

THE WITNESS: I will do my best to keep that in mind, your Honor.

MR. QUINLAN: But in this one reference, it is just saying that the operation of the company's business will comply with basically all the laws.

THE COURT: What's government's view of the reference at page 8?

MS. ESCOBAR: Well, I disagree, since the company's only business was the sale of synthetic cannabinoids. It seems to me that we are getting into areas that should not - - that are not relevant.

MR. QUINLAN: I'm not going to ask about specific state laws or compliance with state laws. But this paragraph basically says that they will comply with all laws applicable to the business during the transfer. And it says that "it is and will continue to."

THE COURT: My ruling is that I will allow "other laws," but that state and local, everywhere that it appears, should be redacted.

MR. QUINLAN: Okay. Could I have a few minutes?

THE COURT: Yes.

MR. QUINLAN: Thank you.

(Recess)

Circumstantial evidence from which you are entitled to infer the defendant knew what he was doing and knew that the 5-F-UR-144 was a controlled substance analogue also includes knowledge that a substance is subject to seizure by law enforcement. Which is the subject of the attempted possession count, the 12 kilos of 5-F-UR-144 that was seized here by Fresno County Sheriffs.

And there's a lot of evidence of seizures in this case. A lot of evidence. There were seizures to Up In Smoke in January of 2013. There was an email relating to seizures of Mike's MWI. You heard from Mike Sohani testify, he's from Texas, he was a big distributor, he was a big buyer of ZenBio products. There was an email relating to the seizures of product intended for Brothers Boutique and for Real Deal.

You heard from Rachel Templeman that these seizures kept escalating and they didn't get their product back. Knowledge that their product is subject to seizure by law enforcement is strong circumstantial evidence that the defendant knew that 5-F-UR-144 was a controlled substance analogue. That is circumstantial evidence. Circumstantial.

Excerpts of Record
Pages 735:11-736:4

Don't buy into this ostrich type mentality, which compromises their defense. Don't buy into an ostrich defense. The defendant is smart. He knows what is going on. He can't claim he didn't know what was going on. He can't claim that he didn't know about seizures. The text message between - - messages between him and Nottoli shows he knows of a seizure here in Fresno. He knows a package was snagged and yet he continues to make money from pushing products containing 5-F-UR-144. He knew what he was doing was wrong. He knew this at the outset when Ritchie told him that he'd been raided in Vegas. He was also aware of ZenBio seizure policy that was circulated. He's on the email. That relates to the refund policy to customers, 100 percent shipment, replacement if product gets seized on - -

before it reaches the customer. But they would change the carrier. He knows of that policy. And why would a - - you know, would Budweiser have a seizure policy? Would any legitimate business have a seizure policy for its product? No. That's because this business was an illegal business.

Excerpts of Record
Pages 744:12-20-745:2-5

The bottom line, though, is the defendant was aware of the illegal nature of the business based upon the circumstantial evidence. And he was motivated by the money. It was millions and millions of dollars, 32 million dollars in five months. That was the incentive. He clearly occupied a leadership role. He had knowledge of the controlled nature of the drug, the controlled substances and controlled substance analogues here. he was aware of the illegal nature that he was - - of the product he was making and selling.

So coupled with his knowledge of the illegal nature of this business, he was motivated by the greed, which we all know is the root of all evil. It was the reason he entered this drug conspiracy.

I, Douglas Jason Way, declare:

It was represented to me by Burton Ritchie, Ben Galecki, and other employees of ZIW that the company established its seizure policy in response to the evolving landscape of State laws. In addition to that policy, the company had in place compliance practices intended to ensure that State laws were not being violated, including receiving periodic compliance updates from attorney Tim Dandar.

I was made aware of the changing nature of State laws, and I was made aware of specific seizures that had happened under State laws. My experience was that the company acted in good faith to comply with State laws, as well as serve and inform its retail and distribution customers. In so far as I was able, I personally followed the

company's pre-existing compliance practices to the letter.

At no time prior to or during the transition was I made aware of any seizures associated with Federal regulations. My understanding and belief about the company's products, product components, and product packaging was that they were compliant with Federal laws. To my knowledge, no seizures by Federal agencies under Federal law took place during the period in which I provided transition consulting services.

I declare under the laws of the United States that the forgoing is true and correct to the best of my knowledge. Executed this 9th day of August, 2018 at Evanston, Il.

Douglas Jason Way

From: J. Way,zencensejway@gmail.com>

To: zencensecrystal@gmail.com zencensecrystal@gmail.com; Jim Vail zencensejim@gmail.com; Rachel Templemen zencenserachel@gmail.coml; Ray Dupree zencenseray@gmail.com

CC: Crystal Henry zencensecrystal@gmail.com

Sent: 12/3/2012 12:05:53 PM

Subject: READ THIS-Weekly Sales Call Recap

Folks,

Thanks for the time this morning. To recap:

• The **purpose of our call** is to get on the same page, collaborate and solve problems, and be accountable to each other. Our next milestone is to get the business consistently

above $2MM/week. Just a matter of time and effort.

- the **sales job at ZenBio** is to get orders, make sure they go out, and make sure we get paid. When you do that, you will get paid. When you don't we won't. Therefore, the idea of "assigned" or "protected" accounts is not relevant to our business. You get the order, put your name on it. (Note: Jim and his team will pass along messages on call-ins. If he gets repeated calls from the same customer trying to place an order, he will take the order and put my name on it.)
- No more sales to accounts in **North Dakota**. We are choosing to no longer sell there because of the regulatory climate and our commitment to compliance. Please inform distributors of this information and request that they follow our lead.

• Please inform customers of the **name change to ZenBio LLC**, and give them the new wire transfer info that Crystal provided to you. You are welcome to tell them that the company has changed hands if they ask what's up, but since its not really relevant. I wouldn't offer that information proactively.

• We discussed **legal compliance**. I will be reaching out to Tim Dandar this week to make sure that we continue to be very proactive about compliance. We expect customers to follow our lead in this area. If customers indicate to us directly or indirectly that they are engaged in "shady" behavior, they cannot be customers anymore. Please bring cases to me as they come up.

<u>At our next meeting, we will discuss payment terms and conditions.</u>

Have a great week, and let me know if there is anything that I can do to help.

Jason.

From: J. Way,zencensejway@gmail.com>

To: zencensecrystal@gmail.com <zencensecrystal@gmail.com>; Ray Dupree zencenseray@gmail.com> Rachel Templemen <zencenserachel@gmail.coml>;TJ Street <zensencetj@gmail.com>l;Michael Dupuis miked.zencense@gmail.com;Skylar McCloskey sky@wildpeaches.com;AJ zencense18@gmail.coml/Glen May zenglen1@gmail.coml Jim Vail <zencensejim@gmail.com>

CC: Crystal Henry zencensecrystal@gmail.com

Sent: 12/11/2012 3:35:16 PM

Subject: READ THIS-Legal Compliance Update

Folks,

Due to unfavorable regulatory climate, we will no longer be shipping to DE, KS, and OH. We highly recommend that our distributors follow our lead and cease shipping to these states immediately.

To be perfectly clear, the states to which we currently do not ship are LA, GA, VT, IN, ND, DE, KS, and OH.

Please let me know if you have any questions, and I will keep you updated of further developments.

Jason

From: J. Way,zencensejway@gmail.com>

To: zencensecrystal@gmail.com
<zencensecrystal@gmail.com>;
Ray Dupree
<zencenseray@gmail.com>
Rachel Templemen
<zencenserachel@gmail.coml>;Andy
Gehrett andyzen024@gmail.com;
Skylar McCloskey
<sky@wildpeaches.com>TJ Street
<zensencetj@gmail.com> AJ
<zencense18@gmail.com> Michael
Dupuis
<miked.zencense@gmail.com>;
Glen May <zenglen1@gmail.com>

CC: Crystal Henry
<zencensecrystal@gmail.com>
Jim Vail
<zencensejim@gmail.com> Tim
Ortiz <mfitton08@gmail.com>

Sent: 12/13/2012 12:30:31 PM

Subject: READ & RESPOND-FL Compliance Update

PLEASE READ THIS CAREFULLY AND RESPOND TO ME WITH YOUR UNDERSTANDING

Folks,

This is what you need to know (and tell your customers) about this week's events:

1.We became aware at 5:00 pm on Tuesday 12/11 through our attorney Tim Dandar that our products are no longer compliant with Florida law. We ceased our operations in Florida as of that time.

2.Given that we have recently been purchased by a California company, we obtained permission through our local counsel Ron Johnson from the Escambia County Sheriff's department to return all of our merchandise to the California facility

that sent it to us, and where it is still legally complaint.

3.Today, we are closing down our Florida office and operation, and therefore, we will not be shipping today.

We may be able to begin shipping again from California tomorrow. Monday at the latest.

5.Because of the legal climate, we will no longer be shipping to accounts in Florida, and we advise our distributors to follow our lead. Our returns and refunds policy applies to all Florida accounts if they ask.

6.Any order issues that have resulted from this disruption will be fixed in order of priority – first in, first out. It is reasonable to assume that we will have every customer whole by mid next week, and that they can expect business as usual thereafter.

As always, ZenBio has the utmost commitment to legal compliance in our

operations and our communications. I expect that each of you will follow suit by sharing this information, and only this information.

If you have any questions, please let me know.

Jason

ATTORNEY AND COUNSELOR AT LAW

P.O. BOX 55276

Law Office of ST PETERSBURG

Timothy Dandar FLORIDA 33732

January 9, 2013

Via Email and U.S. Mail

Zen Bio, LLC

Re: Legal Status of 5FUR-144 for all Fifty (50) States

PRIVILEGED AND CONFIDENTIAL. You have a legal privilege to refuse to disclose the contents of this letter to others in litigation, unless you waive the privilege. To avoid waiver, you must limit copies and access to the content of this letter to (a) persons with authority to obtain professional legal advice, or to act on legal advice rendered, and (b) other persons who, for the purpose of implementing the legal advice, make or receive a confidential copy or a report of this letter while acting within the scope of their employment for the client.

Ladies and Gentlemen,

You have asked that I render my opinion of chemical 5FUR-144 ((1-(5-fluoropentyl)-1H-indol-3-yl)(2,2,3.3-tetramethyleyclopropyl)methanone), as to whether it is considered a controlled substance under the varying legal parameters used by each individual state in defining Scheduled substances. IN rendering my opinion. I have analyzed the following relevant language of each State: Class, Analogue, Activity, and Effect. Each State has been categorized as being one of the following:

(1) Legal

a. Legal within the four corners of the relevant authority.

b. No foreseeable misinterpretation by law enforcement or any other state agency.

(2) Risky

a. Legal within the four corners of the relevant authority.

b. Actual/Foreseeable misinterpretation by law enforcement and/or other state agencies.

(3) Illegal.

a. Illegal within the four corners of the relevant authority.

This correspondence is intended to aid Zen Bio, LLC in interpreting the laws pertaining to the relevant products they Manufacture/Distribute. This correspondence is not to be used for commercial purposes or for the promotion of any product. Moreover, this correspondence does not serve as a guide or opinion to the safety or efficacy of the compounds mentioned within, nor does it recommend them for human consumption. Because laws

and restrictions are constantly changing, the opinions contained within this letter are only as of the date above. Lastly, this correspondence does not take into account any relevant county or municipality ordinances...

In rendering my opinion, I analyzed the relevant Statutes, Legislation, Administrative Orders, et., and applied the principals of organic chemistry, in order to establish a clear and definite interpretation for each state. Therefore, based upon the foregoing, and having regard for such legal consideration as I have deemed relevant, I am of the opinion that:

State	Legality	Pursuant to:	Pending Legislation and Status (Synthetic Drug
U.S. Congress	Legal	SB3187	

		SEC.1 151 SHORT TITLE This subtitle may be cited as the "Synthetic Drug ...	Abuse Prevention Act of 2012) May 16, 2012- Read twice and referred to the Committee on the Judiciary ...
...Maine	Legal	Default-Federal	
Maryland	Legal	Default-Federal	2012-03-27- Hearing 4/4 at 1:00 p.m. February 10, 2012- Hearing 3/6 at 1:00 p.m.

			January 27, 2012- Hearing 2/16 at 1:00 p.m. January 25, 2012- Hearing 2/14 at 1:00 p.m.
Massa-chusetts	Risky	Law enforce ment has been acting under the followi ng...	June 27, 2012 Rules suspend ed...

Q. Have you also received training regarding the investigation of these types of crimes?

A. Yes.

Q. Could you briefly describe that training to us?

A. I went to a 17-week Basic Agent Training Program, in Quantico, Virginia, learning report writing, surveillance techniques, use of informants, firearms, drug identification, things like that.

Q. So on June 26, 2013, you were involved in the execution of a search warrant?

A. I was.

Q. And where was that search warrant executed?

A. It was in 2315 Fordham Avenue, in Clovis, California.

Q. And do you know who lived at that residence?

A. Charlene Middleton and Natalie Middleton.

Q. What was your role during the search?

A. I was the seizing agent for the search warrant.

Q. Did you end up seizing any evidence?

A. Yes, I did.

Q. What kind of evidence?

A. We seized drug exhibits, Spice, cell phones, a resume, some tax information, and some business cards, and I think that was about it.

Docket 745, page 752:3-24

BY MS. ESCOBAR:

Q. Would you state your occupation for the record.

A. I am a Special Agent with Drug Enforcement Administration.

Q. How long have you been employed by the DEA?

A. I have been employed with DEA since 2003.

Q. Where are you currently assigned?

A. I'm currently assigned to the Montevideo, Uruguay Country office.

Q. Back in 2013, where were you assigned?

A. I was assigned to the Fresno resident office, Group Two.

Q. Would you describe briefly the nature and training of your experience in narcotics investigations?

A. I have been employed since 2003. I attended the academy and received training at Quantico, Virginia, for about approximately 16 weeks.

While I was there, I received training in drug use, physiology, identification, the method of manufacturing a controlled substance, transportation, and the sales of controlled substances.

Q. On or about June 26, 2013, did you execute a search warrant at a residence in San Francisco, 227 Vidal Drive?

A. Yes.

Q. Where to you work?

A. Currently, well, I work for CVCIF, Central Valley HIDTA, High Intensity Drug Trafficking Area. Currently, I'm assigned to U.S. Marshals.

Q. When did you start with the Marshals?

A. I started with the Marshals about two years ago. Previously before that, I was with DEA for six years.

Q. So in 2012-2013 - -

A. Correct.

Q. - - you were with the DEA? And in that position, what were your job duties?

A. As an intel analyst, I was in charge of - - specialized in financials, cell phone, toll analysis. And then kind of whatever else the team needed at the time, I would use government databases to find people, find information, along those lines.

Q. You did that for about six years?

A. I did.

Q. And did you also go on search warrants?

A. I did.

Q. Do you recall an investigation into Douglas Jason Way and others?

A. Yes.

Q. On June 26, 2013, were you involved at the execution of a search warrant related to this investigation?

A. I was.

Q. Where did you go?

A. I believe it was The Stuffed Pipe, on Shaw and 99.

Q. What was your role during that search?

A. I was a finder.

Q. Was it also known as ZenBio?

A. Correct.

Q. How did you become aware of - - I'm going to call it ZenBio. How did you become aware of that company?

A. In February of 2013, during my investigation of Elite Distributing, I was going over financial records and I had noticed two wire transfers totaling $150,000 being made into my target's bank account from ZenBio.

Q. And what type - - you indicated you were looking at Elite as a synthetic cannabinoid trafficker. What specifically was Elite involved in distributing?

A. Synthetic cannabinoid, synthetic marijuana, smokeable product. And also the distribution of illegal powder.

Q. When you refer to the "powder," what are you referring to?

A. AT that time they were distributing 5-F-UR-144, also known as XLR11.

Docket 753, page 485:13-24

Did you also determine that ZenBio was manufacturing synthetic cannabinoids with 5-F-UR-144 or XLR11?

A. I did, yes.

Q. Did you determine that shipments of ZenBio synthetic cannabinoids had been seized by law enforcement?

A. Yes, I was.

Q. Where were their seizures?

A. One shipment of - - well, two shipments in one location was by our DEA office in Baltimore, Maryland and the second one, another shipment was by our DEA office in Memphis, Tennessee.

Q. And what time frame were those seizures?

A. I believe those were in February or March of 2013.

Q. Did you ever receive packages of the product from China after having purchased it from Libby?

A. Yes.

Q. How was it packaged when you received it?

A. The package from China was shoe box size, cardboard shoe box size, which contained two kilos. Roughly, you know, a book size or a kilogram envelope. And inside the box, each kilogram is sealed in a mylar sealed, I guess you could say sealed packet.

Q. And were they in kilo quantities?

A. Yes.

Q. Did the package correctly identify the contents?

A. You mean any writings or so forth?

Q. Either outside or inside.

A. No.

Q. On or about - - sometime in April 2013, did you obtain a federal search warrant to search Adam Libby's residence?

A. Yes.

Q. And did you search it?

A. Yes.

Q. Was he also arrested at that time?

A. Yes.