

## I. TYPES OF CASES

### WHETHER SUBSTANCE WAS CONTROLLED THEN / NOW

1. Substance *was* legal then *and* now (typically charged as attempt)
  - Very difficult for USAO to prove
2. Substance *was* legal then, but is illegal now (typically charged as attempt)
  - Very difficult for USAO to prove
3. Substance was illegal then *and* now (typically charged as completed offense)
  - Easier for USAO to prove; may require a stronger defense case

### TYPES OF INDICTMENTS

1. Charges a specific chemical compound (e.g., XLR-11)
2. Charges “synthetic cannabinoid, a Schedule I controlled substance”

### TYPE OF CONDUCT

1. Street-level
2. Stores

## II. LITIGATION STRATEGY

### WHAT TO DO IN C-10

- Serve DEA *Rosser* letter, in addition to preservation / discovery letters
  - See examples distributed at training

### WHAT TO DO IN 301

- Probe what the substance was: packaging, labeling, etc.
- Probe what words were said: bizarre? Synthetics? K2?
- Argue for no PC, given that (1) there’s no field test for synthetics and (2) some synthetics are in fact legal (so even testimony that the substance was “consistent” with synthetics is insufficient)

### WHAT TO REQUEST IN DISCOVERY LETTERS

- When USAO does not respond to your initial DEA letter, send a request again for the “full chemist file”
  - You’ll need this to analyze what your substance actually is

### WHAT TO DO WHEN YOU ARE INDICTED

- Look up your compound in the controlled substance list, DCMR § 22-B-1201 for both (1) today and (2) date of your incident, through the LIMS system at

<http://dcregs.dc.gov/Gateway/RuleHome.aspx?RuleNumber=22-B1201>

### **WHAT TO DO / FILE PRE-TRIAL**

- Consider a motion for jury instruction re: what government must prove
- Consider a motion to exclude expert under 702 / *Daubert*
  - Note: This is a strategic decision; you may actually *want* the government's expert testimony
- Consider whether you need an expert to testify that (1) it is impossible to know whether a synthetic cannabinoid is legal / illegal and (2) many forms of synthetic cannabinoids were, and are, legal
  - This intersects with the strategic consideration on the motion to exclude

### **WHAT TO FILE IN TRIAL**

- MJOA based on mens rea / motion to dismiss indictment

### **III. OTHER ISSUES, INCLUDING SENTENCING**

- Sentencing:
  - If you end up losing, note that synthetic cannabinoids are likely *not* narcotic / abusive substances, *see* D.C. Code § 48-901.02(15), (26)
    - This means that these offenses are likely 5-year offenses, not 30-year offenses
    - This also means that they are in a different sentencing group on the drug chart
  - Even if these substances *were* narcotic or abusive, if the USAO did not indict with the language, it still is a 5-year offense because the jury didn't find the facts necessary to determine it's narcotic / abusive, *see Apprendi v. New Jersey*, 530 U.S. 466 (2000)
- Resources: E-mail PDS with questions