



Jurisprudence Section - 2016

F40 The Legal and Scientific Landscape of a Federal Analogue Prosecution Post-*McFadden*

Heather L. Harris, MFS, JD*, PO Box 43626, Philadelphia, PA 19106; and T. Douglas Clifford, JD*, Law Offices of T. Douglas Clifford, LLC, 26 Benedict Avenue, Norwalk, OH 44857

After attending this presentation, attendees will understand the questions related to the “knowledge” requirement for a controlled substance analogue offense and the majority and concurring opinions. This presentation will discuss the scientific issues in analogue prosecutions and the impact that *McFadden* may (or may not) have on future prosecutions.

This presentation will impact the forensic science community by educating scientists, attorneys, and other interested parties on the recent United States Supreme Court decision regarding the Analogue Act and the impact it may have on future federal analogue prosecutions.

This presentation will discuss the landscape for federal analogue act prosecutions after the United States Supreme Court’s decision in *McFadden v. United States*.¹ This presentation will discuss the main issue of this case, the “knowledge” requirement for a controlled substance analogue offense, and the opinions of the 9-0 majority, including the Roberts’s concurrence. This presentation will also discuss the scientific issues in analogue prosecutions and the impact that *McFadden* may (or may not) have on future prosecutions.

The issue in *McFadden* was ultimately one of the defendant’s mens rea, or intent. The Controlled Substances Act of 1970 requires a person to *knowingly* engage in a prohibited act. The question as applied to *McFadden* was what exactly does the government have to prove a defendant knew in order to obtain a proper conviction under the Controlled Substances Act? Does a defendant have to know the exact chemical formula of the substance? Does he have to know that the substance is on the statutory list of controlled substances? Does he have to know that people will ingest the substance for the purpose of intoxication of any form?

Those questions related to the knowledge requirement become more difficult to ascertain when the Controlled Substance Analogue Enforcement Act of 1986 is considered. By definition, analogues are not controlled substances, but they can be treated as controlled substances for purposes of prosecution if determined to be substantially similar to a controlled substance in structure and effect. *McFadden*’s position was that the government needed to prove that *McFadden* knew of this substantial similarity. This led to the question for the United States Supreme Court: what specifically does the government have to prove regarding the defendant’s mens rea under the Controlled Substance Analogue Enforcement Act? This presentation will discuss this question in the context of the recent *McFadden* decision and its potential applications in future cases.

Reference(s):

1. *McFadden v. United States*, 576 U.S. ____ (2015).

Controlled Substance Analogue, Mens Rea, Controlled Substance