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Terrorism Statutes Run Wild: Methamphetamine and Weapons of Mass Destruction

In response to the growing number of clandestine methamphetamine labs, some North Carolina prosecutors have expressed willingness to charge individuals who operate methamphetamine labs under North Carolina's "weapons of mass destruction" statute.¹ This prosecutorial practice reflects a disturbing nationwide trend among some prosecutors to apply newly-enacted anti-terrorism statutes to common, domestic crimes in order to obtain more severe punishments.² Although there may be arguments that applying the North Carolina weapons of mass destruction statute to the manufacturing of methamphetamine is impermissible per se,³ this Recent Development takes a more modest approach. This Recent Development argues that, even if applying the statute in this manner is permissible in principle, its *retroactive* application is unconstitutional because it deprives defendants of their due process right to fair warning. Although this analysis focuses specifically on a North Carolina statute, markedly similar statutes exist in other states and are just as susceptible to manipulation as the one examined here.⁴

In *Bouie v. City of Columbia*,⁵ the United States Supreme Court first articulated the principle that a deprivation of the right of fair warning embodied in the Due Process Clause may result, not only from vague statutory language, but also from "an unforeseeable and retroactive judicial expansion of narrow and precise statutory language."⁶ *Bouie* arose in the

1. See David Ingram, *Forsyth DA will Also Try New Anti-Terrorism Statute to Fight Meth Labs*, WINSTON-SALEM J., July 20, 2003, at B1; Jim Sparks, *Watauga Takes Aim at Spread of Drug*, WINSTON-SALEM J., Sept. 10, 2003, at A1. The statute makes it unlawful to "knowingly manufacture, assemble, possess, store, transport [or] sell . . . a nuclear, biological, or chemical weapon." N.C. GEN. STAT. § 14-288.21(a) (2003). The term "nuclear, biological, or chemical weapon" is defined, in pertinent part, as "any weapon, device, or method that is designed or has the capability to cause death or serious injury through the release, dissemination, or impact of [t]oxic or poisonous chemicals, or their immediate precursors;" or as "[a]ny substance that is designed or has the capability to cause death or serious injury and . . . [i]s or contains toxic or poisonous chemicals or their immediate precursors." *Id.* § 14-288.21(c). A person convicted under the statute is guilty of a Class B1 felony which carries a penalty of twelve years to life imprisonment. *Id.* § 14-288.21(d); *Id.* § 15A-1340.17(c).

2. See Siobhan Roth, *Anti-Terror Laws Increasingly Used Against Ordinary Criminals*, LEGAL INTELLIGENCER, Sept. 11, 2003, at 4.

3. For instance, one could argue that application of the statute in this context violates various rules of statutory construction.

4. See *infra* notes 78-83 and accompanying text.

5. 378 U.S. 347 (1964).

6. *Id.* at 352.

context of a civil rights sit-in where the defendants were charged with criminal trespass when they refused to leave a lunch counter at an Eckerd's drug store after being asked to leave.⁷ The Supreme Court held that the courts could not construe the criminal trespass statute, which forbade " 'entry upon the lands of another' " after the owner has given notice that entry is prohibited to cover the "act of remaining on the premises of another after receiving notice to leave."⁸ The Court analogized to the classic void-for-vagueness doctrine,⁹ which likewise derives from the Due Process Clause, but also relied on the fact that this judicial enlargement of the statute operated "precisely like an ex post facto law."¹⁰ The Court noted that, "[i]f a state legislature is barred by the Ex Post Facto Clause from passing such a law, it must follow that a State Supreme Court is barred by the Due Process Clause from achieving precisely the same result by judicial construction."¹¹

The current Court significantly narrowed the scope of *Bouie* in *Rogers v. Tennessee*¹² yet left unclear the precise boundaries of the rule. *Rogers* involved, not the judicial expansion of a statute, but rather the "retroactive application of a judicial decision abolishing the common law 'year and a day rule.' "¹³ The Court noted that, because the Ex Post Facto Clause, by its own terms, applies only to legislatures, the *Bouie* doctrine rests squarely within the Due Process Clause and its guarantees of fair warning.¹⁴ It therefore noted that, to the extent that the *Bouie* decision seemed to rely on the Ex Post Facto Clause, that language was "dicta."¹⁵ Thus, the *Bouie* doctrine did not incorporate "jot-for-jot" the specific categories of cases to which the Ex Post Facto Clause applies.¹⁶ In justifying this conclusion the

7. *Id.* at 348.

8. *Id.* at 349–50 (citing S.C. CODE ANN. § 16-386 (1952) (Cum. Supp. 1960)).

9. *See, e.g.,* *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972) (voiding a state vagrancy statute because it failed to give a person of normal intelligence fair notice of what conduct it proscribed).

10. *See Bouie*, 378 U.S. at 353–54.

11. *Id.* In a subsequent case the Court further expanded the *Bouie* principle to apply, not only to statutes that are narrow and precise, but to statutes that are broad and sweeping as well. *Marks v. United States*, 430 U.S. 188, 195 (1977). "Ex post facto" simply means "after the fact."

12. 532 U.S. 451 (2001).

13. *Id.* at 453. Under the year and a day rule, a defendant could not be convicted of murder if the victim died more than a year and a day after the defendant's act. *See id.*

14. *Id.* at 456.

15. *Id.* at 459.

16. *Id.* The categories to which the Court refers were first enunciated by Justice Chase in *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (*seriatim* opinion of Chase, J.):

1st. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2d. Every law that aggravates a crime, or makes it greater than it was, when committed. 3d. *Every law that changes the punishment, and inflicts a greater punishment, than the law annexed to the crime, when*

Court stressed the institutional differences between common law judicial functions and legislative lawmaking functions.¹⁷ The Court reasoned that “incorporation of the *Calder* categories into due process limitations on judicial decisionmaking would place an unworkable and unacceptable restraint on normal judicial processes and would be incompatible with the resolution of uncertainty that marks an evolving legal system.”¹⁸ The *Rogers* Court stressed that this rationale was especially applicable to common law doctrine and held that “a judicial alteration of a common law doctrine of criminal law violates the principle of fair warning, and hence must not be given retroactive effect, only where it is ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’ ”¹⁹

For present purposes, the *Rogers* decision left three relevant questions open: whether the *Bouie* doctrine applies to after-the-fact increases in punishment for conduct that was previously criminal, and whether the applicable test is the “unexpected and indefensible” test articulated in *Rogers* and, if so, how that test operates.

Each of the cases in which the Supreme Court has applied the *Bouie* principle has involved judicial interpretation that criminalized previously innocent conduct.²⁰ Thus, it is not clear whether the *Bouie* principle applies at all to after-the-fact increases in punishment,²¹ especially since the principle does not necessarily offer protections coextensive with the Ex Post Facto Clause.²² Most circuit courts that have addressed the issue have

committed. 4th. Every law that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offense, in order to convict the offender. (emphasis added)

17. *Rogers*, 532 U.S. at 460.

18. *Id.* at 461.

19. *Id.* at 462 (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). The *Rogers* rationale and result have evoked some criticism. See *id.* at 467–81 (Scalia, J., dissenting). See generally Heyward D. Armstrong, Comment, *Rogers v. Tennessee: An Assault on Legality and Due Process*, 81 N.C. L. REV. 317 (2002) (arguing that *Rogers* unjustifiably limited the constitutional protections of criminal defendants); Daniel James White, Casenote, *Ex Post Facto Excepted: Rogers v. Tennessee and the Permissible Retroactive Application of Judge Made Law*, 71 U. CIN. L. REV. 1141 (2002) (examining and critiquing the rationale of *Rogers* and suggesting its possible consequences).

20. See *Rogers*, 532 U.S. at 451 (involving retroactive application of a decision abolishing the year and a day rule); *Marks v. United States*, 430 U.S. 188, 188 (1977) (involving the transportation of materials not defined as obscene under the pornography law as it existed at the time of the acts); *Bouie v. City of Columbia*, 378 U.S. 347, 348 (1964) (involving the retroactive expansion of a trespass statute).

21. See *Dale v. Haeblerlin*, 878 F.2d 930, 934 (6th Cir. 1989) (noting lack of clarity in *Bouie*).

22. *Rogers*, 532 U.S. at 459.

concluded that *Bouie* extends to after-the-fact increases in punishment;²³ however, each of these cases was decided before *Rogers* and in all of them the courts relied heavily on the ex post facto language from *Bouie*.²⁴ The discussion in *Davis v. Nebraska*²⁵ is representative. After citing *Bouie* for the proposition that unforeseeable judicial expansion of a statute operates like an ex post facto law, the court concluded that, because after-the-fact increases in punishment are forbidden by the Ex Post Facto Clause, they likewise must be forbidden by the Due Process Clause under *Bouie*.²⁶ The rationale in these cases has certainly been undercut by the conclusion in *Rogers* that the *Bouie* principle does not incorporate wholesale the restrictions embodied in the Ex Post Facto Clause.²⁷

Rogers, however, may be distinguishable. In limiting the applicability of the *Bouie* principle, the *Rogers* Court stressed the need for flexibility inherent in a common law legal system. The Court noted that restrictive limitations on the abilities of the courts to mold the law could hamper the evolution of the common law.²⁸ This proposition is undoubtedly correct, but it does not follow that courts require the same flexibility when interpreting statutes. To the contrary, in areas of law that are largely statutory, it is the province of the legislature to change and refine the law.²⁹ Therefore, in the statutory context, the judiciary does not require, nor should it even exercise, the flexibility that the *Rogers* court sought to secure for common law courts.

Even if *Rogers* did foreclose the possibility of direct analogy to the categories of lawmaking prohibited by the Ex Post Facto Clause, an argument based upon the general principles of fair warning incorporated in

23. See *Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998); *Davis v. Nebraska*, 958 F.2d 831, 834 (8th Cir. 1992); *Helton v. Fauver*, 930 F.2d 1040, 1045 (3d Cir. 1991); *Haebertlin*, 878 F.2d at 934. Only the Ninth Circuit has expressly held that the *Bouie* principle does not apply to after-the-fact increases in punishment. *Holgerson v. Knowles*, 309 F.3d 1200, 1202 (9th Cir. 2002) (citing *United States v. Newman*, 203 F.3d 700, 703 (9th Cir. 2000)). The Fifth Circuit has not directly ruled on the issue but has indicated that whether the conduct was previously lawful is a significant factor. See *Janecka v. Cockrell*, 301 F.3d 316, 325 (5th Cir. 2002).

24. See, e.g., *Kindt*, 158 F.3d at 1062–63 (relying heavily on *Bouie*'s language regarding the parallels between ex post facto restrictions on legislatures and due process limitations on courts); *Helton*, 930 F.2d at 1045 (same).

25. 958 F.2d 831 (8th Cir. 1992).

26. *Id.* at 833–34.

27. See *Rogers v. Tennessee*, 532 U.S. 451, 459 (2001).

28. *Id.* at 461.

29. Justice Antonin Scalia is one of the primary proponents of the view that the flexibility of judicial decisionmaking in the common law tradition is undesirable when courts are interpreting statutes. For a thorough discussion of his views on this subject and powerful critiques of his argument as applied to constitutional interpretation, see generally ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (Amy Gutmann ed., 1997).

the Due Process Clause could be persuasive as well.³⁰ The Sixth Circuit's opinion in *Dale v. Haeberlin*³¹ is instructive on this point. Though the court relied in part on the language in *Bouie* regarding the Ex Post Facto Clause in holding that the *Bouie* principle applied to after-the-fact increases in punishment,³² it also rested its decision on general notions of fair warning. Noting that the foundation of the "fair warning" requirement assumes the person committing the act is rational, the court said, "[p]rinciples of fairness . . . require that this actor, in making his decision whether to act, be fully informed as to whether this proposed action is criminal, and, if so, what type of punishment one guilty of the criminal act can expect."³³

The deterrence theory of punishment supports this view. The rationale behind deterrence rests on the notion that imposing a greater punishment for a particular act will deter more people from committing that act.³⁴ To the extent that deterrence theory retains force in our society as a viable purpose of punishment,³⁵ society expects individuals to mold their behavior according to the severity of the crime. Therefore, principles of fairness require individuals to know the potential consequences of their criminal actions. One could argue that the degree of punishment for any given crime is often flexible and depends upon the discretion of those working within the criminal justice system. Thus, the degree of punishment is never foreseeable in a particular case. In this age of structured sentencing, however, punishments for crimes are finely graded and the discretion within the system has been substantially reduced.³⁶ Consequently, the

30. See *Rogers*, 532 U.S. at 459 (noting that *Bouie* is applied "in accordance with the more basic and general principle of fair warning").

31. 878 F.2d 930 (6th Cir. 1989).

32. See *id.* at 933–34.

33. *Id.* at 934–35.

34. See WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5(a)(4) (West Publishing Co. 1986) (1972).

35. The theory of deterrence has its critics. See generally Kyron Huigens, *The Dead End of Deterrence, and Beyond*, 41 WM. & MARY L. REV. 943 (2000) (arguing that pure deterrence theory has failed to explain the reason for punishment and advancing a hybrid theory incorporating principles from both deterrence and retribution); Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999) (contending that deterrence arguments often hold little force in society). Other scholars have noted a recent trend away from deterrence theory and towards retribution. See generally Michele Cotton, *Back with a Vengeance: The Resilience of Retribution as an Articulated Purpose of Criminal Punishment*, 37 AM. CRIM. L. REV. 1313 (2000) (arguing that, despite the efforts of utilitarian reformers in the mid-twentieth century, retribution has firmly taken hold in both the courts and the legislatures).

36. See, e.g., U.S. SENTENCING GUIDELINES MANUAL *passim* (2002) (providing a comprehensive system of classifying criminal acts according to the crime committed and certain offense characteristics and a grid for calculating the permissible range of punishment); N.C. GEN. STAT. §§ 15A-1340.10 to .24 (2003) (codifying a similar system).

severity of the punishment for particular crimes is in fact foreseeable.³⁷ Furthermore, with respect to the relevant North Carolina statutes, the difference in punishment between the weapons of mass destruction statute and the statute directly prohibiting the manufacture of methamphetamine is tremendous.³⁸

Assuming that the *Bouie* principle applies to after-the-fact increases in punishment, the question remains as to what test applies after *Rogers*. Prior to *Rogers*, many courts interpreted the *Bouie* test as one of simple foreseeability.³⁹ *Rogers*, however, seemed to reinterpret *Bouie* as standing for the proposition that only a retroactively applied judicial decision that is both “unexpected and indefensible” violates the principles of fair warning embodied in the Due Process Clause.⁴⁰ The specific holding of *Rogers* established the “unexpected and indefensible” test only for judicial alterations of the common law, but the Court suggested that it understood *Bouie* to require the same analysis whenever a retroactively applied judicial decision potentially implicates rights of fair warning.⁴¹ Furthermore, most courts that have addressed the issue of retroactively applied judicial decisions since *Rogers* have applied the “unexpected and indefensible” test across the board.⁴² Therefore, it is highly likely that most courts will apply

37. One could argue that the general public is probably not aware of the prevalence of structured sentencing laws. However, ignorance of the law is generally not an excuse from liability. If an individual is not allowed to use her ignorance of the law as an excuse, the government should not be able to either. *See Posters ‘N’ Things, Ltd. v. United States*, 511 U.S. 513, 524 (1994).

38. A person convicted under the “weapons of mass destruction” statute is guilty of a class B1 felony, which carries a penalty of twelve years to life imprisonment. N.C. GEN. STAT. § 14-288.21(d) (2003); *Id.* § 15A-1340.17(c). A person convicted under the statute directly addressing methamphetamine is generally guilty of a class H felony which carries a penalty of four to twenty-five months imprisonment. *Id.* § 90-90(3)(c); *Id.* § 90-95(b)(1); *Id.* § 15A-1340.17(c).

39. *See, e.g., Johnson v. Kindt*, 158 F.3d 1060, 1063 (10th Cir. 1998) (“The test for determining whether the retroactive application of a judicial decision violates due process is essentially one of foreseeability.”) (citing *McDonald v. Champion*, 962 F.2d 1455, 1458 (10th Cir. 1992)); *McSherry v. Block*, 880 F.2d 1049, 1054 (9th Cir. 1989) (noting that the determination is one of foreseeability).

40. *See Rogers v. Tennessee*, 532 U.S. 451, 461–62 (2001).

41. *See id.* at 461. The *Rogers* Court stated that “*Bouie* restricted due process limitations on the retroactive application of judicial interpretations of criminal statutes to those that are ‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue.’” *Id.* (quoting *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964)). Though the *Rogers* Court fails to note it, that particular language in *Bouie* was a quote from a treatise on criminal law and probably was not intended to be the holding of the case. *See Bouie*, 378 U.S. at 354 (quoting JEROME HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 58–59 (The Bobbs-Merrill Co. 1960) (1947)).

42. *See Janecka v. Cockrell*, 301 F.3d 316, 324 n.11 (5th Cir. 2002); *Willingham v. Mullin*, 296 F.3d 917, 925 (10th Cir. 2002); *State v. Redmond*, 631 N.W.2d 501, 508 (Neb. 2001). *But see Hawkins v. Mullin*, 291 F.3d 658, 665–66 (10th Cir. 2002) (holding that if the statute is “narrow and precise” on its face, any judicial expansion is per se unconstitutional; but if the

the test articulated by *Rogers* in this context.

This conclusion raises the question of what exactly it means for a judicial interpretation to be “unexpected and indefensible.” The *Rogers* holding offers some general guidance by noting that the interpretation must be “‘unexpected and indefensible by reference to the law which had been expressed prior to the conduct at issue.’”⁴³ Most likely the Court envisioned the application of this rule to common law doctrines and statutes that had previously been interpreted and applied by the courts. In such a situation, the reviewing court would simply compare the novel interpretation with past interpretations. Because there has yet to be a judicial opinion interpreting the North Carolina weapons of mass destruction statute,⁴⁴ this method of analysis is unavailable in the present case.

The manner in which the courts have applied the *Rogers* test offers some guidance. The analysis in *Rogers* and the few cases that have applied it suggest that, despite the re-articulation of the test, it is still based primarily on principles of foreseeability, though perhaps requiring a higher threshold showing of unforeseeability than that required pre-*Rogers*.⁴⁵ In *Rogers*, the Court concluded that retroactive application of a judicial decision abolishing the year and a day rule was not “unexpected and indefensible” because the rule was widely viewed as outdated, it had been abolished in most jurisdictions, and had never served as the basis of any Tennessee decision.⁴⁶ The judicial abolition of the “archaic and outdated” year and a day rule was, therefore, not sufficiently unforeseeable to prevent its retroactive application.⁴⁷

Turning to the lower courts, the issue before the Tenth Circuit in *Hawkins v. Mullin*⁴⁸ was whether a judicial decision finding that kidnapping for extortion could serve as a predicate felony under the state felony murder statute where the statute only enumerated simple kidnapping violated principles of fair warning.⁴⁹ At the outset the court observed that the determination was still essentially one of foreseeability.⁵⁰ In holding that the defendant’s rights were not violated, the court emphasized the logical consequences of a decision in favor of the defendant. The court

statute is not “narrow and precise,” the “unexpected and indefensible” test applies).

43. See *Rogers*, 532 U.S. at 461 (citing *Bowie v. City of Columbia*, 378 U.S. 347, 354 (1964)).

44. See N.C. GEN. STAT. § 14-288.21 (2003).

45. See *infra* text accompanying notes 46–63.

46. *Rogers*, 532 U.S. at 462–64.

47. *Id.* at 467.

48. 291 F.3d 658 (10th Cir. 2002).

49. *Id.* at 664.

50. *Id.*

noted that such a finding would produce the illogical result that the lesser offense of simple kidnapping could serve as the requisite predicate offense, but the greater crime of kidnapping for extortion could not.⁵¹ It also noted that the legislative policy underlying the felony murder statute, the deterrence of felonies “so inherently dangerous as to create foreseeable risks of death,” is well-served by including kidnapping by extortion within the predicate felonies.⁵²

The Tenth Circuit addressed retroactive increases in punishment again in *Willingham v. Mullin*,⁵³ in which it stated that the entire test “depends on the merit or plausibility of [the court’s] holding in light of the legal principles and statutory language on which it was based.”⁵⁴ In *Willingham*, the legislature had changed the elements for depraved mind murder to include an element that malice murder, with which the defendant was charged, did not require.⁵⁵ The state court previously had not noticed the amendment, but when it did, declined to include depraved mind murder as a lesser included offense in the jury instruction.⁵⁶ The defendant challenged the failure to instruct on depraved mind murder on due process grounds.⁵⁷ The Tenth Circuit took a two-tiered approach to the test. While it found the interpretation of the statute in question “unexpected,” it nevertheless held that it was not “indefensible.”⁵⁸ The interpretation of the statute may have been unexpected by the defendant, but its application in this case was imminently foreseeable based upon the statutory language.⁵⁹ Thus, the court interpreted the *Rogers* test as two-pronged but nonetheless made its final determination based upon principles of foreseeability, albeit perhaps requiring a greater degree of foreseeability than it would have before *Rogers*.

State courts have also interpreted the *Rogers* test as one of foreseeability. The Connecticut Supreme Court applied the *Rogers* test in *State v. Miranda*,⁶⁰ in which the defendant was charged and convicted under the state’s assault statute for breaching his common law duty to come to the aid of a child he considered his stepdaughter.⁶¹ Because no one had ever been convicted under Connecticut’s assault statute for failing to aid

51. *Id.* at 667.

52. *Id.*

53. 296 F.3d 917 (10th Cir. 2002).

54. *Id.* at 925.

55. *Id.* at 923.

56. *Id.*

57. *Id.*

58. *Id.* at 925–96.

59. *Willingham*, 296 F.3d at 925.

60. 794 A.2d 506 (Conn. 2002).

61. *Id.* at 511.

another, the defendant asserted a due process challenge.⁶² After quoting the “unexpected and indefensible” test from *Rogers*, the court, like the Tenth Circuit, set out to determine whether the trial court’s application of the statute was “foreseeable.”⁶³

Like the *Rogers* Court, these lower courts have applied the “unexpected and indefensible” test in terms of foreseeability, the same principle that governed the analysis before *Rogers* was decided.⁶⁴ This interpretation also comports with the right of fair warning upon which the test is based.⁶⁵ The Court’s purpose in re-articulating the *Bouie* test was then to draw a clear distinction between legislative and judicial lawmaking and to require a greater showing of unforeseeability when challenging the retroactive application of the latter. These principles guide the analysis of the constitutionality of the retroactive application of North Carolina’s weapons of mass destruction statute to the manufacture of methamphetamine. Close, contextual examination of the statutory language reveals that the statute cannot be constitutionally applied in this situation.

The weapons of mass destruction statute makes it unlawful to “knowingly manufacture, assemble [or] possess . . . nuclear, biological, or chemical weapon[s] of mass destruction.”⁶⁶ There are two definitions of “weapon of mass destruction” within the statute that arguably apply to the manufacturing of methamphetamine. The first is “[a]ny *substance* that is designed or has the capability to cause death or serious bodily injury and . . . contains toxic or poisonous chemicals or their immediate precursors.”⁶⁷ The second is “[a]ny weapon, device or *method* that is designed or has the capability to cause death or serious injury through the release, dissemination, or impact of . . . [t]oxic or poisonous chemicals or their immediate precursors.”⁶⁸ Read literally, these provisions could arguably apply respectively to the possession and production of methamphetamine. Methamphetamine is a highly toxic substance that can severely damage the brain, induce strokes, and sometimes cause death.⁶⁹ The manufacturing

62. *Id.* at 510.

63. *Id.* at 515. The court concluded that the trial court’s interpretation of the statute was foreseeable, basing its decision primarily on the fact that the common law has long imposed a duty to aid on those who live under one roof. *Id.* at 516–17.

64. *But see* *State v. Redmond*, 631 N.W.2d 501, 508 (Neb. 2001) (interpreting *Rogers* as demanding an especially rigid, two-pronged test and upholding the retroactive application of a judicial interpretation of statutory language solely on the basis that the decision had some colorable legal support).

65. *See Rogers v. Tennessee*, 532 U.S. 451, 459 (2001).

66. N.C. GEN. STAT. § 14-288.21(a) (2003).

67. *Id.* § 14-288.21(c)(2) (emphasis added).

68. *Id.* § 14-288.21(c)(1) (emphasis added).

69. *See* ERROL YUDKO ET AL., METHAMPHETAMINE USE: CLINICAL AND FORENSIC

process itself involves highly volatile chemical reactions that pose significant dangers both to those involved in producing the substance as well as to investigating law enforcement officials.⁷⁰ Moreover, each pound of manufactured methamphetamine produces five pounds of toxic and potentially lethal waste that can seep into groundwater and cause serious health problems for those living in the surrounding community.⁷¹

Thus, a reading of the statutory definitions in isolation suggests that it is foreseeable that those who manufacture methamphetamine could be prosecuted under the weapons of mass destruction statute. Both methamphetamine itself and the chemical processes involved in its production fit within the literal statutory definition of a “weapon of mass destruction.”⁷² Viewing the statute as a whole, however, it becomes less foreseeable that the statute could be so applied.

Under the “method” definition, the section referring to chemicals is preceded by references to “radiation or radioactivity,” and “disease organism[s].”⁷³ Under the “substance” definition, the “chemical” section is preceded and followed by similar references.⁷⁴ The references to radioactivity and disease organisms refer specifically to weapons such as nuclear weapons, dirty bombs and anthrax—types of weapons associated with terrorism and generally regarded as weapons of mass destruction. The fact that the more expansive definition relating to chemicals is listed alongside these specific references to nuclear and biological weapons compels the inference that the chemical definition is properly limited to those substances and weapons that one generally associates with terror attacks.⁷⁵ Upon reading the statute, one could reasonably foresee that the

ASPECTS 47–48 (CRC Press 2003).

70. H.R. REP. NO. 106-878, at 22 (2000).

71. *Id.*

72. Because the statute criminalizes both manufacturing and possession, one anomalous result of this reading is that those who simply possess a small amount of methamphetamine could be subject to the same extreme penalties as those who manufacture it. *See* N.C. GEN. STAT. § 14-288.21(a) (2003). The courts could easily avoid this result, however, by finding that only the definition regarding the “method,” not the “substance,” applies. Such an interpretation arguably makes sense given the fact that it is only the manufacturing process that entails a high risk of explosion and widespread environmental contamination.

73. *Id.* § 14-288.21(c)(1) (“Any weapon, device or method that is designed or has the capability to cause death or serious injury through the release, dissemination, or impact of: (a) Radiation or radioactivity; (b) A disease organism; or (c) Toxic or poisonous chemicals or their immediate precursors.”).

74. *Id.* § 14-288.21(c)(2) (“Any substance that is designed or has the capability to cause death or serious injury and: (a) Contains radiation or radioactivity; (b) Is or contains toxic or poisonous chemicals or their immediate precursors; or (c) Is or contains one or more of the following [disease organisms]”).

75. According to the canon of construction *ejusdem generis*, when a general term is followed by more specific terms, the meaning of the general term should be limited to the scope of the specific terms. *See* *Brogan v. United States*, 522 U.S. 398, 403 n.2 (1998) (citing *Norfolk &*

chemical definition included substances such as napalm or agent orange. But given the context of the definition, it is not foreseeable that the definition covers methamphetamine, a drug, no matter how dangerous, that is manufactured solely for personal consumption not violent terrorist attacks.

Viewing the statute in light of North Carolina law as a whole, its application to manufacturing methamphetamine becomes even more unforeseeable. More than thirty years ago the General Assembly enacted the North Carolina Controlled Substances Act, a comprehensive statutory scheme designed to address directly the problem of the use, sale and production of illegal drugs.⁷⁶ The Controlled Substances Act specifically defines methamphetamine as a Schedule II controlled substance and contains other provisions detailing the severity of punishment for its sale and production depending on the quantity of the drug.⁷⁷ The existence of well-established laws that specifically address methamphetamine leads one to expect that those who deal in methamphetamine will be prosecuted exclusively under those laws.⁷⁸

An analysis of similar statutes in other jurisdictions confirms the conclusion that retroactive application of the weapons of mass destruction statute⁷⁹ in this situation is unforeseeable. Congress and several states have enacted laws similar to North Carolina's weapons of mass destruction statute.⁸⁰ Much of the language used in defining weapons of mass destruction in those statutes is identical to that used in North Carolina's statute. For instance, all of them target "the release, dissemination, or impact of toxic or poisonous chemicals" and whether the chemicals can

Western Ry. Co. v. Train Dispatchers' Assoc., 499 U.S. 117, 129 (1991)).

76. See North Carolina Controlled Substances Act, ch. 919, sec. 1, 1971 N.C. Sess. Laws 1477, 1477 (codified at N.C. GEN. STAT. §§ 90-86 to 90-113.5 (2003)).

77. See N.C. GEN. STAT. § 90-90(3)(c) (2003) (designating methamphetamine a Schedule II controlled substance); *Id.* § 90-95(b)(1) (providing that possession, sale and manufacturing of methamphetamine is normally a Class H felony); *Id.* § 90-95(h)(3b) (providing more severe sentences based upon the quantity of the drug possessed, sold, or manufactured).

78. At the very least, the existence of a statute dealing directly with methamphetamine proves that the General Assembly is fully able to draft a statute to address the problem directly. If the General Assembly had intended the weapons of mass destruction statute to apply to methamphetamine it would have explicitly done so.

79. Although it may seem that examining the law of other jurisdictions is not especially relevant to the foreseeability determination, both the *Rogers* Court and the Connecticut Supreme Court examined the state of the law in other jurisdictions. See *supra* notes 44, 61 and accompanying text.

80. See 18 U.S.C. § 2332a (2000); ARIZ. REV. STAT. §§ 13-2301 to -2308.01 (West Supp. 2003); D.C. CODE ANN. §§ 22-3151 to -3156 (West Supp. 2003); FLA. STAT. ANN. § 790.166 (West Supp. 2004); S.C. CODE ANN. § 16-23-710 (West Supp. 2003); VA. CODE ANN. § 18.2-46.4 (Lexis Supp. 2003).

cause death or serious bodily harm.⁸¹ North Carolina's statutory definition of a weapon of mass destruction is more expansive than those of other jurisdictions in that it includes chemicals and methods that simply have the capability of causing death or serious bodily harm, while most other jurisdictions limit the definition to include only those chemicals that are designed or otherwise intended to cause serious death or bodily harm.⁸² Despite these differences, there is substantial similarity between the language used in the statutes, which gives rise to a compelling inference that they were all passed with an eye towards addressing the same issues.⁸³ Consequently, it is notable that the chapter or article title of many of these statutes is "terrorism."⁸⁴ These titles suggest that the purpose of these statutes is to address, and provide serious penalties for, *terrorist* activities rather than activities related to controlled substances.⁸⁵

The foregoing analysis demonstrates the unforeseeability of application of the North Carolina weapons of mass destruction statute to those who manufacture methamphetamine. Moreover, the degree of unforeseeability is sufficiently great to surpass even the heightened standard implicit in the "unexpected and indefensible" test articulated by the *Rogers* Court. There is no doubt that methamphetamine use and production is a serious problem in our society. More serious penalties for methamphetamine related crimes may very well be warranted.⁸⁶ However,

81. See 18 U.S.C. 2332a(c)(2)(B); ARIZ. REV. STAT. § 13-2301(C)(11)(a); D.C. CODE ANN. § 2-3152(12)(c); FLA. STAT. ANN. § 790.166(1)(a)(1); S.C. CODE ANN. § 16-23-710(19)(b); VA. CODE ANN. § 18.2-46.4.

82. Compare N.C. GEN. STAT. § 14-288.21(c)(1) ("Any weapon, device, or method that is designed or has the capability to cause death or serious injury . . ."), with 18 U.S.C. § 2332a(c)(2)(B) ("any weapon that is designed or intended to cause death or serious bodily injury . . ."), and S.C. CODE ANN. § 16-23-710(19)(b) (same).

83. The fact that the North Carolina statute does not include an element of intent regarding the dangerousness of the substance or method may not be as important as it seems. A person convicted under the statute is guilty of a Class B1 felony which carries a penalty of twelve years to life imprisonment. N.C. GEN. STAT. § 14-288.21(d); *Id.* § 15A-1340.17(c). The greater the possible punishment the more likely courts will read into the statute an element of intent. See, e.g., *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (presuming a knowledge requirement in a child pornography statute that carried a potential penalty of ten years); *Staples v. United States*, 511 U.S. 600, 616-18 (1994) (imputing a requirement of knowledge in a firearm statute that potentially exposed violators to ten years imprisonment).

84. See 18 U.S.C. § 2332a ("Terrorism"); D.C. CODE ANN. § 22-3151 ("Terrorism"); VA. CODE ANN. § 18.2-46.4 ("Terrorism Offenses").

85. The fact that the North Carolina statute was enacted on Nov. 28, 2001, shortly after the Sept. 11 terrorist attacks, further supports the view that it was intended to provide penalties for those engaged in terrorist activities. See Act of Nov. 28, 2001, ch. 2001-470, sec. 1, 2001 N.C. Sess. Laws 2565, 2565 (codified at N.C. GEN. STAT. § 14-288.21 (2003)).

86. In fact the General Assembly is considering bills which would significantly increase the penalties for manufacturing methamphetamine. See Steve Hartsoe, *Proposed Bills Target Meth, Guns*, NEWS & OBSERVER (Raleigh, N.C.), Apr. 29, 2004, at B5, available at <http://www.newsobserver.com/politics/politicians/legislature/story/1260790p-7377457c.html> (last

retroactively applying broadly phrased anti-terrorism statutes to deal with this problem violates the core due process guarantees that are the hallmark of a fair criminal justice system.

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