

Changes mulled as synthetic drug sentences cause confusion

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The men who sold it called it Mr. Miyagi, a mind-altering chemical compound mixed with vegetable material and resembling marijuana.

It was clear the drug was meant to be smoked for a potent high, notwithstanding the deceptive label that the product was potpourri not fit for human consumption. But less clear was how to punish the people who pushed it.

As drug enforcement authorities sound alarms over the effects and accessibility of [synthetic drugs](#), the Mr. Miyagi case in Louisiana is but one example of how courts are struggling for consistency in dealing with substances that are developing faster than the laws to govern them. The result is a sentencing process that's often bogged down by complex science and can yield uneven results in courtrooms around the country.

"It's been a challenge for the courts and for the regulatory agencies to manage and make appropriate, logical decisions relating to these new substances," said Greg Dudley, a West Virginia University chemistry professor who has testified in synthetic drug cases. "If they're interpreted differently in different courts, you end up with broad disparities in sentencing for similar offenses."

Now the federal panel that sets sentencing policy is studying ways for courts to better handle cases involving drugs such as "[bath salts](#)," which can provoke violent outbursts, and the party drug Molly.

The issue matters, given the sustained popularity of synthetic drugs—man-made compounds that mimic more conventional street drugs and hallucinogens and are sold under catchy names in stores and on the internet.

Drug Enforcement Administration officials have repeatedly warned about the products' harmful effects but say it's hard to police them. Those who make synthetic drugs can alter their chemical makeup faster than regulators can ban them, and those who sell them can skirt the law through misleading labeling. Meanwhile, the DEA's forensic testing laboratories are "overwhelmed with the amount of substances" they're trying to identify and analyze, said spokesman Russ Baer.

Amid concerns about consistency in punishment, the U.S. Sentencing Commission is doing a two-year study on synthetic drugs that, among other things, will look at whether to update the drug quantity table that federal judges rely on at sentencing.

Judges use the table to come up with the starting point for the sentence based on the amount of drugs involved, then factor in considerations like a defendant's criminal history and level of responsibility. That's easy for drugs like marijuana, cocaine and heroin that are listed on the table.

Problem is, "bath salts" and similar synthetic or designer drugs aren't included.

In prosecutions involving those drugs, judges consult the table to find the most similar drug to the one in their case, based on [chemical makeup](#) and pharmacological effects. They then convert the drug quantity in their case to the equivalent quantity of marijuana to calculate a base offense level. But that often causes confusion.

Selling something that gets you high isn't unnecessarily illegal "unless it's

kind of like something on the list," said Lloyd Snook, a Virginia defense lawyer.

"Well, how kind of alike does it have to be? Who knows?" Snook said.

The commission says it's heard complaints about days-long hearings with dueling chemistry experts, disagreements about which drug is most analogous and varied sentences in similar cases.

The Mr. Miyagi case, for instance, turned on a dispute over which drug was most similar to the product the defendants' sold—pure THC, marijuana's principal ingredient, or marijuana itself.

A federal appeals court sided with the government's conclusion that it was most like THC. Since sentencing guidelines treat one gram of THC as equivalent to 167 grams of marijuana, the defendants, Thomas William Malone and Drew T. Green, were held responsible for 233,800 kilograms of marijuana and given long prison sentences. Each was sentenced to nearly 10 years in prison.

The defendants had argued it was most like marijuana and that a 1:1 ratio was appropriate, an assertion that if accepted would have resulted in lighter punishments.

But, in an example of the disparate outcomes the guidelines sometimes yield, the ringleader in the case, sentenced in Florida, received only probation. And another man who worked with Malone and was charged in a similar case was allowed to avoid a conviction in New York by entering a diversion program, a supervised remedial plan for petty offenders.

"You just have a nightmare situation that cannot be explained to a defendant because it makes no sense," said Malone's attorney, Steven

Sadow. "He's at the mercy of what the judge chooses to do with the ratio and how the judge treats certain people."

Some judges have openly struggled with formulas. In Florida, U.S. District Judge Donald Middlebrooks said he found no scientific basis for the standard marijuana-to-THC ratio and rejected it in a case involving a designer drug known as XLR-11.

"Although I asked each of the experts at the hearing, no one could provide me with a reason for this ratio, which has major implications in determining the base level offense," Middlebrooks wrote. "After my own research and a phone call to the Sentencing Commission, I still could find no basis for this ratio."

Snook, the lawyer, said he was glad the commission was studying the problem but thought Congress might need to get involved.

"There are a lot of reasons why it's an arbitrary and capricious system and why it ought to get changed," he said.

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