

A state statute makes it a crime to "knowingly possess a controlled substance analogue." The statute defines a "controlled substance analogue" (CSA) as a substance that has a chemical structure similar to a controlled substance and has a physiological effect on humans similar to or greater than a controlled substance. A defendant was arrested for possession of a synthetic stimulant known by its street name as "bath salts" and was charged with violating the criminal statute.

Regarding the knowledge element of this crime as it relates to the substance found in the defendant's possession, which of the following is the most proper jury instruction?

- A. "If you find that the defendant knew that the substance he possessed was an illegal CSA, you must find the defendant guilty."
- B. "If you find that the defendant knew that the substance he possessed was illegal or had a chemical structure similar to a controlled substance and physiological effects on humans similar to or greater than a controlled substance, you must find the defendant guilty."
- C. "If you find that the defendant possessed a substance that was a CSA, you must find the defendant guilty even if the defendant did not know that the substance was a CSA or illegal."
- D. "If you find that the substance possessed by the defendant is commonly known to have a chemical structure similar to a controlled substance and physiological effects on humans similar to or greater than a controlled substance, you must find the defendant guilty."

Explanation:

Possession of controlled substance

(dual-knowledge requirement)

Knowledge of possession

Defendant must knowingly possess substance—ie:
exercise dominion & control over substance

Knowledge of item

Defendant must know that substance is controlled—ie:
know that substance is prohibited by law, even if defendant does not know specific identity of substance *or*
know facts about substance that make possession illegal, even if defendant does not know possession is illegal

When a statute makes it a crime to **knowingly** possess an item, the word "knowingly" **applies to the statute's verb** (possess) as well as the **object of that verb** (controlled substance analogue (CSA)). As a result, a conviction under this statute requires proof that the defendant **knowingly possessed** the substance and either:

knew that the **substance** was **prohibited by law**—even if the defendant did not know the specific identity of the substance—*or*

knew facts about the substance that made possessing it illegal—eg, knew that it had a chemical structure similar to a controlled substance and physiological effects on humans similar to or greater than a controlled substance—even if the defendant did not know that possessing it was illegal.

A jury instruction regarding the knowledge element of this crime as it relates to the substance found in the defendant's possession must include *both* of the above bullet points **(Choice A)**.

The jury instruction should therefore read: "If you find that the defendant knew that the substance he possessed was illegal (prohibited by law) or had a chemical structure similar to a controlled substance and physiological effects on humans similar to or greater than a controlled substance (facts making its possession illegal), you must find the defendant guilty."

(Choices C & D) Mere possession of a substance later identified as a controlled substance or an analogue thereof is not sufficient to convict the defendant. Nor is it sufficient that the substance possessed by the defendant is commonly known (by the public at large) as a CSA. Instead, the *defendant* must have *known* that the substance is illegal or known facts about the substance that made possessing it illegal.

Educational objective:

In prosecutions for possession of a controlled substance or analogue thereof, the defendant's knowledge that the substance was a controlled substance or analogue may be established by evidence that the defendant knew (1) the substance was prohibited by law or (2) facts about the substance that made possessing it illegal.

References

McFadden v. United States, 576 U.S. 186, 194–96 (2015) (applying the dual-knowledge requirement to controlled substance analogue prosecutions).

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