

2016

Mike's Smoke, Cigar & Gifts, Petitioner/ Appellant v. City of St. George, Respondent/ Appellee.

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

MIKE'S SMOKE, CIGAR & GIFTS,

Petitioner/Appellant

Case No. 20151030-CA

v.

CITY OF ST. GEORGE,

Respondent/Appellee.

On appeal from the order of the Fifth District Court for Washington County, the
Honorable Jeffrey C. Wilcox presiding.

APPELLANT'S OPENING BRIEF

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UTAH APPELLATE COURTS

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STATEMENT OF JURISDICTION

This Court has jurisdiction of the present appeal pursuant to U.C.A. § 78A-4-103 and Utah R. App. P. 3 because the appeal is taken from a final order resolving all issues as to all parties. Additionally, pursuant to an Order issued by the Utah Supreme Court this appeal was transferred from the Utah Supreme Court to this Court for resolution. R. 664-65.

STATEMENT OF ISSUES

The license holder, Mike's Smoke, Cigar & Gifts (hereinafter "Mike's") raises one issue on appeal--whether U.C.A. § 58-37-2(g) should be read in the conjunctive. As written, U.C.A. § 58-37-2(g) provides three subsections used in determining whether a substance is a controlled substance analog. A conjunctive reading would require meeting at least two of the three subsections before a substance could be considered a controlled substance analog. More specifically, it would require meeting subsection (A) and (B) or (A) and (C) before a substance could be considered a controlled substance analog.

This specific issue was argued before the St. George City Council at the revocation hearing. R. 174-92. The issue was further preserved for appeal through Mike's timely petition for judicial review and arguments before the district court. R. 1-8, 317-43, and 384-96. The issue was then timely appealed from the district court to the present Court. R. 658-60 and Docketing Statement (Dec. 28, 2015).

DETERMINATIVE CONSTITUTIONAL PROVISIONS

The Appellant is not aware of any dispositive constitutional provisions applicable in this matter.

STATEMENT OF THE CASE

The present appeal arises out of a license revocation and subsequent judicial review of that license revocation. R. 42-58 and 196-98. Mike's is a retail tobacco store that has operated in St. George, Utah for several years. R. 17-21 and 643-46. As part of its product line Mike's carried tobacco products in addition to products used for the consumption of those tobacco products. *Id.* Mike's also carried sports memorabilia and odds and ends such as incense, bumper stickers, vitamins, and supplements. *Id.* For a relatively brief time, Mike's product line also included products commonly known as spice but also marketed as incense, herbal incense, potpourri, herbal potpourri, and aroma therapy.¹ R. 60-64, 71-78, 92-113, and 115-31.²

The spice product of concern in the present case was commonly known as "Reborn." *Id.* Over a period of several months, local law enforcement acquired several Reborn packages and had them tested by the Utah State Lab for purposes of identifying the chemical(s) present in the Reborn plant material. *Id.* The lab tests identified the chemical XLR-11 (also known as 5FUR-11) as present in the Reborn. R. 148, 163, and 165.. Those lab tests also purported that XLR-11 was a controlled substance and alleged XLR-11 was an analog of a listed controlled substance commonly known as AM-694. *Id.*

¹ For purposes of this brief, Mike's will use the term generic term "spice" as Mike's acknowledges that there is no meaningful distinction between the different names applied to the product.

² For purposes of the appellate argument only, Mike's accepts the facts as they relate to the possession and sale of Reborn as true but disagrees with any statement of fact concluding Reborn contained a controlled substance or controlled substance analog or that Mike's knew or intended the product to be a controlled substance or controlled substances analog.

At no time was Mike's found to possess, market, distribute, or sell any product containing a chemical that expressly prohibited at the time Mike's handled it. *Compare id.* and U.C.A. §§ 58-37-4 and 4.2 (2012).

Based on the representation of the Utah State Lab that XLR-11 was a controlled substance, the City of St. George (hereinafter "City") elected to revoke the business license of Mike's. R. 42-58 and 196-98. Mike's requested a hearing before the City Council. R. 200. The primary basis of Mike's challenge to the revocation proceedings was that the City lacked sufficient evidence to prove XLR-11 was an analog under U.C.A. § 58-37-2(g). R. 174-94, 317-43, and 384-96. This argument focused heavily on the proper interpretation of that section of code. *Id.* More specifically, Mike's maintained that U.C.A. § 58-37-2(g) should be read in the conjunctive and not disjunctive. *Id.*

Ultimately the City elected to interpret U.C.A. § 58-37-2(g) in the disjunctive. R. 42-58. Based on the City's interpretation of U.C.A. § 58-37-2(g), the City concluded it had sufficient evidence to find Reborn contained a controlled substance analog and revoked Mike's business license. *Id.*

Mike's sought judicial review of the City's decision. R. 1-8. The two claims raised by Mike's were that the City misinterpreted U.C.A. § 58-37-2(g) and the City lacked substantial evidence to support its ruling. *Id.*, 317-43, and 384-96. The district court concluded that it lacked sufficient information to properly review the matter. R. 473-76. The information lacking was testimony from the respective experts as to the basis of their opinions. *Id.* The district court then remanded the matter back to the City to hold an evidentiary hearing where the experts were to testify. *Id.* It was contemplated by the

district court that once the hearing had been completed the matter would be brought back before the court. *Id.* Furthermore, the district court did not address Mike's arguments as to U.C.A. § 58-37-2(g) at that time and that claim remains outstanding. *Id.* Nor did the district court rule on whether the City had substantial evidence to support its license revocation action. *Id.*

The City appealed the district court's order. R. 477 and 572-73. The matter was brought before this Court in Case No. 20140521-CA. On June 18, 2015, this Court overturned the district court's decision and remanded for further proceedings before the district court. R. 587-94.

The parties went back before the district court for oral arguments on October 21, 2015. R. 622-23. Following oral arguments, the district court issued its Decision and Order Affirming Business License Revocation. R. 624-41. In its decision, the district court concluded U.C.A. § 58-37-2(g) should be read in the disjunctive and based on this interpretation, concluded the City has sufficient evidence to uphold the license revocation. *Id.* That decision and order was issued on November 24, 2015. *Id.* Mike's timely filed its Notice of Appeal on December 2, 2015. R. 658-60.

SUMMARY OF ARGUMENTS

Mike's challenges the City's and district court's decisions concluding U.C.A. § 58-37-2(g) should be read in the disjunctive. Mike's will argue that a disjunctive reading marks a distinct and critical break from federal case law interpreting a federal statute that is substantially similarly worded as U.C.A. § 58-37-2(g). Mike's will also argue that a disjunctive reading creates absurd results such that the Utah legislature could not have

intended them. Finally, Mike's will argue that a disjunctive reading creates numerous situations in which U.C.A. § 58-37-2(g) would be unconstitutional. Due to the issues raised by a disjunctive reading, Mike's will ask this Court to hold similar to every federal court that has addressed this same issue, and find only a conjunctive reading can give proper effect to the statute while avoiding the absurd and unconstitutional results brought by a disjunctive reading.

ARGUMENT

Utah Code Annotated § 58-37-2(g) should be read in the conjunctive to avoid absurd results and valid constitutional challenges.

A. STANDARD OF REVIEW

This Court reviews interpretation of law de novo, giving no deference to the City's, or the district court's, prior interpretations. *Meinhard v. State*, 2016 UT 12, ¶24 (2016). Furthermore, where this Court finds error in the district court's interpretation of law, this Court affords no deference to the district court's application of the misinterpreted law to the facts of the case. *Id.*

B. COMPARISON OF UTAH'S CONTROLLED SUBSTANCE ANALOG LAW TO ITS FEDERAL COUNTERPART.

To fully appreciate the current similarity between U.C.A. § 58-37-2(g) (Utah's controlled substance analog definition) and 21 U.S.C. § 802(32) (federal controlled substance analog definition), one must first compare their development to their current respective points. Below is a side-by-side comparison of the two statute's original wording and organization. It should be noted that for purposes of this comparison we are

using the introduced bill language for the federal analog law as the language that was ultimately codified will be discussed later.

U.C.A. § 58-37-2 (2011)

(g)(i) "Controlled substance analog" means a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513:

(A) which has a stimulant depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances set forth in Subsection (1)(f), or a substance listed in Section 58-37-4.2; *or*

(B) which, with respect to a particular individual, is represented or intended to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances in the schedules or list set forth in this Subsection (1).

(emphasis added).

21 U.S.C. § 802(32) as originally introduced in H.R. Rep. No. 99-848, pt. 1, at 1 and taken from *U.S. v. Hodges*, 321 F.3d 429, 435 n.4 (3rd Cir. 2003).

The term 'controlled substance analog' means a substance --

(i) the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II; *and*

(ii)(I) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system; *or*

(II) with respect to a particular person, which such person represents or intends to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to that of a controlled substance

A reading of the above recited language denotes both controlled substance analog definitions were originally to be read to always require the first subsection along with either the second or the third subsection. Consequently, under their original language it was evident both statutes were intended to always require at least two of the subsections be met before a substance could be considered a controlled substance analog.

The similarities between the two laws continue as the Utah and federal legislative bodies altered their respective controlled substance analog definitions. Each did so for the explicit purpose of trying to curb those who would make small changes to a substance in an effort to skirt existing controlled substances law. As noted in *U.S. v. Hodges*, Congresses' "only goal" in adopting its present version of its controlled substance analog definition was to "make illegal the production of designer drugs and other chemical variants of listed controlled substances that otherwise would escape the reach of the drug laws." 321 P.3d 429, 437 (3rd Cir. 2003)(citing comments from congressional record "This proposal will prevent underground chemists from producing dangerous designer drugs by slightly changing the chemical composition of existing illegal drugs.").

Similarly, when Utah changed its analog definition to its current form, it likewise explicitly justified the action as necessary to curb people from making slight changes to existing controlled substances to circumvent the law. This was noted by the City in one of its early briefs when it stated:

The Legislature was concerned that chemists were changing the molecular structure of substances in the slightest of ways to avoid falling under one of the list of controlled substances in Utah's Controlled Substances Act in an effort to stay one step ahead of the law....The Legislature's amendment was designed to eliminate this activity.

R. 348, Brief of Respondent City of St. George, 5 (Nov. 20, 2013)(citing comments of Rep. Froer and Sen. Christensen, Debate of H.B. 254, 59th Gen. Leg. Sess. (Mar. 1, 2012)).

With Congress and the Utah legislature sharing the one and only goal of curbing minor changes to controlled substances, both took a similar approach. As noted in *Hodges*, Congress removed the conjunctive term "and" from the proposed language and renumbered the subsections so that it was no longer (i) and i(I) and (i)(II) but (i), (ii), and (iii). *Hodges*, 321 F.3d at 438 and 21 U.S.C. § 802(32). Congress then left the disjunctive term "or" in between subsections (ii) and (iii). *Id.* It would appear from such changes that Congress intended to make each subsection an equal stand alone prong, any one of which could be used to find a substance was a controlled substance analog.

Similarly, in Utah's 2012 amendment, Utah created three subsections, (A), (B), and (C) and placed the disjunctive term "or" between subsection (B) and (C). *Compare* U.C.A. § 58-37-2(g)(2011) and U.C.A. § 58-37-2(g)(2012). It is this change that has prompted both the City and the district court to conclude the current version of Utah's controlled substance analog act requires a disjunctive reading--i.e. that each subsection is a stand-alone prong, any one of which may be used to find a substance is a controlled substance analog. R. 52-54 and 624-42.

As it stands today, Congress and the Utah legislature have reached remarkably similar points, with remarkably similar purpose, with remarkably similar verbiage in their respective statutes even though the changes were years apart and with no apparent

influence between the two. A side-by-side of the current versions of the two analog definitions demonstrates this point.

U.C.A. § 58-37-2

(g) (i) "Controlled substance analog" means:

(A) a substance the *chemical structure* of which is *substantially similar* to the chemical structure of a controlled substance listed in Schedules I and II of Section 58-37-4, a substance listed in Section 58-37-4.2, or in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;

(B) a substance which has a stimulant, depressant, or hallucinogenic effect on the central nervous system *substantially similar* to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513;

or

(C) A substance which, with respect to a particular individual, is *represented* or *intended* to have a stimulant, depressant, or hallucinogenic effect on the central nervous system substantially similar to the stimulant, depressant, or hallucinogenic effect on the central nervous system of controlled substances listed in Schedules I and II of Section 58-37-4, substances listed in Section 58-37-4.2, or substances listed in Schedules I and II of the federal Controlled Substances Act, Title II, P.L. 91-513.

21 U.S.C. § 802(32)

(A) Except as provided in subparagraph (C), the term "controlled substance analogue" means a substance--

(i) the *chemical structure* of which is *substantially similar* to the chemical structure of a controlled substance in schedule I or II;

(ii) which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is *substantially similar* to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II;

or

(iii) with respect to a particular person, which such person *represents* or *intends* to have a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in schedule I or II.

(emphasis added).

The similarities are fairly obvious, nevertheless it is important to note that each statute contains three subparts with each subpart containing substantially the same terminology as its state or federal counterpart. The first subpart of each looks to the chemical structure of the substance. The second subpart looks to the pharmacological effect of the substance. The third subpart looks to the intent and/or representations of the person.

It is even more important to note that each statute lists all three subparts with the disjunctive "or" placed only between the second and third subsections. No connecting term is placed between the first and second subsections.

Given the legislative history of the federal analog law and its current wording, it would seem obvious that the statute should be afforded a disjunctive reading. However, the federal courts are in complete uniformity that the federal analog law must be read in the conjunctive. *See U.S. v. Turcotte*, 405 F.3d 515, 522 (7th Cir. 2004); *U.S. v. Klecker*, 228 F.Supp.2d 720, 727 (E.D. Va. 2002); and *Hodge*, 321 F.3d at 436.³ The federal courts have each reached this conclusion for three primary reasons, the first being the

³ Each of the cited cases discusses the uniformity of federal court holding the federal analog law must be read in the conjunctive with a couple citing to a single example of a federal court holding the law should be read in the disjunctive. That federal case was a district court case out of the Virgin Islands. *U.S. v. Greig*, 144 F. Supp.2d 386 (D. Vi. 2001). *Greig* was later overturned by the Third Circuit in *Hodges* where the court stated, "[t]he District Court in this case read the definition disjunctively, but every other federal court to consider the issue has read it conjunctively." *Hodges*, 321 F.3d at 433. *Hodges* itself went on to overturn *Grieg* and hold the statute had to be read in the conjunctive. *Id.* Consequently, there is now complete uniformity in the federal courts mandating a conjunctive reading.

absurd results that would follow from a disjunctive reading, the second--somewhat related--reason being that Congress could not have intended the absurd results that would follow, and third, the absurd results would open the law to valid constitutional challenges. We turn now to the federal courts' reasoning in holding the federal analog law must be read in the conjunctive.

C. THE FEDERAL AND STATE ANALOG LAWS MUST BE READ IN THE CONJUNCTIVE TO AVOID ABSURDITIES THAT COULD NOT HAVE BEEN INTENDED BY THE LEGISLATURE AND WOULD ULTIMATELY PROVE TO BE UNCONSTITUTIONAL IN A NUMBER OF CONTEXTS.

This Court is now being asked to interpret a statute that is substantially similar to the federal controlled substance analog law. Fortunately, this Court has the benefit of several federal cases which have previously addressed the very question posed to this Court in the present case--namely, should the analog law be read in the conjunctive or the disjunctive? This Court may very well echo the words of the Seventh Circuit when it stated, "[a]s the old adage instructs, the devil is in the details--the relevant detail here being the single word 'or' between clauses (ii) and (iii) of the definition." *U.S. v. Turcotte*, 405 F.3d 515, 521 (7th Cir. 2005).

The City and district court purport the supposed unambiguous language and legislative intent mandate a disjunctive reading. This position is primarily predicated on the "or" contained in U.C.A. § 58-37-2(g). However, as noted in *Hodges*, "[w]e have said that 'canons of construction ordinarily suggest that terms connected by a disjunctive be given separate meaning unless the context dictates otherwise'....Indeed, we have also said that 'whether requirements in a statute are to be treated as disjunctive or conjunctive does

not always turn on whether the word 'or' is used; rather it turns on context." 321 F.3d at 436.⁴ Therefore, simply seeing the word "or" in U.C.A. § 58-37-2(g) does not automatically mean the term unambiguously renders the statute disjunctive. Rather, this Court should engaged in a contextual analysis similar to that afforded by the federal courts.

A contextual analysis demonstrates the absurd results that follows a disjunctive reading. This position is best summarized by the Seventh Circuit in *Turcotte* where it noted the federal courts were holding the analog law had to be read in the conjunctive based "largely on the absurd results that might obtain under a disjunctive reading, noting that alcohol and caffeine could be criminalized as controlled substance analogues based solely on the fact that, in concentrated form, they might have depressant or stimulant effects similar to illegal drugs." 405 F.3d at 522. These absurdities can be reviewed by looking at each prong independently, just as one would if the prong were to remain a stand-alone prong.

1. Prong One as a Stand-Alone Prong Yields the Absurd Result of Criminalizing Monosodium Glutamate (MSG) Due to a Similarity in Chemical Structure to a Controlled Substance.

In *U.S. v. Washam*, the Eighth Circuit analyzed the federal analog law as it applied to 1,4-Butanediol, which was alleged to be a controlled substance analog of GHB. 312 F.3d 926 (8th Cir. 2002). As part of that case the Government brought in expert witnesses

⁴ See also *U.S. v. Vickery*, stating "the mere existence of 'or' between the last two subordinate clauses cannot be taken to be conclusive evidence that Congress intended all subordinate clauses to be read in the disjunctive." 199 F. Supp.2d 1363, 1367 (N.D. Ga. 2002).

to prove GHB and 1,4-Butanediol differed one side of a single molecule. *Id.* at 928. The defendant in *Washam* challenged his conviction under the federal analog law by claiming the law was unconstitutionally vague. *Id.* at 929.

As part of his constitutional challenge, Washam pointed out that MSG, commonly found in every day foods such as Dorito chips, is literally transformed into GHB once inside the human body. *Id.* at 932. Washam argued the statute was unconstitutionally vague as it allowed for enforcement against both 1,4-Butanediol and MSG. *Id.* The court disagreed, holding:

[t]here is some superficial appeal to Washam's comparison between 1,4-Butanediol and MSG, the common food additive that also becomes GHB in the human body. But Washam's argument that the Analogue Statute lends itself to arbitrary enforcement because it allows for a distinction between the two substances is flawed. The statute does not allow for arbitrary enforcement because the statute itself requires a two-step inquiry....The first step in the statute is to determine whether a chemical is substantially similar in chemical structure to a listed chemical. Beyond this inquiry is the requirement that the chemical either has the same effect as the listed chemical on the human body, or it is intended to have such an effect. Utilizing these two steps, MSG could not be proscribed by the Analogue Statute. While MSG may be substantially similar in physical and chemical structure to GHB...MSG does not have similar effects on the human body, nor do food producers intend for MSG to have the same effect as GHB.

Id. (internal citations omitted).

MSG is not the only substance that presented a problem when analyzed on a structural comparison alone. The *Washam* court noted that in *U.S. v. Roberts*, a federal district court had held the federal analog law was unconstitutionally vague as applied because other food substances such as Gamma Aminobutyric Acid (GABA) and succinic acid "were as similar to GHB as 1,4-Butanediol, differing only in one functional group."

Id. at 932-33 (analyzing *U.S. v. Roberts*, 2002 U.S. Dist. LEXIS 16778 (S.D.N.Y. 2002)).⁵

Washam and *Roberts* both demonstrate that if prong one, the chemical structure prong, is left as a stand-alone prong, it generates the absurd result of criminalizing everyday food items. Indeed, every food item containing MSG, Gamma Aminobutyric Acid (GABA), or succinic acid would quite literally be illegal for containing substances substantially structurally similar to the controlled substance GHB. The key for avoiding this absurd, and unconstitutionally vague result, was to read the analog law in the conjunctive.

2. Prong Two as a Stand-Alone Prong Yields the Absurd Result of Criminalizing Caffeine, Tobacco, Alcohol, Energy Drinks, and/or Aromatherapy Products Due to Their Ability to Produce Similar Pharmacological Results as a Controlled Substance.

In *U.S. v. Vickery*, the defendant was indicted under the federal controlled substance analog law for distributing 1,4 butanediol and GBL, both of which are considered controlled substance analogs of GHB. 199 F. Supp.2d 1363, 1364 (N.D. Ga. 2002). The defendant sought review specifically to determine if the federal controlled substance analog law should be read in the conjunctive or disjunctive. *Id.*

In addressing the question raised by the defendant, the court in *Vickery* turned, in part, to "another canon of statutory interpretation," that canon being that a statute must be

⁵ *Roberts* was later overturned by the Second Circuit in *U.S. v. Roberts*, 363 F.3d 118 (2nd Cir. 2004) when the Second Circuit applied a conjunctive reading of the statute and found the statute constitutional under a conjunctive reading.

construed to avoid unintended or absurd results." *Id.* at 1369. In addressing this canon of statutory construction, the *Vickery* court noted

A reading of clause (ii) independently results in alcohol or caffeine becoming a controlled substance analogue, given the depressant or stimulant effect such substances have in concentrated form. Without tying the first clause of the statute in with the latter clauses, the statute loses its link between the unknown drugs and the drugs already controlled under the Controlled Substance Act, which is critical to the Act's stated purpose....

Id.

In addition to noting the absurd results that would result from a disjunctive reading, the court in *Vickery* also noted that "there is no indication in the legislative history that Congress intended to dispense with both limiting provisions [subsections (ii) and (iii)] and create a statute in which *nearly any substance could be prosecuted as a controlled substance analogue.*" *Id.* at 1371 (emphasis added). Accordingly, the court in *Vickery* concluded the analog law must be read in the conjunctive.

Vickery's concerns were echoed in *U.S. v. Forbes*, which opined that a disjunctive reading of UCA § 58-37-2(g) will lead to unintended and absurd results thus rendering the statute vague and unconstitutional. The court stated that a conjunctive reading of the statute:

If I adopt the government's construction and read clause (ii) independently, alcohol or caffeine would be controlled substance analogues because, in concentrated form, they can have depressant or stimulant effects substantially similar to a controlled substance.

806 F. Supp 232 (D. Colo. 1992).

Similarly, in *U.S. v. Turcotte*, the Seventh Circuit expressed concern over the absurd results that would stem from a disjunctive reading of the analog law "noting that

alcohol and caffeine could be criminalized as a controlled substance analogues based solely on the fact that, in concentrated form, they might have depressant or stimulant effects similar to illegal drugs." 405 F.3d 515, 522-23 (7th Cir. 2005). The court in *Turcotte* also echoed *Vickery's* concern that Congress could have never intended such criminalization when *Turcotte* quoted "there is 'not a scintilla of evidence' that 'Congress intended to cover and criminalize sales of legal substances such as flour, salt, ginseng, vitamin B, etc.'" *Id.* at 523. With those concerns in mind, *Turcotte* decided to "heed the call of both accumulated precedent and common sense, joining the vast majority of federal courts in adopting the conjunctive reading of [21] U.S.C. § 802(32)(A)." *Id.*

Consider for a moment an FDA report issued in March 2013 which linked energy drinks to multiple deaths and listing numerous health risks posed by energy drinks. R. 269-82. Consider a wealth of articles detailing the rising health concerns with energy drinks. R. 284-96. Given the now well documented health hazards of energy drinks, the youth attraction to energy drinks, and the youths' tendency to abuse energy drinks, what is to stop an enterprising prosecutor or city council from turning to the controlled substance analog law as a tool for prosecution or license revocation? Indeed, such ingenuity has been done before in Utah.

While prosecutors were waiting for the State to take action in criminalizing chemicals commonly found in spice they turned to the glue huffing statute in an effort to take matters into their own hands. Undersigned counsel personally handled several such cases including, but not limited to such a case involving the City of St. George and the owner of Mike's, Michael Connors. *City of St. George v. Connors*, Washington County,

Justice Court, Case No. 101701872, prosecuting for spice under U.C.A. § 76-10-107, more commonly known as the glue huffing statute. If cities and prosecutors were willing to move unilaterally against spice through attempting to adapt other statutes, what is to prevent them from doing so again on substances such as energy drinks? The short answer is nothing. Consequently, the public at large bears the risk that at any given moment a city or prosecutor could charge them with possessing and/or distributing a controlled substance analog. Given the documented health risks of energy drinks and the link between those drinks and deaths in the country, such a situation is not so far-fetched.

The absurd results generated by a stand-alone prong two can only be avoided by giving the law a conjunctive reading. Something the *Turcotte* court found to be a "common sense" interpretation. Utah's analog law is no different. Standing alone, its second prong generates the same absurd results as those identified by the federal courts. This Court should interpret U.C.A. § 58-37-2(g) in the conjunctive to avoid such absurd results.

3. Prong Three as a Stand-Alone Prong Yields the Absurd Result of Criminalizing Virtually Any and All Products Due to The Fact They Would be an Analog Purely on a Person's Representation That They Will Produce Similar Pharmacological Results as a Controlled Substance.

Out of the three subparts the City contends should be stand-alone prongs, the third is perhaps the most alarming as a stand-alone prong. This is because under the third prong (if it were a stand-alone prong), the mere representation that a substance will generate a pharmacological result similar to a controlled substance is sufficient to render the substance a controlled substance analog. To be clear, this prong does not require the

person making the representation to claim the substance is a controlled substance (i.e. selling flour while claiming it is cocaine), rather it only requires a representation that the product in its natural state will generate a similar result as a controlled substance (i.e. representing enough sugar can give a rush similar to cocaine or an amphetamine). Furthermore, this prong does not even require the representation to be true. In other words, a person could represent to another that using a ginseng supplement will give the user a euphoria akin to heroin. Such a representation is almost certainly untrue, but it matters not, as the representation alone is sufficient to render the ginseng a controlled substance analog.

Again, such claims are not the whimsical fancies of the Appellant, but genuine concerns voiced in the federal courts. For example, the court in *Vickery* concluded that,

to allow the Government to succeed in a prosecution under the Analogue Act by proving only subsection (iii) of the statute results in an application much broader than the stated purpose of the statute - thwarting evasion of the drug laws by underground chemists who create new drugs. There is no indication in the legislative history that "Congress intended to cover and criminalize the sales of legal substances such as flour, salt, ginseng, vitamin B, etc., *merely because the seller represents* they will yield a stimulant, depressant, or hallucinogenic effect like that of a controlled substance.

Vickery, 199 F. Supp.2d at 1370 (emphasis added) (internal citations omitted). See also *Turcotte*, 405 F.3d at 523.

The absurd results become even more absurd when one considers the consequences as between individual people in the State of Utah. For instance if one person makes a representation about ginseng that renders ginseng a controlled substance

analog, is ginseng now a controlled substance analog for all people in the State or just the person making the representation? Under the former proposition, a single person's act can render an otherwise perfectly legal item illegal for every person in the state quite literally on a single turn of phrase.

Such absurdities are the result of a disjunctive reading of the analog statute. These absurdities have been recognized by the federal courts as real, valid, and concerning results if the analog law is to be read in the disjunctive. To avoid such absurd results, the federal courts have consistently and uniformly come to hold the analog law must be read in the conjunctive. This Court should likewise act to avoid these absurd results by interpreting Utah's analog law in the conjunctive.

D. LEGISLATIVE INTENT AND THE STATUTORY DOCTRINES OF AVOIDING ABSURDITIES AND CONSTITUTIONAL AVOIDANCE DICTATE A CONJUNCTIVE READING OF UTAH'S ANALOG LAW.

The Utah Supreme Court has held that "when statutory language is ambiguous—in that its terms remain susceptible to two or more reasonable interpretations after we have conducted a plain language analysis—we generally resort to other modes of statutory construction and "seek guidance from legislative history" and other accepted sources." *Marion Energy, Inc. v. KFJ Ranch Partnership*, 2011 UT 50, ¶15, 267 P.3d 863 (Utah 2011). The Utah Supreme Court further instructed that,

[g]enerally, when interpreting statutes we seek to avoid interpretations "which render some part of a provision nonsensical or absurd." Thus, when "statutory language . . . presents the court with two alternative readings, we prefer the reading that avoids absurd results." In defining the parameters of what constitutes an absurd result, we have noted that such a "result must be so absurd that the legislative body which authored the legislation could not have intended it."

Id. at ¶26 and p. 869.

Based on the Utah Supreme Court's language it is settled that this Court must first look to the plain language of the statute. If the statute is ambiguous (i.e. it is susceptible to two or more interpretations) then this Court may turn to other canons of statutory construction such as legislative history, the rule against absurdities, and constitutional avoidance.

No doubt, the City takes the position U.C.A. § 58-37-2(g) is clear and unambiguous. The City adopts this position based on the presence of the term "or" between the second and third prongs of the statute. However, as has been previously stated, both *Hodges* and *Vickery* are both quick to point out that the presence of "or" in a list of items does not automatically or conclusively result in the disjunctive applying through the entire list. *Hodges*, 321 F.3d at 436 and *Vickery*, 199 F. Supp.2d at 1367. It is not enough for the City to simply point to the "or" as if that is the end all in statutory analysis. Rather, as stated in *Hodges*, the "or" itself needs to be analyzed in the context of the entire statute to determine if it should be applied throughout.

In the present case, a contextual analysis of the statute lends itself to competing interpretations as to whether the "or" should apply throughout. Not the least of which is the fact that subsections (B) and (C) are of similar nature whereas subsection (A) is quite unique. Subsection (A) relates entirely with the substances physical form and structure and does not concern itself with any pharmacological effects. In contrast both subsections (B) and (C) are entirely concerned with pharmacological effects and not at all with structure. Subsections (B) and (C) present two alternatives for determining

pharmacological effect with subsection (B) looking to actual effects and subsection (C) looking to the represented or intended effects.

Because subsections (B) and (C) present two alternatives to the same determination--pharmacological effects--it stands to reason that the disjunctive "or" would appear between them. It therefore makes sense to see how the statute can be read to require subsection (A) in all cases, but permit a choice between subsections (B) and (C) as those two subsections both deal with pharmacology. Accordingly, the plain language and contextual driven analysis results in the statute being ambiguous as to its application of the term "or".

The City also purports, that even if this Court were to consider the legislative history in order to divine intent, it would hold the statute should be read in the disjunctive. This is perhaps the City's strongest argument as the legislative history does contain strong language evidencing an intent to treat each subsection as a stand-alone prong. *See* H.B. 254 (enrolled copy), ll. 11-15, available at <http://le.utah.gov/~2012/bills/static/HB0254.html>. However, even with this stated intent, the picture is not so clear.

A review of the legislative history, including the recorded audio of the "debates," demonstrates two things: first, the legislature was passing the amendment at the recommendation of the State purely to make prosecutions easier⁶; and second, the focus

⁶ This is an important consideration as it was never contended that the State could not successfully prosecute these types of cases under the conjunctive approach. Rather, the State simply wanted the prosecutions to be easier. When the interest of prosecutorial

was entirely on subsection (A) with absolute no thought or consideration going into the effects of making subsections (B) and (C) stand-alone prongs. This is problematic in that it generates manifestly clear competing and contradictory legislative purposes and intent.

If this Court stops at the legislature's stated intent and interprets U.C.A. § 58-37-2(g) in the disjunctive all of the absurd results previously detailed become a reality. Neither the City or the district court has presented any reasonable explanation as to how such absurd consequences can be avoided under a disjunctive reading. A disjunctive reading in the interest of legislative intent is therefore tantamount to claiming the legislature intended to criminalize caffeine, coffee, soda, energy drinks, alcohol, tobacco, ginseng, flour, wax, vitamin B, MSG, GABA, and the like. Certainly, the City, the district court, and this Court cannot reasonably claim the legislature intended to criminalize everyday household items. To the contrary, the legislature's intent was to target designer drug manufacturers, not peddlers of Coca-Cola. However, the intent to target designer drug manufacturers and not Folgers coffee is obliterated through a disjunctive reading. Consequently there are two contradictory legislative intents at work, the first seeks to make prosecution easier through making subsection (A) a stand-alone prong; and the second seeks to target designer drug manufacturers and not Doritos chips. A disjunctive reading gives effect to the former whereas a conjunctive reading gives effect to the latter.

economy is weighed against mass criminalization of household items it hardly seems appropriate or what the legislature truly intended.

It is here perhaps that the other rules of statutory construction are useful. The rule requiring interpretation avoiding absurd results was cited above. In addition to that rule is the canon of constitutional avoidance. That canon was set forth by the Utah Supreme Court when it held,

[t]he canon of constitutional avoidance is an important tool for identifying and implementing legislative intent. Its premise is a presumption that the legislature "either prefers not to press the limits of the Constitution in its statutes, or it prefers a narrowed (and constitutional) version of its statutes to a statute completely stricken" by the courts. Thus, when a court rejects one of two plausible constructions of a statute on the ground that it would raise grave doubts as to its constitutionality, it shows proper respect for the legislature, which is assumed to "legislate[]" in the light of constitutional limitations."

Utah DOT v. Carlson, 2014 UT 24, ¶23, 332 P.3d 900, 905 (Utah 2014)(internal citations omitted).

The absurd results of a disjunctive reading manifest the situations in which valid challenges for vagueness as applied under the State and federal constitutions may be asserted. Indeed, many of the federal cases determining how to interpret the federal analog law were the result of a defendant's challenge for vagueness. *See Washam*, 312 F.3d 926. In those cases where the federal analog statute was challenged for vagueness it was often upheld as constitutional due to a conjunctive reading of the statute. *See id.* In other words, a conjunctive reading prevents the statute from being rendered unconstitutional due to the absurd results that would have flowed from a disjunctive reading.

It is important to note two characteristics of the constitutional avoidance doctrine. The first is that the doctrine does not ask if the discarded reading would in fact make the

statute unconstitutional, but rather if the discarded reading merely raises grave doubts as to the constitutionality of the statute. Second, the rule explicitly states that this Court is actually showing proper respect for, and giving effect to, the legislative intent when it rejects an interpretation that may render the statute unconstitutional. Therefore, under this rule, this Court can interpret U.C.A. § 58-37-2(g) in the conjunctive in order to avoid constitutional challenges and such a finding would in fact be giving effect to legislative intent when that intent is considered in light of constitutional considerations.

Because U.C.A. § 58-37-2(g) is ambiguous as to its application of the term "or", and because the legislature presents this Court with competing and contradictory legislative intent, it is proper for this Court to turn to other canons of statutory construction. Pursuant to those canons, in particular the rule of avoiding absurdities and constitutional avoidance, this Court should interpret U.C.A. § 58-37-2(g) to be read in the conjunctive. Meaning, the City must show the alleged analog in the present case is (A) substantially structurally similar to a controlled substance *and* that the alleged analog is either (B) substantially similar in its pharmacological effect as a controlled substance; *or* (C) that Mike's intended or represented the alleged analog to have a substantially similar pharmacological effect as a controlled substance.

CONCLUSION

The Seventh Circuit in *Turcotte* identified a conjunctive reading as the "common sense" interpretation. It further found the conjunctive reading to be in line with a wealth of precedent set before by courts across the country. In reviewing the various decisions that have come out it becomes apparent why the Seventh Circuit viewed a conjunctive

reading as the common sense approach. A disjunctive reading creates three stand-alone prongs, each of which when left on its own creates absurd results.

These results range from the criminalization of structurally similar substances such as MSG to the criminalization of pharmacologically similar substances such as caffeine. These absurd results are not the intent of the legislature. Rendering an interpretation that permits the criminalization of virtually every common household item would be a grave injustice to the heart of the legislative intent, which was to stop designer drug manufacturers for the protection of the public. Criminalizing the public at large in the same fell swoop as criminalizing designer drugs certainly runs contrary to the legislative intent in amending U.C.A. § 58-37-2(g). This is particularly true when it is remembered that the amendment to U.C.A. § 58-37-2(g) was made purely to make prosecutions easier, not because previous prosecutions had failed. One cannot reasonably conclude the legislature meant to engage in mass criminalization of everyday household items purely in the name of prosecutorial economy.

This Court has tools for statutory construction which render a result that avoids these absurd results, avoids constitution challenges, and maintains the legislative intent of stopping designer drugs. That construction is through a conjunctive reading. Accordingly, the Appellant, Mike's Smoke Shop, respectfully requests this Court find U.C.A. § 58-37-2(g) must be read in the conjunctive. Meaning, the City must show the alleged analog in the present case is (A) substantially structurally similar to a controlled substance **and** that the alleged analog is either (B) substantially similar in its pharmacological effect as a controlled substance; **or** (C) that Mike's intended or represented the alleged analog to

have a substantially similar pharmacological effect as a controlled substance. Mike's also respectfully requests this Court overturn the district court's decision to uphold the license revocation and overturn the City's license revocation. Finally, Mike's respectfully requests this Court remand this matter to the district court with instructions to apply a conjunctive reading of the statute to the facts of this case.

DATED this 25th day of April 2016.




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CERTIFICATE OF COMPLIANCE
WITH RULE 24

This brief complies with the type-volume limitation of Utah Rule of Appellate Procedure 24(f)(1) because according to the word processing program used to prepare this brief (Word 2007), this brief contains 7,879 words, excluding the parts of the brief exempted by Utah Rule Appellate Procedure 24(f)(1)(B).

DATED this 25th day of April 2016.



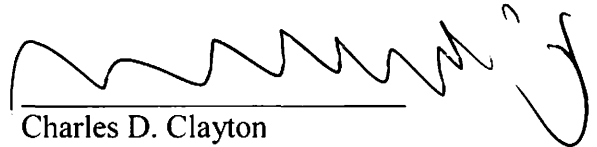
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I hereby certify that on April 25, 2016, I served two copies of the Appellant's Opening Brief on the following by U.S. Mail, postage prepaid, addressed to the following:

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