No. 16-___

IN THE

Supreme Court of the United States

STEPHEN DOMINICK MCFADDEN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Two terms ago, this Court vacated petitioner's conviction under the Controlled Substance Analogue Enforcement Act of 1986 because the district court failed to instruct the jury that it must find that petitioner "knew he was dealing with 'a controlled substance.'" *McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015). The Court then remanded for a harmless error analysis under *Neder v. United States*, 527 U.S. 1 (1999). In *Neder*, the Court held that such an error may be found harmless if "the omitted element *was uncontested and* supported by overwhelming evidence." *Id*. at 17 (emphasis added). The Court did not make clear whether overwhelming evidence is sufficient to find harmless error even when the element *is* contested or the defendant had no reason to litigate the element because (as happened in this case, but not in *Neder*) the district court ruled early on that the Government was not required to prove it. The courts of appeals are divided on those questions, as well as over whether proof that a defendant knew the name and effects of his products constitutes overwhelming evidence of intent in an Analogue Act case. The Questions Presented are:

1. Under what circumstances, if any, is overwhelming evidence of an element omitted from a criminal jury instruction a sufficient basis for finding the error harmless?

2. Does proof that the defendant knew the name and physiological effects of the product he was selling compel a jury to conclude that the defendant "knew he was dealing with a 'controlled substance'" as required by *McFadden v. United States*?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Stephen Dominick McFadden respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (Pet. App. 1a-23a) is published at 823 F.3d 217. The district court's opinion denying petitioner's motion for acquittal (Pet. App. 40a-64a) is unpublished, but available at 2013 WL 8339005. The district court's denial of petitioner's motion in limine (Pet. App. 65a-68a) is unpublished.

JURISDICTION

The judgment of the court of appeals was entered on May 19, 2016. Pet. App. 1a. The court of appeals denied petitioner's timely petition for rehearing en banc on June 30, 2016. *Id*. 69a. On September 19, 2016, the Chief Justice extended the time to file this petition through November 25, 2016. No. 16A277. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 841(a) of Title 21 provides in relevant part:

(a) Unlawful acts

Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally –

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . .

Section 813 of Title 21 provides:

A controlled substance 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.

Section 802(32) of Title 21 provides:

(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.

(B) The designation of gamma butyrolactone or any other chemical as a listed chemical pursuant to paragraph (34) or (35) does not preclude a finding

pursuant to subparagraph (A) of this paragraph that the chemical is a controlled substance analogue.

(C) Such term does not include –

(i) a controlled substance;

(ii) any substance for which there is an approved new drug application;

(iii) with respect to a particular person any substance, if an exemption is in effect for investigational use, for that person, under section 355 of this title to the extent conduct with respect to such substance is pursuant to such exemption; or

(iv) any substance to the extent not intended for human consumption before such an exemption takes effect with respect to that substance.

Federal Rule of Criminal Procedure 52 provides in relevant part:

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

STATEMENT OF THE CASE

In *McFadden v. United States*, 135 S. Ct. 2298 (2015), this Court vacated petitioner's conviction under Controlled Substances Analogue Act, 21 U.S.C. §§ 802(32)(A), 813. The Court held that under the Act, the Government must prove that the defendant knew that the substance he was distributing was a controlled substance, not simply that he intended the substance to be consumed by humans, as the jury had been instructed. 135 S. Ct. at 2302. The Court explained that the Government could satisfy its burden by proving, *inter alia*, that the defendant was aware of the features of his products that rendered them analogues, including that the substances had a chemical structure "substantially similar to the chemical structure of a controlled substance in schedule I or II." *Id*. at 2305 (quoting 21 U.S.C. § 802(32)(A)). The Court then remanded to the Fourth Circuit to decide whether the omission of the mens rea element from the jury charge was harmless error.

On remand, petitioner pointed out that although he had always denied being aware of the chemical structure of his products, he had no reason to submit evidence of that ignorance at trial (including by taking the stand) because the district court had ruled before trial that the Government's only burden with respect to intent was to show that petitioner intended his products for human consumption.

The Fourth Circuit nonetheless held that the instructional error was harmless beyond a reasonable doubt because there was "overwhelming evidence admitted at trial" that petitioner was aware of the chemical structure of his products and their

substantial similarity in chemical structure to certain controlled substances. Pet. App. 13a-14a; *see also id.* 22a-23a. That overwhelming proof consisted of evidence showing petitioner knew the names of the products he was selling and had compared their effects to the effects of controlled substances. *Id*. 16a-23a.

The court of appeals' harmless error standard conflicts with other circuits' interpretation of *Neder*, and in particular, with another recent Analogue Act decision from the Fifth Circuit. That conflict, in turn, lays bare long-standing ambiguities in *Neder* itself on questions of profound practical and constitutional significance. At the same time, the decision below conflicts with other circuits' interpretation of the Analogue Act's intent element and this Court's decision in *McFadden*.

I. Legal Background

The Controlled Substance Analogue Enforcement Act of 1984 provides that a "controlled substance 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." 21 U.S.C. § 813. As relevant here, a "controlled substance analogue" is defined as 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.

21 U.S.C. § 802(32)(A) (emphasis added).[1]

Unlike controlled substances, the Attorney General is not required to define and publicize in advance what constitutes a controlled substance analogue. As a consequence, a "substance's legal status as a controlled substance analogue is not a fact that a defendant can know conclusively *ex ante*; it is a fact that the jury must find at trial." *United States v. Turcotte*, 405 F.3d 515, 526 (7th Cir. 2005).

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[1] The definition also sets out certain exclusions that are not relevant to this case. *See id*. §§ 802(32)(B)-(C). The "vast majority of federal courts" construe the Act to require the government to satisfy subsection (i) *and* either subsection (ii) or (iii). *United States v. Turcotte*, 405 F.3d 515, 522 (7th Cir. 2005) (collecting cites)); *see also United States v. McFadden*, 753 F.3d 432, 436 (4th Cir. 2014) (same); *McFadden*, 135 S. Ct. at 2305 n.2 (noting the "Government has accepted for the purpose of this case that" this interpretation is correct).

II. Factual Background

In 2007, petitioner, an employee of a construction company, began operating a small business on the side, buying overstocked items and reselling them on the internet. *See* C.A. J.A. 634, 814, 842. In early 2011, he noticed that a variety of businesses in his Staten Island neighborhood were openly selling products referred to as "bath salts," which, when burned as aroma therapy products, had a stimulant effect. *See id*. 633-37, 842-44. The term "bath salts" is used loosely to describe a range of products containing a varying list of compounds. Until October 21, 2011, the most common ingredients were not included on federal controlled substances schedules. *See* Pet. App. 6a, 41a n.1.

Prior to selling bath salts himself, petitioner investigated the legal status of the particular substances he intended to market, comparing the names of the ingredients in his products to the names of controlled substances listed on the DEA's website. *See* Pet. App. 8a, 21a-22a; C.A. J.A. 635, 638-39, 844-46. Finding nothing to indicate that the substances he intended to sell were illegal, petitioner began selling several varieties of bath salt mixtures containing various ingredients. *See id*. 634-39, 846-47. When the Government later listed two of the compounds contained in some of his products on the controlled substances schedule, petitioner flushed his supply of the affected products down the toilet. *See* Pet. App. 8a; C.A. J.A. 640-41. When an undercover DEA agent subsequently attempted to purchase the banned substances from him, petitioner refused on the ground that they were illegal. *See* Pet. App. 8a.

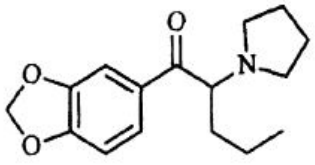
Nevertheless, in November 2012, a grand jury indicted petitioner under the Analogue Act for distributing, and conspiring to distribute, products containing 4-methyleth-cathinone, 3,4-methyl-enedioxypyrovalerone, and/or 3,4-methyl-enedioxymethcathinone. Pet. App. 6a.

III. Procedural History

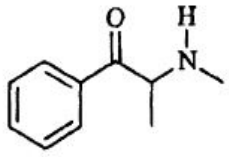
A. Trial And Initial Appeal

At trial, the Government was required to prove, among other things, that the substances petitioner sold had a "chemical structure [that] is substantially similar to the chemical structure of a controlled substance." 21 U.S.C. § 802(32)(A)(i). The Government met that burden by presenting the expert testimony of DEA scientists. For example, it called Dr. Thomas DiBerardino, a Ph.D. chemist, to establish the structural similarity of 3,4-methyl-enedioxypyrovalerone ("MDPV") to methcathinone (a controlled substance). C.A. J.A. 396, 417.

To reach his conclusions, Dr. DiBerardino relied on standard chemistry diagrams of the two substances' chemical structures, which show each chemical's atoms, their arrangement, and the kinds of bonds between them:



MDPV



Methcathinone

C.A. J.A. 34. Pointing to such diagrams, Dr. DiBerardino testified that the "core chemical

structure" of MDPV and methcathinone is phenethylamine. C.A. J.A. 422. But that, he acknowledged, was not proof that MDPV is an analogue. "Phenethylamine in itself is not controlled," he explained. *Id*. 424. And there are "probably thousands of compounds that share that core, but that does not make them analogues." *Id*. 453; *see also id*. 452 (giving example of sassafras, used to flavor root beer); *id*. 456 ("decongestants" and "weight loss drugs"). Instead, what made MDPV substantially similar to methcathinone was that both had "alkyl groups" and "ethers" ("certain kind[s] of chemical moiety") substituted for some of the hydrogen atoms of the phenethylamine core, rather than having "aromatic" substitutions. C.A. J.A. 420-22, 426-28.

Prior to trial, the district court ruled that the prosecution's only burden, with respect to *mens rea*, was to prove that petitioner "intended the substance be consumed by humans." Pet. App. 7a-8a. Accordingly, the Government made no effort to prove that petitioner was aware of the atomic structure of the chemicals in his products. At the same time, petitioner had no reason to present evidence on whether he was aware of the chemical structures of his products or their similarity to controlled substances. For example, petitioner elected not to take the stand to testify as to his ignorance of chemical structure.

Under the instructions, a jury convicted petitioner. On appeal, the Fourth Circuit affirmed the district court's *mens rea* instruction and the conviction. Pet. App. 8a.

B. This Court's Decision

This Court reversed. Before this Court, the Government confessed that, contrary to the Fourth Circuit's decision, prosecutors "must prove, *inter alia*, that the defendant knowingly distributed a controlled substance analogue." U.S. S. Ct. Br. 13. The Government agreed with petitioner that one way to prove this knowledge was to show that the "defendant knew of the characteristics of the substance that make it illegal, *including its chemical structure*." *Id*. 15 (emphasis added). But it also argued that in addition to this "knowledge-of-identity" theory, prosecutors can establish *mens rea* under a "knowledge-of-regulated-status" approach by proving "that the defendant knew he was dealing with an illegal or regulated substance" even if he had no knowledge of the substance's chemical structure. *Id*.

This Court agreed that the Government must prove "that the defendant knew he was dealing with 'a controlled substance.'" 135 S. Ct. at 2302. And it agreed that this could be shown in either of two ways (only the second of which is at issue now).

First, the Court partially accepted the Government's knowledge-of-regulated-status theory, explaining that prosecutors may establish that "a defendant knew that the substance . . . is some controlled substance—that is, one actually listed on the . . . schedules or treated as such by operation of the Analogue Act—regardless of whether he knew

the particular identity of the substance." *McFadden*, 135 S. Ct. at 2305.[2]

Second, the Court accepted the Government's knowledge-of-identity theory, holding that the *mens rea*

> can be established by evidence that the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue. The Analogue Act defines a controlled substance analogue *by its features*, as a substance "the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II"; [other elements omitted]. § 802(32)(A). A defendant who possesses a substance with knowledge of *those features* knows all of the facts that make his conduct illegal . . . .

Id. at 2305 (emphasis added); *see also id*. at 2306 (knowledge-of-identity approach requires proof of the defendant's "knowledge of the *physical characteristics* that give rise to [the substance's] treatment" as an analogue (emphasis added)).

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[2] The Court rejected the Government's claim that it can prove this knowledge by showing "the 'defendant knew he was dealing with an illegal or regulated substance' under *some* law," such as state law or an import ban. *Id*. at 2306 (emphasis added).

The Court refused to consider the Government's harmless error argument, remanding the case to the Fourth Circuit to consider the issue in the first instance. 135 S. Ct. at 2307.

C. Remand Proceedings

On remand, the court of appeals found that the instructional error was harmless with respect to the majority of the counts.

1. In his remand brief, petitioner pointed out that the district court's misconstruction of the Analogue Act's elements had pervaded the trial, not just the jury instruction. He explained that prior to trial, petitioner's counsel had "asked the trial court to instruct the jury that the prosecution needed to prove that the defendant knew that the substance in question was a controlled substance analogue." Petr. Remand Br. 1. The court denied the motion prior to trial, stating that the "parties are advised that the court intends to utilize the elements set forth by the United States Court of Appeals for the Fourth Circuit in *United States v. Klecker*," Pet. App. 66a-67a (citation omitted), which held that the only mens rea element for an Analogue Act is intent that the substance be consumed by humans, *id*. 7a-8a. Given the district court's pretrial determination of the elements of the offense, petitioner "never had a fair chance to rebut any evidence the Government may now point to" as proving the omitted element, petitioner explained. Petr. Remand Br. 5. And it "would be a manifest injustice to sustain a conviction on the basis of a legal theory that the judge foreclosed before the trial began, that the Government never advanced at trial, that the defendant never had an

opportunity to rebut, and that a jury was never asked to apply." *Id*.

Petitioner thus argued that it would be improper for the court simply to ask whether the allegedly "overwhelming" evidence adduced at trial for other purposes proved his knowledge of chemical structural similarity. He explained that the Sixth Amendment precluded using harmless erorr analysis in a way that resulted in "his guilt or innocence [being] determined by an appellate court's conclusion about what a properly-instructed jury **would** have done," Petr. Remand Br. 11 (emphasis in original), as opposed to "whether the guilty verdict actually rendered in this trial was surely unattributable to the [instructional] error," *id*. (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993)).

2. The original Fourth Circuit panel reconvened on remand and held that the district court's instructional error was harmless with respect to six of the nine counts. Pet. App. 3a.

Initially, the panel held that in order to find harmless error, it was sufficient for the court to conclude that the "omitted element is supported by overwhelming evidence admitted at trial," Pet. App. 13a-14a; the Government thus was not required to prove that the element was "uncontested," *Neder*, 527 U.S. at 17, or that "the jury necessarily found facts that would satisfy the omitted element" as might happen when "the omitted element overlaps with an element in another count of conviction," Pet. App. 14a n.2 (citing *United States v. Brown*, 202 F.3d 691, 699-700 (4th Cir. 2000)). Moreover, because the Fourth Circuit's "overwhelming evidence" standard focuses solely on the "evidence admitted at trial," *id*. 13a-14a,

the panel gave no consideration to whether the district court's misconstruction of the elements early in the case distorted the trial evidence by depriving petitioner of any reason to present evidence (including his own testimony) to rebut what were then legally irrelevant inferences about his knowledge of chemical structure arising from evidence submitted for an entirely different purpose.

Applying these principles, the panel concluded that a jury would not be compelled to accept the Government's knowledge-of-regulated status theory because petitioner had presented evidence that he had checked the legal status of his products on the DEA website. Pet. App. 16a-17a.

But the court held that any reasonable juror would have been compelled to conclude that petitioner "had knowledge of the analogues' chemical structures" during certain periods. Pet. App. 18a. The panel did not point to any evidence that petitioner knew the kinds of facts the Government had relied upon to prove the products were analogues (*e.g.*, phenethylamine cores, ethyl substitutions, or the type and arrangement of atoms in the active ingredients of his products). Instead, the panel pointed solely to evidence that: (1) petitioner was aware of the *names* of the chemical forming the active ingredients in his products, and (2) he compared the *physiological effects* of his products to the effects of controlled substances. *See id*. 18a-23a.

Thus, the panel recited that petitioner "explicitly referenced 'MDPV' and '4-MEC' *by name*," and that in doing so he "accurately described the chemical composition of his products." Pet. App. 21a (emphasis added); *see also id*. 20a (noting petitioner

referred to one substance as "Alpha mixed with 4-MEC"); *id*. 20a (petitioner referred to "Alpha" and "Alpha mixed with the 4-MEC"); *id*. ("Hardball" described as "a blend with 'five active chemicals in it' or 'five ingredients'").[3] And the panel explained that petitioner "demonstrated that he had sufficient knowledge about his products' chemical structures to be able to compare them to the list of *chemical names* on the CSA schedules." *Id*. 22a (emphasis added).[4]

The panel also cited petitioner's statements to potential customers regarding the physiological effects of his products. Pet. App. 20a ("McFadden also explicitly compared these mixtures to 'cocaine' and 'crystal meth.'");[5] *id*. ("Alpha mixed with the 4-MEC gives you a *No Speed Limit*-like feeling, just not as intense."); *id*. (petitioner added "a little extra kick" to "Hardball").

3. Petitioner timely filed a petition for rehearing en banc, which the court denied. Pet. App. 69a.

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[3] The panel cited no evidence that petitioner knew that "4-MEC" and "MPDV" stood for "4-methylethcathinone" and "methylenedioxypyrovalerone," respectively, or that the names signify anything about chemical structure. "Alpha" and "Hardball" are not chemical names.

[4] The CSA schedules identify controlled substances by name, not chemical structure. *See McFadden*, 135 S. Ct. at 2305.

[5] The context of the statements make clear petitioner was making a comparison of *effects*, not making any claim about chemical structure (which would be of no interest to his customers). *See* C.A. J.A. 735-36 (cited by U.S. Remand Br. 12-13).

REASONS FOR GRANTING THE WRIT

I. Certiorari Is Warranted To Resolve Circuit Conflicts Over The Role Of Overwhelming Evidence In Deciding Whether Omission Of An Element From A Jury Charge Is Harmless Error.

The Fourth Circuit, like a number of others, holds that omission of an element of the offense from the jury instructions is harmless error so long as "the omitted element is supported by overwhelming evidence admitted at trial." Pet. App. 13a-14a (citing *Neder v. United States*, 527 U.S. 1, 16, 18 (1999)). That interpretation of *Neder* is the subject of an acknowledged circuit conflict that arises from an ambiguity in *Neder* itself, which only this Court can resolve. *See United States v. Pizarro*, 772 F.3d 284, 303 (1st Cir. 2014) (Lipez, J., concurring) (describing circuit conflict and urging "the Supreme Court to clarify the line between an unconstitutional, directed guilty verdict and a harmless failure to instruct on an element"). Although presented in the context of omission of an element of the offense from a jury charge, the case also presents the Court an opportunity to provide broader guidance on the role of overwhelming evidence in harmless error analysis more generally, something the Court attempted to do in granting certiorari in *Vasquez v. United States*, No. 11-199, only to dismiss the petition as improvidently granted after oral argument. *See* 132 S. Ct. 1532 (2012).

A. *Neder* Left Unresolved When, If Ever, Overwhelming Evidence Of An Omitted Element Is Sufficient To Establish Harmless Error.

The Sixth Amendment "indisputably entitle[s] a criminal defendant to a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (internal punctuation, alteration, and citation omitted). As a consequence, the Sixth Amendment bars a court from entering a directed verdict in a criminal case no matter how overwhelming the evidence may be. *See Rose v. Clark*, 478 U.S. 570, 578 (1986). At the same time, however, there is no denying the social cost of requiring retrials for errors that did not affect the jury's verdict.

In *Chapman v. California*, 386 U.S. 18 (1967), this Court attempted to balance these competing interests by holding that constitutional errors at trial may be found harmless if the Government "prove[s] beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id*. at 24. The Court subsequently made clear, however, that assessing whether an error contributed to the verdict does not entail asking "whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). That, Justice Scalia explained, "must be so, because to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the findings to support that verdict might be – would violate the jury-trial guarantee." *Id*.

In *Neder v. United States*, this Court held that *Chapman* harmless error review applies when a trial court fails to submit an element of an offense to the jury. Neder was charged with filing false statements in his tax return. 527 U.S. at 6 (citing 26 U.S.C. § 7206(1)). One element of the crime was the materiality of the false statements. *Id*. Applying existing circuit precedent, the district court treated materiality as a question of law for the court and therefore instructed the jury not to consider it. *Id*. However, because the court was deciding materiality, the parties had every incentive to litigate the element. Nonetheless, the defendant did not contest materiality, likely because he had no plausible basis for doing so (he under-reported millions of dollars of income on his tax return). *Id*. at 16.

Without suggesting that it was modifying the *Chapman* standard, the Court found the instructional error harmless because the "defendant did not, and apparently could not, bring forth facts contesting the omitted element." 527 U.S. at 19. "In this situation, where a reviewing court concludes . . . that the omitted element *was uncontested* <u>*and*</u> supported by overwhelming evidence, such that the jury verdict would have been the same absent the error, the erroneous instruction is properly found to be harmless." *Id*. at 17 (emphasis added); *see also id*. at 18 ("We believe that where an omitted element is supported by *uncontroverted evidence*, this approach reaches an appropriate balance" of constitutional interests. (emphasis added)). The Court explained that subjecting "the *narrow class of cases* like the present one to harmless-error review" would not be tantamount to allowing "a directed verdict against a

defendant in a criminal case." *Id*. at 17 n.2 (emphasis added).

Neder left two fundamental questions unresolved. *First*, must the omitted element be uncontested (as it was in *Neder*) or is overwhelming evidence sufficient in itself? *See Pizarro*, 772 F.3d at 303 (Lipez, J., concurring) (noting that *Neder* "did not unequivocally answer whether its two-part formulation . . . was merely descriptive of the circumstances in *Neder* itself or also prescriptive of any finding of harmlessness where an element was omitted.").

Second, is overwhelming evidence sufficient in every case? For example, in *Neder*, there was no doubt that materiality was an element of the offense; the trial court's error was in deciding the question itself rather than submitting it to the jury. 527 U.S. at 6. Accordingly, the defendant was on notice that he needed to litigate materiality at the trial. But in other cases, the district court's (or circuit precedent's) misapprehension of the elements may mean the defendant has no incentive (or even opportunity) to present evidence on the omitted evidence.

For example, in this case, petitioner elected not to testify when it was clear that the jury's only inquiry into his state of mind would be to ask whether he intended his products for human consumption. If he had known that the Government would be required to prove his knowledge of the chemical structure of his products, he could well have decided it made sense to testify to his ignorance of those crucial facts. And if he did, it would have been left to the jury to decide – largely on the basis of a credibility determination – whether his direct

testimony on his state of mind was overcome by any inferences drawn from his knowledge of the products' names and physiological effects. And on *that* record, the Government would have been hard pressed to demonstrate harmless error beyond a reasonable doubt. *See Neder*, 527 U.S. at 19 (error not harmless when "the defendant contested the omitted element and raised evidence sufficient to support a contrary finding").

B. The Circuits Are Divided Over The Questions Left Open In *Neder*.

As Judge Lipez has explained, the federal courts of appeals are divided over the proper interpretation of *Neder* and application of its harmless error rule. *See Pizarro*, 772 F.3d at 303 (Lipez, J., concurring); *see also United States v. Schneider*, Nos. 15-3247 & 15-3248, 2016 WL 6543342, at *3 n.2 (10th Cir. Nov. 4, 2016) (acknowledging that the "case law reflects some controversy on that point").

1. The circuit conflict is presented most starkly by comparing the Fourth Circuit's decision in this case with the Fifth Circuit's decision, one day earlier, in *United States v. Stanford*, 823 F.3d 814 (5th Cir. 2016), *reh. denied* July 5, 2016, *cert. denied*, – S.Ct. –, 2016 WL 5851763 (Nov. 7, 2016).[6] Like petitioner, the defendant in *Stanford* was convicted of an Analogue Act offense in the absence of an instruction requiring the jury to find that he knew his products

[6] The defendant in *Stanford* filed a petition for certiorari on an unrelated question, which this Court recently denied. *See* No. 16-454.

were controlled substances. *See id*. at 826. However, unlike this case, the court submitted an interrogatory to the jury, asking whether it found that the defendant knew the substance in question was a controlled substance analogue. The jury convicted and answered the interrogatory in the affirmative. *Id*. at 827. On appeal, the Fifth Circuit rejected the Government's claim that the jury interrogatory rendered the instructional error harmless.

Writing for the court, Judge Jerry E. Smith explained that even assuming the interrogatory was the equivalent of a jury instruction, it failed to specify a burden of proof, *id.* at 829, and failed to convey the mens rea required by this Court's decision in *McFadden*, *see id*. at 834-35. The Government claimed that the latter error – which is functionally indistinguishable from the instructional error in this case – was harmless because there was overwhelming evidence of intent. *Id*. at 837. But looking to *Neder*, the Fifth Circuit held that overwhelming evidence of the missing element was insufficient, for two reasons.

First, the court rejected any claim that overwhelming evidence is sufficient in itself under *Neder*. The court explained that in *Neder*, "the missing element was logically encompassed by a guilty verdict and was not in fact contested." *Stanford*, 823 F.3d at 832. That is, the "proof of the element missing from the instruction was inherent in proof of the overall conviction, so the jury could not have failed to find the element." *Id*. "In contrast," the Fifth Circuit noted, "a finding that Stanford knew that AM-2201 was a [controlled substance analogue] was not logically inherent in proof of Count One." *Id*.

at 834. In that very different circumstance, the court held that it did not matter whether, as the Government claimed, there was "ample proof that Stanford knew AM-2201 was a" controlled substance analogue. *Id*. at 835. It is "one thing for the government to look back . . . and pick out evidence that" supports the uncharged element, but "it is another to assume that the jury focused on the same evidence, without the benefit" of a proper instruction. *Id*.

Second, the court explained that a district court's misapprehension of the elements of an offense can result in a distortion of the trial record, further precluding a finding of harmless error based on overwhelming evidence alone:

> The government misses the point in focusing only on the evidence actually presented at trial. Cobbling together evidence that the prosecution offered for other issues to demonstrate that Stanford likely had the requisite knowledge ignores the possibility that he might have done more to counter that evidence if he had known that it mattered for the verdict.

Stanford, 823 F.3d at 837.[7]

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[7] Stanford cast this part of his argument as implicating a constitutional right to present a complete defense. *Id*. at 836. The Fifth Circuit explained, however, that cases "involving a claim that the defendant was denied the right to present an adequate defense typically involve the court's excluding certain

Accordingly, the Fifth Circuit held that the instructional error could not be "harmless unless proof of the missing element was inherent in proof of one of the others." *Id*. at 837; *see also id*. at 836 ("[T]he critical question is whether proof rebutting the missing element of knowledge was inherent in Stanford's defense of other elements."). Because it was not, the court vacated Stanford's Analogue Act conviction. *Id*. at 838 & n.25.

Had petitioner been tried in the Fifth Circuit, he would be preparing for a new trial rather than submitting this petition. As petitioner told the panel, he had even less reason than Stanford to contest his knowledge of chemical structural similarity; not only was there no jury interrogatory on that issue, but the judge had informed counsel before trial that the jury would be instructed that the Government need only prove petitioner intended his products for human consumption. *See* Petr. Remand Br. 1, 6. The Fourth Circuit rejected that argument because its precedent stands in direct conflict with *Stanford*, holding that overwhelming evidence in the trial record supporting an omitted element is sufficient, without more, to render an omission error harmless under *Neder*. Pet. App. 13a-14a (citing *United States v. Brown*, 202 F.3d 691, 700-01 (4th Cir. 2000), and *United States v. Davis*, 202 F.3d 212 (4th Cir. 2000)).

2. The conflict between the Fourth and Fifth Circuits' Analogue Act cases reflects a broader

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testimony or evidence." *Id*. Stanford's objection therefore was more properly analyzed under *Neder*'s harmless error test. *Id*.

disagreement in the lower courts over when, if ever, overwhelming evidence of an omitted evidence is sufficient to render omission of an element harmless error.

A number of circuits have joined the Fourth Circuit in turning what the Court in *Neder* described as a "narrow class of cases," 527 U.S. at 17 n.2, into an exceedingly broad one. For example, on remand from this Court in *Neder* itself, the Eleventh Circuit rejected the defendant's assertion that an omission error cannot be harmless "unless the Government shows both that [the defendant] never contested materiality and that the evidence overwhelmingly supports the materiality of every charged falsehood." *United States v. Neder*, 197 F.3d 1122, 1129 (11th Cir. 1999). "[W]hether Neder contested materiality may be considered but is not the pivotal concern," the court concluded. *Id*. "Instead, what the evidence showed regarding materiality is the touchstone." *Id*.; *see also United States v. Takhalov*, 825 F.3d 1307, 1320-21 (11th Cir. 2016). Other circuits likewise find omission of an element harmless error so long as there was overwhelming evidence of the element in the trial record. *See, e.g.*, *United States v. Robinson*, 250 F.3d 527, 530 (7th Cir. 2001); *Sasser v. Hobbs*, 735 F.3d 833, 854 (8th Cir. 2013).

The Ninth Circuit has gone a step further, permitting the Government to introduce *new* evidence post-conviction to support its harmless error argument. *See, e.g.*, *United States v. Zepeda-Martinez*, 470 F.3d 909, 913 (9th Cir. 2006); *see also United States v. Guerrero-Jasso*, 752 F.3d 1186, 1196-1204 (9th Cir. 2014) (Berzon, J., concurring) (objecting to the practice).

The Second Circuit, on the other hand, applies a multi-step test under which the court may find an error harmless even if the jury *could* have reasonably acquitted on the trial record, so long as the court concludes that it *would have* convicted instead. *See United States v. Jackson*, 196 F.3d 383, 386 (2d Cir. 1999). That rule has been directly rejected by the Fourth Circuit, and questioned by later Second Circuit panels that nonetheless continue to apply it in the absence of further direction from this Court. *See United States v. Brown*, 202 F.3d 691, 701 n.19 (4th Cir. 2000); *Monsanto v. United States,* 348 F.3d 345, 351 (2d Cir. 2003) (Calabresi, J.) (expressing doubt whether circuit precedent is consistent with *Neder*).

On the other hand, the Fifth Circuit's decision in *Stanford* is consistent with law in the D.C. Circuit, which has recognized that when "a defendant is prevented from offering crucial evidence in her own defense" by a court's misconstruction of the elements of the offense, "it can hardly be concluded that the trial errors are harmless." *United States v. Sheehan*, 512 F.3d 621, 633 (D.C. Cir. 2008) (finding no harmless error when magistrate wrongly concluded that crime was strict liability offense and therefore precluded defendant from presenting a mens rea defense). "In *Neder*," the court observed, "the district court did not prevent the defendant from adducing evidence on the disputed issue of materiality." *Id*.

At the same time, at least two state supreme courts have held that overwhelming evidence in itself is never sufficient to establish harmless error under *Neder*. The Connecticut Supreme Court, for example, has held that a "jury instruction that improperly

omits an essential element from the charge constitutes harmless error if a reviewing court concludes beyond a reasonable doubt that the omitted element *was uncontested and supported by overwhelming evidence*." *State v. Velasco*, 751 A.2d 800, 815 (Conn. 2000) (quoting *Neder*, 527 U.S. at 17) (emphasis in original). The Idaho Supreme Court has held the same. *See State v. Perry*, 245 P.3d 961, 976, 980 (Idaho 2010).

C. This Court Attempted To Address The Role Of Overwhelming Evidence In Harmless Error Analysis In *Vasquez v. United States*, But Was Unable To Do So In That Case.

The ambiguity over the role of overwhelming evidence in *Neder* reflects a broader uncertainty in this Court's cases over how courts should conduct harmless error review generally, including in such contexts as the wrongful admission of evidence.

As a number of academic commentators have noted, this Court's decisions are widely seen as inconsistently applying "two tests for constitutional harmless error [], one focusing on the effect that the error . . . had on the deliberations of the jury, and one focusing on whether the evidence properly before the jury was overwhelming." Jeffrey O. Cooper, *Searching for Harmlessness: Method and Madness in the Supreme Court's Harmless Constitutional Error Doctrine*, 50 U. KAN. L. REV. 309, 311 (2002); Roger A. Fairfax, Jr., *Harmless Constitutional Error and the Institutional Significance of the Jury*, 76 FORDHAM L. REV. 2027, 2037 (2008) (noting that this "Court has shifted between the two standards – harmlessness

based upon whether the error contributed to the verdict and harmlessness based upon whether the residual evidence was overwhelming").

In 2011, this Court granted certiorari in *Vasquez v. United States*, No. 11-199, to provide some much needed clarity. The Court took the case to decide whether the Seventh Circuit's harmless error analysis erred in focusing "solely on the weight of the untainted evidence without considering the potential effect of the error . . . on th[e] jury." Pet. (i), *Vasquez v. United States*, No. 11-199 (First Question Presented). But the Court was unable to decide that question, dismissing the case as improvidently granted after oral argument. *See* 132 S. Ct. 1532 (2012).

This case presents the Court another opportunity. While the erroneous admission of evidence does not implicate the bedrock rule against directed verdicts in the same way as omission of an element from a criminal jury charge, granting certiorari in this case could allow the Court to provide greater clarity as a general matter regarding the role of overwhelming evidence in harmless error review. In particular, in both *Vasquez* and this case, the court of appeals' single-minded focus on the strength of the evidence admitted at trial led them to ignore the broader impact the error could have had in leading to the jury's verdict in the case. The Court would considerably advance clarity in the law by holding in this case that courts may not disregard serious trial errors simply by declaring that the other evidence admitted at trial was overwhelmingly in the Government's favor.

D. The Entrenched Conflict Should Be Resolved In This Case.

The continuing conflict and confusion is untenable. "The harmless-error rule [is] probably the most cited rule in modern criminal appeals. . . ." William M. Landes & Richard A. Posner, *Harmless Error*, 30 J. LEGAL STUD. 161, 161 (2001) (reviewing a sample of nearly 1,000 harmless error appeals over a two-year period). Moreover, any error in its application undermines critical constitutional protections essential to the fair operation of the criminal justice system. *Cf. United States v. Nash*, 482 F.3d 1209, 1221 (10th Cir. 2007) (McKay, J., dissenting) ("Nearly three decades of observing and participating in the application of the so-called harmless error analysis persuades me that the courts of appeals, by reciting the *Bruton* standard but justifying its breach in the name of harmlessness, increasingly are eroding the important constitutional protection afforded by the *Bruton* barrier."); *United States v. Dobek*, 789 F.3d 698, 701 (7th Cir. 2015) (Posner, J.) ("We admit to some misgivings about invoking harmless error with regard to a jury instruction. For where does one stop?").

At the same time, there is no prospect of the conflict resolving itself without the Court's intervention. The circuit conflict is fully entrenched. For example, both petitioner's petition for rehearing en banc in this case and the Government's in *Stanford* were denied. And the conflict arises from acknowledged ambiguities in *Neder* and this Court's broader harmless error jurisprudence that only this Court can sort out.

E. The Decision Below Is Wrong.

Certiorari is further warranted because many courts of appeals have badly over-read *Neder* as making overwhelming evidence in the trial record the sole consideration in harmless error review in omitted element cases. That view is not supported by *Neder* itself, defies common sense, and violates the fundamental guarantee of the Sixth Amendment.

1. As discussed, the Court's opinion in *Neder* never addresses the question presented here, focusing instead on the much easier cases in which: (1) the defendant does not contest the element, for which there is overwhelming proof, 527 U.S. at 17; and (2) the defendant contests the evidence and there is sufficient evidence to permit the jury to find in the defendant's favor on the missing element, *id*. at 19.

But *Neder* and the cases upon which it relies are founded on principles that are incompatible with the view that overwhelming evidence alone is sufficient in every case to hold an omitted element harmless error. First, *Neder* expressly reaffirmed the foundational premise that "a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict . . . regardless of how overwhelmingly the evidence may point in that direction." *Rose v. Clark*, 478 U.S. 570, 578 (1986) (alteration in original) (citations omitted); *see Neder*, 527 U.S. at 17 n.2 (citing *Rose*, 478 U.S. at 578). When a court directs a verdict against a criminal defendant, overwhelming evidence of guilt is simply irrelevant because "the error in such a case is that the wrong entity judged the defendant guilty." *Rose*, 478 U.S. at 578.

In *Neder*, this Court rightly concluded that that subjecting "the narrow class of cases *like the present one* to harmless-error review" was consistent with the bedrock prohibition on directed verdicts, 527 U.S. at 17 n.2 (emphasis added). But that conclusion is only supportable when, as was true in *Neder*, the defendant had every incentive to contest the omitted element, but chose not to. Sixth Amendment rights are waivable, and it was fair to conclude in *Neder* that the defendant waived his right to have a jury decide the materiality question in that case by declining to contest the element at all.

But if a court of appeals can hold omission of a criminal element harmless in a case like this one, based solely on its view that the evidence is overwhelming, there is no principled reason why the district court, viewing the same evidence before the case is submitted to the jury, should not be permitted to simply declare an element satisfied as a matter of law. *See Pizarro*, 772 F.3d at 309-10 (Lipez, J., concurring).

2. At the very least, even if overwhelming evidence could sometimes be a basis for harmless error in an omitted element case, it cannot be a sufficient ground when the evidentiary record is distorted by the district court's misapprehension of the statute's elements.

For example, when a court unconstitutionally excludes defense evidence from a case, the harmless error does not simply ask whether the *other* evidence that was *admitted* is so overwhelming a jury would have been compelled to convict. Instead, the "correct inquiry is whether, assuming that the damaging potential of the [excluded evidence] were fully

realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (addressing erroneous preclusion of cross-examination).

Surely, the standard must be at least as rigorous when an entire element (as opposed to simply some evidence relating to an element) is withheld from the jury. In both instances, the trial court's error distorts the evidentiary record and that distortion must be taken into account in the harmless error analysis. Ignoring an error's effect on the composition of the trial evidence flies in the face of the central harmless error inquiry, which is to determine whether it can be said with great confidence that the error "did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24.

The Analogue Act cases provide a straightforward example of the illogic of the Fourth Circuit's contrary rule. Under *McFadden*, it would be a complete defense that the defendant honestly believed, based on a convincing (but erroneous) report from a trustworthy lab, the substance he was selling contained only caffeine. But under the Fourth Circuit's prior precedent, that belief was entirely irrelevant; the Government needed only to prove that the defendant intended humans to consume the product and that the product *in fact* had the chemical properties of an analogue. A defendant tried under that precedent would have had no reason to present his case-ending lab report at trial (and the judge might well exclude it as irrelevant and prejudicial to the Government's case). *See, e.g.*, *Descamps v. United States*, 133 S. Ct. 2276, 2289 (2013) ("A

defendant, after all, often has little incentive to contest facts that are not elements of the charged offense – and may have good reason not to. At trial, extraneous facts may confuse the jury. (Indeed, the court may prohibit them for that reason.)").

Yet, in the Fourth Circuit and elsewhere, such problems are completely irrelevant to any subsequent harmless error analysis, which focuses solely on the evidence actually submitted at trial. The predictable result is that individuals who are actually innocent – who surely would be acquitted in a trial unaffected by the court's misinterpretation of the statute – will be convicted and have their convictions affirmed on appeal. That cannot be the law, and this Court should grant certiorari in this case to say so.

II. Certiorari Is Warranted To Review The Fourth Circuit's Construction Of The Analogue Act's Intent Element.

As described above, the Fourth Circuit held that the jury in this case would have been *compelled* to find mens rea proven beyond a reasonable doubt because the prosecution proved that petitioner knew the names of the substance he was selling and compared their effects to the effects of controlled substances. That holding disregards this Court's decision in this very case and establishes a precedent that substantially diminishes the Government's burden in all future Analogue Act prosecutions. That erroneous decision also created a conflict with the Fifth, Seventh, and Tenth Circuits. And it does so in part by adopting a position that the Solicitor General specifically repudiated in this Court. Another reversal (perhaps even a summary one) is in order.

1. In *McFadden*, this Court held that under a knowledge-of-identity theory, the Government must prove that "the defendant knew the specific features of the substance that make it a 'controlled substance analogue.'" 135 S. Ct. at 2302. Those "features," the Court explained, include the substance's substantial similarity in chemical structure to a controlled substance. *Id*. at 2305. The decision below cannot remotely be squared with that holding and conflicts with decisions of several other circuits.

First, the panel conflated knowing the chemical *name* of a substance with knowing its chemical *structure*.[8] As the United States rightly acknowledged in this Court:

> the government *cannot* prove knowledge of identity by proving that a defendant knew *the name* of the substance he distributed – controlled substance analogues are identified by their features, as set forth in the statutory definition in 21 U.S.C. 802(32)(A), rather than by name in published schedules.

U.S. S. Ct. Br. 28 (emphasis added).

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[8] As the Government's own expert testimony shows, "chemical structure" refers to the number, type, and arrangement of atoms in a molecule, as often represented on a standard chemical diagram. *See United States v. McFadden*, 753 F.3d 432, 437-38 (4th Cir. 2014) (first appeal); J.A. 444-45. This same definition is applied in other circuits. *See, e.g.*, *United States v. Roberts*, 363 F.3d 118, 121-22, 124 (2d Cir. 2004); *United States v. McKinney*, 79 F.3d 105, 108 (8th Cir. 1996), *vacated on other grounds*, 520 U.S. 1226 (1997).

This Court agreed, explaining that the key difference between the Controlled Substances Act (CSA) and the Analogue Act is that while the CSA prohibits scheduled substances by name (*e.g.*, "heroin" or "3-methylfentanyl"), the "Analogue Act defines a controlled substance analogue *by its features*, as a substance 'the chemical structure of which is substantially similar to the chemical structure of a controlled substance in schedule I or II' . . . . § 802(32)(A)." 135 S. Ct. at 2305. Holding that the Government may nonetheless prove knowledge of chemical structure by proving knowledge of chemical name collapses this important distinction.

It also conflicts, again, with the Fifth Circuit's holding in *Stanford*. In that case, the court instructed the jury that it had to find the defendant knew the name of his product, and the jury did so. *Id*. at 826-27. Yet the Fifth Circuit concluded that this did not make the court's failure to require the jury to find knowledge of chemical structure harmless – the court of appeals observed that having to prove knowledge of chemical structure "is a significantly greater burden of proof than just demonstrating that" the defendant knew something called "AM-2201" was being distributed. *Id*. at 835.

That is clearly right. Absent the captions on the chemical diagrams on page 5, could the reader determine which diagram describes the chemical structure of MDPV and which describes methcathinone simply be referring to their names? Not likely. Would the reader know that "4-MEC" is a short hand for "4-methylethcathinone"? There is no evidence petitioner did either. But even knowing the longer name, could a non-scientist determine

whether 4-methylethcathinone is substantially similar in chemical structure to methcathinone? Of course not. Neither could petitioner.

Second, even if knowing a chemical's name imparted knowledge of its chemical structure, the statute does not simply require proof that the defendant has "knowledge of the chemical structures . . . of his products," as the panel wrongly held. Pet. App. 19a. The "specific feature" that makes a substance an analogue is its substantial similarity in chemical structure to *"a controlled substance in schedule I or II*." 21 U.S.C. § 802(32)(A)(i) (emphasis added). And the only way to know whether two substances have similar chemical structures is to know the structure of *both* chemicals. Here, the panel did not cite any evidence petitioner knew even the *name* of methcathinone (the controlled substance the DEA's expert said was substantially similar to MDPV), much less that he knew its chemical structure.

Third, the only other evidence the panel cited were statements in which petitioner compared the *physiological effect* of his products to the effect of controlled substances, or (even less relevantly) to his other products. Pet. App. 19a-22a. But as the Tenth Circuit recently held, in conflict with the panel decision in this case, "the fact that one drug produces a similar effect to a second drug just doesn't give rise to a rational inference – let alone rationally suggest beyond a reasonable doubt – that the first drug shares a similar chemical structure with the second drug." *United States v. Makkar*, 810 F.3d 1139, 1144 (10th Cir. 2015). For example, Aspirin and Tylenol have similar effects but are not similar in chemical

structure. *Id*. Indeed, DEA experts have testified that inferring structural similarity from similarity in effect "is not scientifically sound." *Id*. (citation omitted).

In *Makkar*, the Tenth Circuit thus rejected the Seventh Circuit's creation of a permissive inference that allows a jury to infer knowledge of chemical structure from a defendant's knowledge of similarity in physiological effect. *Id*. at 1144-45 (rejecting *United States v. Turcotte*, 405 F.3d 515 (7th Cir. 2005)).[9] But even *Turcotte* is inconsistent with the Fourth Circuit's decision below: in *Turcotte*, the Seventh Circuit explicitly rejected any claim that the permissible inference rendered an instructional error harmless. *See id*. at 528 (explaining that that a jury would not have been *compelled* to find knowledge of chemical structure based on knowledge of effects).[10]

2. This is not simply a complaint about the panel's fact-bound misapplication of law to fact. In

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[9] The Seventh Circuit recently disavowed the *Turcotte* inference. *See United States v. Novak*, – F.3d –, 2016 WL 6610220, at *6 (7th Cir. Nov. 9, 2016). But the Eighth Circuit has embraced it, while "recogniz[ing] that the Tenth Circuit reached a different conclusion" in *Makkar*." *United States v. Carlson*, 810 F.3d 544, 552 (8th Cir. 2016). That conflict likely would be resolved in the course of deciding the Second Question Presented by this petition.

[10] The Fourth Circuit purported to distinguish *Turcotte* on the ground that there was additional evidence of knowledge of chemical structure in this case. Pet. App. 22a. But that evidence consisted solely of proof that petitioner knew the names of his products. *See id*. 21a-22a. But so did the defendant in *Turcotte*. *See* 405 F.3d at 519, 528-29 & n.5.

finding harmless error, the panel necessarily held that proof of a defendant's knowledge of his products' chemical names and effects is sufficient to satisfy (indeed, *compels* the jury to find established) the knowledge-of-chemical-structure element of the offense. In future prosecutions, the Government will be entitled to ask for an instruction to that effect, in conflict with the law of the Fifth, Seventh, and Tenth Circuits.

That conflict warrants this Court's review. As this Court's previous grant of certiorari in this case illustrates, the proper construction of the Analogue Act's intent element is a matter of recurring importance. And the panel opinion provides a clear roadmap for the Government to evade this Court's interpretation of the knowledge-of-chemical-structure element in future cases.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 13-4349

UNITED STATES OF AMERICA,
Plaintiff - Appellee,

v.

STEPHEN DOMINICK MCFADDEN, a/k/a Stephen Domin McFadden,
Defendant - Appellant.

On Remand from the Supreme Court of the United States.
(S. Ct. No. 14-378)

Argued: March 22, 2016 Decided: May 19, 2016

Before TRAXLER, Chief Judge, and WILKINSON and KEENAN, Circuit Judges.

Affirmed in part, vacated in part, and remanded by published opinion. Judge Keenan wrote the opinion, in which Chief Judge Traxler and Judge Wilkinson joined.

ARGUED: J. Lloyd Snook, III, SNOOK & HAUGHEY, P.C., Charlottesville, Virginia, for Appellant. Anthony Paul Giorno, OFFICE OF THE UNITED STATES ATTORNEY, Roanoke, Virginia, for Appellee. **ON BRIEF**: Timothy J. Heaphy, United States Attorney, Roanoke, Virginia, Ronald M. Huber, Assistant United States Attorney, Jean B. Hudson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Charlottesville, Virginia, for Appellee.

BARBARA MILANO KEENAN, Circuit Judge:

In this case, which is before us for a second time, we consider whether certain erroneous jury instructions given at trial require us to vacate Stephen D. McFadden's convictions. After a jury trial, McFadden was convicted of conspiring to distribute controlled substance analogues and of distributing controlled substance analogues in violation of the Controlled Substance Analogue Enforcement Act of 1986 (the Analogue Act), 21 U.S.C. §§ 802(32)(A), 813, and the Controlled Substances Act (CSA), 21 U.S.C. §§ 841(a), 846. In McFadden's initial appeal, we affirmed the district court's judgment, and McFadden petitioned the Supreme Court for certiorari. The Supreme Court granted certiorari,

concluded that the jury instructions given at trial improperly omitted elements relating to McFadden's state of mind, and remanded this case for us to consider whether the error was harmless.

On remand, we conclude that the erroneous jury instructions constituted harmless error with respect to McFadden's convictions under Counts One, Five, Six, Seven, Eight, and Nine of the superseding indictment. However, we conclude that the error was not harmless with respect to McFadden's convictions under Counts Two, Three, and Four. We therefore affirm in part, vacate in part, and remand the case for further proceedings in the district court.

I.

A.

We begin by providing an overview of the relevant federal statutes and regulations governing controlled substances and their analogues. The CSA prohibits the distribution of a "controlled substance," 21 U.S.C. § 841, and defines "controlled substance" to mean any drug or substance included in five schedules, Schedule I through Schedule V, established by the CSA. 21 U.S.C. §§ 802(6), 812(a). Distribution of controlled substances listed on Schedule I carries strict criminal penalties. 21 U.S.C. § 841(b)(1)(C). The Attorney General also has the authority to add substances to or remove substances from the CSA schedules by rule. 21 U.S.C. § 811(a). The up-to-date schedules are codified in the Code of Federal Regulations. *See* 21 C.F.R. §§ 1308.11–1308.15.

Congress enacted the Analogue Act to prevent the distribution of newly created drugs, not yet listed on the schedules but that have similar effects on the human body. *See United States v. Klecker*, 348 F.3d 69, 70 (4th Cir. 2003). The Analogue Act defines a "controlled substance analogue" as any substance "the chemical structure of which is substantially similar to [that] of a controlled substance in schedule I or II" (the chemical structure element), and "which has [an actual, claimed, or intended] stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than [that] of a controlled substance in schedule I or II" (the physiological effect element). 21 U.S.C. § 802(32)(A).

Under the Analogue Act, controlled substance analogues are treated as Schedule I controlled substances for purposes of federal law. 21 U.S.C. § 813. The interaction between the CSA and the Analogue Act therefore prohibits the distribution of controlled substance analogues, even if not listed on the CSA schedules.

B.

The facts of this case are discussed in detail in our previous opinion in *United States v. McFadden*, 753 F.3d 432 (4th Cir. 2014), and in the Supreme Court's opinion in *McFadden v. United States*, 135 S. Ct. 2298 (2015). We will recite here the facts relevant to the issue presented on remand.

In July 2011, certain law enforcement officials (police officers) in Charlottesville, Virginia began investigating the distribution of synthetic stimulants

commonly known as "bath salts." The investigation revealed that bath salts were being sold from a video rental store owned and operated by Lois McDaniel. Under supervision of the police officers, a confidential informant made two controlled purchases of bath salts at McDaniel's video store. On August 24, 2011, the police officers confronted McDaniel with evidence from their investigation, searched the video store, and solicited information regarding her supplier.

McDaniel agreed to cooperate with the investigation and to assist the police in gathering evidence against her supplier, Stephen McFadden. At the officers' direction, McDaniel initiated recorded telephone conversations with McFadden, who was located in Staten Island, New York. The first of these telephone conversations occurred on August 25, 2011. In these recorded conversations, McFadden described the active ingredients in the bath salts and gave instructions on how the bath salts were to be consumed. McFadden also described the stimulant effects of the bath salts and compared the effects to those of cocaine or methamphetamine. During these telephone conversations, McDaniel engaged in five separate controlled purchases of several varieties of bath salts from McFadden. McFadden shipped packages containing bath salts through FedEx, a commercial courier, from Staten Island to Charlottesville.

The United States Drug Enforcement Administration (DEA) seized the packages directly from FedEx. Inside these packages, the "vials" and "baggies" containing the bath salts had been labeled by McFadden, and some labels warned that the

contents were "not for human consumption or illegal use." Other labels listed chemical compounds, some of which were Schedule I controlled substances, and stated that the package contents "[did] not contain [those] compounds or analogues of [those] compounds."

Chemical analysis revealed that the composition of the bath salts seized in these shipments changed over time. McFadden's five shipments from July 2011 through September 2011 contained 3,4-methylenedioxypyrovalerone (MDPV), 3,4-methylenedioxymethcathinone (methylone, or MDMC), and 4-methyl-N-ethylcathinone (4-MEC).

On October 21, 2011, the government adopted a rule adding MDPV and methylone to Schedule I. *See* Schedules of Controlled Substances: Temporary Placement of Three Synthetic Cathinones into Schedule I, 76 Fed. Reg. 65,371, 65,371–75 (Oct. 21, 2011). Immediately upon learning of the new rule, McFadden destroyed his inventory of MDPV and methylone. Although McFadden ceased distributing MDPV or methylone at this point, he continued to send shipments containing 4-MEC until his arrest in February 2012.

A federal grand jury indicted McFadden for distributing MDPV, methylone, and 4-MEC in violation of the CSA and the Analogue Act. The indictment alleged that although MDPV, methylone, and 4-MEC were not controlled substances at the time of McFadden's distribution, these three compounds nonetheless qualified as controlled substance analogues by virtue of their chemical

structures and physiological effects. *See* 21 U.S.C. § 802(32)(A). The grand jury charged McFadden with one count of conspiracy to distribute controlled substance analogues between June 2011 and February 2012 (Count One), and eight counts of distribution of controlled substance analogues. Three counts of distribution corresponded with three different shipments made on July 25, 2011 (Count Two), August 11, 2011 (Count Three), and August 24, 2011 (Count Four), before police officers began supervising telephone conversations between McFadden and McDaniel on August 25, 2011. Five counts of distribution corresponded with five different shipments made on August 26, 2011 (Count Five), September 16, 2011 (Count Six), October 27, 2011 (Count Seven), January 6, 2012 (Count Eight), and February 2, 2012 (Count Nine), after the police officers began directing and monitoring McDaniel's communications with McFadden.

In a motion to dismiss the indictment and in his proposed jury instructions, McFadden argued that the government was required to prove that he knew the substances he distributed were controlled substance analogues under the Analogue Act. Under McFadden's proposed jury instruction, the government would have been required to prove that McFadden knew that the analogues had substantially similar chemical structures and physiological effects as those of controlled substances.

The district court denied McFadden's motion, relying on this Court's opinion in *United States v. Klecker*, 348 F.3d 69, 71 (4th Cir. 2003) (requiring the government to prove only that a substance had the

chemical structure and physiological effects of an analogue and that the defendant intended the substance be consumed by humans). During the four-day trial, McFadden presented evidence that he was not aware of the Analogue Act, or that the CSA prohibited the distribution of controlled substance analogues. The district court instructed the jury consistent with the holding in *Klecker*, and the jury returned a guilty verdict on all nine counts.

At his sentencing hearing, McFadden argued that he had been careful not to sell any substances listed on the controlled substance schedules. McFadden and the government stipulated that McFadden had consulted the DEA website for the list of controlled substances, and that the website did not contain any warning at the time that controlled substance analogues also were regulated. Further, McFadden testified that he had ceased selling MDPV and methylone after those substances were added to the CSA schedules, even when an undercover DEA agent attempted to purchase them. The district court considered this testimony and sentenced McFadden to serve a term of 33 months' imprisonment on each count, to run concurrently.

McFadden appealed, arguing in this Court that the government should have been required to prove his knowledge of the bath salts' illegal status as a controlled substance analogue. Relying on our precedent in *Klecker*, 348 F.3d at 72, we affirmed the district court's interpretation of the Analogue Act as not requiring proof that the defendant knew that the distributed substances were controlled substance

analogues. *See United States v. McFadden*, 753 F.3d 432, 436, 443–44 (4th Cir. 2014).[1]

McFadden sought review of our decision by the Supreme Court, which granted certiorari on the issue whether the government was required to prove that he knew that the substances he distributed were controlled substance analogues. The Supreme Court held that a conviction under the Analogue Act requires proof of knowledge of either the substance's legal status as a controlled substance or of its specific features that make the substance a controlled substance analogue. *McFadden v. United States*, 135 S. Ct. 2298, 2305 (2015). Accordingly, the Supreme Court vacated this Court's opinion, and remanded the case to us to determine whether the district court's erroneous jury instructions constituted harmless error. *Id*. at 2307.

II.

A.

The Supreme Court has clarified the elements that the government must prove to support a conviction for distribution of controlled substance

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[1] In the initial appeal, we also rejected McFadden's challenges to the vagueness of the Analogue Act, the district court's evidentiary rulings, and the sufficiency of the evidence at trial. *See United States v. McFadden*, 753 F.3d 432, 436 (4th Cir. 2014). McFadden did not seek Supreme Court review on these other issues, so they are not before us on remand.

analogues. As discussed above, the Analogue Act defines a "controlled substance analogue" by its chemical structure and its actual, claimed, or intended physiological effects. 21 U.S.C. § 802(32)(A). If intended for human consumption, any controlled substance analogue is regulated as a Schedule I controlled substance. *Id*. § 813. Therefore, the CSA's prohibition of knowing or intentional distribution of controlled substances extends to controlled substance analogues intended for human consumption. *See id*. §§ 813, 841(a)(1).

The government must also satisfy one of two methods of proof regarding the defendant's state of mind. *McFadden*, 135 S. Ct. at 2305. Under the first method of proof, the government may establish that "a defendant knew that the substance . . . is some controlled substance—that is, one actually listed on the . . . schedules or treated as such by operation of the Analogue Act—regardless of whether he knew the particular identity of the substance." *Id*. Under the second method, the government may establish that "the defendant knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. Under this second method of proof, knowledge of the substance's chemical structure and physiological effects is sufficient to support a conviction. *Id*.

A conviction under the Analogue Act therefore requires the government to prove that the defendant: (1) distributed a substance that had the chemical structure of an analogue and the actual, intended, or claimed physiological effects of an analogue; (2) intended that the substance be used for human

consumption; and (3) knew either the legal status of the substance, or the chemical structure and physiological effects of that substance. Only the third element is in dispute on remand in this case.

At trial, the jury found that McFadden distributed substances that qualified as controlled substance analogues, and that he intended the substances for human consumption. The district court instructed the jury that to convict on the distribution counts, the jury must find:

> FIRST: That the defendant knowingly and intentionally distributed a mixture or substance that has an actual, intended, or claimed 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 of the Controlled Substances Act;
>
> SECOND: That the chemical structure of the mixture or substances is substantially similar to the chemical structure of a controlled substance in Schedule I or II of the Controlled Substances Act; AND
>
> THIRD: That the defendant intended for the mixture or substance to be consumed by humans.

By returning a guilty verdict on the distribution counts of the superseding indictment, the jury necessarily found that McFadden distributed a substance that had the chemical structure of an

analogue and the actual, intended, or claimed physiological effects of an analogue, intending the substance to be consumed by humans. The jury was not instructed to determine whether McFadden had knowledge of the legal classification of the substances as controlled substance analogues or of the substances' chemical structures and physiological effects.

The jury instructions for the conspiracy count were essentially identical with respect to the question of McFadden's knowledge. In order to find McFadden guilty of conspiracy, the jury was required to find that McFadden willingly and knowingly joined an agreement that existed "beginning in or around June 2011, and continuing until February 15, 2012," to accomplish the purpose of distributing substances containing MDPV, methylone, or 4-MEC. Conviction on the conspiracy count also required a jury finding that MDPV, methylone, or 4-MEC have the chemical structures and the actual, intended, or claimed physiological effects of controlled substance analogues. By returning a guilty verdict, the jury therefore necessarily found that McFadden conspired to distribute certain substances, and that those substances had the features of controlled substance analogues. However, the guilty verdict did not necessarily reflect that the jury found that McFadden knew the legal status of those substances or that those substances had the chemical structures and physiological effects of controlled substance analogues.

With respect to all nine counts, therefore, the jury instructions omitted the required element that

McFadden knew either that the bath salts were regulated as controlled substances or that the bath salts had the features of controlled substance analogues. Accordingly, we turn to consider whether the failure to instruct the jury on this knowledge element constituted harmless error.

B.

A court commits a constitutional error subject to harmless error analysis when it omits an element of an offense from its jury instructions. *Neder v. United States*, 527 U.S. 1, 8–9 (1999). To establish harmless error in such a case, the government must show "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967); *United States v. Brown*, 202 F.3d 691, 699 (4th Cir. 2000). The reviewing court must "conduct a thorough examination of the record," and if "the court cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error . . .[,] it should not find the error harmless." *Neder*, 527 U.S. at 19; *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993) (requiring the reviewing court to ensure that the guilty verdict rendered at trial was "surely unattributable to the error").

Both the Supreme Court and this Court have held that an erroneously omitted jury instruction may be deemed harmless error if the omitted element is supported by overwhelming evidence admitted at

trial.[2] *See Neder*, 527 U.S. at 16, 18; *Brown*, 202 F.3d at 700–01. In *Neder*, the jury found that a taxpayer had knowingly filed false statements in a tax return by underreporting his income by $5 million, but did not determine whether the false statement was material to the taxpayer's tax liability. 527 U.S. at 16. The Supreme Court held that the omission of this element from the jury instruction was harmless beyond a reasonable doubt, because the taxpayer had contested only the classification, but not the calculated amount, of the $5 million, and that any reasonable jury would find that $5 million in unreported income is material to tax liability. *Id*.

Additionally, in *United States v. Davis*, 202 F.3d 212 (4th Cir. 2000), we considered the omission of a jury instruction in a case that would have required the jury to determine whether the defendant fired gunshots into a "dwelling." *Id*. at 217. We held that because overwhelming evidence established that the building in question was a family residence with six occupants, the district court's failure to instruct on

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[2] The government may also prove harmless error by showing that the jury necessarily found facts that would satisfy the omitted element, such as when the omitted element overlaps with an element in another count of conviction. *See Brown*, 202 F.3d at 699–700. However, the government does not argue that this type of harmless error applies in this case, because the same element was erroneously omitted in all nine counts.

the "dwelling" element was harmless beyond a reasonable doubt. *Id*.

On the other hand, we have held that evidence of an element omitted from jury instructions will not be deemed overwhelming if the defendant had "genuinely contested" the omitted element with evidence that could have caused "disagreement among the jurors about" the contested element. *See Brown*, 202 F.3d at 702. In *Brown*, the jury was not instructed that it must find unanimously that the defendant had participated in specific predicate violations before finding that he had participated in a "continuing criminal enterprise." *Id*. at 698. The government had presented evidence of several predicate offenses through witnesses whose credibility had been impeached and whose testimony had been countered by other evidence. *Id*. at 701–02. We held that the error was not harmless beyond a reasonable doubt, because the omission of the element from the jury instructions could have allowed the jury to return a guilty verdict without unanimous agreement on which predicate offenses occurred. *Id*. at 702.

In accord with these decisions, we must examine the record for evidence of McFadden's knowledge regarding either the legal status or the relevant characteristics of the bath salts. *See McFadden*, 135 S. Ct. at 2305. We consider whether the government has met its burden of showing that overwhelming evidence established McFadden's knowledge on this issue, rendering the failure to instruct the jury on that knowledge element harmless beyond a reasonable doubt.

III.

The government argues that the evidence at trial established McFadden's knowledge under either method of proof articulated by the Supreme Court. According to the government, the evidence overwhelmingly proved that McFadden knew that the bath salts were regulated as controlled substances, and that the bath salts had chemical structures and physiological effects similar to those of controlled substances.

In response, McFadden asserts that his conduct showed that he thought that his actions were lawful, and argues that he is entitled to a jury determination of his credibility on this issue. Relying on the Seventh Circuit's decision in *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005), he also argues that under proper instructions, the jury would have been permitted, but would not have been required, to infer from the evidence that he had any knowledge of the chemical structures of the substances that he sold. We disagree with certain parts of both parties' arguments.

A.

We address the parties' arguments in the context of the two methods of proof identified by the Supreme Court for establishing the knowledge element. The government argues that the first method of proof was satisfied in this case, because overwhelming evidence established that McFadden knew that the bath salts were regulated or controlled under the CSA or the Analogue Act. The government highlights the fact that McFadden distributed the bath salts using

packaging, prices, and names consistent with illicit drug distribution. Further, in the recorded telephone conversations, McFadden compared his products to cocaine and methamphetamine. The government also argues that McFadden's attempts to conceal his activity and the nature of his business showed that he was conscious of his own wrongdoing. We disagree with the government's argument regarding the extent of evidence supporting this first method of proof.

Although the jury could have inferred from McFadden's evasive behavior and the "disclaimer" labeling of the packages and vials that he knew that the bath salts were treated as controlled substances, *McFadden*, 135 S. Ct. at 2304 n.1, we agree with McFadden that such an inference would not have been compelled. McFadden countered the government's evidence of his guilty knowledge by presenting evidence that he tried to comply with the law and intentionally avoided selling substances listed on the CSA schedules. McFadden affixed labels to his packages that disclaimed the inclusion of specific Schedule I substances, and he ceased selling MDPV and methylone immediately after learning of their listing in the CSA schedules. Thus, we conclude that McFadden's efforts to avoid selling substances listed in the CSA schedules is the type of "genuinely contested" evidence we discussed in *Brown* that could have caused "disagreement among the jurors" about whether McFadden knew that the bath salts were regulated or controlled under the CSA or the Analogue Act. *See Brown*, 202 F.3d at 702.

We therefore hold that the evidence was sufficient to permit, but not so overwhelming to compel, the jury to find that McFadden knew that federal law regulated the bath salts as controlled substances. Instead, the jury could have concluded from the evidence that McFadden erroneously thought that it was not a crime to sell MDPV, methylone, and 4-MEC. Therefore, the government has not shown that overwhelming evidence established McFadden's knowledge under the first method of proof.

B.

The government may also prove McFadden's knowledge by showing that McFadden knew "the specific analogue he was dealing with." *McFadden*, 135 S. Ct. at 2305. For this second method of proof, the government relies on McFadden's statements in telephone conversations recorded between August 25, 2011 and February 1, 2012 to show that McFadden had knowledge of the analogues' chemical structures and physiological effects.

As we discuss below, we agree with the government that the recorded telephone conversations overwhelmingly establish that McFadden knew the bath salts' chemical structures and physiological effects. However, the first recorded telephone conversation occurred on August 25, 2011, after McFadden's conduct giving rise to Count Two (July 11–25, 2011), Count Three (July 29–August 11, 2011), and Count Four (August 10–24, 2011) of the superseding indictment. The government does not

cite, nor were we able to find, any earlier direct evidence of McFadden's state of mind.

Although the jury reasonably could have inferred from McFadden's discussions in the August 25, 2011 phone call that he had possessed the required knowledge before his first shipment to Charlottesville, the evidence on this point cannot in any view be termed "overwhelming." *See Brown*, 202 F.3d at 701–02. McFadden's brother, a federal law enforcement agent, testified at trial that McFadden began selling "aromatherapy" products after seeing similar products for sale in plain view around Staten Island. Based on this and the other evidence before us, the jury reasonably could have concluded that McFadden began selling his products before knowing their identity, chemical structures, or physiological effects when ingested. The jury therefore reasonably could have concluded from the evidence that McFadden's guilty knowledge had not been established at the time he made the shipments corresponding with Counts Two, Three, and Four. Accordingly, we conclude that the government has not met its burden of establishing harmless error with respect to Counts Two, Three, and Four.

Any reasonable uncertainty about McFadden's knowledge, however, evaporated with McFadden's recorded participation in telephone conversations that demonstrated his full knowledge of the chemical structures and physiological effects of his products. McFadden does not dispute the accuracy of the

recordings and transcripts admitted at trial, nor does he point to evidence that would contradict the contents of those conversations.[3] In the first recorded substantive conversation, on August 25, 2011, McFadden discussed the composition of his products, characterizing a mixture called "Alpha" as "the straight chemical" and "the replacement for the MDPV." When asked for further details about a mixture labeled "No Speed Limit," McFadden represented that "Alpha mixed with the 4-MEC gives you a No Speed Limit–like feeling, just not as intense." McFadden also explicitly compared these mixtures to "cocaine" and "crystal meth." In later conversations, McFadden discussed distributing a "4-MEC" blend called "New Sheens," adding "a little extra kick" to a blend called "Hardball," and describing "Hardball" as a blend with "five active chemicals in it" or "five ingredients."

McFadden nevertheless argues that his statements to McDaniel were mere "sales talk," completely unconnected with any actual knowledge

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[3] In his initial appeal, McFadden challenged the relevance of the recordings and the transcripts, but did not challenge their accuracy. *United States v. McFadden*, 753 F.3d 432, 443 (4th Cir. 2014). We held that the district court did not abuse its discretion in admitting the recordings and transcripts, because they were relevant to prove that McFadden intended the bath salts to be used for human consumption. *Id*.

he might have. McFadden, a construction foreman and furniture salesman, asserts that he obviously lacked the experience or training to have scientific, chemical, or pharmacological knowledge about the products he sold. We are not persuaded by this argument, or by McFadden's assertion that under the holding of *United States v. Turcotte*, 405 F.3d 515, 527 (7th Cir. 2005), he is entitled to have the jury judge his credibility on the knowledge issue rather than have this question be reviewed on appeal for harmless error.

McFadden correctly states the principle from *Turcotte*, that even if a defendant is proved to have had knowledge of an analogue's physiological effects, a jury is permitted, but is not required, to infer that a defendant had knowledge of the analogue's relevant chemical similarities. *See* 405 F.3d at 527. However, McFadden's argument on this point, as well as his contention that he was engaged in mere "sales talk," grossly understates the evidence of his knowledge of the substances' chemical structures and physiological effects.

The nine recorded telephone conversations, beginning on August 25, 2011, established McFadden's thorough and detailed knowledge of chemicals identified in Count One and Counts Five through Nine, their chemical structures, their effects, and their similarity to other controlled substances. On August 25, 2011, McFadden explicitly referenced "MDPV" and "4-MEC" by name and described blends of different chemicals. Laboratory tests confirmed that McFadden's statements accurately described the chemical composition of his products. In addition,

McFadden's evidence that he consulted the CSA schedules on the DEA website, although effective to raise a question whether he knew the bath salts were regulated as controlled substances, demonstrated that he had sufficient knowledge about his products' chemical structures to be able to compare them to the list of chemical names on the CSA schedules. *See* 21 C.F.R. § 1308.11. Therefore, the record shows far more evidence than the mere knowledge or representation of physiological effects referenced in *Turcotte*. *See* 405 F.3d at 527.

The telephone conversations also established that McFadden knew the physiological effects of the products. On August 25, 2011, McFadden described the "feeling" caused by different blends, comparing their effects to those of cocaine and methamphetamine. The government presented evidence that McFadden's descriptions accurately reflected the actual physiological effects of the blends. And, even if McFadden's descriptions of the physiological effects were merely "sales talk," the Analogue Act defines analogues to include substances merely *represented* to have the relevant physiological effects. *See* 21 U.S.C. § 802(32)(A)(iii).

Therefore, the recorded telephone conversations demonstrate overwhelmingly that by August 25, 2011, McFadden knew the chemical identities and the physiological effects of the substances he was selling. As the Supreme Court has held, "[a] defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal." *McFadden*, 135 S. Ct. at 2305. Accordingly, we conclude that because overwhelming

evidence established that McFadden knew, as of August 25, 2011, the specific features of the substances he was selling, the district court's omission of the knowledge element from the jury instructions was harmless error with regard to McFadden's convictions under Counts Five through Nine. For the same reason, we affirm McFadden's conviction under Count One for conspiracy to distribute controlled substance analogues, which is supported by overwhelming evidence of his state of mind beginning with the date of those recorded telephone conversations.

With respect to Counts Two, Three, and Four, however, because the erroneous omission of the knowledge element from the jury instructions was not harmless beyond a reasonable doubt, we vacate and remand those counts for further proceedings in the district court consistent with the principles expressed in this opinion. We also remand the convictions on Count One, and Counts Five through Nine, to the district court for resentencing.

IV.

For these reasons, we affirm the district court's judgment of conviction on Counts One, Five, Six, Seven, Eight, and Nine, and vacate the court's sentence on those counts and remand for resentencing. We vacate the district court's judgment on Counts Two, Three, and Four, and remand those counts for further proceedings in the district court.

AFFIRMED IN PART,
VACATED IN PART,
AND REMANDED

APPENDIX B

UNITED STATES DISTRICT COURT
Western District of Virginia

UNITED STATES OF AMERICA

v.

Stephen Dominick McFadden

JUDGEMENT IN A CRIMINAL CASE

Case Number: DVAW312CR000009-001

Case Number:

USM Number: 65902-053

John Lloyd Snook III, Esq. and Louis Elias Diamond, Esq.

Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s)_____

☐ pleaded nolo contendere to count(s) which was accepted by the court. _____

☒ was found guilty on count(s) after a plea of not guilty, 1, 2, 3, 4, 5, 6, 7, 8 and 9

The defendant is adjudicated guilty of these offenses:

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21 U.S.C. §§ 846 and 841(b)(1)(C)	Conspiracy to Distribute MDPV, MDMC and 4-MEC, Controlled Substance Analogues	02/15/2012	1
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution of MDPV and MDMC, Controlled Substance Analogues	07/25/2011	2
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution of MDPV and MDMC, Controlled Substance Analogues	08/11/2011	3

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) _____

☐ Count(s) _____☐ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

April 29, 2013
Date of Imposition of Judgment

/s/ Glen E. Conrad
Signature of Judge

Glen E. Conrad, Chief United States District Judge
Name and Title of Judge

April 30, 2013
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	**Nature of Offense**	**Offense Ended**	**Count**
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution of MDPV and MDMC, and 4-MEC, Controlled Substance Analogues	08/24/2011	4
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution of MDPV and MDMC, and 4-MEC, Controlled Substance Analogues	08/26/2011	5
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution of MDPV and MDMC, and 4-MEC, Controlled Substance Analogues	09/16/2011	6
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution 4-MEC, Controlled Substance	10/27/2011	7

	Analogues		
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution 4-MEC, Controlled Substance Analogues	01/06/2012	8
21 U.S.C. §§ 841(a)(1) and(b)(1)(C)	Distribution 4-MEC, Controlled Substance Analogues	02/02/2012	9

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of:
Thirty Three (33) Months as to each of Counts One through Nine (1-9), to run concurrently.

☒ The court makes the following recommendations to the Bureau of Prisons: Placement as near as possible to defendant's home in Staten Island, New York.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

- ☐ at _____ ☐ a.m. ☐ p.m. on _____
- ☐ as notified by the United States Marshal.

☒ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

- ☐ before _____ on _____
- ☒ as notified by the United States Marshal.
- ☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ a _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy United States Marshall

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of:

Thirty (30) Months as to each of Counts One through Nine (1-9), to run concurrently.

The defendant must report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

☐ The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse. (*Check, if applicable.)*

☒ The defendant shall not possess a firearm, ammunition, destructive device, or any other dangerous weapon. *(Check, if applicable.)*

☒ The defendant shall cooperate in the collection of DNA as directed by the probation officer. *(Check, if applicable.)*

☐ The defendant shall comply with the requirements of the Sex Offender Registration and Notification Act (42 U.S.C. § 16901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in which he or she resides, works, is a student, or was convicted of a qualifying offense. *(Check, if applicable)*

☐ The defendant shall participate in an approved program for domestic violence. *(Check, if applicable.)*

If this judgment imposes a fine or restitution, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendants must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or probation officer;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) the defendant shall support his or her dependents and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;
10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere

and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court; and
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPEVISION

1. The defendant shall pay any special assessment and fine that are imposed by this judgment.
2. The defendant shall reside in a residence free of firearms, ammunition, destructive devices, and dangerous weapons.
3. The defendant shall submit to warrantless search and seizure of person and property as directed by the probation officer, to determine whether the defendant is in possession of firearms and illegal controlled substances.

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	Fine	Restitution
TOTALS	$900.00	$1,000.00	$

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

☐ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	**Total Loss***	**Restitution Ordered**	**Priority or Percentage**
TOTALS	$0.00	$0.00	

☐ Restitution amount ordered pursuant to please agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

  ☐ the interest requirement is waived for the ☐ fine ☐ restitution.

  ☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 13, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, the total criminal monetary penalties are due immediately and payable as follows:

A ☒ Lump sum payment of $900.00 immediately, balance payable

☐ not later than _____, or

☐ in accordance ☐ C, ☐ D, ☐ E, ☒ F or, ☐ G below); or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, ☐ F, or ☐ G below); or

C ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after the date of this judgment; or

D ☐ Payment in equal _____ (e.g., weekly, monthly, quarterly) installments of $_____ over a period of _____ (e.g., months or years), to commence _____ (e.g., 30 or 60 days) after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ During the term of imprisonment, payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 50 , or 50 % of the defendant's income, whichever is less to commence 60 days (e.g., 30 or 60 days) after the date of this judgment; AND payment in equal monthly (e.g., weekly, monthly, quarterly) installments of $ 100 during the term of supervised release, to commence 60 days (e.g., 30 or 60 days) after release from imprisonment.

G ☐ Special instructions regarding the payment of criminal monetary penalties:

Any installment schedule shall not preclude enforcement of the restitution or fine order by the United States under 18 U.S.C. §§ 3613 and 3664(m).

Any installment schedule is subject to adjustment by the court at any time during the period of imprisonment or supervision, and the defendant shall notify the probation officer and the U.S. Attorney of any change in the defendant's economic circumstances that may affect the defendant's ability to pay.

All criminal monetary penalties shall be made payable to the Clerk, U.S. District Court, P.O. Box 1234, Roanoke, Virginia 24006, for disbursement.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Any obligation to pay restitution is joint and several with other defendants, if any, against whom an order of restitution has been or will be entered.

☐ Joint and Several
Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ He defendant shall forfeit the defendant's interest in the following property to the United States:
as noted in the attached order of forfeiture.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) penalties, and (8) costs, including cost of prosecution and court costs.

APPENDIX C

MAY 10, 2013

UNITED STATES DISTRICT COURT, FOR THE
WESTERN DISTRICT OF VIRGINIA
CHARLOTTESVILLE DIVISION

UNITED STATES OF AMERICA	)	Criminal Action No. 3:12CR00009
v.	)	**MEMORANDUM OPINION**
STEPHEN DOMINICK McFADDEN,	)	By: Hon. Glen E. Conrad, Chief United States District Judge
Defendant,	)	

This case is presently before the court on the defendant's motion for judgment of acquittal. For the reasons set forth below, the motion will be denied.

Background

On November 14, 2012, the defendant, Stephen Dominick McFadden, was charged in a nine-count superseding indictment returned by a grand jury in the Western District of Virginia. Count One charged the defendant with conspiring to distribute and possess with intent to distribute, for human consumption, controlled substance analogues, in violation of 21 U.S.C. § 841(a)(1) and 846. Counts Two through Nine charged the defendant with

distributing controlled substance analogues, for human consumption, in violation of 21 U.S.C. § 841(a)(1).

The charges stemmed from McFadden's sale and distribution of products marketed as "bath salts," which contained one or more of the following substances: 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"). The indictment alleged that methylone, MDPV, and 4–MEC were controlled substance analogues during the time periods charged in the indictment, and that McFadden's activities were therefore unlawful under the Controlled Substance Analogue Enforcement Act of 1986 ("Analogue Act"). *See* 21 U.S.C. §§ 802(32), 813.[1]

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[1] On October 21, 2011, the Drug Enforcement Administration exercised its emergency scheduling authority to designate methylone and MDPV as Schedule I controlled substances for at least one year. *See* 76 Fed.Reg. 65371 (Oct. 21, 2011) (amending 21 C.F.R. § 1308.11(g) to include methylone and MDPV). The superseding indictment reflected these amendments. Count One charged that, prior to October 21, 2011, the defendant conspired to distribute a mixture or substance containing methylone, MDPV, and 4–MEC, and that from October 21, 2011 until February 15, 2012, the defendant conspired to distribute a mixture or substance containing 4–MEC. Likewise, Counts Seven, Eight, and Nine, which charged conduct occurring after October 21, 2011, related solely to the distribution of 4–MEC, which remains unscheduled.

McFadden's co-defendant, Lois McDaniel, began selling bath salts from her video store in Charlottesville, Virginia in 2011. During the course of investigating McDaniel, law enforcement agents determined that she was purchasing the bath salts from a supplier in New York, later identified as McFadden. On February, 15, 2012, a search warrant was executed at an office unit occupied by McFadden in Staten Island, New York. During the search, agents recovered bath salts, scales, plastic bags, and other items associated with the distribution of these substances.

McFadden went to trial, and, on January 10, 2013, a jury returned a verdict of guilty on all nine counts. McFadden subsequently filed a motion for judgment of acquittal, in which he challenges 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.

Discussion

I. *The Constitutionality of the Analogue Act*

McFadden contends that the Analogue Act is unconstitutionally vague as applied to him. The Act defines a "controlled substance analogue" as:

> 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.

21 U.S.C. § 802(32)(A).[2] The Act further provides that "[a] controlled substance 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." 21 U.S.C. § 813.

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[2] Although § 802(32)(A) contains the word "or" between clauses (ii) and (iii), the "vast majority of federal courts ... have adopted [a] conjunctive reading," which requires a controlled substance analogue to satisfy both clause (i) and either clause (ii) or (iii). *United States v. Turcotte,* 405 F.3d 515, 522 (7th Cir. 2005) (citing cases). Since both parties advocated for a conjunctive reading of the statute, the court assumed, for purposes of this case, that it is the correct one.

"Due process requires that a criminal statute provide adequate notice to a person of ordinary intelligence that his contemplated conduct is illegal, 'for no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.' " *Buckley v. Valeo,* 424 U.S. 1, 77 (1976) (quoting *United States v. Harriss,* 347 U.S. 612, 617 (1954)). Thus, "[t]he void-for-vagueness doctrine requires that penal statutes define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson,* 461 U.S. 352, 357 (1983). "[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie,* 419 U.S. 544, 550 (1975).

Under existing circuit precedent interpreting the Analogue Act, McFadden is unable to establish that the Act lends itself to arbitrary enforcement. In *United States v. Klecker,* 348 F.3d 69 (4th Cir. 2003), the United States Court of Appeals for the Fourth Circuit held that "[t]he requirement of preventing arbitrary enforcement is easily satisfied" by the Analogue Act. *Id.* at 71. In reaching this conclusion, the Fourth Circuit explained as follows:

> In order to show an Analogue Act violation, the Government must prove (1) substantial *chemical* similarity between the alleged analogue and a controlled substance; *see* 21 U.S.C. § 802(32)(A)(i); (2) actual, intended, or claimed *physiological* similarity (in other

> words, that the alleged analogue has effects similar to those of a controlled substance or that the defendant intended or represented that the substance would have such effects), *see id.* § 802(32)(A)(ii), (iii); and (3) *intent* that the substance be consumed by humans, *see id.* § 813. The intent requirement alone tends to defeat any vagueness challenge based on the potential for arbitrary enforcement.

Id. (emphasis in original) (additional internal citations omitted); *see also United States v. Hofstatter,* 8 F.3d 316, 322 (6th Cir. 1993) (rejecting a similar vagueness challenge and holding that the intent requirement set forth in 21 U.S.C. § 813 "sufficiently constrains law enforcement officials and discourages arbitrary or discriminatory application of the laws").

The court also rejects McFadden's argument that the Analogue Act fails to provide adequate notice that distributing a mixture or substance containing methylone, MDPV, or 4–MEC would be unlawful. In reaching this decision, the court is again guided by the Fourth Circuit's opinion in *Klecker.* While *Klecker* involved substances other than methylone, MDPV, and 4–MEC, its analysis is instructive. Specifically, in addressing the issue of adequate notice, the Fourth Circuit determined that it was "useful to compare chemical diagrams of the controlled substance and the alleged analogue." *Id.* at 72 (citing *United States v. McKinney,* 79 F.3d 105, 108 (8th Cir. 1996), *vacated on other grounds,* 520 U.S. 1226 (1997)). The diagrams admitted into evidence in *Klecker* demonstrated similarities between DET, a controlled

substance, and Foxy, the alleged analogue. *Id.* Although there were "important differences" between the two substances, the Fourth Circuit held that "the similarities in their structures would put a reasonable person on notice that Foxy might be regarded as a DET analogue, particularly if that person intended (as Klecker plainly did) that Foxy be ingested as a hallucinogen." *Id. Accord McKinney,* 79 F.3d at 108 (rejecting the defendant's vagueness challenge to the Analogue Act and emphasizing that "a reasonable layperson could, for example, have examined a chemical chart and intelligently decided for himself or herself, by comparing their chemical diagrams, whether the chemical structure of two substances were substantially similar"). While the record in *Klecker* contained evidence indicating that the defendant was aware that Foxy was a controlled substance analogue, the Fourth Circuit concluded that "the Analogue Act would not be unconstitutionally vague as applied to Foxy even with respect to a defendant who lacked actual notice." *Klecker,* 348 F.3d at 72.

In this case, one of the government's experts, Tom DiBerardino, a chemist with the Drug Enforcement Administration, testified regarding the chemical structures of MDPV, 4–MEC, and methylone. DiBerardino opined that the chemical structures of MDPV and 4–MEC are substantially similar to that of methcathinone, a Schedule I controlled substance, and that the chemical structure of methylone is substantially similar to that of MDMA, which is also known as ecstasy. During DiBerardino's testimony, the government presented

diagrams of each substance's chemical structure for the jury to compare. The government also presented diagrams on which the chemical structures of the alleged analogues were superimposed on the respective controlled substances to further emphasize their common features. Having examined the chemical diagrams, the court is convinced that they would put a reasonable person on notice that MDPV and 4–MEC might be regarded as analogues of methcathinone, given the considerable similarities in their chemical structures. The court likewise concludes that the similarities between the chemical structures of methylone and MDMA would put a reasonable person on notice that methylone might be regarded as an MDMA analogue. This is particularly true if that person intended for the analogues to be consumed as alternatives to illicit stimulants, and, in this case, the government's evidence, viewed in its favor, established that this was McFadden's intention.

McFadden's remaining statutory challenges fare no better. The fact that the Analogue Act "does not specify any particular drug that may not be sold" does not render it unconstitutionally vague. (Docket No. 134 at 8.) As other courts have recognized, "[t]he object of the Analogue Act is to prevent underground chemists from producing slightly modified drugs that are legal but have the same effects and dangers as scheduled controlled substances." *United States v. Hodge,* 321 F.3d 429, 432 (3d Cir. 2003); *see also United States v. Washam,* 312 F.3d 926, 933 (8th Cir. 2002) ("One of Congress's purposes for passing the Analogue Statute was to prohibit innovative drugs

that are not yet listed as controlled substances."). Under the existing law, "all substances that meet the definition of a controlled substance analogue are illegal" and, thus, "[n]o list of controlled substance analogues is necessary." *United States v. Fisher,* 289 F.3d 1329, 1337 (11th Cir. 2002). Indeed, "[g]iven the creativity of amateur chemists, such a list might well be impossible to compile." *Hofstatter,* 8 F.3d at 322. Accordingly, the court agrees with the government that the failure to specifically list controlled substance analogues does not render the Analogue Act impermissibly vague.

The court is also unpersuaded by the defendant's argument that the failure to define the term "human consumption" renders the Analogue Act void for vagueness. It is well settled that "a criminal statute need not define explicitly every last term within its text, for as the Supreme Court has repeatedly explained, where 'terms used in a statute are undefined, we give them their ordinary meaning.'" *United States v. Day,* 700 F.3d 713, 725 (4th Cir. 2012) (quoting *Jones v. United States,* 529 U.S. 848, 855 (2000)); *see also Chapman v. United States,* 500 U.S. 453, 462 (1991) (construing the undefined term "mixture" in 21 U.S.C. § 841(b)(1)(B)(v) by looking to its ordinary meaning and holding that such a construction did not leave the statute unconstitutionally vague).

Here, the court is convinced that the ordinary meaning of the term "human consumption," as it is used in the context of the Analogue Act, clearly encompasses the use of a substance, by a human being, in a manner that would introduce the

substance into the body. This conclusion is supported by legal dictionaries, which define "consumption" to include "use." *See, e.g., Black's Law Dictionary* 359 (9th ed. 2009) (defining "consumption" as "the use of a thing in a way that exhausts it"); *Ballentine's Law Dictionary* (3d ed. 2010) (available on LEXIS) (defining "consumption" as "use of a thing, sometimes, but not necessarily, to the complete extermination of the thing."). The conclusion is further supported by case law and statutes from other jurisdictions defining "consumption" and "human consumption," in the context of controlled substances. *See State v. Ireland,* 2005 UT App. 22, P19, 106 P.3d 753 (Utah Ct.App. 2005) (concluding that the term "consumption," as used in a state controlled substance statute, described the introduction of a substance into the body); *see also* Tex. Health & Safety Code § 481.002(21) (defining "human consumption" as "the injection, inhalation, ingestion, or application of a substance to or into the human body"); Mich. Comp. Laws Serv. § 333.7105(8) (defining "human consumption" to mean "application, injection, inhalation, or ingestion by a human being"); N.M. Stat. Ann. § 30–31–2(X) (defining "human consumption" to include "application, injection, inhalation, ingestion, or any other manner of introduction").

The court, thus, rejects McFadden's argument that "the only definition of [human consumption] that would seem to make sense in context would embrace the idea of 'eat or drink.' " (Docket No. 134 at 14.) Such a limited reading would be completely at odds with the purpose of the Analogue Act. As many

controlled substances are commonly used by injection and inhalation, the court does not think that Congress could have intended for the term "human consumption" to exclude such methods, or for the Act to otherwise extend only to analogues that are taken like food or drink. Instead, the court holds that other methods of introducing a substance into the body fall within the ordinary meaning of the term "human consumption," as that term is used in the statute.

For all of these reasons, the court concludes that the Analogue Act is not unconstitutionally vague as applied to methylone, MDPV, and 4–MEC.

II. *The Court's Instructions to the Jury*

McFadden next argues that the court improperly instructed the jury on the elements of the conspiracy and distribution offenses charged in the indictment. During trial, McFadden requested an instruction that would have (1) advised the jury that a substance does not qualify as a controlled substance analogue unless it is both chemically similar to a particular controlled substance and physiologically similar to the same controlled substance; and (2) specified the controlled substance to which each of the alleged analogues must be compared. McFadden also proposed an instruction that would have required the government to prove, inter alia, that 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. The court instead gave its own instructions, to which McFadden objected.

For the conspiracy offense charged in Count One of the indictment, the jury was instructed that it had to be convinced that the government had proven each of the following elements beyond a reasonable doubt:

> FIRST: That beginning in or around June 2011, and continuing until February 15, 2012, two or more persons, directly or indirectly, reached an agreement or understanding to accomplish a common plan;
>
> SECOND: That the defendant knew the purpose of the agreement, and joined in it willfully, that is, with the intent to further the purpose of the plan;
>
> THIRD: That the purpose of the plan was to distribute or possess with intent to distribute, for human consumption, a mixture or substance containing MDPV, MDMC/Methylone, or 4–MEC, which has an actual intended, or claimed stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to that or greater than the stimulant, depressant, or hallucinogenic effect on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act; and
>
> FOURTH: That the chemical structure of MDPV, MDMC/Methylone, or 4–MEC is substantially similar to the chemical structure of a controlled substance in

> Schedule I or II of the Controlled Substances Act.

(Docket No. 152 at 23–24.)

For the offense of distributing a controlled substance analogue, as charged in Counts Two through Nine of the indictment, the jury was instructed that the government was required to prove, as to each count, the following essential elements beyond a reasonable doubt:

> FIRST: That the defendant knowingly and intentionally distributed a mixture or substance that has an actual, intended, or claimed 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 of the Controlled Substances Act;
>
> SECOND: That the chemical structure of the mixture or substance is substantially similar to the chemical structure of a controlled substance in Schedule I or II of the Controlled Substances Act; and
>
> THIRD: That the defendant intended for the mixture or substance to be consumed by humans.

(*Id.* at 34.)

After further review, the court remains convinced that the foregoing instructions are consistent with the plain language of the Analogue Act and the Fourth Circuit's decision in *Klecker*. The second and third clauses of § 802(32)(A), which relate to actual and claimed physiological effects, require the alleged analogue to be substantially similar to "*a* controlled substance," rather than "*the* controlled substance" used to prove chemical similarity in clause (i). 21 U.S.C. § 802(32)(A) (emphasis added). Likewise, in setting forth the elements that must be proven to establish an Analogue Act violation, the Fourth Circuit observed that the government must prove substantial chemical similarity between the alleged analogue and "a controlled substance," and "that the alleged analogue has effects similar to those of a controlled substance or that the defendant intended or represented that the substance would have such effects." *Klecker,* 348 F.3d at 71 (emphasis added). The court elected to use the same language in instructing the jury in this case, and the defendant has failed to persuade the court that the instructions were in error in this regard.

The court is also of the opinion that its instructions on the scienter elements of the conspiracy and distribution offenses were appropriate. As set forth above, the court's instructions required the government to prove that the defendant intended for the substances to be consumed by humans, in accordance with 21 U.S.C. § 813. The court's instructions also required the government to prove that the defendant knowingly and intentionally distributed a substance that had an

actual, intended, or claimed physiological effect that was substantially similar to or greater than that of a controlled substance, and that the purpose of the conspiratorial agreement was to distribute or possess with intent to distribute such substances. While McFadden would have also required the government to prove that he knew that the alleged analogues have a chemical structure that is substantially similar to the chemical structure of a controlled substance and, thus, that they were, in fact, controlled substance analogues under the Act, the court remains convinced that this is not required by the statute or Fourth Circuit precedent. *See Id.* at 71–72 (setting forth the elements of an Analogue Act violation and noting that the Act "would not be unconstitutionally vague as applied to Foxy even with respect to a defendant who lacked actual notice [that Foxy was a controlled substance analogue]"); *see also United States v. Desurra,* 865 F.2d 651, 653 (5th Cir. 1989) ("If 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 he know what drug he possesses, and that he possess it with the statutorily defined bad purpose."); *but see United States v. Turcotte,* 405 F.3d 515, 522 (7th Cir. 2005) (holding that "[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").

The court also declined to give the defendant's proposed instruction distinguishing a conspiracy from

a buyer-seller relationship, and instead gave its own buyer-seller instruction to the jury. To the extent defendant maintains that this decision was erroneous, the court disagrees.

The court's instructions to the jury on the conspiracy count included the following:

> I ... tell you that the existence of a mere buyer-seller relationship alone is insufficient to support a conspiracy conviction, even if the buyer intends to resell the purchased drugs to others. However, you may consider the purchase of drugs for resale, along with all the other evidence, in determining whether there was a conspiratorial agreement between the buyer and seller, or other persons, to distribute or possess with intent to distribute, controlled substance analogues.

(Docket No. 152 at 29.) This instruction is clearly consistent with existing Fourth Circuit precedent. *See United States v. Hackley,* 662 F.3d 671, 679 (4th Cir. 2011) ("We have held that evidence of a continuing buy-sell relationship when coupled with evidence of large quantities of drugs, or continuing relationships and repeated transactions, creates a reasonable inference of [a conspiratorial] agreement.") (internal citation and quotation marks omitted); *United States v. Mills,* 995 F.2d 480, 485 n. 1 (4th Cir. 1993) (noting that "evidence of a buy-sell transaction is at least relevant (i.e. probative) on the issue of whether a conspiratorial relationship exists").

McFadden's proposed instruction, taken from a former edition of the Seventh Circuit Pattern Federal Jury Instructions, included a list of nine factors that the jury could consider in deciding whether a buyer and a seller formed a conspiracy to distribute controlled substance analogues.[3] Based on the Seventh Circuit's criticism of the instruction in *United States v. Colon,* 549 F.3d 565, 570–571 (7th Cir. 2008), the instruction has been modified to delete the factors requested by McFadden. *See* Pattern Federal Jury Instructions for the Seventh Circuit—Criminal, No. 5.10(A) (2012 ed.) ("In *Colon,* the Seventh Circuit was critical of the previously-adopted pattern instruction on this point, which included a list of factors to be considered. The Committee has elected to simplify the instruction....").

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[3] The requested factors were as follows: (1) whether the seller extended credit to the buyer for the purchase of the controlled substance analogues; (2) whether the seller instructed the buyer in how to distribute controlled substance analogues; (3) whether the seller had a shared stake in the buyer's resale of the controlled substance analogues; (4) whether the seller controlled the buyer in the conduct of his resale of the controlled substance analogues; (5) the quantity of controlled substance analogues sold; (6) the length of time over which the seller sold controlled substance analogues to the buyer; (7) whether one of the parties advised the other on the conduct of the other's business; (8) whether either had agreed to warn the other of threats to the business from competing dealers or from law-enforcement authorities; and (9) whether there was any understanding between them limiting how either conducted their business. (Docket No. 139 at 9.)

Accordingly, for the reasons stated, the court concludes that McFadden's motion must be denied to the extent he argues that the court erred in rejecting his proffered jury instructions.

III. *Admissibility of Expert Testimony*

McFadden next argues that the court should not have permitted evidence concerning animal studies. At trial, McFadden moved to exclude testimony from one of the government's experts, Dr. Cassandra Prioleau, on the ground that her opinions were based on animal studies involving controlled substances. After considering the reliability and relevance standards set forth in Rule 702 of the Federal Rules of Evidence[4] and *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579 (1993),[5] the court

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[4] Rule 702 provides that a witness "who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case." Fed.R.Evid. 702.

[5] In *Daubert,* the Supreme Court announced five factors that the trial court may use in assessing the relevancy and reliability of proffered expert testimony: (1) whether the particular scientific theory "can be (and has been) tested"; (2) whether the theory "has been subjected to peer review and publication"; (3) the technique's "known or potential rate of error"; (4) the "existence and maintenance of standards

denied the motion in open court, finding that there was a sufficient basis for receipt of Dr. Prioleau's opinions.

For the reasons stated on the record, the court remains convinced that Dr. Prioleau's testimony was properly admitted, and that the alleged shortcomings identified by the defendant went to the weight it should be given rather than its admissibility. The animal studies relied upon by Dr. Prioleau were thoroughly challenged on cross-examination and by McFadden's own expert witness, and it was ultimately up to the jury to decide whether her testimony was credible and how much weight to give her opinions. Accordingly, the court concludes that it did not err in admitting Dr. Prioleau's testimony, and that the defendant's motion for judgment of acquittal on this ground must be denied. *See United States v. Moreland,* 437 F.3d 424, 431 (4th Cir. 2006) (emphasizing that "[t]he court need not determine that the proffered expert testimony is irrefutable or certainly correct," since "[a]s with all other admissible evidence, expert testimony is subject to

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controlling the technique's operation"; and (5) whether the technique has achieved "general acceptance" in the relevant scientific or "expert community." *Daubert,* 509 U.S. at 593–94. Rather than providing a definitive or exhaustive list, *Daubert* illustrates the types of factors that will "bear on the inquiry." *Id.* at 593. The Supreme Court emphasized that the analysis must be "a flexible one." *Id.* at 594; *see also Kumho Tire Co., Ltd. v. Carmichael,* 526 U.S. 137, 141–42 (1999) (holding that *Daubert's* factors neither necessarily nor exclusively apply to every expert).

testing by 'vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof' ") (quoting *Daubert,* 509 U.S. at 596).

IV. *The Sufficiency of the Evidence*

Finally, McFadden challenges the sufficiency of the evidence to support his convictions. Specifically, McFadden argues that the evidence was insufficient to establish that methylone, MDPV, and 4–MEC have actual, intended, or claimed stimulant effects on the central nervous system that are substantially similar to or greater than the stimulant effects on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act. For the following reasons, the court is unable to agree.

When a motion for judgment of acquittal is based on a claim of insufficient evidence, the jury verdict "must be sustained if there is substantial evidence, taking the view most favorable to the Government, to support it." *Glasser v. United States,* 315 U.S. 60, 80 (1942). "Substantial evidence is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *United States v. Green,* 599 F.3d 360, 367 (4th Cir. 2010). In determining whether substantial evidence supports the verdict, the court considers both circumstantial and direct evidence, drawing all reasonable inferences from such evidence in the government's favor. *United States v. Harvey,* 532 F.3d 326, 333 (4th Cir. 2008). The court does not reweigh the evidence or reassess the jury's

determination of witness credibility, *United States v. Brooks,* 524 F.3d 549, 563 (4th Cir. 2008), and can overturn a conviction on insufficiency grounds "only when the prosecution's failure is clear," *United States v. Moye,* 454 F.3d 390, 394 (4th Cir. 2006) (internal quotation marks omitted).

Applying these principles, the court is convinced that the government presented sufficient evidence to establish actual, intended, or claimed physiological similarity between each of the alleged analogues and a controlled substance. Specifically, the jury heard sufficient evidence to find that methylone, MDPV, and 4–MEC have actual, intended, or claimed stimulant effects on the central nervous system that are substantially similar to or greater than the stimulant effects on the central nervous system of a controlled substance in Schedule I or II of the Controlled Substances Act.

Dr. Prioleau, a drug science specialist employed by the Drug Enforcement Administration, testified as an expert witness for the government on the physiological effects of the alleged analogues. Dr. Prioleau first summarized her evaluation of methylone. Based on her review of drug discrimination studies involving animals, as well as case reports and other scientific literature, Dr. Prioleau opined that methylone would have stimulant effects on the central nervous system that are substantially similar to that of MDMA (ecstasy), a Schedule I controlled substance.

In evaluating the effects of MDPV, Dr. Prioleau reviewed drug discrimination and locomotor studies

involving animals, as well as case reports detailing the effects that people experienced when taking MDPV. Additionally, Dr. Prioleau performed a structural activity relationship analysis. Based on the results of that analysis, as well as the reports contained in the existing scientific literature, Dr. Prioleau opined that MDPV would have stimulant effects on the central nervous system that are substantially similar to those of methcathinone, a Schedule I controlled substance.

With respect to 4–MEC, Dr. Prioleau testified that it was an emerging substance and, thus, that there were not yet any published studies on its pharmacological effects. Consequently, Dr. Prioleau performed a structural activity relationship analysis, which incorporated a review of relevant scientific literature. Based on that analysis, Dr. Prioleau opined that 4–MEC would also have stimulant effects on the central nervous system substantially similar to those of methcathinone.

The court is of the opinion that Dr. Prioleau's testimony, standing alone, was sufficient to allow a reasonable juror to find that methylone has stimulant effects substantially similar to or greater than those of MDMA, and that MDPV and 4–MEC have stimulant effects substantially similar to or greater than those of methcathinone.[6] While

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[6] Thus, the court notes that, even if the defendant is correct in arguing that an alleged analogue must be both chemically and physiologically similar to the same controlled substance to meet the requirements of § 802(32)(A), the

McFadden criticizes Dr. Prioleau's testimony on the basis that she relied on "qualitative" analyses, as opposed to "quantitative" evaluations of the alleged analogues, McFadden's argument is unsupported by the existing case law applying the Analogue Act. *See, e.g., United States v. Brown,* 415 F.3d 1257, 1267–68, 1272 (11th Cir. 2005) (holding that the visual assessment method used by the governments' experts to assess substantial similarity under § 802(32)(A)(i), while not quantitative or testable by scientific method, was admissible, and that the expert testimony provided a reasonable basis for concluding beyond a reasonable doubt that the chemical structure of the alleged analogue was substantially similar to that of a controlled substance); *United States v. Klecker,* 228 F.Supp.2d 720, 729 (E.D.Va. 2002) (rejecting the defense expert's attempts "to apply the same test for finding a substantially similar stimulant, depressant or hallucinogenic effect under the statute as the medical community requires for the approval of new prescription drugs to be utilized in medical treatment"). Moreover, the fact that McFadden provided his own expert testimony from Dr. Matthew Lee does not undermine the court's conclusion as to the sufficiency of the government's

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government's evidence was sufficient in this regard. As summarized above, the government's evidence established that the chemical structure of methylone is substantially similar to that of MDMA, and that MDPV and 4–MEC have chemical structures substantially similar to the chemical structure of methcathinone.

evidence. *See Brown,* 415 F.3d at 1271 ("That a defendant has provided some testimony to support his theory of the case is not enough to show insufficient evidence, because the factfinder is free to reject that testimony.").

In addition to Dr. Prioleau's expert opinions, the government presented testimony from Toby Sykes, who purchased bath salts from Lois McDaniel, and consumed them by mixing the bath salts with water and injecting them into his body. Sykes testified that he regularly used methamphetamine, a Schedule II controlled substance, from 1987 until 2006, and that the effects of the bath salts he purchased from McDaniel were more potent than those of methamphetamine.[7] While McFadden argues that there were no laboratory certificates confirming what Sykes consumed, there was sufficient evidence for the jury to infer that the substances consumed by Sykes were the same substances that McDaniel purchased from McFadden.

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[7] Sykes' comparison to methamphetamine was consistent with additional testimony provided by Dr. Prioleau. When asked to describe the actual effects that methylone, MDPV, and 4MEC would have on the central nervous system, Dr. Prioleau testified that the effects would include, among others, decreased appetite, restlessness, and increased blood pressure, heart rate, and body temperature. Dr. Prioleau noted that such effects are common characteristics of stimulants, and, thus, that other stimulants, such as cocaine and methamphetamine, have similar effects.

In addition to the foregoing testimony, the government played a recorded telephone call from August 25, 2011, during which McFadden compared one of his bath salt products containing 4–MEC to cocaine. During the same conversation, McFadden referenced MDPV when describing another bath salt product that he compared to crystal methamphetamine. The court agrees with the government that this evidence further supports the jury's findings with regard to physiological similarity under § 802(32)(A).

In sum, the evidence was sufficient to establish, beyond a reasonable doubt, that methylone, MDPV, and 4–MEC have actual, intended, or claimed stimulant effects on the central nervous system that are substantially similar to or greater than those of a controlled substance in Schedule I or II. In the absence of any other meritorious arguments, McFadden's convictions must be sustained.

Conclusion

For the reasons stated, McFadden's motion for judgment of acquittal will be denied. The Clerk is directed to send certified copies of this memorandum opinion to all counsel of record.

ENTER: This 10th day of May, 2013.

/s/ Glen Conrad
Chief United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

UNITED STATES OF AMERICA,	)	Criminal Action No. 3:12CR00009
	)	
v.	)	**ORDER**
	)	
STEPHEN DOMINICK MCFADDEN,	)	By: Hon. Glen E. Conrad
	)	Chief United States
Defendant.	)	District Judge

The defendant, Stephen Dominick McFadden. has been charged with conspiring to distribute and distributing controlled substance analogues, in violation of 21 U.S.C. §§ 841(a)(I) and (b)(1)(C), and 846. The defendant's jury trial is scheduled to begin on January 7, 2013. The case is presently before the court on the defendant's motion to dismiss the indictment (Docket No. 134) and the defendant's motion to preclude evidence (Docket No. 132). The parties declined to be heard on the motions. Having considered the parties' arguments and the applicable case law, it is hereby

ORDERED

as follows:[*]

1. The defendant's motion to dismiss the indictment on the basis that the Controlled Substance Analogue Enforcement Act of 1986 is unconstitutionally vague is **DENIED**.
2. The defendant's motion to dismiss the indictment on the basis that the Drug Enforcement Agency website misled the defendant is **DENIED**.
3. The defendant's motion to dismiss the indictment on the basis that the government is estopped from prosecuting the defendant because he relied on the advice of a federal law enforcement officer is **DENIED**. If the defendant wishes to assert the defense of entrapment by estoppel, he must be prepared to present sufficient evidence at trial that would warrant the presentation of this defense.
4. The defendant's request for an instruction that would require the jury

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[*] Giving the timing of the parties' filings, the court has not undertaken to issue a memorandum opinion on the defendant's motions. If necessary following trial, the court may issue a memorandum opinion which sets forth, in greater detail, the court's rulings on the issues raised by the defendant.

to find, beyond a reasonable doubt, that the defendant knew that the substances he was distributing were controlled substance analogues is **DENIED**. The parties are advised that the court intends to utilize the elements set forth by the United States Court of Appeals for the Fourth Circuit in *United States v. Klecker*, 348 F.3d 69 (4th Cir. 2003), in its instructions to the jury. The court will consider any additional elements at the time of the charge conference.

5. The defendant's motion to preclude the admission of certain recorded phone calls between the defendant and Lois McDaniel is **DENIED**. The court concludes that the recorded calls are relevant to the issue of whether the defendant intended or claimed that the substances at issue have physiological effects substantially similar to or greater than one or more controlled substances, and to the issue of whether the defendant intended for the substances at issue to be used for human consumption. The court further concludes that the probative value of the recorded calls is not substantially outweighed by the danger of unfair prejudice or potential confusion by the jury.

The Clerk is directed to send certified copies of this order to all counsel of record.

ENTER: This 4th day of January, 2013.

/s/ Glen E. Conrad
Chief United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

FILED: June 30, 2016

No. 13-4349
(3:12-cr-00009-GEC-1)

UNITED STATES OF AMERICA

Plaintiff-Appellee

v.

STEPHEN DOMINICK MCFADDEN, a/k/a Stephen Domin McFadden

Defendant-Appellant

ORDER

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Chief Judge Traxler, Judge Wilkinson and Judge Keenan.

For the Court

/s/ Patricia S. Connor, Clerk