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State v. Mendel Appellant's Reply Brief Dckt. 40416

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IN THE SUPREME COURT OF THE STATE OF IDAHO

**Docket No. 40416
District Court No. CR 12-1397 FE**

STATE OF IDAHO,

Plaintiff/Respondent,

v.

BRYCE SCOTT MENDEL,

Defendant/Appellant.

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Seventh Judicial District for Bonneville County. The Honorable Judge Joel E. Tingey presiding.

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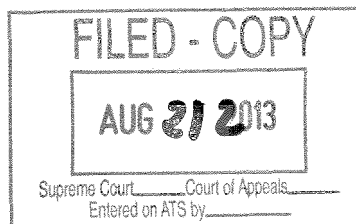


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ARGUMENT

A. When Meaning and Affect are Applied to the Terms of the Statute the Chemical AM-2201 is Not Prohibited Under the Plain Language of the Statute.

In its response the State's position is primarily that AM-2201 is covered under I.C. § 37-2705(d)(30)(ii)(a) by virtue of the "such as" language. The Defendant takes issue with the State's position for two reasons: the first is that the "such as" language introduces a legal fiction and the second is that the State's approach to the "such as" language renders portions of the statute void, superfluous and/or redundant.

The specific portion of the statute in question states:

(d) Hallucinogenic substances.

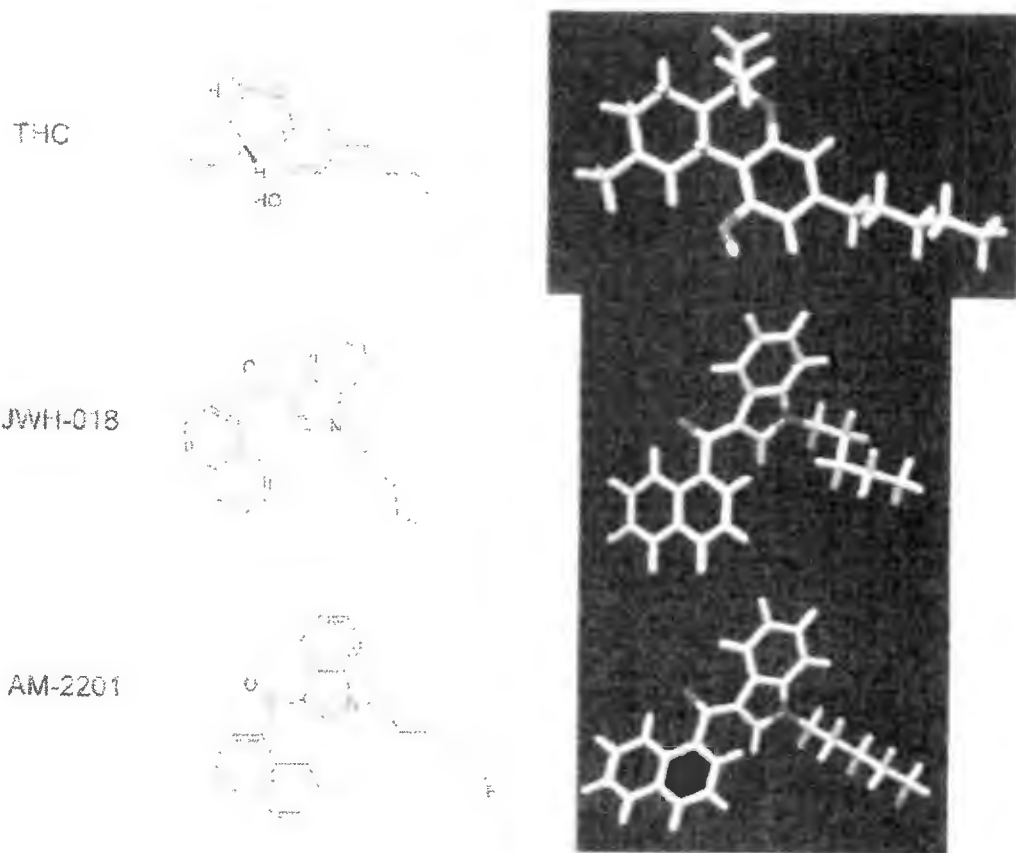
(30) synthetic equivalents of the substances contained in the plant or in the resinous extractives of Cannabis, sp. and/or synthetic substances, derivatives, and their isomers with similar chemical structure such as the following:

(ii) The following synthetic drugs:

(a) Any compound structurally derived from 3-(1-naphthoyl) indole or 1H-indol-3-yl-(1-naphthyl)methane by substitution at the nitrogen atom of the indole ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, or 2-(4-morpholinyl)ethyl...

I.C. § 37-2705(d).

At the outset it should be noted that this statute creates the legal fiction that the listed substances under the "such as" language in any way resembles the structure of THC. A side-by-side comparison of the substances such as JWH-018, JWH-019, JWH-015 and/or AM-2201 to THC show distinct and substantial differences in the chemical structure. *See* R. at 80. Below are depicted the chemical structures of THC, JWH-018 and AM-2201 in both two dimensional and three dimensional form.



While AM-2201 may have only a single atom difference between it and JWH-018 both of those chemicals look nothing like THC. *Id.* Nevertheless, the statute references THC and criminalizes synthetic equivalents of THC and "synthetic substances...with similar chemical structure" to THC. I.C. § 37-2705(d)(30).

It is THC, not JWH-018, to which AM-2201 is ultimately being compared. In providing the list of examples of substances that have a "similar chemical structure" with THC the statute describes whole groups of compounds (which would admittedly include JWH-018) that in reality bear no resemblance to the chemical structure of THC. The result is a complete legal fiction wherein the legislature has deemed JWH-018 to be structurally similar to THC despite the factual reality to the contrary. The result is that anyone reviewing a chemical not expressly

described in the example list is left guessing as what is actually structurally similar to THC since the example list itself does not resemble THC. Consequently, the descriptive terms contained in the example list take on significant importance as they are the sole guidance on what other chemical structures will likewise be considered structurally similar to THC under the legal fiction created by this statute.

The examples provided under the statute amount to a variety of "parent compounds" along with a highly specific list of variations within those parent compounds that are included in the list of prohibited substances. In Dr. Owen McDougal's report the alleged "parent compound" at issue can be seen set apart from the remainder of the chemical in a rectangular box. R. at 81. The substituent (diagonal line) emerging from the rectangular box is at the heart of the issue in the present case. *See id.* This is because it is in reference to the substituent where the statute becomes highly specific to the point it differentiates between one or more bonds between atoms, the shapes and configurations of the atoms, and even the number of hydrogen atoms present. *See* I.C. § 37-2705(d)(30)(ii)(a) and R. at 80-81.

Statutory rules of construction mandate that meaning and effect be given to the example terms. Specifically, where possible, every word in a statute is to be given meaning and effect so as not to be rendered void, superfluous, or redundant. *State v. Hart*, 135 Idaho 827, 831 (2001). The State ignores this rule of statutory construction when it invites this Court to render an interpretation that would make several terms superfluous and/or redundant. This is because the State can only reach its position by claiming that even if AM-2201 does not possess an alkyl, alkenyl, or other substituent identified in I.C. § 37-2705(d)(30)(ii)(a), it looks close enough to other substances that do to be prohibited under the "such as" language.

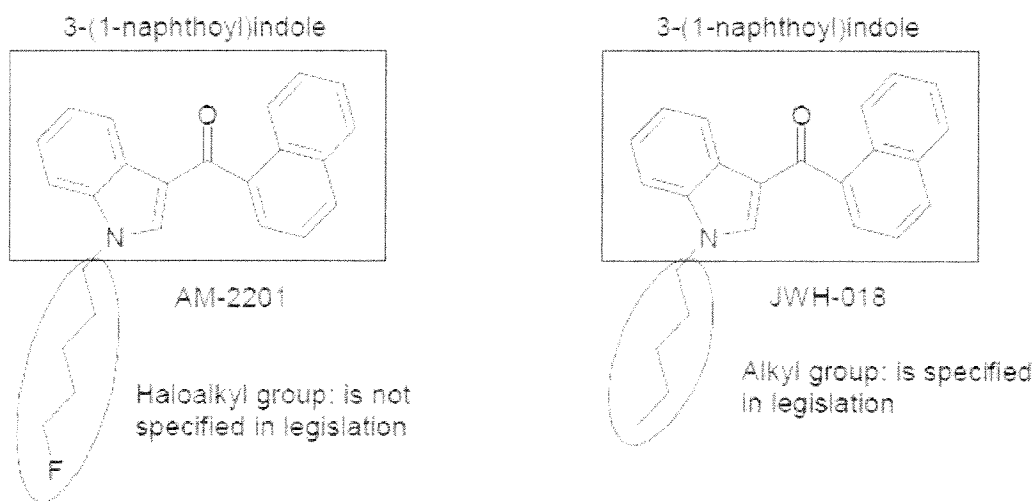
The issue in *Hart* is instructive in this point. In *Hart* the district court needed to interpret I.C. § 18-918(2) and (3). The specific language being interpreted was the meaning of the term "traumatic injury" which was statutorily defined as "a condition of the body, such as wound or external or internal injury, whether of a minor or serious nature caused by physical force." *Hart*, 135 Idaho at 831. The district court ultimately interpreted "traumatic injury" to mean "an injury to the body in which the skin or other tissue is broken." *Id.* The Idaho Supreme Court took issue with the district court's interpretation because such an interpretation rendered the remaining word meaningless. *Id.* As the Idaho Supreme Court noted:

Under that definition, every other injury is already covered by the term wound, making "other injuries" superfluous. The error is even more apparent when considering the actual wording of the statute. The statute, which is written in the disjunctive, refers to wounds or external injuries or internal injuries. If wound is interpreted as referring to the breaking of the skin and internal injuries to the breaking of sub-dermal tissues, the term external injuries must still be given meaning. Any conditions relating to the cutting, tearing, or piercing of the skin are already covered by the term wound. Thus, external injury must refer to conditions other than those involving the breaking of the skin. One of the most common forms of injury that does not involve a breaking of the skin is a bruise.

Id.

The statute in the present case and the State's proposed interpretation introduce the same issues as *Hart*. Here the statute prohibits "substitution at the nitrogen atom of the indole ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl..." I.C. § 37-2705(d)(30)(ii)(a). From the State's position, any chemical comprised of the parent compound 3-(1-maphthoyl)indole would be covered under the "such as" language as the compounds possessing that parent structure would necessarily look similar in some respects to chemicals expressly described in the statute. The chemicals JWH-018 and AM-2201 illustrate this point well which is why both the State and the Defendant have focused so heavily on those two chemicals.

JWH-018 is comprised of the parent compound and contains a substituent that all parties would agree is an alkyl (a single bonded line of solely carbon and hydrogen atoms). *See R.* at 79-81. The chemical AM-2201 shares the same parent structure but contains a substituent that is a haloalkyl or alkyl halide. *See id.* This is represented by the following diagram taken from Dr. McDougal's report.



If the State's position is true then the statutes express references to changes by "alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl..." are rendered completely meaningless as such changes would already be included by virtue of the presence of the parent compound. In short any compound containing 3-(1-naphthoyl)indole is illegal irrespective of the substituent. This is akin to the district court in *Hart* interpreting wound in such a way as to make "every other injury [] already covered by the term wound, making 'other injuries' superfluous." *Hart*, 135 Idaho at 831. If every possible variant of the parent compound is so similar as to be considered covered under the "such as" language, then the specific variations prohibited have no purpose and no meaning as they are already included by sole virtue of the parent compound. This cannot be under standard rules of statutory construction as those words must be given affect.

The Court in *Hart* also focused on the fact that the list was in the disjunctive as the disjunctive implies each word is distinguishable from the other and therefore worthy of independent mention. *Id.* So too are the key terms at issue in I.C. § 37-2705(d)(30)(ii)(a). That language states by "alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl..." *Id.* (emphasis added). The same disjunctive property is present in this case as shown above. Indeed, the terms are distinguishable. While all of them except the morpholinylethyl share the common trait that they are comprised *solely* of carbon and hydrogen atoms they differ in very specific and minute ways. An alkyl is a line of single bonded carbon and hydrogen atoms. An alkenyl is a line of carbon and hydrogen atoms that has one or more double bonds between one or more of the atoms. Cycloalkylethyls and cycloalkylmethyls are cyclical in form rather than a line and vary between each other solely on the number of hydrogen atoms present. One non-hydrocarbon group is specifically mentioned which is the morpholinylethyl. R. at 94.

The State has failed to identify what purpose and effect is to be given to these very specific and nuanced terms included in the statute. The State likes to focus on the sole atom that distinguishes an alkylhalide from an alkyl and therefore AM-2201 from JWH-018. The State does so in an effort to minimize the differences and distinctions between the chemicals under the guise that a single atom difference cannot be substantial enough to remove AM-2201 from the purview of the language in I.C. § 37-2075(d)(30)(ii)(a). In doing so the State ignores the fact that the statute itself makes efforts to delineate and distinguish between structures that are different solely on the presence or absence of a single atom (cycloalkylethyls as compared to cycloalkylmethyls) or the number of bonds between two atoms (alkyls as compared to alkenyls). It also ignores the fact that the statute includes a single specific example of a non-hydrocarbon

structure. From the language of the statute it is readily apparent that an atom makes does make a difference and therefore even a single atom may be substantial enough to render a chemical outside of the scope of the "such as" language of the statute.

Furthermore, it is apparent the list of prohibited variations are intended to have specific meaning comes from the surrounding portion of the statute. Looking at the language again it reads:

Any compound structurally derived from 3-(1-naphthoyl) indole or 1H-indol-3-yl-(1-naphthyl)methane by substitution at the nitrogen atom of the indole ring by alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl, or 2-(4-morpholinyl)ethyl, whether or not further substituted in the indole ring to any extent, whether or not substituted in the naphthyl ring to any extent.

I.C. § 37-2705(d)(30)(ii)(a).

It is the last portion of that subsection we turn to now. As may be recalled the parent compound, 3-(1-naphthoyl)indole is the "parent compound" at issue in the present case. As diagramed in Dr. McDougal's report that compound includes the indole ring and the naphthoyl ring. R. at 79-81. The specific diagram that would be useful here has been reproduced on page 5 of this brief for ease of reference. The indole ring is depicted as the hexagon joined to the pentagon on the left hand side of the parent compound. The naphthoyl ring is comprised of the two hexagons on the right. The language of the statute expressly provides that variations to this compound involving substitutions at the indole or naphthoyl ring, irrespective of the nature of the variation, are covered by the statute. It does so when it reads, "whether or not further substituted in the indole ring to any extent, whether or not substituted in the naphthyl ring to any extent."

For some reason the legislature elected to draft the statute such that any change, no matter what, to the indole or naphthoyl ring would be included in the express language of the statute but

did not do so when discussing the substituent shooting off from the nitrogen atom in the indole ring. For the substituent the statute gets highly technical and nuanced as to the types of changes expressly covered by the statute. Again, this manifests that the descriptions of alkyl, alkenyl, cycloalkylethyl, and so on are significant terms of meaningful importance and affect should be given to them. The State's interpretation and application of the statute fails to do so as it purports that virtually any variation of the parent compound places the resulting chemical squarely under the "such as" language.

In summary, the State has failed to identify what purpose the specific references to alkyl, alkenyl, cycloalkylethyl, cycloalkylmethyl, and morpholinylethyl serves. It fails to account for the fact that when the statute is referring to other components of the chemical structure it includes changes "to any extent" but for some reason becomes substantially more specific when addressing the substituent. While the subsection may serve as an example it must nevertheless serve a purpose. The example list delineates the classes or types of structures the statute is criminalizing. Those classes are carefully set forth in the statute with a premium on distinctions at the atomic level. The classes include alkyls, alkenyls, cycloalkylethyls, cycloalkylmethyls, and morpholinylethyl. A plain reading of the statute dictates such an interpretation. Furthermore, were statute meant to go beyond the delineated classes it could have said "to any extent" just as it did when discussing other components of the chemical structure.¹

One can appreciate the frustration of the State (both the judicial and legislative aspects of it) as it struggles to find language that will satisfactorily criminalize all chemicals that can

¹ The code was amended in 2012 to accomplish precisely this, as it removed the language limiting the examples to alkyls, alkenyls, etc., and replaced that language with "to any extent," thereby including all possible constituents in the example list. Compare I.C. § 37-3705(d)(30)(a) (2011) and 37-2705(d)(30)(a) (2012). The statute was amended again in 2013 to narrow the description of the parent compound so as to focus more on the indole ring.

potentially be used in so called "spice." Nevertheless, American jurisprudence and constitutional guarantees mandate that the language of a statute place a person on notice of the conduct being criminalized. Statutes that rely on example lists to describe prohibited conduct flirt with obscuring constitutional protections by requiring a citizen to make a guess as to whether conduct not expressly identified is sufficiently similar to the example list so as to be illegal. A criminal statute that reduces such an example list to the atomic level and in specialized terms unknown or understood by the general public further blurs the line and makes it even more difficult for a person to know what is prohibited.

The answer is to use the example list as a limitation rather than an expansion on the category of conduct being prohibited. The Defendant understands that to be a reason that example lists are intended to identify classes or categories of things that are prohibited so as to limit the example list to those classes or categories. To that end meaningful purpose must be assigned to the terms and language used in the example list as set forth in subsection (ii)(a). At that level a single atom makes a world of difference. That single atom removes AM-2201 from the classes and categories of chemical substitutions so carefully set forth by the statute. Therefore, AM-2201 was not illegal at the time of the Defendant's conduct and remained legal until the passage and implementation of the subsequent 2012 amendment.

B. Should an Ambiguity Exists as to the Application of the "Such as" Language the Rule of Lenity Should Operate in the Defendant's Favor.

As to the issue of lenity, The Defendant will stand primarily on his prior briefing of this issue but will comment on one argument of the State. The State purports the Defendant has "failed to show any ambiguity in the statute, much less an ambiguity rising to the level of requiring application of the rule of lenity." Brief of Respondent, 7 (July 10, 2013). The Defendant agrees that in this appeal he has not asserted any ambiguity as to the language in the

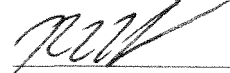
statute. To the contrary the Defendant maintain the plain language of the statute is unambiguous and does not include AM-2201. The argument set forth by the Defendant is essentially in the alternative contending that "[t]o the extent the statute is ambiguous...the rule of lenity" applies. Appellant's Opening Brief, 18 (Mar. 27, 2013).

Such an ambiguity, should there be one, would arise in the application of the "such as" language. As noted in the previous section, due to the fact that the example list in this case reduces things to the atomic level and uses specialized terms, it places citizens in a precarious position as they attempt to comply with the statute. The ambiguity arises in attempting to answer the question of what substances not expressly identified are so closely associated with the example list that they are themselves criminalized. At that level the rule lenity should serve to construe the interpretation and application of the statute in the Defendant's favor.

CONCLUSION

Based on the foregoing and the Defendant's opening briefing the Defendant respectfully requests that this Court reverse the decision of the District Court and find that AM-2201 was not prohibited under I.C. § 37-27059d)(30)(ii)(a) at the time of the relevant conduct of the Defendant.

DATED this 21st day of August 2013.



Ryan L. Holdaway
Attorney for Defendant

CERTIFICATE OF SERVICE


I HEREBY CERTIFY that on this 21 day of August 2013, I caused a true and correct copy of the Defendant/Appellant's Reply Brief to be served by the method indicated below, and addressed to the following:

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