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U.S. v. McFadden: Fourth Circuit Reads Scienter out of Analogue Enforcement Act

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I. Introduction

The district court refused to instruct the jury that the government must prove "the defendant *knew* that chemical structures of the substances at issue were substantially similar to the chemical structures of controlled substances in Schedule I or II."[1]

In 2007, Stephen McFadden, "a construction worker, began operating a small business buying overstocked items and reselling them on the internet."[2] After noticing that several businesses in his neighborhood were selling "bath salts," McFadden researched the "bath salts" by consulting the controlled

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1. United States v. McFadden (*McFadden I*), 15 F. Supp. 3d 668, 675 (W.D. Va. 2013) (emphasis added), *aff'd*, 753 F.3d 432, 436 (4th Cir. 2014), *cert. granted*, 135 S. Ct. 1039 (2015).

2. Petition for Writ of Certiorari at 7, United States v. McFadden, 753 F.3d 432 (4th Cir. 2014) (No. 14-378), 2014 WL 4948942 [hereinafter Petition for Cert.].

substances list maintained on the Drug Enforcement Agency's (DEA) website and, finding no indication that the "bath salts" were illegal, began selling the "bath salts."[3] After discovering that two ingredients in some of his products were subsequently put on the controlled substance list, McFadden flushed those products down the toilet and ceased selling them.[4] As part of a police investigation in Charlottesville, Virginia, in July 2011, police received "bath salts" purchased from McFadden, which were subsequently analyzed by the DEA.[5] On November 14, 2012, McFadden "was charged in a nine-count superseding indictment returned by a grand jury in the Western District of Virginia"[6] alleging that McFadden distributed and conspired to distribute "for human consumption, controlled substance analogues, in violation of 21 U.S.C. § 841(a)(1) and 846."[7] The alleged analogues were "3,4–methylenedioxymethcathinone (commonly known as 'methylone' or 'MDMC'); 3,4–methylenedioxypyrovalerone (commonly known as 'MDPV'); and 4–methyl–ethylcathinone (commonly known as '4–MEC')."[8]

"At the close of evidence, the district court rejected petitioner's request that the jury be instructed that the Government was 'required to prove that he knew, had a strong suspicion, or deliberately avoided knowledge that the [substances at issue] possessed the characteristics of controlled substance analogues."[9] Instead the only state of mind requirement, regarding the alleged analogue, that was given to the jury was that McFadden "intended for the mixture or substance to be consumed by humans."[10] The district court recognized that this interpretation of the statute was inconsistent with precedent from the Seventh Circuit, but held that it was "convinced that this [scienter requirement] is not required by the statute or Fourth Circuit precedent."[11]

On January 10, 2013, McFadden was found guilty by a jury on all nine counts.[12] McFadden filed a motion for a judgment of acquittal challenging "the constitutionality of the Analogue Act; the propriety of the court's instructions to the jury; the admission of certain expert testimony; and the sufficiency of the evidence to support his convictions."[13] McFadden's motion was denied[14] and he appealed to the Fourth Circuit Court of Appeals, primarily asserting that the

3. *Id.*
4. *Id.* at 7–8.
5. United States v. McFadden (*McFadden II*), 753 F.3d 432, 437 (4th Cir. 2014).
6. *McFadden I*, 15 F. Supp. 3d at 671.
7. *Id.*
8. *Id.*
9. Petition for Cert., *supra* note 2, at 8-9 (quoting *McFadden II*, 753 F.3d at 443).
10. *McFadden I*, 15 F. Supp. 3d at 676.
11. *Id.*
12. *Id.* at 671.
13. *Id.*
14. *Id.* at 681.

> Controlled Substance Analogue Enforcement Act of 1986 (the Act), 21 U.S.C. §§ 802(32)(A), 813 . . . is unconstitutionally vague as applied to him, that the district court abused its discretion in making certain evidentiary rulings at trial, and that the government failed to prove that the substances McFadden distributed qualified as controlled substance analogues under the Act.[15]

The Fourth Circuit affirmed the district court's decision,[16] denied a rehearing, and McFadden subsequently filed a petition for a writ of certiorari with the United States Supreme Court.[17] In its opinion, the Fourth Circuit also noted the circuit split and acknowledged that "[i]n contrast to our decision in *Klecker*, the Seventh Circuit has imposed a strict knowledge requirement before a defendant may be convicted of violating the Act," demanding proof that "'the defendant knew the substance in question was a controlled substance analogue.'"[18]

The United States Supreme Court granted McFadden certiorari on January 16, 2015[19] to determine "[w]hether, to convict a defendant of distribution of a controlled substance analogue, the government must prove that the defendant knew that the substance constituted a controlled substance analogue, as held by the Second, Seventh, and Eight Circuits, but rejected by the Fourth and Fifth Circuits."[20]

This Article argues that the Fourth Circuit incorrectly applied the Controlled Substances Enforcement Act of 1986 (AEA) because its analysis fails to recognize the scienter required by the AEA. Part II of this Article provides a brief history of the AEA and explains the mechanics of its application. Part III examines the different approaches taken by the federal circuits in applying the AEA. Part IV examines how the Fourth Circuit's ruling in *McFadden* (1) incorrectly reads a scienter requirement out of the statute by ignoring 21 U.S.C. § 841(a), (2) ignores the legislative history which specifically discusses this scienter requirement, and (3) improperly creates a strict liability crime.

II. THE CONTROLLED SUBSTANCES ANALOGUE ENFORCEMENT ACT OF 1986

The Controlled Substances Act (CSA) was enacted in 1970 in part to combat the "clandestine production, distribution, and use" of hallucinogenic drugs that

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15. *McFadden II*, 753 F.3d at 435–36.
16. *Id.* at 436.
17. Petition for Cert., *supra* note 2, at 1.
18. *McFadden II*, 753 F.3d at 444 (quoting United States v. Turcotte, 405 F.3d 515, 527 (7th Cir. 2005)).
19. United States Supreme Court, Order List: 574 U.S. (Jan. 16, 2015), *available at* http://www.supremecourt.gov/orders/courtorders/011615zr_f2q3.pdf.
20. Petition for Cert., *supra* note 2, at i.

"first appeared in the late 1960's."[21] The CSA criminalizes "knowingly or intentionally" manufacturing, distributing, or dispensing "a controlled substance."[22] Controlled substances are listed in five schedules,[23] which may be amended through notice-and-comment rulemaking.[24] Attempts to circumvent the numerous drugs listed in the CSA schedules created a "designer drug" phenomenon that has continued from the late 1960s to present day.[25] These designer drugs or "analogs" (sic) are "chemical variants of controlled substances[, which] are not subject to the provisions of the Controlled Substances Act unless or until they are controlled in one of the five schedules of the CSA."[26] Therefore, to prevent prosecution, "clandestine chemists" can make slight alterations to the scheduled controlled substances, which produce substances that are not on the schedules but still have "the effects of controlled narcotics, stimulants, depressants or hallucinogens."[27]

To combat the inability to prosecute individuals for production of these analogues, Congress enacted the Controlled Substances Analogue Enforcement Act of 1986 by amending the CSA to include a definition of a "controlled substance analogue,"[28] and providing a mechanism for treatment of controlled substance analogues.[29] A controlled substance analogue, subject to four exceptions[30] not relevant to the present discussion, is defined as a substance:

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21. *Controlled Substance Analogs Enforcement Act of 1985: Hearing on S. 1437 Before the S. Comm. on the Judiciary*, 99th Cong. 44–45 (1985) [hereinafter *Hearing*] (statement of John C. Lawn, Administrator, Drug Enforcement Administration).

22. 21 U.S.C. § 841(a)(1) (2012).

23. *Id.* §§ 802(6), 812(a) (2012).

24. *See id.* § 811 (2012).

25. *Hearing*, *supra* note 21. "[T]he term designer drugs refers to clandestinely produced substances which are chemically and pharmacologically similar to substances listed in the Controlled Substances Act (CSA) but which are not themselves controlled." *Id.*

26. *Id.* at 44.

27. *Id.*

28. 21 U.S.C. § 802(32)(A) (i)–(iii).

29. *Id.* § 813 (2012).

30. *See id.* § 802(32)(C) (i)–(iv).

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.[31]

Although the logical connector "or" only separates subsections (ii) and (iii), "'the vast majority of federal courts' construe it to require the government to satisfy subsection (i) *and* either subsection (ii) or (iii)."[32] In *McFadden*, at the district court level, a conjunctive or disjunctive reading was not at issue because both parties agreed to a conjunctive reading, which the court "assumed" was the correct reading.[33] Once a substance has been determined to satisfy the above definition of a controlled substance analogue, the mechanism provision of the AEA is invoked, which states that an analogue "shall, to the extent intended for human consumption, be treated, for the purposes of any Federal law as a controlled substance in schedule I."[34] As federal law makes it "unlawful for any person knowingly or intentionally—to manufacture, distribute . . . or possess with intent [to do the same] . . . a controlled substance,"[35] and an analogue is treated as a controlled substance, as will be discussed in more detail in Part IV(A) of this Article, it logically follows that a controlled substance analogue violation should require the same scienter as a controlled substance violation.

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31. *Id.* § 802(32)(A) (i)-(iii).

32. Petition for Cert., *supra* note 2, at 6 n.1; *see also Hearing*, *supra* note 21, at 26, 31, 35 (statement of Assistant Att'y Gen. Stephen S. Trott). *But see id.* at 2 (statement of Chairman Strom Thurmond) (stating in a Senate hearing held prior to the enactment of the AEA, that a contrary reading of the statute requires that an analogue substance need only be "'substantially similar' *either* in chemical structure *or* in its intended effect" (emphasis added)).

33. United States v. McFadden (*McFadden I*), 15 F. Supp. 3d 668, 672 n.2 (W.D. Va. 2013).

34. 21 U.S.C. § 813.

35. *Id.* § 841(a)(1) (2012).

III. FEDERAL CIRCUIT COURT APPROACHES

The federal circuit courts are split 3-2 over the application of the AEA. The Fourth and Fifth Circuits hold that in order to meet the burden of proof required by a violation of the AEA, the government must prove: (1) the substance at issue satisfies the definition of a controlled substance analogue, and (2) "the defendant intended that the substance at issue be consumed by humans."[36] In contrast, the Second, Seventh, and Eighth Circuits hold that in addition to the above two elements, the government must prove that the defendant "knew he was in possession of a controlled substance analogue."[37]

A. U.S. v McFadden *and the Minority Approach*

The Fourth and Fifth Circuits have applied a narrow reading of the scienter requirement when prosecuting cases involving controlled substance analogues. The Fifth Circuit was the first to address this issue in 1989 in *United States v. Desurra*.[38] In *Desurra*, the defendant argued that in order for the government to convict him, it would have to prove that he "understood MDMA [the alleged analogue] to be a chemical analogue of MDA [a scheduled controlled substance]."[39] The court rejected this argument as misunderstanding "the intent requisite to convictions under 21 U.S.C. §§ 813, 841, 952, and 960" and held "[i]f a defendant possesses an analogue, with intent to distribute or import, the defendant need not know that the drug he possesses is an analogue. It suffices that [the defendant] know what drug he possesses, and that he possess it with the statutorily defined bad purpose."[40]

Similarly, the Fourth Circuit, in *United States v. Klecker*, narrowly construed the scienter requirement when addressing whether the definition of an analogue

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36. United States v. McFadden (*McFadden II*), 753 F.3d 432, 444 (4th Cir. 2014) (citing United States v. Klecker, 348 F.3d 69, 71 (4th Cir. 2003); *see also* United States v. Desurra, 865 F.2d 651, 653 (5th Cir. 1989) (applying the same burden of proof requirements for the government by a violation of the AEA).

37. United States v. Sullivan, 714 F.3d 1104, 1107 (8th Cir. 2013) (holding that the jury must find that the defendant "knew he was in possession of a controlled substance analogue"); *see also* United States v. Roberts, 363 F.3d 118, 123 n.1 (2d Cir. 2004) (holding that prosecution must prove defendants acted "with the knowledge that they were in possession of a controlled substance"); United States v. Turcotte, 405 F.3d 515, 527 (7th Cir. 2005) (holding that "defendant must know that the substance at issue meets the definition of a controlled substance analogue set forth in § 802(32)(A)").

38. 865 F.2d 651 (5th Cir. 1989).

39. *Id.* at 653.

40. *Id.*; *see also* United States v. Petree, 581 F. App'x 448, 449 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1011 (2015), *reh'g denied*, No. 14-7438, 2015 WL 732319 (U.S. Feb. 23, 2015) (rejecting claim that district court committed reversible plain error by failing to find that the defendant "knew the substances were controlled substance analogues" because, under *Desurra*, if "a defendant possesses an analogue, with intent to distribute . . . defendant need not know that the drug . . . is an analogue") (quoting *Desurra*, 865 F.2d at 653).

was unconstitutionally vague as applied.[41] Outlining what the Government must prove to show an AEA violation, the *Klecker* court included "*intent* that the substance be consumed by humans" as a necessary element.[42] The court found that the definitional section of the AEA[43] was not unconstitutionally vague in part to the intent requirement found in § 813.[44] Interestingly, the court noted in its decision that "the district court heard testimony that [the defendant] was actually aware that Foxy was a controlled substance analogue," and that "[s]ome courts have concluded that a defendant who had actual notice that his conduct was unlawful cannot prevail on a vagueness challenge."[45] Additionally, the court declined to decide whether a defendant's actual awareness that the substance at issue was an analogue would, in and of itself, defeat a vagueness challenge "because we conclude that the Analogue Act would not be unconstitutionally vague as applied to Foxy even with respect to a defendant who lacked actual notice."[46]

The Fourth Circuit again narrowly construed the scienter requirement in *United States v. McFadden* when ruling that a proposed jury charge requiring the government to prove the defendant knew (or strongly suspected or deliberately avoiding knowing) that the substances at issue were analogues was incorrect.[47] The *McFadden* court provided no independent analysis, stating the issue had been resolved by *Klecker,* which "set forth the elements that the government was required to prove to obtain a conviction under the Act, including the scienter requirement that the defendant intended that the substance at issue be consumed by humans."[48] The *McFadden* court additionally noted that the *Klecker* decision states "that the Act may be applied to a defendant who lacks actual notice that the substance at issue could be a controlled substance analogue."[49] As such, the Fourth Circuit has made clear that the government need not prove the defendant had knowledge that the substance at issue was an analogue.

However, similar to the Fifth Circuit, despite this contention, the court provided no rationale underlying its decision nor did the court distinguish the scienter requirement from its holdings in cases involving controlled substances versus cases involving controlled substance analogues.[50]

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41. *Klecker*, 348 F.3d at 71.

42. *Id.*; *cf.* United States v. Hodge, 321 F.3d 429, 436–39 (3d Cir. 2003) (interpreting § 802(32)(A)).

43. The definitional section of the Analogue Act requires that the chemical structure of the substance be substantially similar to that of a controlled substance and that the physiological effects also be substantially similar to, or greater than, that of a controlled substance. 21 U.S.C. § 802(32)(A) (2012).

44. *Klecker*, 348 F.3d at 71.

45. *Id.* at 72.

46. *Id.* Also note that the court makes no mention of § 841. *Id.*

47. United States v. McFadden (*McFadden II*), 753 F.3d 432, 443–44 (4th Cir. 2014).

48. *Id.* at 444 (citing *Klecker*, 348 F.3d at 71).

49. *Id.* (citing *Klecker*, 348 F.3d at 72).

50. *Id.*

Despite this, one court has attempted to outline the rationale underlying this minority approach.[51] Essentially, the problem arises in that the "government cannot be required to prove a defendant's knowledge that a substance is a controlled substance when, by definition, it is not a controlled substance—it is a controlled substance analogue."[52] The fact that "Congress directs courts to treat these substances as schedule I controlled substances does not mean that they *are* controlled substances."[53] "In fact, the definition of 'controlled substance analogue' expressly states that the 'term does not include a controlled substance.'"[54] As a result, the question becomes how, in an AEA violation, may the court require the government to prove the defendant knew "he was in possession of or distributed controlled substances when the substances charged are not, by their very nature, controlled substances?"[55] The court contends that such a requirement "simply makes no sense in the context of the Analogue Act."[56] Rather, it is the requirement that the government prove intent for human consumption that distinguishes analogue cases from distribution cases under the CSA, which has no such requirement.[57]

B. The Majority Approach

The Second, Seventh, and Eighth Circuits have applied the scienter requirement found in 21 U.S.C. § 841 to prosecutions involving analogues by requiring that the government prove the defendant knew the substance in question to be a controlled substance analogue, "and thus, by definition, a controlled substance."[58] Significantly, courts have recognized that a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice that such conduct is prohibited.[59] This same concern is

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51. *See* United States v. Dau, No. 7:13–CR–00082, 2014 WL 4187327, at *5 (W.D. Va. Aug. 22, 2014).

52. *Id.*

53. *Id.*

54. *Id.* (quoting 21 U.S.C. § 802(32)(C)(i) (2012)).

55. *Id.*

56. *Id.* at *6.

57. Corrected Brief of the Appellee at 61, United States v. McFadden, 753 F.3d 432 (4th Cir. 2014) (No. 13-4349), 2013 WL 5538614, at *61.

58. Petition for Cert., *supra* note 2, at 14.

59. *See, e.g.*, Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 499 (1982) (utilizing a scienter requirement to determine the clarity of an ordinance); *see also* Colautti v. Franklin, 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*."); Boyce Motor Lines, Inc. v. United States, 342 U.S. 337, 342 (1952) ("The statute punishes only those who knowingly violate the Regulation."); Screws v. United States, 325 U.S. 91, 101 (1945) (5-4 decision) ("The Court, indeed, has recognized that the requirement of a specific intent to do a prohibited act may avoid those consequences to the accused which may otherwise render a vague or indefinite statute invalid."); A.G.A., Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 87 n.98 (1960) (discussing scienter and *mens rea* as they relate to the void-for-vagueness doctrine at the Supreme Court level).

addressed in the legislative history of the statute and is discussed in more detail in Part IV(B) of this Article.[60]

The Second Circuit outlined the necessary elements to obtain a criminal conviction.[61] The government must prove the substance meets the definition of an analogue; thatthe defendant intended it for human consumption; that the defendant intended to distribute the substance; and finally, that the defendant did so with the knowledge he possessed a controlled substance.[62] The last element requires the government prove the defendant knew that he possessed a controlled substance, not merely that the defendant knew he "might be involved in some sort of criminal activity." However, the defendants are not required to know the specific drug, only that it is a controlled substance. [63]

Of the circuits, the Seventh Circuit provides the most detailed rationale underlying the application of the scienter requirement under § 841 to analogue drugs.[64] In *United States v. Turcotte*, the court held the government must prove a defendant's knowledge that a substance in question meets the definition of a controlled substance analogue set forth in 21 U.S.C. § 802(32)(A)—specifically, "[a] defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects."[65]

The *Turcotte* court explained that the AEA "imposes criminal liability through the more general provisions of the CSA,[66] ... which implicate a well-established scienter requirement."[67] The court noted previous holdings "that as a prerequisite to liability for possessing a controlled substance with intent to distribute under § 841(a), defendants must know that the substance in question is a controlled substance."[68] Acknowledging precedent involving application where the substances involved are *per se* illegal,[69] the *Turcotte* court held, as applied to analogues, "many newly engineered and relatively unknown substances may be involved such that knowledge of the substance's identity does not automatically imply knowledge of its status as a controlled substance."[70]

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60. *See infra* Part IV.B; S. REP. NO. 99-196, at 4 (1985).
61. *See* United States v. Roberts, 363 F.3d 118 (2d Cir. 2004).
62. *Id.* at 123 n.1.
63. *Id.* (quoting United States v. Morales, 577 F.2d 769, 773 (2d Cir. 1978)).
64. *See* United States v. Turcotte, 405 F.3d 515, 527 (7th Cir. 2005).
65. *Id.*
66. 18 U.S.C. § 841(a) (2012).
67. *Turcotte*, 405 F.3d at 525.
68. *Id.* (citing United States v. Barlow, 310 F.3d 1007, 1012 (7th Cir. 2002) ("Section 841(a) requires only that the defendant know that he possesses a controlled substance; it does not require that he know the type of controlled substance he possesses."); United States v. Jones, 248 F.3d 671, 675 (7th Cir. 2001) (citing *Lanier* for the same rule); Lanier v. United States, 220 F.3d 833, 840 (7th Cir. 2000) (requiring "knowledge that [the drug] is a controlled substance")).
69. *Turcotte*, 405 F.3d at 525 (citing *Barlow*, 310 F.3d at 1008 (involving cocaine base); *Jones*, 248 F.3d at 673 (involving crack cocaine); *Lanier*, 220 F.3d at 835 (involving marijuana)).
70. *Id.* at 526.

Further, "new 'designer drugs' are often created as alternatives to known illegal drugs precisely because they may be sold with an appearance of *legality*."[71] This poses an insurmountable challenge to updating controlled substance schedules in the face of "accelerating innovations in drug technology," which led Congress to enact the "Analogue Provision [AEA] to target distribution of such substances."[72] As such, the scienter requirement is "not obvious in the context of the Analogue Provision."[73]

The *Turcotte* court also acknowledged that "[a]t least one court has ruled that 'the definition of controlled substance analogue does not require *any* scienter—a defendant does not have to "know" that a substance has a substantially similar chemical structure to an illegal drug'"[74] and that "[o]ther courts have applied the more general scienter requirement of the CSA, 21 U.S.C. § 841(a), holding that the Analogue Provision "'requires the Government to show that the defendants knew that they possessed a controlled substance.'"[75] The court stated that, under this construction, defendants "need not know the exact nature of the drug; it is sufficient that they be aware that they possessed 'some controlled substance'"[76] and found neither approach to be satisfactory.

Rather, the court held its

> precedents demand a showing that the defendant knew the substance in question was a [CSA]. That is, the defendant must know the substance at issue meets the definition of a [CSA] set forth in § 802(32)(A): A defendant must know that the substance at issue has a chemical structure substantially similar to that of a controlled substance, and he or she must either know that it has similar physiological effects or intend or represent that it has such effects.[77]

Acknowledging such a requirement may impose a heavy burden on the government the court provided a provisional remedy.[78] In such cases, if the government meets the scienter requirement by virtue of the second part of the analogue definition,[79] "the jury is permitted—but not required—to infer that the defendant also had knowledge of the relevant chemical similarities.[80]

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71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* (quoting United States v. Forbes, 806 F. Supp. 232, 238 (D. Col. 1992)); *see also* United States v. Carlson, 87 F.3d 440, 443 n.3 (11th Cir. 1996) (citing *Forbes*, 806 F. Supp. at 237–38) (noting "the absence of a scienter requirement in the Analogue Act").
75. *Id.* (quoting United States v. Roberts, 363 F.3d 118, 123 n.1 (2d Cir. 2004).
76. *Id.*(quoting *Roberts*, 363 F.3d at 123 n.1).
77. *Id.* at 527.
78. *Id.*
79. *Id.* This second part of the definition includes knowledge of or representation of similar psychological effects. 21 U.S.C. § 802(32)(A)(iii).
80. *Id.*

The Eighth Circuit adopted the Seventh Circuit's broader interpretation as requiring more than the intent for human consumption. In *United States v. Sullivan*, the court held a jury could reasonably find that the defendant must have known that the substance at issue was a controlled substance analogue and that the defendant knew he was in possession of a controlled substance analogue.[81] In that case, at issue was whether the evidence was sufficient to provide a reasonable inference the defendant knew the substance he possessed was an analogue.[82] The Eighth Circuit relied solely on the defendant's statement that the substance he possessed was illegal in finding that the defendant had the requisite knowledge that he possessed an analogue.[83]

IV. EXAMINING THE FOURTH CIRCUIT'S APPROACH IN *UNITED STATES V. MCFADDEN*

The Fourth Circuit's decision in *United States v. McFadden* will face numerous uphill battles if it is going to be upheld by the Supreme Court. Not only does the opinion place the Fourth Circuit in the minority of jurisdictions, it is the only circuit—other than the Fifth Circuit, which made its ruling in 1989—to not require the government to prove that the defendant knew that the substance constituted a controlled substance analogue.[84] The trend in the circuit courts has been to properly consider 21 U.S.C. § 841(a) in interpreting the overall statutory scheme, with cases from 2004, 2005, and 2013 all requiring proof that the defendant knew he was in possession of a controlled substance analogue.[85]

Regardless of being the minority rule, the opinion in *McFadden* contains at least three fundamental problems that make the holding subject to reversal: the Fourth Circuit's ruling in *McFadden* (A) incorrectly reads a scienter requirement out of the statute by ignoring 21 U.S.C. § 841(a); (B) ignores the legislative history, which specifically discusses this scienter requirement; and (C) improperly creates a strict liability crime.

A. A Proper Reading of the Statutory Scheme of the AEA Requires Proof that the Defendant Knew the Substance Constituted a Controlled Substance Analogue

A prosecution for violation of the AEA requires a four-step process. First, the substance at issue must satisfy the definition of a controlled substance analogue.[86] Second, the substance at issue must have been "intended for human

81. United States v. Sullivan, 714 F.3d 1104, 1107 (8th Cir. 2013).
82. *Id.*
83. *Id.*
84. United States v. Desurra, 865 F.2d 651, 653 (5th Cir. 1989).
85. *See* discussion *supra* Part III.B.
86. *See* 21 U.S.C. § 802(32)(A) (2012).

consumption."[87] Third, having satisfied steps one and two, the substance at issue "shall . . . be treated, for the purposes of any Federal law as a controlled substance in schedule I."[88] Fourth, federal law makes it "unlawful for any person knowingly or intentionally . . . to manufacture or distribute . . . or possess with intent [to do the same] . . . a controlled substance."[89]

The Fourth Circuit in *McFadden* crucially does not apply the fourth step, at least in any meaningful manner. The *McFadden* court's statement of the law begins with steps two and three (above) acknowledging "that a 'controlled substance analogue,' when intended for human consumption, [is] treated under federal law as a Schedule I controlled substance,"[90] and then proceeds to step one, defining a controlled substance analogue. The *McFadden* court explains that prosecution under 21 U.S.C. § 841(a) (step four above) for a controlled substance analogue requires the government to prove three elements.[91] The first two elements address the different ways the definition of "controlled substance analogue" may be satisfied (step 1 above).[92] The third element addresses that a controlled substance analogue be intended for human consumption (step 2 above).[93]

Notwithstanding that, the Fourth Circuit acknowledges, at least summarily, that a controlled substance analogue is prosecuted as a controlled substance under 21 U.S.C. § 841(a).[94] It expressly states that applying § 841(a)'s scienter requirement to a control substance analogue case "is not a correct statement of the law in this Circuit."[95] The *McFadden* court cites its own precedent for the proposition that the scienter requirement for a controlled substance analogue violation is that "the defendant *intended* that the substance at issue be consumed by humans."[96] The court goes on to acknowledge that the Seventh Circuit, in *United States v. Turcotte*, imposes "a strict knowledge requirement," but concludes, "we have not imposed such a knowledge requirement."[97]

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87. *Id.* § 813 (2012).

88. *Id.*

89. *Id.* § 841(a) (2012).

90. United States v. McFadden (*McFadden II*), 753 F.3d 432, 436 (4th Cir. 2014) (citing 21 U.S.C. § 813).

91. *Id.*

92. *Id.* (providing both the chemical structure prong and chemical effect prong that define a controlled substance analogue per 21 U.S.C. § 802(32)(A)).

93. *Id.*

94. *See id.* at 443–44 (analyzing the controlled substance analogue in terms of § 841(a)).

95. *Id.* (rejecting McFadden's proposed jury instruction that the government must prove McFadden knew "the alleged CSAs possessed the characteristics of controlled substance analogues").

96. *Id.* at 444 (citing United States v. Klecker, 348 F.3d 69, 71 (4th Cir. 2003)).

97. *Id.* (acknowledging that the Seventh Circuit's *Turcotte* decision "demand[s] a showing that the defendant knew the substance in question was a controlled substance analogue."); *see also* United States v. Turcotte, 405 F.3d 515, 527 (7th Cir. 2005) (discussing the knowledge requirement).

In contrast, the Seventh Circuit properly applies all four steps required in a prosecution for violation of the AEA. The *Turcotte* court explains that the "analogue provisions" (steps 1-3 above) of the Controlled Substances Act[98] "provide[] that substances satisfying the definition of a 'controlled substance analogue' may be regulated as controlled substances even though they are not formally classified as such under federal law."[99] The court acknowledged that a controlled substance analogue is by definition not a controlled substance and therefore a "[d]irect and literal application of the scienter requirement applicable to § 841(a) [step 4 above, which textually only addresses controlled substances] . . . would threaten to eviscerate the Analogue Provisions of § 802(32)(A) at one stroke."[100]

Notwithstanding this seeming contradiction, the Seventh Circuit reasoned that "[d]iscarding the scienter requirement [of § 841(a)] would essentially mean that individuals deal in narcotics substitutes at their own risk, removing a primary *mens rea* element of possession and distribution offenses,"[101] and therefore held that prosecution under the AEA requires the government to prove "the defendant knew that the substance in question was a controlled substance analogue"[102]—that is, requiring the government to proceed with step four.

The government's brief to the United States Supreme Court in opposition to granting certiorari in *McFadden v. United States* argues against the Seventh Circuit's application of the law specifically on the very issue the Seventh Circuit acknowledges, i.e., that because by definition a controlled substance analogue is not a controlled substance, then the mens rea of "knowingly or intentionally" in 21 U.S.C. §841(a) (step 4) should not apply to the alleged controlled substance analogue at issue.[103] However, the government's argument is a semantic paradox.[104] The government argues that the "knowing or intentional" mens rea should only be applied to an *act* a defendant took—e.g., the defendant must *distribute* the substance "knowingly or intentionally"[105]—as opposed to a

98. The Controlled Substance Analogue Enforcement Act is a combination of several sections that amend the Controlled Substances Act. *See* Controlled Substance Analogue Enforcement Act of 1986, Pub. L. No. 99-570, § 1203, 100 Stat. 3207, 3213–14 (codified in scattered sections of title 21 of the United States Code).

99. *Turcotte*, 405 F.3d at 519–20.

100. *Id.* at 526–27; *see* 21 U.S.C. § 802(32)(C) (2012) (outlining that the term "controlled substance analogue" does not include a controlled substance).

101. *Id.* at 527.

102. *Id.*

103. Brief for the United States in Opposition at 12–13, United States v. McFadden (*McFadden II*), 753 F.3d 432, 437 (4th Cir. 2014) (No. 14-378), 2014 WL 7473760 [hereinafter Opposition Brief] (quoting *Turcotte*, 405 F.3d at 526).

104. SIMON BLACKBURN, OXFORD DICTIONARY OF PHILOSOPHY 332 (2d ed. 2008) ("[S]emantic paradoxes . . . seem to depend upon an element of self-reference, in which a sentence talks about itself, or in which a phrase refers to something defined by a set of phrases of which it is itself one.").

105. Opposition Brief, *supra* note 103, at 10 (emphasis added) (quoting 21 U.S.C. § 841(a)(1) (2012)).

defendant's mental state as applied to the substance. To buttress its argument, the government points out that "the definition of [a controlled substance] analogue does not require that the defendant knew the chemical nature of what he was selling,"[106] and that the AEA requires the substance be "*intended* . . . for human consumption."[107]

The government's arguments fail to provide support. First, the definition of a controlled substance similarly "does not contain a mens rea element either,"[108] simply because it is a definition and not a mechanism for enforcement; as such, a defendant cannot be convicted of violating 21 U.S.C. § 802(6) because it merely defines "controlled substance."[109] Second, the government's reading of 21 U.S.C. §841(a) would make it a general intent crime when applied to a controlled substance analogue and a specific intent crime when applied to a controlled substance because "in an ordinary drug prosecution, [the government] must prove that the defendant *knew that the substance* he sold was a controlled substance,"[110] not merely that he distributed some substance.

As the Southern District of Alabama concisely points out:

> The government appears to be unclear about this relationship between the statutes. It speaks of an "Analogue Act violation," demonstrated by reference to Sections 813 and 802(32)(A) only, . . . but a defendant cannot be convicted of "violating" those provisions. Section 813 is simply a gateway provision, permitting prosecutions for violations of controlled substance statutes of those dealing with CSAs, and Section 802(32)(A) simply defines what constitutes a CSA. Satisfying those two statutes does not establish a "violation" of anything; it merely opens the door to establishing a violation of other statutes.[111]

The district court, in *United States v. Gross*, went further pointing out that the *McFadden* court's use of *Klecker* was improper because "*Klecker* did not address, much less resolve, whether the government must prove the defendant's knowledge that the substance at issue was a CSA in order to obtain a

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106. Reply Brief for Petitioner at 6, United States v. McFadden (*McFadden II*), 753 F.3d 432, 437 (4th Cir. 2014) (No. 14-378), 2014 WL 7242820 [hereinafter Reply Brief for Petitioner] (citing Opposition Brief, *supra* note 103, at 10–12).

107. Opposition Brief, *supra* note 103, at 13.

108. Reply Brief for Petitioner, *supra* note 106, at 7; *see* 21 U.S.C. § 802(6) (2012).

109. *See* 21 U.S.C. § 802(6). "The term 'controlled substance' means a drug or other substance, or immediate precursor, included in schedule I, II, III, IV, or V of part B of this subchapter. The term does not include distilled spirits, wine, malt beverages, or tobacco, as those terms are defined or used in subtitle E of the Internal Revenue Code of 1986." *Id.*

110. Reply Brief for Petitioner, *supra* note 106, at 7 (emphasis added) (citing Opposition Brief, *supra* note 103, at 12).

111. United States v. Gross, No. 13-0268-WS, 2014 WL 6483307, at *3 n.9 (S.D. Ala. Nov. 20, 2014). For the court's order on "the government's motion for pretrial ruling on scienter requirement," see *id.* at *1.

conviction."[112] The *Gross* court asserts that the issue in *Klecker* was that a defendant's knowledge is unnecessary to defeat a vagueness challenge regarding the definition of a controlled substance analogue.[113]

Gross expressly states that *Klecker* "is not, and cannot be, a ruling that knowledge is unnecessary to obtain a conviction under Section 846."[114] Therefore, upon satisfying the definitional sections of either a controlled substance or a controlled substance analogue, the government must have an enforcement mechanism and that mechanism is found in "Subchapter I. Control and Enforcement," "Part D. Offenses and Penalties," specifically the section "Prohibited acts A" of 21 U.S.C. § 841(a).[115]

B. The Legislative History of CSA Requires Proof of Intent or Knowledge

In its report to the United States Senate, the Committee on the Judiciary addressed concerns about punishing legitimate or unintended actions.[116] It stated that "[s]everal specific intent elements are built into the offenses to ensure that" innocent offenders would not be punished.[117] The very first specific intent element discussed is the intent element being ignored by the Fourth Circuit in *McFadden*.[118]

The Committee explained that "[f]irst, to be found guilty, an offender's manufacture, distribution, or possession of an illicit substance must have been knowing or intentional."[119] It goes on to clarify: "[T]hat is, the offender must have known or intended that he was manufacturing, distributing, or possessing a substance *that he knew or intended to have the characteristics of a controlled substance analog*."[120]

The Report goes on to list other intent elements that must be proven, including the "intent to distribute a controlled substance analog" and that "the substance must have been intended for human consumption."[121]

But, most notably, the Report lists the scienter requirement that is specifically rejected by the Fourth Circuit as the first specific intent element built into the statute.[122] Simply put, the legislative history shows that Congress intended that the government prove the defendant knew that the substance constituted a controlled substance analogue.

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112. *Id.* at *3.
113. *Id.*
114. *Id.*
115. 21 U.S.C. § 841(a) (2012).
116. S. REP. NO. 99-196, at 4 (1985).
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* (emphasis added).
121. *Id.*
122. *Id.*

C. *The Fourth Circuit Ruling Improperly Creates a Strict Liability Crime*

The statutory scheme enacted by Congress states a controlled substance analogue is to "be treated . . . as a controlled substance," and it is to be so treated "for the purpose of any Federal law."[123]

> To be "treated . . as a controlled substance" means to be treated the same as a controlled substance, and "any Federal law" includes Sections 841(a), 846, 952(a) and 963; thus, the courts must impose on a [controlled substance analogue] prosecution under those statutes every requirement that applies to a controlled substance prosecution under those statutes.[124]

On its face, § 813 permits no exception to the express requirement to treat controlled substance analogues as controlled substances and therefore, given the statutory language, eliminating the knowledge requirement is not an option.[125]

Doing away with the scienter requirement altogether could "ensnare individuals engaged in apparently innocent conduct."[126] "Discarding the scienter requirement would essentially mean that individuals deal in narcotics substitutes at their own risk, removing a primary *mens rea* element of possession and distribution offenses."[127] Such a holding directly contravenes an established staple of federal controlled substance jurisprudence[128] and would impose strict liability by eviscerating the necessary scienter. "It is a fundamental principle of Anglo–Saxon jurisprudence that guilt is . . . not lightly to be imputed to a citizen who . . . has no evil intention or consciousness of wrongdoing."[129]

In *Staples v. United States*, the Supreme Court explained that "we have taken [particular care] to avoid construing a statute to dispense with *mens rea* where doing so would 'criminalize a broad range of apparently innocent conduct.'"[130] The concern is that the statute would, in essence, hold a criminal defendant strictly liable for his conduct, which would go against centuries of moral philosophy and criminal law. Aristotle believed that a person is not morally responsible for his actions unless he acts voluntarily, and that "[b]y the voluntary I mean . . . any of the things in a man's own power which he does with

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123. 21 U.S.C. § 813 (2012).

124. United States v. Gross, No. 13-0268-WS, 2014 WL 6483307, at *4 (S.D. Ala. Nov. 20, 2014).

125. *Id.*

126. United States v. Turcotte, 286 F. Supp. 2d 947, 951 (N.D. Ill. 2003), *aff'd*, 405 F.3d 515 (7th Cir. 2005).

127. *Turcotte*, 405 F.3d at 526.

128. *Gross*, 2014 WL 6483307, at *5.

129. United States v. Dotterweich, 320 U.S. 277, 286 (1943) (Murphy, J., dissenting).

130. Staples v. United States, 511 U.S. 600, 610 (1994) (quoting Liparota v. United States, 471 U.S. 419, 426 (1985)).

knowledge, i.e., not in ignorance."[131] The Supreme Court, in *Staples*, cites to criminal law books and cases, dating back to the 1800s, to explain that "[g]enerally speaking, such knowledge is necessary to establish *mens rea,* as is reflected in the maxim *ignorantia facti excusat*."[132]

At issue in *Staples* was whether the defendant knew he possessed a machine gun even though the statute did not contain an express scienter element.[133] The Supreme Court held that a successful criminal prosecution required that the defendant "knew the weapon he possessed had the characteristics that brought it within the statutory definition."[134] As articulated in McFadden's Petition for a Writ of Certiorari:

> [I]f the defendant knew he possessed a rifle, but did not know that it would fire multiple rounds with a single pull of the trigger, he could not be convicted of knowingly possessing an unregistered machine gun. He might have knowingly possessed a rifle, which was in fact a machine gun; but he could not knowingly possess a machine gun unless he knew that it had the features (i.e., the capacity to fire multiple rounds with a single trigger pull) that makes owning it potentially illegal.[135]

Therefore, the question remains whether "hold[ing] a criminal defendant strictly liable for the chemical structure and effects on a substance in his possession" is any different from "holding a defendant strictly liable for the operation of his firearm."[136] Ultimately, the Fourth Circuit ruling ignores this question and disregards centuries of legal tradition in which "courts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element."[137]

V. CONCLUSION

The Fourth Circuit's interpretation of the AEA risks "impos[ing] criminal sanctions on a class of persons whose mental state—ignorance of the characteristics of [the substances] in their possession—makes their actions entirely innocent."[138] The statutory interplay of sections 802(32)(A), 813, and 841(A) requires a reading where a defendant can only be convicted if he knows the substance he is distributing is, in fact, a controlled substance analogue. By

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131. Aristotle, *Nicomachean Ethics*, *in* 2 THE COMPLETE WORKS OF ARISTOTLE 1791 (Jonathan Barnes ed., 1st ed. 1984).

132. *Staples*, 511 U.S. at 607–08 n.3 (citing generally to criminal law books and cases from the nineteenth and twentieth centuries).

133. *Id.* at 602.

134. *Id.*

135. Petition for Cert., *supra* note 2, at 21.

136. *Id.* at 22

137. Flores-Figueroa v. United States, 556 U.S. 646, 652 (2009).

138. *Staples*, 511 U.S. at 614–15, *cited in* Petition for Cert., *supra* note 2, at 24–25.

only referencing 802(32)(A) and 813, the Fourth Circuit only looks to gateway provisions that would permit a prosecution for violations of the controlled substances statutes. "Satisfying those two statutes does not establish a 'violation' of anything; it merely opens the door to establishing a violation of other statutes."[139] Further, the Fourth Circuit ignored the legislative history of the AEA, which clearly anticipates this problem and instructs that the prosecution must prove that the defendant knew the substance he was manufacturing, distributing, or possessing was a controlled substance analogue. Finally, the Fourth Circuit has written out the scienter requirement from this element of the statute and has ignored centuries of legal tradition.

139. United States v. Gross, No. 13-0268-WS, 2014 WL 6483307, at *3 n.9 (S.D. Ala. Nov. 20, 2014).