RELEVANT STATUTORY AND REGULATORY PROVISIONS (excerpted):

D.C. Code § 48-904.01:

(a)(1): [I]t is unlawful for any person knowingly or intentionally to manufacture, distribute, or possess with intent to manufacture or distribute, a controlled substance.

(a)(2): Any person who violates this subsection with respect to:

> (A) A controlled substance classified in Schedule I or II that is a narcotic or abusive drug shall be imprisoned for not more than 30 years or fined not more than the amount set forth in § 22-3571.01, or both;
>
> (B) Any other controlled substance classified in Schedule I, II, or III, except for a narcotic or abusive drug, is guilty of a crime and upon conviction may be imprisoned for not more than 5 years, fined not more than the amount set forth in § 22-3571.01, or both;

(d)(1): [I]t is unlawful for any person knowingly or intentionally to possess a controlled substance…. Except [PCP], any person who violates this subsection is guilty of a misdemeanor and upon conviction may be imprisoned for not more than 180 days, fined not more than the amount set forth in § 22-3571/01, or both.

D.C. Code § 48-901.02(15) and (26): define "narcotic drug" and "abusive drug"

D.C. Code § 48-904.09: Attempt; conspiracy.

> Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

D.C. Code § 48-902.04: Schedule I enumerated.

> The controlled substances listed in this section are included in Schedule I, unless and until removed therefrom pursuant to § 48-902.01…

D.C. Code § 48-902.01

> (a) The Mayor shall administer this chapter and, with provision for public notice and comment, may add substances to or delete or reschedule all substances enumerated in the schedules in § 48-902.04, § 48-902.06, § 48-902.08, § 48-902.10 or § 48-902.12 pursuant to subchapter I of Chapter 5 of Title 2 and pursuant to the procedures set forth in this chapter.

DCMR § 22-B-1201: Controlled Substances Act Rules, Schedule I Enumerated

> THIS IS WHERE TO FIND THE CURRENT LIST OF SCHEDULE I SUBSTANCES. Found at this link: http://dcregs.dc.gov/Gateway/RuleHome.aspx?RuleNumber=22-B1201 (see sheet following for visual).

D.C. Municipal Regulations and D.C. Register

Beta

Secretary of the District of Columbia | Office of Documents and Administrative Issuances

Rule: 22-B1201

SCHEDULE I ENUMERATED

Title: 22-B PUBLIC HEALTH AND MEDICINE

Chapter: 22-B12 CONTROLLED SUBSTANCES ACT RULES

Latest version of the final adopted rule presented in D.C. Municipal Regulations (DCMR)

Effective Date: 12/2/2016

View Text

Authority: § 201(a) of the District of Columbia Uniform Controlled Substances Act of 1981, effective August 5, 1981 (D.C. Law 4-29; D.C. Official Code § 48-902.01(a) (2012 Repl.)) and Mayor's Order 98-49, dated April 15, 1998.

Source: Final Rulemaking published at 39 DCR 1882 (March 20, 1992); as amended by Final Rulemaking published at 41 DCR 7967 (December 16, 1994); as amended by the Uniform Controlled Substances Amendment Act of 1999, §2(a)(3), effective May 9, 2000 (D.C. Law 13-99; 47 DCR 791 (February 11, 2000)); as amended by Emergency and Proposed Rulemaking published at 47 DCR 7512 (September 15, 2000) [EXPIRED]; as amended by Final Rulemaking published at 48 DCR 914 (February 2, 2001); as amended by Emergency and Proposed Rulemaking published at 50 DCR 10421 (December 5, 2003) [EXPIRED]; as amended by Final Rulemaking published at 51 DCR 4080 (April 23, 2004); as amended by Final Rulemaking published at 61 DCR 10233 (October 3, 2014); as amended by Final Rulemaking published at 63 DCR 14819 (December 2, 2016).

Editor's Note:

Rulemaking notices presented in D.C. Register(DCR) and Rule versions presented in D.C. Municipal Regulations (DCMR)

Total Records: **9**

ID	Register Category / Adoption	Heading	Notice / Adoption	Publish Date
4771350	Adopted Rule	SCHEDULE I ENUMERATED	View Text	Effective: 12/2/2016
6294735	Final Rulemaking	Health, Department of - Notice of Final Rulemaking - Schedule of Controlled Substances	View Text	12/2/2016 Vol 63/50
6076194	Emergency and Proposed	Health, Department of - Notice of Emergency and Proposed Rulemaking - Re-scheduling of and additions to the schedules of controlled substances	View Text	6/17/2016 Vol 63/26
5930112	Emergency Rulemaking	Health, Department of - Notice of Emergency Rulemaking - Amendments to Schedules I and IV, Controlled Substances	View Text	3/25/2016 Vol 63/14
4345132	Adopted Rule	SCHEDULE I ENUMERATED	View Text	Effective: 10/3/2014
5115603	Final Rulemaking	Health, Department of - Notice of Final Rulemaking - Amended Controlled Substances Schedule	View Text	10/3/2014 Vol 61/41
4967096	Emergency and Proposed	Health, Department of - Notice of Emergency and Proposed Rulemaking - Controlled Substances Schedule Amendments	View Text	6/27/2014 Vol 61/27
4654562	Emergency Rulemaking	Cannabimimetic agents	View Text	11/29/2013 Vol 60/51
961384	Adopted Rule	SCHEDULE I ENUMERATED	View Text	

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IMPORTANT FACTS ABOUT SYNTHETIC CANNABINOIDS:

- Not all synthetic cannabinoids are illegal.
- Packets labeled "Bizarro" (or "Scooby Snax", or others) will contain different substances.
- Without a chemical analysis (there is no field test), no one can tell what substance is within.

Government drug "experts" should testify to these basic principles.

Excerpt from PDS Amicus Brief in *United States v. Kravitz*, Appeal No. 16-OA-10:

> In order to understand the issues presented, it is necessary to understand a number of relevant terms. . . . The terms "synthetic cannabinoids" (currently used in the rule) and "cannabimimetic agents" (used in Mr. F.'s indictment) are synonymous. *See Rogers v. Stem*, 590 Fed. App'x 201, 202 n.2 (4th Cir. 2014). According to the prosecutor's proffer, synthetic cannabinoids are "familial drugs" and can include up to 30 varieties – some of which are designated as controlled substances (at any given point in time) and some of which are not. Tr. 10/16/15 13-14.
>
> The next term that is important to understand is "Bizarro." The packet that the government alleges Mr. F. handed the undercover agent in this case was labeled "Bizarro," which the government frequently refers to as a "brand." *See, e.g.*, Pet. App. 4, 10; Tr. 1/27/16 44; Pet. at 4. But Bizarro is not a "brand" like a traditional supermarket brand, because there is no consistency to what is placed inside a packet labeled Bizarro. Different Bizarro packets contain different chemical products, and many Bizarro packets contain no illegal controlled substances at all.
>
> As the detective at the suppression hearing explained, Bizarro packaging is "ordered separately from the chemicals and the plant material" within, and providers of synthetic cannabinoids place different chemical compounds into identical-looking packets. Tr. 1/27/16 58. As a result, "identical packet[s] of Bizarro" can test positive for controlled and non-controlled substances. Tr. 10/16/15 15-16; *see also* Tr. 10/16/15 17; Tr. 1/13/16 10. While any given packet of Bizarro will contain a "synthetic cannabinoid," it will not necessarily contain a controlled substance. Tr. 10/16/15 14. Without a forensic analysis, it is impossible to differentiate among the chemical compounds that might be contained in any single packet of Bizarro. Tr. 9/9/15 18.

IMPORTANT CASES

TWO QUESTIONS CRITICAL TO THE GOVERNMENT'S BURDEN OF PROOF:

(1) What was the substance? (actus reus)
(2) What was the intent? (mens rea)

Wooley v. United States, 697 A.2d 777 (D.C. 1997).
Robinson v. United States, 697 A.2d 787 (D.C. 1997).

Actus reus: The government must prove the particular drug that is charged in the indictment.

Companion cases (with splintered opinions) that hold that when an indictment charges a particular controlled substance (heroin), allowing the government to prove another (cocaine) constitutes a constructive amendment of the indictment. (Does not decide whether the indictment could properly have charged merely "controlled substance.")

Seeney v. United States, 563 A.2d 1081 (D.C. 1989).

Actus reus: No need to prove that the substance possessed was in fact a proscribed substance for an attempt charge.

"It is undisputed that in order to prove the completed crime of illegal possession of a specified controlled substance, the government must prove that the substance possessed was, in fact, the controlled substance in question. . . . However, there is no such requirement when the charge is an attempt."

Washington v. United States, 965 A.2d 35 (D.C. 2009).

Mens rea: For attempt charge, even though the government need not prove the substance was actually a controlled substance, the government still needs to prove that the defendant intended to possess/distribute a controlled substance.

"The mens rea element of the attempt offenses required the government to prove that appellant intended to possess and distribute a controlled substance; in other words, that appellant believed he was selling drugs rather than something else."

Intent to possess or sell so-called "burn bags"— bags containing fake drugs rather than the real thing – "does not satisfy the mens rea element of attempted distribution or PWID."

MENS REA CASES

AGAIN, TWO QUESTIONS:

(1) What does the statute require?
(2) What does the indictment require?

(1) WHAT DOES THE STATUTE REQUIRE?

Both the Supreme Court and the DCCA have suggested that, as a matter of statutory construction, the mens rea for a drug case is broad – the government needs to establish the intent to distribute "a controlled substance," not a particular substance.

McFadden v. United States, 135 S.Ct. 2298 (2015), interpreting the federal Controlled Substances Act (CSA):

> Statute makes it "unlawful for any person knowingly or intentionally . . . to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance."
>
> "'[K]nowingly' applies not just to the statute's verbs, but also to the object of those verbs – '*a* controlled substance.'"
>
> "The ordinary meaning of § 841(a)(1) thus requires a defendant to know only that the substance he is dealing with is some unspecified substance listed on the federal drug schedules."
>
> Two ways for the government to prove the requisite knowledge:
>
> (1) "That knowledge requirement may be met by showing that the defendant knew he possessed a substance listed on the schedules, even if he did not know which substance it was. Take, for example, a defendant whose role in a larger drug organization is to distribute a white powder to customers. The defendant may know that the white powder is listed on the schedules even if he does not know precisely what substance it is. And if so, he would be guilty of knowingly distributing 'a controlled substance.'"
>
> (2) "The knowledge requirement may also be met by showing that the defendant knew the identity of the substance he possessed. Take, for example, a defendant who knows he is distributing heroin but does not know that heroin is listed on the schedules."

Carter v. United States, 591 A.2d 233 (D.C. 1991), is consistent with *McFadden*:

> Undercover asked to buy "blow" (cocaine), and substance sold tested to be heroin. Court holds that, as a matter of statutory construction, the Controlled Substances Act merely requires the intentional distribution of "a controlled substance."

(2) WHAT DOES THE INDICTMENT REQUIRE?

As a matter of *indictment law*, the DCCA has said (in *Digsby*) that just like when the government charges distribution of heroin, it cannot broaden the indictment at trial by proving distribution of cocaine (*Wooley*/*Robinson*), the same applies to the mens rea element.

Digsby v. United States, 981 A.2d 598 (D.C. 2009).

Digsby was indicted for PWID heroin, which the Court reversed for a Confrontation Clause violation (improperly admitted DEA-7). The Court then rejected the government's argument to enter judgment on attempted PWID heroin, finding the DEA-7 not harmless as to that charge.

Government then asked the Court to enter judgment on "attempted possession of an unidentified controlled substance with intent to distribute." DCCA said:

> During oral argument, the government contended that if it only proved that Mr. Digsby thought he was possessing some controlled substance, it could convict him for possessing with intent to distribute a controlled substance, rather than the indicted offenses. However, the government could cite no cases in support of its contention. Mr. Digsby took issue with the government and cited two cases to support his position, *Wooley v. United States*, 697 A.2d 777 (D.C.1997) and *Robinson v. United States*, 697 A.2d 787 (D.C.1997).
>
> Here, Mr. Digsby's indictment document gave him notice that the government had to prove beyond a reasonable doubt that he possessed heroin with intent to distribute it. . . . The government's suggestion that judgment be entered on the offense of possession of an unidentified controlled substance with intent to distribute it not only permits it to convict him on a complex of facts which are distinct from those set forth in the indictment but also undercuts the indictment clause by removing him from the protection of the grand jury and by failing to give him notice that he could be convicted of attempted possession of any controlled substance with intent to distribute it.

Digsby v. United States, 981 A.2d 598, 610 (D.C. 2009)

Thus, if the indictment charges PWID *heroin*, the government must prove intentional distribution *of heroin*. If the indictment charges distribution of a *Schedule I Controlled Substance, Synthethic Cannabinoid*, the government must prove intentional distribution of a *Schedule I Controlled Substance, Synthethic Cannabinoid*. Same for XLR-11, etc.

Given the *Digsby* analysis/language, this is true whether the charge is an attempted or completed offense.

JURY INSTRUCTION ISSUES

Two main categories of issues to address in jury instructions:

- Matching the *mens rea* to the substance charged in the indictment
  - Completed crime (*Digsby*)
  - Attempt (*Digsby*, *Fields*, Redbook Comments)
- Synthetics-specific issues
  - Actual knowledge that the plant material (not controlled) contains an illegal synthetic cannabinoid (controlled)
  - Not all synthetic cannabinoids are illegal
  - Case-specific issues (e.g., compound wasn't illegal at the time)

Recap of *Digsby*

Digsby v. United States, 981 A.2d 598 (2009), held that it would be a violation of the Fifth Amendment's Grand Jury Clause for the government to do the following:

1. Indict for PWID Heroin, BUT THEN
2. Obtain a conviction for Attempt PWID of some "unspecified controlled substance" (assuming this is even a crime, which *Digsby* and *Wooley* have expressed doubt about)

It follows that

1. When the indictment charges the knowing possession or distribution of "Synthetic Cannabinoid, a Schedule I controlled substance," the government must prove, beyond a reasonable doubt, that your client knew or believed he or she possessed or distributed *one of the Synthetic Cannabinoids listed on Schedule I.*
2. It's the same when the indictment is more specific (XLR-11, for example).

Attempt Offenses

For attempt offenses, there is additional support in case law and the Redbook for an instruction that the government must prove the defendant knew or believed that he or she possessed the specific controlled substance alleged in the indictment.

Consult the Comments for:

- Instruction 6.200 (Possession)
- Instruction 6.201 (PWID)
- Instruction 6.202 (Distribution)

Each of these instructions contains the same commentary guiding the trial court on how to instruct the jury when the government seeks to convict on an attempted controlled substances offense (D.C. Code § 48-904.09):

> For the completed crime of possession, "the government must prove that the substance possessed was, in fact, the controlled substance in question," *Fields v. U.S.*, 952 A.2d 859, 864 (D.C. 2008) (quoting *Seeney v. U.S.*, 563 A.2d 1081, 1083 (D.C. 1989)). It is not necessary that the government prove that the defendant had actual knowledge as to the type of controlled substance that he or she possessed; the government must prove that the defendant believed that he or she possessed some controlled substance. *Carter v.*

U.S., 591 A.2d 233, 234-35 (D.C. 1991); *U.S. v. Branham*, 515 F.3d 1268, 1275 (D.C. Cir. 2008). The Committee has provided bracketed language which may be given in a case where this is an issue. The bracketed language should not be given, however, for a charge of attempted possession of a controlled substance. For the crime of attempted possession of a controlled substance (with the intent to distribute), the government must prove that the defendant had the requisite criminal intent, that is the government must prove that the defendant intended to possess the controlled substance charged in the information or indictment; it need not prove, however, that the substance possessed was in fact the controlled substance charged. *See Fields*, 952 A.2d at 865; *Digsby v. U.S.*, 981 A.2d 598 (D.C. 2009). In an attempted possession case, this instruction should be modified accordingly.

PWID – Instruction 6.201 (pg. 6-37)

The elements of possession with intent to distribute a controlled substance, each of which the government must prove beyond a reasonable doubt, are that:

1. [Name of defendant] possessed [a [measurable] [detectable] amount of a controlled substance] [more than one ounce of marijuana];
2. S/he did so voluntarily and on purpose, not by mistake or accident; and
3. When s/he did so, s/he intended to distribute, that is transfer to another person, the controlled substance. The government need not prove that [name of defendant] received or expected to receive anything of value in return.

The law makes [name of controlled substance] a controlled substance. In order to decide whether the material was [name of controlled substance], you may consider all evidence that may help you, including exhibits, expert, and non-expert testimony.

[The government is not required to prove that the defendant knew the precise type of controlled substance that s/he possessed. The government must prove beyond a reasonable doubt, however, that the defendant knew that s/he possessed some type of controlled substance.]

MOTION FOR JUDGMENT OF ACQUITTAL ISSUES

Potential bases for MJOA:

- Insufficient evidence of actual knowledge or belief that "Bizarro," "K-2," etc., or the plant material client allegedly possessed contained the illegal substance charged, or a controlled substance, period
    - Client's knowledge extends only to the packaging/appearance of the material seized; no one can know without lab testing what's actually in it
    - Client's lack of specific knowledge related to synthetics and the drug schedules
    - Client's lack of knowledge of substance's effects
    - Client's lack of behavior consistent with illegal sales vs. legal sales
    - Analogize to obscure controlled substances
- Attempt cases: Insufficient "objective facts" corroborating an intent to possess/distribute the illegal substance
    - Acts that are commonplace or equivocal are not sufficient
    - Alleged statements referencing "Bizarro," "K-2," "synthetics" etc. not sufficient
    - Prevents the punishment of innocent conduct, because intent to violate the drug laws must be proven by circumstantial evidence