



# Synthetic Cannabinoids in South Carolina State Court: An Overview

by **Sam Tooker, Esq.**



In the last five years, synthetic cannabinoids and similar substances have become consistently available across South Carolina. If you are not familiar with the substances, synthetic cannabinoids refer to the class of drugs packaged like and designed to mimic the effects of marijuana.

Chemists and laboratories develop these substances to sell on the grey market. In the case of drugs designed to mimic marijuana, retailers and other merchants purchase chemicals from wholesalers, dissolve the substance into a solvent, often acetone, and spray the liquid on tea, grass, or other vegetative matter. The solvent evaporates, leaving the now chemical-infused vegetative substance ready to be packaged and sold.

Invariably, legislators, regulators, and law enforcement agencies try to stifle the production and sale of these substances with statutory enactments, drug scheduling, and specific investigative strategies. In response, manufacturers alter the chemical makeup of newly-proscribed substances in an attempt to circumvent regulation, investigation, and prosecution. The

amended chemical compounds remain substantively similar to their precursors to have similar biological effects but are believed by manufacturers and retailers to be sufficiently dissimilar to skirt federal and state drug scheduling.

## The Cycle of Scheduling, Chemical Innovation, and Re-scheduling

By way of example, JWH-018 is a synthetic cannabinoid created in 2008 by John W. Huffman, an organic chemist at Clemson University.<sup>1</sup> JWH-018 was designed to mimic the effects of marijuana and was used, originally, in research.<sup>2</sup> However, since approximately 2010, the compound has been sold by retailers to consumers who wished to smoke the substance for its marijuana-like effects.<sup>3</sup> JWH-018 was sold in head shops in South Carolina as potpourri, incense, Purple Haze, K2, and Spice.<sup>4</sup>

Addressing the purchase and consumption of JWH-018 by consumers, the DEA temporarily scheduled JWH-018 in March of 2011.<sup>5</sup> JWH-018 was permanently scheduled in 2012.<sup>6</sup>

In response to the government's attempt to proscribe JWH-018, manufacturers of synthetic cannabinoids shifted

production to synthesizing XLR-11 and UR-144, substances molecularly and pharmacologically similar to JWH-018 but distinct enough to avoid DEA scheduling.<sup>7</sup> In response, the government scheduled XLR-11 and UR-144, making it illegal to possess or distribute either substance.<sup>8</sup> With that paradigm shift, the manufacturers of synthetic cannabinoids again shifted to different substances, including PB-22 and 5f-PB-22, which were, like their precursors, later scheduled.<sup>9</sup>

From a legal perspective, the ever-changing nature of the chemical makeup of synthetic cannabinoids raises two questions for criminal defense attorneys representing folks accused of distributing these substances in violation of South Carolina law. First, attorneys need to understand which substances are controlled, how South Carolina schedules drugs, and whether an alleged violation of the law actually violated our scheduling provisions at the time of the offense. Second, practitioners must understand how South Carolina defines controlled substance analogues as defendants caught distributing or in possession of controlled substance analogues may still be prosecuted.<sup>10</sup>

1 Wiley, J. L., Marusich, J. A., Human, J. W., Balster, R. L., & Thomas, B. F. (2011). "Hijacking of basic research: the case of synthetic cannabinoids." RTI Press publication No. OP-0007-1111. Research Triangle Park, NC: RTI Press. Retrieved from <http://www.rti.org/rtipress>.

2 *Id.*

3 *Id.*

4 *Id.*

5 76 FR 11075.

6 Synthetic Drug Abuse Prevention Act of 2012.

7 Michael H. Baumann, Ph.D., *The Changing Face of Recreational Drug Use*, Cerebrum, January, 2016, at 8.

8 "DEA Makes Three More Drugs Temporarily Illegal Today", <http://www.dea.gov/divisions/hq/2013/hq051613.shtml>, May 16, 2013.

9 PB-22 and 5F-PB-22," [http://www.deadiversion.usdoj.gov/drug\\_chem\\_info/spice/pb22.pdf](http://www.deadiversion.usdoj.gov/drug_chem_info/spice/pb22.pdf), March 2014.

10 It is important not to forget that synthetic cannabinoid and analogue violations are prosecuted pursuant to Title 44, Chapter 53 and are therefore subject to S.C. Code Section 44-53-520 and 530, the asset forfeiture statute. Sometimes the folks selling these substances make a lot of money, and if law enforcement finds that money, then you can bet they will pursue any available avenues to ensure forfeiture of funds and property.

## How does South Carolina Schedule its Controlled Substances?

South Carolina schedules controlled substances in three ways. First, the legislature periodically codifies drug schedules in South Carolina Code of Laws Sections 44-53-180 through 44-53-270. Second, the legislature defers to the Department of Health and Environmental Control when it is out of session, permitting DHEC to add, amend, or remove substances from South Carolina's controlled substance schedule. Any such change is given the full force of law unless and until the legislature overrules DHEC's decision.<sup>11</sup> Finally, if the Federal government, through the Drug Enforcement Agency, amends the Federal controlled substance schedule, then DHEC is required to, at the first regular or special meeting of DHEC's board or within thirty days of the amendment to the Federal scheduling, change DHEC's schedule to reflect the changes to the Federal schedule.<sup>12</sup> Again, DHEC's changes to South Carolina's controlled substance schedule are to be given the full force of the law unless and until the legislature enacts a law abrogating DHEC's changes.<sup>13</sup>

The South Carolina code also proscribes a series of synthetic cannabinoids that fall in to ten specific categories of chemicals: naphthoylindoles; naphthylmethylindoles; naphthoylpyrroles; naphthylmethylindenes; phenylacetylindoles; cyclohexylphenols; benzoylindoles, WIN 55,212-2; HU-210, HU-211; and adamantoylindoles.<sup>14</sup> Examples of substances included in each category are enumerated in the code, so the code and a quick internet search should help a diligent attorney ascertain whether his client's controlled substance violation is scheduled pursuant

to the synthetic cannabinoid subsection of 44-53-190.

So, for an attorney to determine whether his client is criminally culpable for possessing or distributing synthetic cannabinoids, the attorney must first look to the South Carolina Code. If the substance is not scheduled pursuant to South Carolina law, then it may still be illegal as it may have been scheduled by DHEC while the legislature was out of session. So, a thorough examination should also include an examination of DHEC's drug schedule at the time of the alleged offense. Finally, look to the DEA's drug schedule to determine whether the drug is one prohibited by the U.S. government. If it is, then the prudent lawyer will contact DHEC and ascertain whether DHEC's board has convened and, if so, whether the changes to the Federal schedule were ratified at the DHEC board meeting preceding the date of offense in the accused's warrant or indictment.

### Controlled Substance Analogues in South Carolina

So, let us assume that an attorney's client is arrested on distribution of a schedule I controlled substance, and the indictment alleges that the client sold synthetic cannabinoids for a period of several months in 2014. The attorney checks the South Carolina Code, DHEC's controlled substance schedule, and the Federal drug schedule, and ascertains that the chemical substance the client is accused of distributing is not a substance specifically prohibited by statute or regulation. Does that mean that the client will skate? Not necessarily. He may still face prosecution for distributing an analogue to a controlled substance.

South Carolina Code Section 44-53-110(7) defines a controlled substance analogue as "a substance that is intended for human consumption and that either has a chemical structure substantially similar to that of a controlled substance in Schedules I, II, or III or has a stimulant, depressant, analgesic, or hallucinogenic effect on the central nervous system that is substantially similar to that of a controlled substance in Schedules I, II, or III."<sup>15</sup>

To meet this definition, an analogue must be: 1) intended for human consumption; and 2) either of substantially similar chemical composition to an existent controlled substance or of substantially similar pharmacological effect to a existent controlled substance.<sup>16</sup> The Federal analogue statute is similar to our own, and the available case law requires the admission of both the chemical composition and pharmacological effect prongs to establish the existence of an analogue.<sup>17</sup>

The potential analogues the client sold were all marked "not for human consumption." Does he skate? It is doubtful. The definition merely requires that the substance be intended for human consumption, so the prosecution could rely on cooperating witnesses, co-conspirators, confidential informants, and circumstantial evidence to establish that the client wanted folks to buy his product. Would a jury really believe that the client did not want people to ingest the dime-bags of "potpourri" he sold on the same shelf as rolling papers, glass pieces, and water bongos?

Substantially similar chemical composition is a stickier wicket. In *U.S. v. McFadden*, the Fourth Circuit Court of Appeals addressed the substantially similar chemical composition element of the Federal

11 S.C. Code Ann. Section 44-53-160(B).

12 S.C. Code Ann. Section 44-53-160(C).

13 *Id.*

14 S.C. Code Ann. Section 44-53-190 (24)(a)-(j).

15 S.C. Code Ann. Section 44-53-110(7). It is worth noting here, that this definition specifically carves out an exception for certain substances provided they fit criteria prescribed by the Federal Food, Drug and Cosmetic Act.

16 *Id.* It is worth noting that this definition only applies to Schedule I, II, or III controlled substances. However, as marijuana and synthetic cannabinoids are Schedule I controlled substances, it provides no shelter for our head shop heroes.

17 *United States v. McFadden*, 753 F.3d 432 (4th Cir. 2014).

analogue statute and determined that the term “substantially similar” was not unconstitutionally vague and that expert testimony that a controlled substance and prospective analogue have substantially similar chemical structures is enough evidence of the “chemical structure element” to warrant admission of the case to the jury.<sup>18</sup> So, if the sole disputed fact in an analogue case is the existence of the analogue, then a defense expert capable of contradicting the state’s assertion that the compounds are substantially similar will likely benefit a defendant fighting the state’s classification of the compound in issue.

Likewise, the similar pharmacological effect prong is an element primed for battles of dueling experts. The state must

prove that the chemical in issue has a similar hallucinatory, depressant, or stimulant effect on the human body to the drug the state purports the chemical mimics. While the state may rely on an expert to establish these facts, a defense expert can rebut the same, creating a substantial issue of fact and maybe a reasonable doubt.<sup>19</sup>

### How does a Practitioner Prepare to Defend a Synthetic Cannabinoid Case?

To successfully represent their clients in these types of cases, lawyers need to do their homework. These cases, more than traditional drug cases, benefit from serious elbow grease as the prosecution’s success hinges on its ability to prove that a specific

substance is controlled, is an analogue, or is another proscribed substance like a salt or an isomer<sup>20</sup> of a controlled substance. If a defense attorney understands what the prosecution has to prove to meet its burden, the he can better prepare both on cross and in his case-in-chief to disarm the state’s case or, if the state’s evidence is substantial and reliable, to help his client understand the likelihood of conviction and the benefits of whatever plea avenues are available. ❖

*Sam Tooker, Esq. practices civil and criminal litigation with David. R. Price, Jr., P.A. in Greenville, South Carolina*

<sup>18</sup> *Id.*, overruled on other grounds (see [United States v. McFadden](#), 576 U.S. \_\_\_\_ (2015)).

<sup>19</sup> There may be an argument that the testimony of lay witnesses who have consumed the substance and can attest to their interpretation of its effect on their bodies and whether the substance is similar to any other drugs they have consumed is relevant and pertinent to a jury’s determination of the substance’s pharmacological effects.

<sup>20</sup> Controlled substance salts and isomers are additional types of proscribed substances not addressed by this article, but like analogues, the prosecution’s ability to prove their case likely hinges on testimony regarding the molecular makeup of the substance relative to a specific controlled substance.