3-19-2013

State v. Alley Appellant's Brief Dckt. 40428

IN THE SUPREME COURT OF THE STATE OF IDAHO

Docket No. 40428

STATE OF IDAHO,

Plaintiff/Respondent,

v.

MORGAN CHRISTOPHER ALLEY,

Defendant/Appellant.

APPELLANT'S OPENING BRIEF

Appeal from the District Court of the Fourth Judicial District for Ada County. The Honorable Judge Richard D. Greenwood presiding.

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STATEMENT OF THE CASE

Mr. Alley was charged with the manufacturing and distribution of a controlled substance, to wit: "spice" and/or "potpourri." R. 000032 to 000036 (Indictment). It was alleged that Mr. Alley's manufacturing and distribution ran from November 2011 through September 2011. R. 000134 to 000170 (Affidavit for Search Warrant). During the time that Mr. Alley was engaged in the practice of manufacturing and selling "spice", the law in Idaho was in flux. R. at 000097 to 000103.

On October 15, 2010 Governor Otter signed into law a rule promulgated by the Idaho Board of Pharmacy in the previous month. *Id.* The rule made it illegal to possess, manufacture, or distribute some chemicals that had been used to make "spice." Id. Those chemicals were: CP 47,497, HU-210, JWH-018, JWH-073, JWH-200, JWH-081, and JWH-250. Id. The Board of Pharmacy rule remained in effect until March 10, 2011, when House Bill 139 was signed into law by Governor Otter and took immediate effect. *Id.* at 000102 to 000103. Whereas the Board of Pharmacy Rule prohibited chemicals by name, HB 139 prohibited substances by describing groups of chemicals, and further prohibited certain chemical alterations to the prohibited chemicals. Compare R. at 0000098 to R. at 000172 to 000176.

In between the time the Board of Pharmacy promulgated its rule and the time HB 139 was signed into law, many in the "spice" industry began looking for chemicals that would be compliant with the language contained in HB 139. R. at 000094. The language of HB 139 was available, and prior to its passage the language was passed along to Dr. Richard Parent along with a list of potential chemical candidates for use in "spice." *Id.* After comparing the language

of the bill with the chemical structures of the list provided to him, Dr. Parent was able to determine that some chemicals were not covered by the language of HB 139. *Id.* Specifically, Dr. Parent concluded that AM-2201 was not covered by the language. R. at 000109 to 000110.

This information soon became common knowledge throughout Idaho, and many spice products began using AM-2201 even before March 10, 2011. To ensure compliance with the law, many manufacturers and distributors would get their base chemicals tested to ensure that they were not "dirty" (i.e. containing chemicals covered under HB 139). *See id.* This had to be done since one cannot tell by simply looking at a chemical what the chemical is, just as one cannot look at a "spice" product and know with what, if any, chemical or chemicals the plant matter has been treated. As with many others in the industry, Mr. Alley was actively engaged in the practice of testing chemicals shipped to him to ensure those chemicals did not contain prohibited substances. R. at 000134 to 000170.

Mr. Alley was not accused of possessing and/or distributing anything illegal prior to the implementation of HB 139. R. 000032 to 000036; 000134 to 000170. The primary instances of distribution were samples of "spice" taken and/or purchased at various times throughout September 2011. *Id.* Specifically, the product involved is a brand called Twizted Potpourri. *Id.* The State ultimately came into possession of three different products from the Twizted Potpourri line: Fire, Ultra Hypnotic, and Blueberry. R. 000161. Those samples were obtained through dumpster diving and controlled buys. R. at 000150 to 000155 and 000161.

Of the samples tested, a total of three different chemicals were identified by the State as alleged controlled substances R. at 000154 to 000155 and 000166 to 000167. On September 13,

2011, some product was taken from a dumpster and some of it was tested. R. at 000150 to 000156. It appears the seized product was potentially a part of the Twizted Potpourri line but it is not clear which sub-product it was intended to be (i.e. Fire, Ultra-hypnotic, or Blueberry). See *id.* That sample was sent in for testing on September 14, 2011 and found to contain AM-2201 and JWH-210. *Id.* Another sample obtained via dumpster diving on September 12, 2011 was ultimately found to contain only AM-2201. R. at 000148 to 000156. That product was identified as Fire Twizted Potpourri. *Id.*

Finally, on September 26, 2011 a controlled buy was made in which the State took control of one sample each of Fire, Ultra-hypnotic, and Blueberry. R. at 000159 to 000162. Each sample was tested. R. at 000167. Fire was confirmed to contain only AM-2201 as was Blueberry. *Id.* Ultra Hypnotic was tested as containing JWH-019. *Id.* The end result is that it appears from the State's evidence that only two samples have ever contained anything other than AM-2201, with one sample containing JWH-210 and the other JWH-019.

The State believes that AM-2201 is a controlled substance and makes no distinction between AM-2201 and other prohibited substances. The Defendant disagrees and thus filed his motion to dismiss based on the contention that AM-2201 was legal in the State in of Idaho at the time he possessed it. R. at 000079 to 000176. The Idaho Legislature amended the relevant statute in 2012 and struck the language at issue in the present case and replaced it with the language "to any extent." 2012 Idaho Sess. Laws 181 (hereinafter HB 502). Had the language used in HB 502 been in effect at the time of Mr. Alley's possession he would concede the language included chemicals such as AM-2201. Nevertheless, the entirety of Mr. Alley's conduct was prior to the

passage of HB 502 and in fact Mr. Alley's case may have been a driving factor in the Legislature's decision to amend the language of the statute.

At the hearing on the motion to dismiss, Defendant presented expert testimony from two doctors of organic chemistry. They both testified that AM-2201 has a structure that substantially differs from the structures prohibited by Idaho Code 37 § 2705(d)(30)(a), and thus, is not a controlled substance under Idaho Law.

Specifically, Dr. Owen McDougal testified, "The chain itself [in AM-2201] is an alkyl halide. So it has the fluorine as a functional group off of the hydrocarbon chain. In the statute it specifies an alkyl group. Alkyl groups are nothing but carbon and hydrogen. When you add a halogen or some other hetero atom, like oxygen or nitrogen [or fluorine], you create functionality in the molecule, and it becomes a different *class* of compound." Tr. of Hearing on Motion to Dismiss, pp 39-40 (emphasis added). Likewise, Dr. DeJesus testified that AM-2201 has a "flouro-alkane chain" and is thus not an alkyl group, *see* Tr. pp. 118 to 125, and that, "[I]n the case of substitution other than carbon, such as the one that we are dealing with in this case right here [AM-2201], it then becomes another functional group. It is no longer an alkyl group." Tr. pp. 131.

Despite this testimony, the District Court denied the motion on the basis that in passing HB 139, the legislature intended to ban chemicals used in "spice", that is, those that mimic the "hallucinatory effects" of marijuana. R. at 000308. The District Court turned to legislative intent without having ever found any portion of the statute to be vague, ambiguous, or in conflict with other law. R. at 297-318. Furthermore, the District Court interpreted the legislative intent as

applying to the pharmacological effects of certain substances without regard to actions of the legislature suggesting precisely the opposite. *Id.*

Based on the concerns Mr. Alley had with the decision as issued by the District Court Mr. Alley filed a Motion to Reconsider. R. at 334-63. The District Court ruled from the bench on the motion and upheld its prior decision on the same grounds and reasoning as set forth in the written decision. R. at 379. As a result of the findings and conclusions of the District Court Mr. Alley entered a conditional plea of guilty. R. at 447-49.

Mr. Alleys conditional plea was based on the Court's denial of his motion to dismiss. *See* R. at 000297 to 000318. It is Mr. Alley's position that the District Court erred by denying his motion to dismiss and his subsequent motion reconsider, because Idaho Code § 2705(d)(30)(a) (2011) did not prohibit the possession, manufacturing, or distribution of the chemical AM-2201.

ISSUES PRESENTED ON APPEAL

On appeal, Defendant argues that the judgment of conviction should be overturned because the district court's denial of the motion to dismiss was in error. Defendant maintains: (1) AM-2201 was not prohibited by the relevant statutory language in place at the time of the alleged offense (which has since been amended to be broader and now unarguably prohibits AM-2201), specifically:

a) The district court improperly turned to legislative intent in interpreting Idaho Code § 2705(d)(30)(a);

b) The district court's improperly considered the alleged effects of AM-2201 in interpreting § 2705(d)(30)(a);

c) § 2705(d)(30)(a) is not ambiguous and does not prohibit AM-2201; and

d) In the alternative, to the extent § 2705(d)(30)(a) is ambiguous, the district court should have applied the rule of lenity, and if it had done so, it should have concluded that 2705(d)(30)(a) does not prohibit AM-2201.

(2) that the interpretation afforded I.C. § 37-2705(d)(30)(a) by the district court renders it unconstitutionally vague.

ARGUMENT

I. The Trial Court incorrectly determined that AM-2201 is prohibited by I.C. § 37-2705(d)(30)

The question of whether a substance is designated in the Controlled Substance Act as a controlled substance is a question of law for the court. *State v. Hobbs*, 101 Idaho 262, 262 (1980); *State v. Kellog*, 102 Idaho 628 (1981). As such, appellate review is *de novo*. *See State v. Doe,* 92 P. 3d 521, 523-24; 140 Idaho 271 (2004).

A. The Court improperly resorted to examining legislative history without first determining whether the statutory language was ambiguous.

In interpreting statutory language, a court must give the words their plain, usual, and ordinary meaning. Where statutory language is not ambiguous, the court should not consult legislative history or other extrinsic evidence. *Verska v. St. Alphonsus Reg'l Med. Ctr.*, 151 Idaho 889, 893, 265 P.3d 502, 506 (2011) (citing *City of Sun Valley v. Sun Valley Co.*, 123 Idaho 665, 667, 851 P.2d 961, 963 (1993)). In its order denying Defendant's motion to dismiss the indictment, the District Court judge cited the language in *Verska* prohibiting it from resorting to legislative history if it determined the statute's plain language was unambiguous.

Despite its correct recitation of the law with regard to statutory interpretation, the District Court then proceeded to resort to legislative history to conclude that the legislature intended I.C. § 37-2705(d)(30) to prohibit AM-2201. The Court's reliance on legislative intent is evidenced by the Court's framing of the issue when it asked, "what did the legislature intend to add to Schedule I?" R. at 300 and 304. The Court then turned to the entirety of I.C. § 37-2705(d) and concluded that "[b]y stripping the statute down to the component parts to be construed it is fairly ease to discern the intention of the legislature[.]" R. at 306. Other language evidencing the Court's reliance on the legislative intent includes, "[t]he minutes of the legislative committees," "the Idaho legislature unambiguously *intended* to add synthetic imitators of marijuana to Schedule I..." and "[i]t was the *intent* of the legislature." R. at 308 (emphasis added).

Based on the legislative history, the Court concluded that the legislature "unambiguously intended to add synthetic imitators of marijuana to Schedule I and did so in broad language that encompasses AM-2201." R. at 307-08. That is, the District Court ultimately concluded that the statute was unambiguous, but reached its conclusion that the language in I.C. § 37-2705(d)(30) prohibiting "THC 'and/or synthetic substances, derivatives, and their isomers with similar chemical structure' is referring to synthetic marijuana or synthetic substances that mimic the hallucinogenic properties of marijuana" by resorting to legislative history.

Accordingly, the District Court erred in resorting to legislative history first, and then using that legislative history to conclude that the unambiguous language of the statute prohibited AM-2201.

What is more is that in making its analysis the District Court omitted any discussion of,

or consideration for, other acts of the legislature when passing HB 139. Specifically, the removal of certain language from the relevant section of the code. The language that was removed looked expressly at the pharmacological effects of a substance. The remaining language referred only to the structural elements of the substance in question.

The version of Idaho Code § 37-2705(d)(30) that was in place prior to the 2011 legislative passage of House Bill 139 read:

> Tetrahydrocannabinols. 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 and pharmacological activity* such as the following:

I.C. § 37-2705(d)(30)(2010)(emphasis added).

The 2011 House Bill 139 that added subsection (ii)(a), which was the subject of the arguments before this Court, also removed from I.C. § 37-2705(d)(30) the term "pharmacological activity" so that it now reads:

> Tetrahydrocannabinols--or 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:

I.C. § 37-2705(d)(30)(2011)(emphasis added).

The removal of the language "pharmacological activity" is quite telling as it creates a plain reading of the statute that does not take into consideration the pharmacological or hallucinogenic effects a given substance may have. A plain reading of the relevant section of statute now requires looking solely at the structural elements of a substance in determining if it

contained within the purview of the statute.

Indeed, the removal of the pharmacological reference in subsection (30) makes the statute more consistent with the language being added under subsection (30) in that all of the language contained in the subsections of (30) is entirely structural related. Those subsections, such as subsection (30)(a)--the subsection in question in the present case--describe naphthyls, indoles, nitrogen atoms on the indole ring, alkyls, alkenyls, cycloalkylmethyls, and cycloalkylethyls. All of those describe structures and not pharmacological effects of a given substance. Even more compelling is considering how fine a point is placed on the structural descriptions. The sole difference between an alkyl and alkenyl is the presence of one or more double bonds between two carbon atoms. Tr. at 40:22-42:9. The only difference between the cycloalkylmethyls and cycloalkylethyls is the relative number of hydrogen to carbon atoms present. Tr. at 43:2-44:3. For the legislature to break down structural descriptions to the point of discerning between a single bond and double bond or a single carbon atom is indicative of a severe focus on structure and not effect.

The result is that while the district court should not have considered the legislative history in reaching its conclusion even where it did consider such history it did not account for the legislature's actions in removing references to pharmacological effects and extreme focus on structure. For both reasons the district court's decision was improper and should be overturned.

B. The Court's determination that I.C. § 37-2705(d) prohibits all "synthetic substances that mimic the hallucinogenic properties of marijuana" was error.

The proper procedure would have been to begin by examining the plain language of I.C.

§ 37-2705(d)(30), which defines tetrahydrocannabinol, "synthetic equivalents of the substances contained in the plant or in the resinous extractives of Cannabis," and, as relevant here, "synthetic substances, derivatives, and their isomers with similar chemical structure [to THC]" as Schedule I drugs. Had the District Court followed this procedure, it would not have concluded that the statute prohibits all "synthetic substances that mimic the hallucinogenic properties of marijuana," because the statutory language states that it is prohibiting substances with "similar chemical structure" to tetrahydrocannabinol (THC, the primary psychoactive chemical in marijuana) and other synthetic equivalents of the chemicals contained in marijuana.

The District Court reached its erroneous conclusion by determining that, in enacting I.C. § 37-2705(d)(30), the legislature was attempting to prohibit "spice" (plant matter combined with chemicals that have similar effects to THC or marijuana), and concluding that the list of prohibited chemical structures following the language "such as" in I.C. § 37-2705(d)(30) was provided merely by way of example and thus could not narrow the language preceding the words "such as."

The District Court was correct in concluding that the plain meaning of "such as" is that whatever list follows, it is non-exhaustive. However, the fact that the statute does not specifically list every chemical it prohibits does not render the list meaningless. In determining the meaning of a statute, courts must give effect to all the words of the statute so that none will be rendered void, superfluous, or redundant. *Hillside Landscape Const., Inc. v. City of Lewiston*, 151 Idaho 749, 264 P.3d 388 (2011) (citing *State v. Mercer*, 143 Idaho 108, 109, 138 P.3d 308, 309 (2006)). Presumably, the legislature did not expend time and resources drafting a list of

prohibited chemicals idly, but rather to instruct the courts as to what it meant by "similar chemical structure." *See Stonecipher v. Stonecipher*, 963 P.2d 1168, 131 Idaho 731 (1998) (non-exhaustive list added to statute by amendment "clarified the language" of the statute).

Moreover, contrary to the District Court's conclusion, non-exhaustive lists can and, indeed, do narrow the general language they explain. *See State v. Cobb*, 969 P.2d 244, 132 Idaho 195 (1998) (disturbing the peace ordinance survived constitutional vagueness challenge because it included a non-exclusive list of examples of proscribed conduct). It is a rule of statutory construction that "where general words of a statute follow an enumeration of persons or things, such general words will be construed as meaning persons or things of like or similar class or character to those specifically enumerated." *State v. Hart*, 135 Idaho 827, 831, 25 P.3d 850, 854 (2001). According to this rule, to determine whether AM-2201 was included within the general term "synthetic substances, derivatives, and their isomers with similar chemical structure [to THC]," the District Court should have considered whether AM-2201 is of a like or similar class, character, and severity to those classes of chemical structures specifically enumerated. *See, e.g., State v. Kavajecz*, 80 P.3d 1083, 1087, 139 Idaho 482 (2003) (criminal statute using a non-exclusive list does not prohibit conduct of similar class and character but lesser severity); *Johnson v. Sunshine Min. Co., Inc.,* 684 P. 2d 268, 106 Idaho 866 (1984) (non-exhaustive list of recreational activities that included "pleasure driving" also encompassed motorcycling for pleasure because it was sufficiently similar to the activities listed).

Further, the examples included in a non-exhaustive list can also narrow the definition of another listed example. In *Cowles Pub. Co. v. Kootenai County Bd.*, 159 P.3d 896, 901 (Idaho

2007), the Idaho Supreme Court was called upon to determine whether email correspondence between a public employee and her supervisor was covered by the personnel records exemption from disclosure under the state's public records act. The act did not define "personnel records" but instead provided a non-exhaustive list of exempt personnel records. Although one of the listed examples was "correspondence" and the Court acknowledged that the emails were a type of correspondence, it held that "in context, it becomes clear that . . . only those types of correspondence typically found in a personnel file [are exempt] . . . [the emails] are informal communications between an employee and her supervisor, unrelated to personnel administration." *Id.* at 902. That is, even though "correspondence" was specifically included in a non-exclusive list, the Court held that, in context, the meaning of "correspondence" was narrowed by the other items included in the list.

Here, the District Court refused to undertake this analysis. Rather, it improperly examined the legislative history to determine that the statute was intended to "deal with the so-called 'spice' problem" and thus interpreted the general language as prohibiting all substances that could have similar hallucinatory effects to marijuana, regardless of their lack of similarity to the chemical structures listed in the statute with regard to structure or potency. Rather than engage in the kind of statutory interpretation required by Idaho's case law, the District Court rendered the legislature's non-exhaustive list meaningless.

Indeed, the non-exhaustive list provided in the code includes subsections (a) through (i), most of which contained yet another list within them. For example, subsection (a) contains a subset list of "alkyl, alkenyl, cycloalkylmethyl, cycloalkylethyl or 2-(4-morpholinyl)ethyl." As

with any other words in the statute these words too, must be given effect and cannot be rendered superfluous or meaningless.

Nevertheless, the district court's opinion does not consider itself with the meaning and application of those terms or what purpose they serve in the overall application of the statute. Yet they do serve a purpose, That purpose is to place context and limits to the applicability of the statute. Those words denote very specific chemical structures that are intended to fall within the purview of the statute. In short, they define the scope of the statute.

Where a chemical falls outside of the type and nature being described by those terms it by definition falls outside of the list of chemicals expressly covered in the statute. As noted by Dr. McDougal, the chemical AM-2201 does not just fall outside of the scope of chemicals described in subsection (d)(30)(ii)(a) it is in a different "class" altogether. Tr. at 39:9-40:6. It is this structural separation between AM-2201 and the chemicals described in (d)(30)(ii)(a) that places AM-2201 outside of the scope of the statute and therefore legal under the law in effect at the time. Because the district court looked solely to similarity in pharmacological effect and disregards the limiting nature of the structural descriptions in the statute the decision of the district court should be reversed.

C. AM-2201 is not included among the substances prohibited by I.C. § 37-2705(d)

A correct statutory analysis leads to a conclusion that AM-2201 is not a prohibited substance. As noted by the District Court, I.C. § 37-2705(d)(30), unlike other sections of I.C. § 37-2705, does not prohibit specific chemicals. Rather, it prohibits "[t]etrahydrocannabinols or synthetic equivalents of the substances contained in . . . Cannabis, sp. and/or synthetic

substances, derivatives, and their isomers with similar chemical structure such as the following:" There are two subsections, the first of which prohibits THC and its optical isomers, and the second of which prohibits "the following synthetic drugs" and then lists in each of its sub-subsections "any compound structurally derived from" one of six chemicals "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."

In the present context the "non-exhaustive" list is exceptionally narrow. The differences between the examples are the relative number of hydrogen to carbon atoms (cycloalkylmethyl or cycloalkylethyl), the number of bonds between carbon atoms (alkenyls), and the length of a hydrogen and carbon chain (alkyls). I.C. § 37-2705(d)(30)(a). All the examples hinge around differences in chemical chains containing only hydrogen and carbon. Consequently, at the molecular level, all non-hydrogen and carbon chains fall outside the list. Otherwise, one would expect that the list would have covered non-hydrogen and carbon type substituents.[1] Due to the highly technical, specific, and minute distinctions between the examples this Court should take great caution in applying the "such as" language beyond the types of examples provided. AM-2201 is not of the type listed because it contains a non-hydrogen and carbon atom substituent.

It should be noted here that the district court never made any findings as whether AM-

[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).

2201 was expressly covered by the language in (d)(30)(ii)(a). The district court rested almost entirely on the language contained in (d)(30) and on its conclusions that AM-2201 allegedly exhibits pharmacological effects similar to THC. As such, to the extent this Court addresses the issue of whether AM-2201 is described in (d)(30)(ii)(a) it is doing so independent of the conclusions of the district court.

D. To the extent the statute is ambiguous as to whether AM-2201 is prohibited, the rule of lenity requires that the statute be interpreted in Defendants' favor.

The rule of lenity, as applied to criminal statutes, requires that any ambiguity should be strictly construed in favor of the accused. *State v. Herrera-Brito*, 131 Idaho 383, 386 (Ct. App. 1998); *see also Capital Care Ctr. v. Idaho Dept. of Health and Welfare*, 129 Idaho 773, 776, (1997). In construing statutory language in the criminal code, the court in *Herrera-Brito* held that "[a]n act cannot be held criminal under a statute unless it *clearly* appears from the language used that the legislature so intended." *Id.* at 387 (emphasis supplied). The order of the language in that quote is essential to the proper application of the rule of lenity. The Court should not look to, or apply, legislative intent. Rather, the language of the statute itself must make evident the intent of the legislature to criminalize the specific conduct of the accused.

This distinction is further explained by the Idaho Supreme Court:

> [w]hile the appellant may be correct that it was the legislative intent to deter not only a person who actually possesses a gun, but all principals involved in a crime in which a dangerous weapon was employed, we cannot make such an interpretation for the legislature when no such intention appears *from the language of the statute*. To hold otherwise would be supplying what the legislature left vague and this we cannot do.
>
> *State v. Morrison*, 143 Idaho 459, 461 (Ct. App. 2006) (quoting *State v. Thompson*, 101 Idaho 430, 438 (1980) (emphasis supplied).

Indeed, in *Morrison* the Court of Appeals found that the legislative history supported the State' s position but concluded it was bound by the "admonition in *Thompson* that the intention of the statute must appear in its language" in order to comport with the rule of lenity. *Morrison*, 143 Idaho at 461.

Any ambiguity in a criminal statute must be resolved in favor of the Defendant. *See also McNally v. U.S.*, 483 U.S. 350 (1987). To the extent the District Court relied upon extrinsic evidence of legislative intent to determine the legal status of AM-2201, it has essentially already implicitly concluded that the statutory language is ambiguous in this regard. The District Court's failure to explicitly recognize this ambiguity and to construe it in favor of the Defendant was error.

II. As applied to Defendants, I.C. § 37-2705(d) is void for vagueness

In the alternative, Defendant submits that the statute is void for vagueness. Where the constitutionality of a statute is challenged, appellate review is de novo. *State v. Korsen*, 138 Idaho 706, 711, 69 P.3d 126, 131 (2003); *State v. Martin,* 148 Idaho 31, 34 218 P.3d 10, 13 (Ct. App. 2009).

A criminal defendant asserting an argument that a statute is unconstitutionally vague bears the burden of overcoming a rebuttable presumption of statutory validity. *State v. Korsen*, 138 Idaho 706, 711 (2003). To meet his burden and overcome the presumption, a defendant can show either that the statute failed to provide fair notice of what conduct is illegal or that the statute failed to provide sufficient guidelines such that the police lacked appropriate guidelines in

the statute's enforcement. *Id.*

Vague statutes violate the due process rights of an individual under the federal constitution as applied through the Fourteenth Amendment, and also violate the due process rights of Idahoans under the Idaho Constitution. *Grayned v. City of Rockford*, 408 U.S. 104 (1972) and *City of Lewiston v. Mathewson*, 78 Idaho 347 (1956). Typically, a statute that "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning, and differ as to its application" is unconstitutionally vague. *Capital Care Center v. Idaho Department of Health and Welfare*, 129 Idaho 773, 776, (1997) (internal citations omitted). In the case of a criminal statute, there is less tolerance for vague language than what might otherwise be permitted under a "civil or non-criminal statute." *Id.* (citing *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 716 (1990)). Indeed, when analyzing a civil or non-criminal statute, the language is not impermissibly vague so long as "persons of ordinary intelligence can derive 'core meaning' from them." *Kolar v. Cassia County Idaho*, 142 Idaho 346, 354 (2005). Perhaps this is because it has long been recognized that "in most English words and phrases there lurk uncertainties." *State v. Bitt*, 118 Idaho 584, 585 (1990)(citing *Rose v. Locke*, 423 U.S. 48, 50 (1975)).

However, noticeably absent from the vagueness test for criminal statutes is the "core meaning" element. *Compare Capital Care Center*, 129 Idaho at 776 and *Kolar*, 142 Idaho at 354. It is not enough in the criminal context that the party accused of a criminal act should have understood the "core meaning" of the statute. Rather, the language must be sufficiently clear so that the accused should have known the precise conduct being prohibited or mandated.

Therefore, when it comes to criminal statutes, there can be little tolerance of the "uncertainties" that "lurk" in "word and phrases" of the English language.

In the criminal context, a statute must provide "fair warning of the conduct that it makes a crime" such that the conduct punished as criminal (here, possession of the chemical AM-2201) is "plainly and unmistakably" within the provisions of a statute. *State v. Kavajecz*, 80 P.3d 1083, 139 Idaho 482 (2003). So far as possible, to comport with due process requirements, criminal statutes must draw a clear line and provide "fair warning . . . in language that the common world will understand" what the law intends to do if that line is crossed. *Id.* (citing *United States v. Lanier*, 520 U.S. 259, 265, 117 S.Ct. 1219, 1224, 137 L.Ed.2d 432, 442 (1997)).

Here, not only can the "common world" not understand which chemicals are prohibited under the statute, experts in the field of organic chemistry do not understand where the line is drawn.

Defendant presented the testimony of two highly qualified experts in the field in Dr. McDougal and Dr. De Jesus. Tr. pp. 29 to 174. Each has significant experience and education in the field of organic chemistry. *Id.*, *see also* R. 000187 to 000198. Both experts concluded that AM-2201 is not described under the statute. *See id.*, *see also* R. 000354 to 000363. Moreover, Defendant did not contact numerous experts and then pick only the ones that agreed with his position. The Defendant selected the experts based upon their qualifications and had each independently analyze AM-2201 under the statute. Defendant's experts unanimously concluded that AM-2201 was not described under the statute.

The State elicited expert testimony from a State lab technician (employed by the State

and under the direction of the State Police) who testifed that an "alkyl" is inclusive of "haloalkyls." The Defendant posits that this because the State is unable to find anyone with a doctorate level of education and unaffiliated with the State who would agree with the position of Mr. Sincerbeaux, the State's expert, who holds only a Bachelor's degree and is a longtime employee of the State.

Regardless, it is apparent from the conflicting expert testimony presented in this case that the statute fails to provide clear warning of what is prohibited, even to experts. Certainly, individuals of common intelligence could conclude that because the substitutions listed as prohibited are all comprised entirely of carbon and hydrogen atoms, substitution by haloalkyl is not prohibited because haloalkyls include adding entirely different types of atoms (fluorine).

A disagreement between experts does not inherently make a law vague, but it is relevant to a determination of vagueness because the vagueness test itself asks how a person of common intelligence would view the statute. Consequently, where even experts cannot agree on the meaning of the language in a statute, one cannot expect that lay persons would be able to determine what is and is not intended to be prohibited with any reasonable accuracy.

Likewise, although a subsequent clarifying amendment is not conclusive in a vagueness analysis, it is relevant to that analysis that the Idaho legislature has already taken steps to clarify and correct for the confusion created by the initial language in the statute. In the 2012 legislative session I.C. § 37-2705(d)(30)(ii)(a) was amended to read,

> 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~~ *to any extent*,

whether or not further substituted in the indole ring to any extent, whether or not substituted in the naphthyl ring to any extent.[2]

I.C. § 37-2705(d)(30)(ii)(a) 2012 (emphasis and strikethrough added).

While the language "to any extent" is certainly more broad then the language it replaced it nevertheless goes a long way in making the statute *clear*. As amended, individuals are placed on notice that *any* substituent, irrespective of whether it is alkyl, haloalkyl, or one of the many other variants, is prohibited. There is no question that this language includes the chemical AM-2201.

Even if the vagueness in the statutory language does not rise to the level of unconstitutionality, Judge Greenwood's interpretation of the statute as prohibiting any substance with similar "hallucinatory effects" to marijuana introduces unconstitutional vagueness, especially given that the effects of chemicals in the human body cannot be determined based solely on the chemical structures of the compounds. *State v. Doe*, 92 P.3d 521, 140 Idaho 271 (2004) (statute that may not be facially overbroad or void for vagueness may nonetheless interpreted in a manner that renders it unconstitutionally overbroad or vague); *State v. Richards*, 896 P.2d 357, 127 Idaho 31 (Ct. Appeals 1995) (infirmity for vagueness may be avoided by interpreting the statute in a manner that comports with constitutional limitations).

Also relevant is that Defendant made a good faith effort to comply with Idaho law.

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[2] This was the language used in the federal law recently passed and was the model language recommended for some time. For some unknown reason Idaho elected not to use the model language and instead chose to list specific substituents. Only after the hearing in *State v. Alley* did the State reevaluate the language and amended the language to match the model language and make the law clear.

Defendant retained experts in organic chemistry to interpret the law, and tested "spice" to ensure that chemicals that were clearly prohibited, such as JWH-018, were not present. Although a good faith subjective belief that conduct is not illegal is not a defense to illegal action, it is relevant to establishing that reasonable people would necessarily disagree as to what the statute prohibited, and, thus, that the statute's lack of clarity presents a due process concern, at least insofar as whether substitution by haloalkyl is prohibited.

CONCLUSION

The judgment of conviction entered in this case should be VACATED, because it was based on Defendant's plea of guilty, which was conditional upon the District Court's denial of Defendant's motion to dismiss, which was based on an error of law. Specifically, the District Court erred in determining that AM-2201 was, at the relevant time, a controlled substance under Idaho law. Specifically, the court erred by examining legislative history without first finding a statutory ambiguity, by resorting to the alleged effects of AM-2201 rather than limiting its analysis to the chemical's structure, and by either failing to correctly interpret the statute's unambiguous language or, in the alternative, failing to apply the rule of lenity to interpret ambiguous language in Defendant's favor. In the alternative, to the extent that the statute can be interpreted as prohibiting AM-2201, it is void for vagueness.

RESPECTFULLY SUBMITTED this 16th day of March, 2013.

Ryan Holdaway
Attorney for Defendant/Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of March 2013, I caused a true and correct copy of the **DEFENDANT/APPELLANT'S OPENING BRIEF** to be served by the method indicated below, and addressed to the following:

Idaho Supreme Court
451 W. State St.
PO Box 83720
Boise, ID 83720-0101

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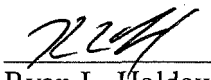

Ryan L. Holdaway