APPENDIX A

A-1 to A-3. Opinion of the Third Circuit U.S. Court of Appeals entered on January 24, 2023.
A-4. Order to vacate and re-enter judgment affirming conviction on October 6, 2023.

UNITED STATES OF AMERICA v. ANDREW TABLACK, Appellant
UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
2023 U.S. App. LEXIS 1727
No. 22-1297
January 24, 2023, Submitted Under Third Circuit L.A.R. 34.1(a)
January 24, 2023, Filed

Notice:

NOT PRECEDENTIAL OPINION UNDER THIRD CIRCUIT INTERNAL OPERATING PROCEDURE RULE 5.7. SUCH OPINIONS ARE NOT REGARDED AS PRECEDENTS WHICH BIND THE COURT.PLEASE REFER TO FEDERAL RULES OF APPELLATE PROCEDURE RULE 32.1 GOVERNING THE CITATION TO UNPUBLISHED OPINIONS.

Editorial Information: Prior History

{2023 U.S. App. LEXIS 1}On appeal from the United States District Court for the District of New Jersey. (D.C. No. 3:19-cr-00374-001). District Judge: Honorable Michael A. Shipp.United States v. **Tablack**, 2020 U.S. Dist. LEXIS 166662, 2020 WL 5500382 (D.N.J., Sept. 11, 2020)

Counsel For UNITED STATES OF AMERICA, Plaintiff - Appellee: Sabrina G. Comizzoli, Esq., Mark E. Coyne, Esq., Office of United States Attorney, Newark, NJ.
For ANDREW **TABLACK**, Defendant - Appellant: Mark W. Catanzaro, Esq., Mount Holly, NJ.

Judges: Before: GREENAWAY, JR., BIBAS, and FUENTES, Circuit Judges.

CASE SUMMARY Defendant's his thirty-year sentence was substantively reasonable as the court canvassed and weighed the various 18 U.S.C.S. § 3553(a) factors, and it compared defendant with his co-conspirator as well as another drug defendant, and it varied downward to sentence him to 30 years, the bottom of the reduced range.

OVERVIEW: HOLDINGS: [1]-In convictions for manufacturing and distributing cyclopropyl fentanyl, as well as conspiring to do the same, defendant did not show how the exclusion of several carve-outs for what an analogue is not in the jury instruction prejudiced him because none of the carve-outs could apply, and those irrelevant hypotheticals would have only confused the jury; [2]-The defendant's his thirty-year sentence was substantively reasonable because defendant's adjusted offense level was 46 and his criminal history was IV, calling for a life sentence. The court canvassed and weighed the various 18 U.S.C.S. § 3553(a) factors, and it compared defendant with his co-conspirator as well as another drug defendant, and it varied downward to sentence him to 30 years, the bottom of the reduced range.

OUTCOME: Judgment affirmed.

LexisNexis Headnotes

The appellate court reviews legal issues de novo.

A-1

75731112

Criminal Law & Procedure > Sentencing > Imposition > Factors

The appellate court must affirm unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided.

Opinion

Opinion by: BIBAS

Opinion

OPINION*

BIBAS, *Circuit Judge.*

Andrew **Tablack** was a drug kingpin of the dark web, selling hundreds of thousands of pills and making millions of dollars, much of it through bitcoin. A jury convicted him of manufacturing and distributing cyclopropyl fentanyl in 2017, as well as conspiring to do the same. The judge gave him two consecutive fifteen-year sentences. All of his challenges on appeal fail, so we will affirm his convictions and sentences.

Tablack's main issue on appeal is that cyclopropyl fentanyl was not added to the federal drug schedules until 2018, after the events charged. So, he argues, the court should have dismissed the indictment or at least removed the word "analogue" from the phrase "controlled substance analogue" in the jury instructions.**{2023 U.S. App. LEXIS 2}** We review both legal issues de novo. *United States v. Nolan-Cooper*, 155 F.3d 221, 228-29 (3d Cir. 1998); *United States v. Lee*, 359 F.3d 194, 203 (3d Cir. 2004).

On both claims, **Tablack** is mistaken. It is enough that he dealt a drug analogue that mimics a scheduled drug. He was charged with violating the Controlled Substance Analogue Enforcement Act, 21 U.S.C. § 813, plus the Controlled Substances Act, § 841(a). When instructing the jury, the District Court followed those statutes. *See* § 802(32)(A); App. 76 (telling the jury that it must find that cyclopropyl fentanyl had a "substantially similar" chemical structure and effect to fentanyl, a Schedule II drug). And the jury convicted him of violating the Analogue Act. So the indictment and jury instruction were proper. *See McFadden v. United States*, 576 U.S. 186, 191-95, 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015).

Tablack makes two more challenges to the jury instructions. Because he raised neither at trial, we review for plain error. *Greer v. United States*, 141 S. Ct. 2090, 2096, 210 L. Ed. 2d 121 (2021). First, he says the instructions did not require the jury to find unanimously whether he knew he was dealing with a substance that (1) was an analogue under the statute or (2) had the same chemical composition and bodily effects as a controlled substance. *See McFadden*, 576 U.S. at 194. True, different jurors could find different forms of knowledge. But **Tablack** cites no Analogue Act case requiring unanimity on what exactly a defendant knew. So we doubt there was error. And there was certainly no plain error: **Tablack** fails entirely to meet his**{2023 U.S. App. LEXIS 3}** burden to show prejudice. *See Greer*, 141 S. Ct. at 2097.

Second, **Tablack** complains that the instructions quoted the statutory language defining what an analogue *is* but did not quote several carve-outs for what an analogue *is not*. But none of the

carve-outs could apply. No one suggests that when **Tablack** sold cyclopropyl fentanyl it was a controlled substance, covered by a new drug application, being used for pharmaceutical investigative research, or not meant for human consumption. § 802(32)(C)(i)-(iv). Those irrelevant hypotheticals would have only confused the jury. And again, **Tablack** does not show how their exclusion prejudiced him.

Finally, **Tablack** challenges his thirty-year sentence as substantively unreasonable. We must affirm "unless no reasonable sentencing court would have imposed the same sentence on that particular defendant for the reasons the district court provided." *United States v. Tomko*, 562 F.3d 558, 568 (3d Cir. 2009) (en banc). He cannot meet that heavy burden.

Tablack attacks his sentence in two ways. One is that the District Court should have run his sentences concurrently, not consecutively. As he notes, we have affirmed a district court's decision to run two drug sentences concurrently. *United States v. Velasquez*, 304 F.3d 237, 243-46 (3d Cir. 2002). But all that shows is that a court has discretion to sentence concurrently.**{2023 U.S. App. LEXIS 4}** *Id.* at 245-46. Nothing in *Velasquez* "diminish[es] the power of the sentencing judge" to sentence consecutively. *Id.* at 244 (construing 18 U.S.C. § 3584). And under the Guidelines, the sentences on the two counts "shall" run consecutively as needed to add up to the total punishment imposed. U.S.S.G. § 5G1.2(d). The court properly considered that Guideline and other circuits' decisions applying it.

Second, **Tablack** lists several other drug defendants who got shorter sentences, suggesting that he should have gotten the same. But the District Court reasonably disagreed. Tablack's adjusted offense level was 46 and his criminal history was IV, calling for a life sentence. The court canvassed and weighed the various § 3553(a) factors. It compared **Tablack** with his co-conspirator as well as another drug defendant, and it varied downward to sentence him to 30 years, the bottom of the reduced range. The other comparators (whom **Tablack** raises only now) do not make that sentence unreasonable, in part because the amounts of drugs they sold were far less. His sentence was well within reason.

In sum, **Tablack** was properly charged with and convicted of dealing a controlled-substance analogue. He cites no authority requiring the jury to find unanimously one of the two ways to show**{2023 U.S. App. LEXIS 5}** knowledge under the Analogue Act. There was no reason to instruct the jury on exceptions that did not apply. And his thirty-year sentence, at the bottom of the range after a downward variance, was substantively reasonable. So we will affirm.

Footnotes

*

This disposition is not an opinion of the full Court and, under I.O.P. 5.7, is not binding precedent.

September 29, 2023

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

C.A. No. 22-1297

UNITED STATES OF AMERICA

v.

ANDREW TABLACK,
Appellant

(D.N.J. No. 3-19-cr-00374-001)

Present: BIBAS and FUENTES, Circuit Judges*

Submitted are

(1) Motion by Appellant to Recall Mandate, Re-enter the Judgment and Direct CJA Counsel to assist in Filing a Petition for Writ of Certiorari; and

(2) Supplement Motion by Appellant to Recall Mandate, Re-enter the Judgment and Direct CJA Counsel to assist in Filing a Petition for Writ of Certiorari

in the above-captioned case.

Respectfully,

Clerk

ORDER

The forgoing motions are granted with respect to recalling the mandate and re-entering the judgment. The Clerk is directed to recall the mandate, vacate the judgment, and then immediately re-issue both the judgment and the mandate. The motions are denied to the extent Appellant seeks to compel counsel's assistance in preparing a

* The Honorable Joseph A. Greenaway was a member of the merits panel. Judge Greenaway retired from the Court on June 15, 2023 and did not participate in the consideration of the motion. The two remaining judges from the panel grant the judgment pursuant to Third Circuit I.O.P 12.1.

petition for writ of certiorari.

By the Court,

s/Stephanos Bibas
Circuit Judge

Dated: October 6, 2023

kr/cc: Andrew Tablack
Sabrina G. Comizzoli, Esq.
Mark E. Coyne, Esq.
Mark W. Cantanzaro, Esq.

A True Copy:

Patricia S. Dodszuweit, Clerk

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 22-1297

UNITED STATES OF AMERICA

v.

ANDREW TABLACK,
Appellant

On Appeal from the United States District Court
for the District of New Jersey
(D.C. No. 3:19-cr-00374-001)
District Judge: Honorable Michael A. Shipp

Submitted Under Third Circuit L.A.R. 34.1(a)
on January 24, 2023

Before: GREENAWAY, JR., BIBAS, and FUENTES, *Circuit Judges*

JUDGMENT

This cause came to be considered on the record from the United States District Court for the District of New Jersey and was submitted under Third Circuit L.A.R. 34.1(a) on January 24, 2023.

On consideration whereof, it is now **ORDERED** and **ADJUDGED** by this Court that the judgment of the District Court entered February 16, 2022, is hereby **AFFIRMED**. Costs shall not be taxed. All of the above in accordance with the Opinion of this Court.

ATTEST:

Mandate originally issued on March 17, 2023 **was recalled on** October 6, 2023**. This document is certified as a true copy and reissued in lieu of a formal mandate on** October 6, 2023**.**

s/ Patricia S. Dodszuweit
Clerk

Dated: October 6, 2023

Teste: Patricia A. Dodszuweit
Clerk, U.S. Court of Appeals for the Third Circuit

A-4

APPENDIX B

District Court Opinions entered in the Case.
B-1 to B-5. Denial of pre-trial motion to dismiss the indictment on September 11, 2020
B-6 to B-8. Denial of a motion for a judgment of acquittal on October 6, 2021.
B-9 to B-11. Denial of a motion for reconsideration on January 4, 2022.

UNITED STATES OF AMERICA v. ANDREW TABLACK
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
2020 U.S. Dist. LEXIS 166662
Criminal No. 19-374 (MAS)
September 11, 2020, Decided
September 11, 2020, Filed

Notice:

NOT FOR PUBLICATION

Editorial Information: Subsequent History

Motion denied by United States v. **Tablack**, 2021 U.S. Dist. LEXIS 135190, 2021 WL 3925689 (D.N.J., July 20, 2021)Motion denied by United States v. **Tablack**, 2021 U.S. Dist. LEXIS 193261, 2021 WL 4595740 (D.N.J., Oct. 6, 2021)Affirmed by United States v. **Tablack**, 2023 U.S. App. LEXIS 1727 (3d Cir. N.J., Jan. 24, 2023)

Counsel **{2020 U.S. Dist. LEXIS 1}**ANDREW **TABLACK**, Defendant, Pro se, FREEHOLD, NJ.

For ANDREW **TABLACK**, Defendant: MARK W. CATANZARO, LEAD ATTORNEY, MOUNT HOLLY, NJ.

For USA, Plaintiff: SARA FRANCES MERIN, TAZNEEN RUDMILA SHAHABUDDIN, LEAD ATTORNEYS, OFFICE OF THE U.S. ATTORNEY, DISTRICT OF NEW JERSEY, NEWARK, NJ.

Judges: MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: MICHAEL A. SHIPP

Opinion

MEMORANDUM OPINION

SHIPP, District Judge

This matter comes before the Court upon Defendant Andrew Tablack's ("Defendant") Motion to Dismiss the Indictment. (ECF No. 102.) The Government opposed (ECF No. 103), and Defendant replied (ECF No. 104). The Court has carefully considered the parties' submissions and decides the matter without oral argument pursuant to Local Civil Rule 78.1, which is applicable to criminal cases under Local Criminal Rule 1.1. For reasons set forth below, the Court denies Defendant's Motion.

I. BACKGROUND

On May 20, 2018, a federal grand jury charged Defendant in a two-count Indictment. (Indictment, ECF No. 33.) Count One charges Defendant with conspiracy to manufacture and distribute a fentanyl analogue, in violation of 21 U.S.C. § 846. (*Id.* at 1.) Count Two charges Defendant with the manufacture and distribution of a fentanyl analogue, in violation of 21 U.S.C. §§ 841(a)(1), 841(b)(1)(C), 813 and 18 U.S.C. § 2. (*Id.* at 2.)

B-1

75731112

Defendant moves to dismiss{2020 U.S. Dist. LEXIS 2} the Indictment. (ECF No. 102.) Defendant argues that the Indictment "fails to both allege facts and contain the elements of the offense intended to be charged." (Def.'s Moving Br. I, ECF No. 102-2.) He also asserts the Controlled Substance Analogue Enforcement Act of 1986 (the "Analogue Act"), 21 U.S.C. § 813, is void for vagueness and inapplicable to his conduct. (*Id.* at 1-2.)

II. LEGAL STANDARD

Pursuant to Federal Rule of Criminal Procedure 12(b)(3)(B), a defendant may move to dismiss an indictment for "lack of specificity" or "failure to state an offense." "[S]uch dismissals may not be predicated upon the insufficiency of the evidence to prove the indictment's charges." *United States v. DeLaurentis*, 230 F.3d 659, 661 (3d Cir. 2000). "In considering a defense motion to dismiss an indictment, the district court accepts as true the factual allegations set forth in the indictment." *United States v. Besmajian*, 910 F.2d 1153, 1154 (3d Cir. 1990).

III. DISCUSSION

A. The Indictment is Sufficient.

"An indictment must contain 'a plain, concise and definite written statement of the essential facts constituting the offense charged." *United States v. Urban*, 404 F.3d 754, 771 (3d Cir. 2005) (citing Fed. R. Crim. P. 7(c)(1)). An indictment is facially sufficient to warrant a trial on the merits if it "(1) contains the elements of the offense intended to be charged, (2) sufficiently apprises the defendant of what he must be prepared to meet, and (3) allows the defendant{2020 U.S. Dist. LEXIS 3} to show with accuracy to what extent he may plead a former acquittal or conviction in the event of a subsequent prosecution." *United States v. Huet*, 665 F.3d 588, 595 (3d Cir. 2012). "[N]o greater specificity than the statutory language is required so long as there is sufficient factual orientation to permit the defendant to prepare his defense and to invoke double jeopardy ...." *United States v. Rankin*, 870 F.2d 109, 112 (3d Cir. 1989).

Defendant does not assert the factual allegations in the Indictment are so sparse that he cannot prepare a defense or invoke double jeopardy. Instead, Defendant asserts that allegations in the Indictment are insufficient for the "mental state" and "controlled substance" elements of 21 U.S.C. § 841(a)(1).1

Here, the Indictment tracks the language of 21 U.S.C. § 841(a)(1) and § 813.2 Count One of the Indictment alleges:

> [Defendant] did *knowingly and intentionally* conspire to agree with others to manufacture, distribute, and posses with intent to manufacture and distribute a quantity of a mixture and substance containing a detectable amount of a Schedule I controlled substance analogue, ... namely [cyclopropyl fentanyl,] *knowing that the substance was intended for human consumption* ...(Indictment I (emphasis added).) Count Two similarly alleges:
>
> [Defendant] did *knowingly{2020 U.S. Dist. LEXIS 4} and intentionally* manufacture, distribute, and possess with intent to manufacture and distribute a quantity of a mixture and substance containing a detectable amount of a Schedule I controlled substance analogue, ... namely [cyclopropyl fentanyl,] *knowing that the substance was intended for human consumption.*(*Id.* at 2 (emphasis added).) The Indictment alleges that Defendant possessed cyclopropyl fentanyl, which he knew was intended for human consumption. This tracks the language of § 813 and brings cyclopropyl fentanyl within the definition of a controlled substance under § 841(a)(1). The Indictment also alleges that Defendant both "knowingly and intentionally" manufactured, distributed, and possessed cyclopropyl fentanyl, meeting the mental state requirement for § 813

B-2

75731112

and § 841(a)(1). Because the Indictment tracks the language of the statutes, and Defendant does not argue he is provided so little factual orientation that he cannot invoke double jeopardy, the Court shall not dismiss the Indictment for lack of specificity or failure to state an offense. *See United States v. Mosberg*, 866 F. Supp. 2d 275, 303 (D.N.J. 2011) ("[A]n indictment need not allege facts to provide evidentiary support for a violation of a criminal statute. Rather, the [i]ndictment may simply track the language**{2020 U.S. Dist. LEXIS 5}** of the statute while providing sufficient factual orientation to the defendant for double jeopardy purposes.").

Defendant also appears to assert that he may not be charged under the Controlled Substances Act as well as the Analogue Act for conduct involving a controlled substance analogue. (Def.'s Moving Br. 2-3, 18.) Because "the Analogue Act extends the framework of the [Controlled Substances Act] to analogous substances," *United States v. McFadden*, 576 U.S. 186, 193, 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015), courts have held charging a defendant under both statutes for conduct involving a controlled substance analogue is appropriate. *See, e.g.*, Indictment, *United States v. Charif*, No. 15-598, (D.N.J. Nov. 19, 2015), ECF No. 21; J., *Chary*, (D.N.J. May 22, 2017). ECF No. 35. Accordingly, the Indictment is not insufficient or improper for charging Defendant under both the Controlled Substances Act and Analogue Act where the Indictment alleges the Defendant's conduct involved a controlled substance analogue.

Finally, Defendant also appears to argue that the Indictment fails to state an offense because cyclopropyl fentanyl was only scheduled as a controlled substance after his relevant conduct. (Def.'s Moving Br. 3-4, 13-14, 17-25.) Defendant is correct**{2020 U.S. Dist. LEXIS 6}** that cyclopropyl fentanyl was placed into Schedule 1 of the Controlled Substances Act after his arrest. *See* Schedules of Controlled Substances: Temporary Placement of Cyclopropyl Fentanyl in Schedule I, 83 Fed. Reg. 469-72 (Jan. 4, 2018). But this is irrelevant. Because Defendant was charged under the Analogue Act, all that matters is whether cyclopropyl fentanyl was substantially similar to a Schedule I or II controlled substance. The Indictment alleges that cyclopropyl fentanyl is an analogue of fentanyl and that fentanyl is a Schedule I controlled substance.3 n (Indictment 1-2.) Defendant does not dispute that fentanyl is a controlled substance under Schedule I or II. Defendant's argument, therefore, is simply misplaced.4 Accordingly, the Court denies Defendant's Motion to Dismiss the Indictment based on any lack of specificity or failure to state an offense.

B. The Analogue Act is Not Void for Vagueness.

The Analogue Act states that a "controlled substance analogue" intended for human consumption shall be treated as a controlled substance. 21 U.S.C. § 813(a). A "controlled substance analogue" is a substance:

(i) the chemical structure of which is *substantially similar* to the chemical structure of a controlled substance in schedule for II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous**{2020 U.S. Dist. LEXIS 7}** system that is *substantially similar* to or greater than the ... effect ... of a controlled substance in schedule I or II; or

(iii) with respect to a particular person, which such person *represents or intends* to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is *substantially similar* to or greater than the ... effect ... of a controlled substance in schedule I or II.21 U.S.C. § 802(32) (emphasis added). Defendant argues that the analogue provision is void for vagueness because the "substantially similar standard ... does not ... afford citizens fair notice" of which substances are substantially similar to controlled substances. (Def.'s Moving Br. 20.) Defendant also argues the scienter requirements of the Analogue Act and Controlled Substances Act

B-3

75731112

renders the statute void for vagueness. (*See id.* at 21-22, 31-32.)

"[T]he void-for-vagueness doctrine requires that a penal statute 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." *Kolender v. Lawson*, 461 U.S. 352, 357, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983). Numerous courts have considered whether the Controlled Substances Act is void for vagueness since the Act**{2020 U.S. Dist. LEXIS 8}** was passed in 1986. Although the Court must acknowledge that "making criminality depend on the 'substantial similarity' of a substance to an expressly prohibited substance inevitably involves a degree of uncertainty," *United States v. Demott*, 906 F.3d 231, 237 (2d Cir. 2018), the Court agrees with the numerous courts that have found the Controlled Substances Act not void for vagueness based on the "substantial similarity" language. *E.g., Demott*, 906 F.3d at 237-38; *United States v. Larson*, 747 F. App'x 927, 930 (4th Cir. 2018) (declining to overturn *United States v. Klecker*, 348 F.3d 69, 71-73 (4th Cir. 2003), which found "substantially similar" language not vague); *United States v. Turcotte*, 405 F.3d 515, 531-32 (7th Cir. 2005), *abrogated on other grounds by United States v. Novak*, 841 F.3d 721 (7th Cir. 2016); *United States v. Granberry*, 916 F.2d 1008, 1010 (5th Cir. 1990); *United States v. Orchard*, 332 F.3d 1133, 1137-38 (8th Cir. 2003); *United States v. Washam*, 312 F.3d 926, 930-32 (8th Cir. 2002); *United States v. Carlson*, 87 F.3d 440, 443-44 (11th Cir. 1996); *United States v. Hofstatter*, 8 F.3d 316, 321-22 (6th Cir. 1993); *United States v. Turks*, No. 17-444, 2018 U.S. Dist. LEXIS 182934, 2018 WL 5292540, at *2-3 (N.D. Ohio Oct. 25, 2018) (holding, in prosecution for conduct involving cyclopropyl fentanyl, that the Controlled Substance Act was not void for vagueness on "substantially similar" or scienter grounds). Here, the statute provides that a substance is a controlled substance analogue (1) where the chemical structure is substantially similar to that of a controlled substance, (2) where the substance's effect on the central nervous system is substantially similar to that of a controlled substance, or (3) where a person intends the substance to have a substantially similar effect on the central nervous system as a controlled substance. 21 U.S.C. § 802(32)(A). There is sufficient definiteness here for an ordinary person to understand**{2020 U.S. Dist. LEXIS 9}** what conduct is prohibited.

As for Defendant's argument that "triple-standard" mental state requirements of § 802(32)(A), § 813, and § 841(a)(1) in the Indictment render the Analogue Act void for vagueness, this argument is foreclosed by the United States Supreme Court's decision in *McFadden*, 576 U.S. at 197, which found the scienter requirement in the Analogue Act alleviated vagueness concerns and did not render the statute vague. *See Novak*, 841 F.3d at 727; *United States v. Carlson*, 810 F.3d 544, 550-51 (8th Cir. 2016); *Turks*, 2018 U.S. Dist. LEXIS 182934, 2018 WL 5292540, at *3. Accordingly, the Court denies Defendant's Motion to Dismiss the Indictment on the basis that the Analogue Act is void for vagueness.

IV. CONCLUSION

For the foregoing reasons, the Court denies Defendant's Motion to Dismiss the Indictment.

/s/ Michael A. Shipp

Michael A. Shipp

United States District Judge

ORDER

This matter comes before the Court upon Defendant Andrew Tablack's ("Defendant") Motion to Dismiss the Indictment. (ECF No. 102.) The Government opposed (ECF No. 103), and Defendant replied (ECF No. 104). The Court has carefully considered the parties' submissions and decides the

B-4

75731112

matter without oral argument pursuant to Local Civil Rule 78.1, which is applicable to criminal cases under Local Criminal Rule 1.1. For the reasons set forth in the accompanying Memorandum Opinion,

IT IS on this 11th day of September 2020 **ORDERED{2020 U.S. Dist. LEXIS 10}** that Defendant's Motion to Dismiss the Indictment (ECF No. 102) is **DENIED**.

/s/ Michael A. Shipp

Michael A. Shipp

United States District Judge

Footnotes

1

21 U.S.C. § 841(a)(1) provides: Tit shall be unlawful for any person *knowingly or intentionally* ... to manufacture, distribute, or dispense, or possess with intent to manufacture distribute, or dispense, a *controlled substance*." 21 U.S.C. § 841(a)(1) (emphasis added).

2

21 U.S.C. § 813 provides: "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).

3

The Government argues in its Opposition Brief that fentanyl is a Schedule II controlled substance. (Gov't's Opp'n Br. 19 (citing Gov't's Ex. A), ECF No. 103.) Upon a motion to dismiss an indictment, the Court "accepts as true the factual allegations set forth in the indictment." *Besmajian*, 910 F.2d at 1154. Because an analogue of either a Schedule I or II controlled substance will be treated as a controlled substance under the Analogue Act, *see* 21 U.S.C. § 802(32)(A), the Court reaches the same outcome under either version.

4

To the extent Defendant argues cyclopropyl fentanyl is not substantially similar to fentanyl. that is a question of fact for the jury.

B-5

75731112

UNITED STATES OF AMERICA, v. ANDREW TABLACK
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
2021 U.S. Dist. LEXIS 193261
Criminal Action No. 19-374 (MAS)
October 6, 2021, Decided
October 6, 2021, Filed

Editorial Information: Subsequent History

Reconsideration denied by United States v. **Tablack**, 2022 U.S. Dist. LEXIS 1479 (D.N.J., Jan. 4, 2022)

Editorial Information: Prior History

United States v. **Tablack**, 2020 U.S. Dist. LEXIS 166662, 2020 WL 5500382 (D.N.J., Sept. 11, 2020)

Counsel **{2021 U.S. Dist. LEXIS 1}**ANDREW **TABLACK**, Defendant, Pro se, FREEHOLD, NJ.

For USA, Plaintiff: JOSE ALMONTE, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, NEWARK, NJ USA; TAZNEEN RUDMILA SHAHABUDDIN, LEAD ATTORNEY, SARAH DEVLIN, OFFICE OF THE U.S. ATTORNEY, DISTRICT OF NEW JERSEY, NEWARK, NJ.

Judges: MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: MICHAEL A. SHIPP

Opinion

MEMORANDUM ORDER

This matter comes before the Court on pro se Defendant Andrew Tablack's ("Defendant") Renewed Motion for Judgment of Acquittal. (ECF No. 173.) The Government did not oppose. The Court has carefully considered Defendant's submission and decides the matter without oral argument under Local Civil Rule 78.1, which is applicable to criminal cases under Local Criminal Rule 1.1.

I. BACKGROUND

In July 2021, Defendant was tried for two drug-related offenses involving cyclopropyl fentanyl, a controlled substance analogue. *See United States v. **Tablack***, No. 19-374, 2021 U.S. Dist. LEXIS 135190, 2021 WL 3925689 (D.N.J. July 20, 2021). After the Government rested, Defendant moved for judgment of acquittal. 2021 U.S. Dist. LEXIS 135190, [WL] at *2. The Court reserved judgment on the motion and submitted the case to the jury. *Id.* The jury then returned a guilty verdict on both counts. *Id.*

Shortly thereafter, the Court issued a written decision denying Defendant's motion. In reaching its decision, the Court noted that Defendant's motion recycled two arguments**{2021 U.S. Dist. LEXIS 2}** already considered and rejected by the Court: (1) that the indictment was deficient, and (2) that cyclopropyl fentanyl was not a scheduled controlled substance during the relevant period. *See* 2021 U.S. Dist. LEXIS 135190, [WL] at *3-4.

B-6

75731112

As to Defendant's first argument, the Court reiterated that the indictment was sufficient because it adequately tracked the language of the charged-and constitutionally upheld statutes. 2021 U.S. Dist. LEXIS 135190, [WL] at *3. As to Defendant's second argument, the Court again explained that the fact that cyclopropyl fentanyl was not a scheduled controlled substance during the relevant period is irrelevant because the charged offenses involved a controlled substance analogue. 2021 U.S. Dist. LEXIS 135190, [WL] at *4. What mattered, therefore, was whether cyclopropyl fentanyl is "substantially similar" to a schedule I or II controlled substance-not whether cyclopropyl fentanyl itself was a scheduled controlled substance at the time. *Id.* And, to the extent that Defendant contested the sufficiency of the Government's evidence at trial, the Court rejected that argument. 2021 U.S. Dist. LEXIS 135190, [WL] at *5-6. The Court noted that the Government presented, among other things: testimony from Defendant's co-conspirator who provided a detailed account of Defendant's drug operation; evidence of Defendant's**{2021 U.S. Dist. LEXIS 3}** drug transactions on the dark web; a recorded conversation between Defendant and his ex-girlfriend in which Defendant discussed and acknowledged the illegality of his conduct; and testimony from DEA personnel who, based on their analysis, concluded that cyclopropyl fentanyl is substantially similar to fentanyl, a scheduled I controlled substance. *Id.*

Thus, the Court found that Defendant failed to meet his heavy burden of showing that the Government presented insufficient evidence to sustain a conviction and, accordingly, denied Defendant's motion for judgment of acquittal. *Id.* at *6. Defendant now renews that motion.

II. LEGAL STANDARD

"[A] defendant who asserts that there was insufficient evidence to sustain a conviction shoulders 'a very heavy burden.'" *United States v. Tiangco*, 225 F. Supp. 3d 274, 278-79 (D.N.J. 2016) (quoting *United States v. Anderson*, 108 F.3d 478, 481 (3d Cir. 1997)). "The court cannot substitute its judgment for that of the jury. Hence it must view the evidence, and all reasonable inferences therefrom, in the light most favorable to the prosecution, resolving all credibility issues in the prosecution's favor." *Id.* (citing *United States v. Hart*, 273 F.3d 363, 371 (3d Cir. 2001); *United States v. Scanzello*, 832 F.2d 18, 21 (3d Cir. 1987)). "Having done so, the court must uphold the conviction if 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'"**{2021 U.S. Dist. LEXIS 4}** *Id.* (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979)).

III. DISCUSSION

In moving for judgment of acquittal, Defendant does not contest the sufficiency of the Government's evidence. Instead, Defendant rehashes his challenges about the sufficiency of the indictment and insists that he did not engage in unlawful conduct because cyclopropyl fentanyl was not a scheduled controlled substance during the relevant period. (Def.'s Moving Br. 2-12, ECF No 173.) But the Court has already considered and rejected those arguments more than once. *See* ***Tablack***, 2021 U.S. Dist. LEXIS 135190, 2021 WL 3925689, at *3-6; *United States v.* ***Tablack***, No. 19-374, 2020 U.S. Dist. LEXIS 166662, 2020 WL 5500382, at *2-4 (D.N.J. Sept. 11, 2020). Having already addressed Defendant's arguments at length, the Court need not do so again.

As noted, Defendant did not address-much less contest-the sufficiency of the Government's evidence and instead recycles flawed arguments already rejected by the Court. Defendant, therefore, cannot claim that this is a clear case where a finding of insufficiency is warranted. *See United States v. Smith*, 294 F.3d 473, 477 (3d Cir. 2002) ("[A] finding of insufficiency should 'be confined to cases where the prosecution's failure is clear.' (quoting *United States v. Leon*, 739 F.2d 885, 891 (3d Cir. 1984))). On these facts, the Court again finds that Defendant fails to meet his heavy burden of

B-7

75731112

showing that the Government presented insufficient evidence to sustain a conviction.

IV. ORDER

Accordingly, for the reasons set**{2021 U.S. Dist. LEXIS 5}** forth above and in the Court's September 12, 2020 and July 20, 2021 opinions and orders, and for other good cause shown,

IT IS, on this 6th day of October 2021, **ORDERED** as follows:

1. Defendant's Motion (ECF No. 173) is **DENIED.**

/s/ Michael A. Shipp

Michael A. Shipp

United States District Judge

B-8

75731112

UNITED STATES OF AMERICA v. ANDREW TABLACK
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY
2022 U.S. Dist. LEXIS 1479
Criminal Action No. 19-374 (MAS)
January 4, 2022, Decided
January 4, 2022, Filed

Editorial Information: Prior History

United States v. **Tablack**, 2021 U.S. Dist. LEXIS 193261 (D.N.J., Oct. 6, 2021)

Counsel **{2022 U.S. Dist. LEXIS 1}**ANDREW **TABLACK**, Defendant, Pro se, FREEHOLD, NJ.

For USA, Plaintiff: JOSE ALMONTE, LEAD ATTORNEY, U.S. ATTORNEY'S OFFICE, NEWARK, NJ USA; TAZNEEN RUDMILA SHAHABUDDIN, LEAD ATTORNEY, SARAH DEVLIN, OFFICE OF THE U.S. ATTORNEY, DISTRICT OF NEW JERSEY, NEWARK, NJ.

Judges: MICHAEL A. SHIPP, UNITED STATES DISTRICT JUDGE.

Opinion

Opinion by: MICHAEL A. SHIPP

Opinion

MEMORANDUM ORDER

This matter comes before the Court on pro se Defendant Andrew Tablack's ("**Tablack**") Motion for Reconsideration of the Court's October 6, 2021 Memorandum Order (the "Order"). (ECF No. 174.) The Government opposed (ECF No. 177), and **Tablack** filed a "Supplemental Brief" in reply (ECF No. 178). The Court has carefully considered the parties' submissions and decides the matter without oral argument under Local Civil Rule 78.1, which is applicable to criminal cases under Local Criminal Rule 1.1.

I. BACKGROUND

The parties are familiar with the facts as this Court has written three separate opinions on this matter. *E.g., United States v. **Tablack** ("**Tablack** I")*, No. 19-374, 2020 U.S. Dist. LEXIS 166662, 2020 WL 5500382 (D.N.J. Sept. 11, 2020), ECF No. 108 (denying motion to dismiss indictment); *United States v. **Tablack** ("**Tablack** II")*, No. 19-374, 2021 U.S. Dist. LEXIS 135190, 2021 WL 3925689 (D.N.J. July 20, 2021), ECF No. 170 (denying motion for judgment of acquittal); *United States v. **Tablack** ("**Tablack** III")*, No. 19-374, 2021 U.S. Dist. LEXIS 193261, 2021 WL 4595740 (D.N.J. Oct. 6, 2021), ECF No. 174 (denying**{2022 U.S. Dist. LEXIS 2}** renewed motion for judgment of acquittal).1 In each of its three prior opinions, the Court rejected Tablack's arguments that his indictment and conviction should be tossed because cyclopropyl fentanyl was not listed in the federal drug schedules at the time of his arrest. *See **Tablack** I*, 2020 U.S. Dist. LEXIS 166662, 2020 WL 5500382, at *2 ("Because Defendant was charged under the Analogue Act, all that matters is whether cyclopropyl fentanyl was substantially similar to a Schedule I or II controlled substance."); ***Tablack** II*, 2021 U.S. Dist. LEXIS

B-9

75731112

135190, 2021 WL 3925689, at *4 ("[T]he Government presented sufficient evidence to establish that cyclopropyl fentanyl qualifies as a controlled substance analogue and thus, under the Analogue Act, the substance may be treated as a Schedule I controlled substance."); ***Tablack III***, 2021 U.S. Dist. LEXIS 193261, 2021 WL 4595740, at *2 (finding same where "Defendant rehashes his challenges about the sufficiency of the indictment and insists that he did not engage in unlawful conduct because cyclopropyl fentanyl was not a scheduled controlled substance during the relevant period.").

The Court now considers Tablack's arguments a fourth time. In his Motion for Reconsideration of the Court's Order, **Tablack** argues that "'cyclopropyl fentanyl' was not regulated under the Controlled Substances Act[,] during the period**{2022 U.S. Dist. LEXIS 3}** of charged activity." (Def.'s Moving Br. 2, ECF No. 175-1.) Given the procedural posture of the case, Tablack's Motion takes on a slightly different flavor than his prior Motions. This time, **Tablack** takes issue with the Court's jury instructions, arguing that "[t]he Court omitted from its instructions the legal element 'a controlled substance' . . . and replaced that legal element with the term *controlled substance analogue*." (*Id.* at 3.) **Tablack** further contends that the Court "did not instruct the jury that the Government must prove that the [D]efendant knew he was dealing with an actual regulated substance under the [Controlled Substances Act]." (*Id.*) The Government opposed Tablack's Motion (*see generally* Gov't's Opp'n Correspondence, ECF No. 177), and **Tablack** submitted a supplemental brief in reply (*see generally* Def.'s Reply Br., ECF No. 178).

II. LEGAL STANDARD

The Federal Rules of Criminal Procedure do not explicitly countenance motions for reconsideration. The Local Criminal Rules, however, contemplate these motions because Local Criminal Rule 1.1 incorporates Local Civil Rule 7.1 (i), which governs motions for reconsideration. *See United States v. Bergrin*, No. 09-369, 2013 U.S. Dist. LEXIS 119291, 2013 WL 4501469, at *1 (D.N.J. Aug. 22, 2013) (listing cases). The standard for civil motions for reconsideration is a familiar one, requiring**{2022 U.S. Dist. LEXIS 4}** movants to show at least one of the following: "(1) an intervening change in the controlling law; (2) the availability of new evidence that was not available when the court granted the motion . . .; or (3) the need to correct a clear error of law or fact or to prevent manifest injustice." *Max's Seafood Café exrel. Lon-Ann, Inc. v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999) (quoting A. *River Ins. Co. v. CIGNA Reins. Co.*, 52 F.3d 1194, 1218 (3d Cir. 1995)). Notably, movants must file reconsideration motions within 14 days after entry of the relevant order. *See* L. Civ. R. 7.1 (i); *United States v. Lieberman*, No. 15-161, 2019 U.S. Dist. LEXIS 103848, 2019 WL 2568600, at *1 (D.N.J. June 21, 2019) (denying late reconsideration motion). Further, a reconsideration motion is an "extraordinary remedy" that is "to be used sparingly in the interests of finality and conservation of judicial resources." *Carroll v. Nakatani*, 342 F.3d 934, 945 (9th Cir. 2003) (quoting 12 Moore's Federal Practice § 59.30[4] (3d ed. 2000)).

III. DISCUSSION

Tablack asks the Court to reconsider its Order. He principally contends that the Court's jury instructions were legally erroneous because the instructions defined cyclopropyl fentanyl as a "controlled substance analogue" rather than a "controlled substance." According to **Tablack**, the Government was required to prove that he knowingly manufactured and distributed a "controlled substance"-not an analogue like cyclopropyl fentanyl.

Before turning to the substance, the Court finds two disabling defects with Tablack's Motion. *First*, the Motion**{2022 U.S. Dist. LEXIS 5}** is untimely. As stated above, under this District's Local Civil Rules, litigants must file reconsideration motions within 14 days of entry of the order they seek to reconsider. *See* L. Civ. R. 7.1 (i). **Tablack**, however, filed this Motion more than a month after the

B-10

75731112

Court's Order. That fact alone merits denial of Tablack's Motion. *See Lieberman*, 2019 U.S. Dist. LEXIS 103848, 2019 WL 2568600, at *1. *Second*, the Motion raises the same arguments as in Tablack's numerous prior briefs, even though reconsideration motions "are not to be used as an opportunity to relitigate the case." *Blystone v. Horn*, 664 F.3d 397, 415 (3d Cir. 2011) (citing *Howard Hess Dental Labs, Inc. v. Dentsply Int'l Inc.*, 602 F.3d 237, 251 (3d Cir. 2010)). This fact also merits outright denial. *See Altana Pharma AG v. Teva Pharm. USA, Inc.GAo.* 04-2355, 2009 U.S. Dist. LEXIS 125195, 2009 WL 5818836, at *1 (D.N.J. Dec. 1, 2009) ("[C]ourts in this District routinely deny motions for reconsideration that simply re-argue the original motion.").

Further, even if the Court considers the substance, the Court denies Tablack's Motion. To start, Tablack's Motion does not specify which of the three grounds for reconsideration under which **Tablack** moves. Because the Motion neither cites any new controlling law nor raises any new evidence, the Court construes the Motion under the third prong. Under that prong, **Tablack** must show a clear error of law or manifest injustice with the Court's jury instructions. Neither exists. Under Tablack's indictment and the plain directives**{2022 U.S. Dist. LEXIS 6}** of the Controlled Substances Act, cyclopropyl fentanyl is a controlled substance analogue that was intended for human consumption. *See* 21 U.S.C. §§ 802(32), 813. As the Court stated in its charging conference (and again in its post-trial orders), "21 U.S.C. [§] 813 provides that '[a] controlled substance analogue shall, to the extent extended for human consumption, be treated for the purposes of any federal law as a controlled substance in Schedule I.'" (Trial Tr. 707:5-8 (quoting 21 U.S.C. § 813); *see also, e.g.,* ***Tablack*** *II*, 2021 U.S. Dist. LEXIS 135190, 2021 WL 3925689, at *4.) Thus, the Court's jury instructions are not legally infirm.

IV. ORDER

The Court concludes that Tablack's Motion for Reconsideration is untimely, duplicative of prior motions, and substantively erroneous. Accordingly, for the reasons set forth above, and for other good cause shown,

IT IS, on this 4th day of January 2022, **ORDERED** as follows:

1. Tablack's Motion for Reconsideration (ECF No. 175) is **DENIED**.

/s/ Michael A. Shipp

Michael A. Shipp

United States District Judge

Footnotes

1

The Court also denied Tablack's motion for reconsideration of its motion to dismiss the indictment at the May 19, 2020 telephone status conference. *See United States v.* ***Tablack***, No. 19-374 (D.N.J. May 19, 2020), ECF No. 120.

B-11

75731112

Additional material from this filing is available in the Clerk's Office.