

IN THE SUPREME COURT OF OHIO
2015

STATE OF OHIO,

Case No. 15-406

Plaintiff-Appellant,

-vs-

On Appeal from the
Franklin County Court
of Appeals, Tenth
Appellate District

THOMAS C. SMITH,

Court of Appeals
Case Nos. 14AP-154
14AP-155

Defendant-Appellee

**MOTION FOR RECONSIDERATION
OF PLAINTIFF-APPELLANT STATE OF OHIO**

RON O'BRIEN 0017245
Franklin County Prosecuting Attorney
373 South High Street, 13th Floor
Columbus, Ohio 43215
Phone: 614-525-3555
Fax: 614-525-6103
E-mail: staylor@franklincountyohio.gov

and

STEVEN L. TAYLOR 0043876 (Counsel of Record)
Chief Counsel, Appellate Division

COUNSEL FOR APPELLANT STATE OF OHIO

JOSEPH R. LANDUSKY, II 0038073
901 South High Street
Columbus, Ohio 43206-2534
Phone: 614-449-0449
Fax: 614-449-0451
E-mail: joelandusky@aol.com

COUNSEL FOR DEFENDANT

Other Counsel on Certificate of Service

**MOTION FOR RECONSIDERATION
OF PLAINTIFF-APPELLANT STATE OF OHIO**

Pursuant to S.Ct.Prac.R. 18.02(B)(1) & (2), and for the reasons stated in the attached memorandum in support, plaintiff-appellant State of Ohio respectfully requests that this Court reconsider its 4-3 ruling on August 26, 2015, declining to accept jurisdiction pursuant to S.Ct.Prac.R. 7.08(B)(4).

Respectfully submitted,

RON O'BRIEN 0017245
Prosecuting Attorney
/s Steven L. Taylor
STEVEN L. TAYLOR 0043876
(Counsel of Record)
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellant

MEMORANDUM IN SUPPORT

This appeal arises from the Tenth District's decision concluding that it was legal to traffic and possess "controlled substance analogs" at the time of defendant Smith's acts in February, May, and July 2012.

In the State's March 12th memorandum supporting jurisdiction, the State raised three propositions of law for this Court's review.

Proposition of Law No. 1: The concept of "strict construction," also known as the rule of lenity, comes into operation at the end of the process of construing what the legislative body has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers. Courts must exhaust all available means of construction before arriving at the conclusion that the statutory text is so grievously ambiguous as to require strict construction.

Proposition of Law No. 2: As effective October 17, 2011, R.C. 3719.013 mandated that "controlled

substance analogs” shall be treated as Schedule I controlled substances for purposes of any provision in the Revised Code. The trafficking and possession statutes were part of the Revised Code and therefore were subject to this broad incorporation of analogs into the Revised Code.

Proposition of Law No. 3: In applying a statute, the judicial branch has a duty under the doctrine of separation of powers to apply the clearly-expressed legislative intent of the General Assembly regardless of the judicial branch’s own preferences regarding organization or manner of expression. It violates the separation of powers for the judicial branch to disregard the broad reach of R.C. 3719.013 making controlled substance analogs applicable to any provision in the Revised Code.

This Court voted 4-3 to decline review. Justices Kennedy and French would have accepted review. Chief Justice O’Connor would have accepted review of the second proposition of law.

The State respectfully requests that this Court grant reconsideration and thereupon accept review. The present motion is not a reargument of the case. All of the grounds for reconsideration occurred *after* the filing of the State’s March 12th memorandum supporting jurisdiction, and therefore the State necessarily could not have provided any argument in regard to these matters. This Court’s rules strictly barred the State from providing any supplemental argument after its filing deadline of March 13th, see S.Ct.Prac.R. 7.04(A)(1), and the State could not provide any discussion or argument when it filed supplemental authority citing the *McFadden* case on June 19, 2015. S.Ct.Prac.R. 7.04(A)(2).

The State respectfully submits that the combination of these after-occurring

events should tip the balance in favor of accepting review.

A. Defense Misquoted the Statute

The defense misstated things significantly in its April 10, 2015, memorandum opposing jurisdiction. At page 9 of that memorandum, the defense contended that:

Here, effective October 17, 2011, the General Assembly enacted 129 Sub. H.B. 64 creating R.C. § 3719.013 which provides:

Except as otherwise provided in section 2925.03 or 2925.11 of the Revised Code, a controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

R.C. § 3719.013 (Baldwin 2011). * * *

This quotation was wrong because the “Except * * *” clause was not added until December 20, 2012, and therefore was not a part of the law earlier in 2012 when defendant committed his acts. Yet the defense twice contended in this passage that the “Except * * *” language became part of the law in 2011.

This was substantially misleading. The State was contending that, by operation of R.C. 3719.013 as effective on October 17, 2011, analogs fell within the trafficking and possession prohibitions in R.C. 2925.03 and R.C. 2925.11. But if the “Except * * *” clause were in effect, then the State’s argument necessarily failed because the possession and trafficking statutes were expressly excepted from the operation of R.C. 3719.013. Defendant’s flawed quotation substantially undercut the State’s appeal and made it look frivolous.

At the pertinent times of defendant’s acts, R.C. 3719.013 stated the following:

A controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

As can be seen, there is a critical difference. With no “Except * * *” clause in place, the trafficking and possession prohibitions readily fall within the reach of R.C.

3719.013, as they are part of the “Revised Code,” they constitute “any provision” therein, and they prohibited the trafficking and possession of “controlled substances,” and analogs are deemed by operation of R.C. 3719.013 to be “controlled substances.”

The State quoted the statute correctly in its memorandum supporting jurisdiction, and so one hopes that this Court was not actually misled. But this Court is a busy court and cannot fact-check every jurisdictional memorandum. When an appellant quotes the statute correctly, but the appellee misquotes it in a prejudicial way, the appellee at a minimum has created an unwarranted doubt about the merits of the appeal. The State could not correct this misquotation until now.

B. State’s Prediction Coming True

The State’s March 12th memorandum supporting jurisdiction noted that “[o]ther cases in Franklin County and in other counties will potentially be affected as well” by the Tenth District’s flawed decision in *Smith*. At least part of this prediction has come true in the weeks and months since March 12th. The Tenth District has doubled-down and tripled-down on *Smith* in *State v. Mohammad*, 10th Dist. No. 14AP-662, 2015-Ohio-1234 (No. 15-774 here) and *State v. Mobarak*, 10th Dist. No. 14AP-517, 2015-Ohio-3007 (No. 15-1259 here). Also, there is little doubt that the Tenth District will stick by *Smith* in two upcoming consolidated Tenth District cases

called *State v. Mustafa*, 10th Dist. Nos. 15AP-465 & -466.

After the upcoming decision in the two *Mustafa* cases, the flawed *Smith* decision will have let five analog traffickers walk, including the defendant in *Mobarak*, whose crimes and criminal history were so bad that he had been facing sentences totaling 35 years.

The State's March 12th prediction is no longer an abstract possibility, and the consequences have eventuated in specific ways that raise the stakes beyond what the State could assert as of March 12th.

C. *Mohammad* "Bath Salts" Discussion

In its March 31st decision in *Mohammad*, the Tenth District panel misquoted the statute in the same way by including the "Except * * *" clause. The panel also followed *Smith* but sought to back it up with the nonsensical contention that treating "bath salts" as controlled substance analogs was impractical and "unworkable" because "bath salts" are merely Epsom salts someone bathes in.

The State filed its memorandum supporting jurisdiction in *Mohammad* on May 15, 2015 in No. 15-774. In pages one to three of the memorandum, the State pointed out that the term "bath salts" is street slang used by analog dealers referring to a family of powerful synthetic cathinones. The State quoted therein information from the National Institute of Drug Abuse showing that "bath salts" are synthetic cathinones and not Epsom salts. The State incorporates that discussion here.

This kind of egregious mistake increases the stakes beyond what the State could have argued in its March 12th memorandum. *Mohammad* reveals that at least

some judges in the Tenth District do not understand that the analog provision is designed to address actually-dangerous synthetic drugs, as opposed to commonly-used household items. When given the opportunity to retract this mistake in *Mobarak*, the Tenth District panel ignored the problem and cited *Mohammad* as if it were a good decision.

In this Court's supervisory capacity over lower appellate courts, this kind of grave misunderstanding by the judicial branch justifies an even closer review of how the appellate court is handling this important legal question.

D. *McFadden* Strongly Supports State's Position and Severely Undercuts *Smith*

Three months after the State filed its March 12th memo, the United States Supreme Court on June 18, 2015, issued its decision in *McFadden v. United States*, 135 S.Ct. 2298 (2015). The State provided supplemental authority here the following day, but, as stated earlier, the State could not provide any argument or explanation.

McFadden addressed 21 U.S.C. 813, which is nearly identical to former R.C. 3719.013. *McFadden* shows that the nearly-identical federal law provisions regarding controlled substance analogs operate in exactly the same fashion as the State contends former R.C. 3719.013 should apply.

This Court has granted reconsideration under similar circumstances when the appellant was not able to initially argue an important United States Supreme Court decision at the jurisdictional stage. In *State v. Bevely*, No. 13-821, the defendant filed his appeal on May 23, 2013. The State filed its memo opposing jurisdiction on June 7, 2013. But when the *Alleyne* decision was announced on June 17, 2013, the State filed

an amended memorandum still within time the following day discussing *Alleyne*. This Court declined review on September 4, 2013. But the defendant then sought reconsideration based on *Alleyne*, and this Court granted reconsideration and accepted the appeal.

The same dynamic is at work here. Even though this Court would have been aware of *McFadden* at the time it declined review, just as much as this Court would have been aware of *Alleyne* in the *Bevly* case, the appellant's inability to discuss the important United States Supreme Court decision was found to warrant reconsideration in *Bevly*. Reconsideration is also warranted here in light of *McFadden* and the other issues discussed above.

1.

The federal analog provision provides, as follows:

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. From October 17, 2011, through December 20, 2012, the Ohio statute provided:

A controlled substance analog, to the extent intended for human consumption, shall be treated for purposes of any provision of the Revised Code as a controlled substance in schedule I.

R.C. 3719.013 (eff. 10-17-11). As can be seen, both contain a "shall be treated" requirement, mandating that analogs be treated as "controlled substances" in "schedule I." Both apply this requirement across the board to their respective legal

Codes, with the federal provision mandating application to “any Federal law” and the Ohio provision mandating application to “any provision of the Revised Code.”

Inasmuch as the federal provision became law in 1986, it is apparent that the Ohio statute was largely copied from the federal provision when it was adopted in 2011 and therefore was meant to apply in the same fashion.

2.

In *McFadden*, the United States Supreme Court was addressing the mens rea that applies to the federal crime of distribution of a “controlled substance” in 21 U.S.C. 841 and was deciding how that mens rea applies to analogs. In analyzing that problem, the Court considered and applied the “shall be treated” requirement, emphasizing how that requirement mandated that analogs are “controlled substances,” and discussing how the knowledge requirement as to “controlled substances” also applied to analogs. The *McFadden* Court again and again recognized that the “shall be treated” requirement resulted in analogs being deemed “controlled substances.”

The Court’s introduction recognized the interplay between the “shall be treated” requirement and the prohibition against distribution:

The Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act) identifies a category of substances substantially similar to those listed on the federal controlled substance schedules, 21 U.S.C. § 802(32)(A), *and then instructs courts to treat those analogues, if intended for human consumption, as controlled substances listed on schedule I for purposes of federal law*, § 813. The Controlled Substances Act (CSA) *in turn* makes it unlawful knowingly to manufacture, distribute, or possess with intent to distribute controlled substances. § 841(a)(1). The question presented in this case concerns the knowledge necessary for conviction under § 841(a)(1) *when the*

controlled substance at issue is in fact an analogue.

We hold that § 841(a)(1) requires the Government to establish that the defendant knew he was dealing with “a controlled substance.” When the substance is an analogue, that knowledge requirement is met if the defendant knew that the substance was controlled under the CSA or the Analogue Act, even if he did not know its identity. The knowledge requirement is also met if the defendant knew the specific features of the substance that make it a “controlled substance analogue.” § 802(32)(A). * * *

McFadden, 135 S.Ct. at 2302 (emphasis added).

The Court noted that the “shall be treated” provision required that courts *must* turn to the statutes defining crimes involving “controlled substances”.

The Analogue Act *requires* a controlled substance analogue, if intended for human consumption, *to be treated “as a controlled substance in schedule I”* for purposes of federal law. § 1201, 100 Stat. 3207–13, 21 U.S.C. § 813. We therefore *must turn first* to the statute that addresses controlled substances, the CSA. The CSA makes it “unlawful for any person knowingly or intentionally ... to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance.” § 401(a)(1), 84 Stat. 1260, 21 U.S.C. § 841(a)(1). Under the most natural reading of this provision, the word “knowingly” applies not just to the statute’s verbs but also to the object of those verbs—“a controlled substance.” * * *

McFadden, 135 S.Ct. at 2303-2304 (emphasis added).

After discussing how the knowledge requirement applied to “controlled substances,” the Court concluded that the “shall be treated” requirement was a “statutory command” that *extends* that very same knowledge requirement to analogs.

The Analogue Act *extends the framework of the CSA to analogous substances*. 21 U.S.C. § 813. The

Act defines a “controlled substance analogue” as a substance * * *. It further 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.” § 813.

The question in this case is how the mental state requirement under the CSA for knowingly manufacturing, distributing, or possessing with intent to distribute “a controlled substance” applies when the controlled substance is in fact an analogue. The answer begins with § 841(a)(1), which expressly requires the Government to prove that a defendant knew he was dealing with “a controlled substance.” The Analogue Act *does not alter that provision, but rather instructs courts to treat controlled substance analogues “as ... controlled substance[s] in schedule I.”* § 813. Applying *this statutory command*, it follows that the Government must prove that a defendant knew that the substance with which he was dealing was “a controlled substance,” even in prosecutions involving an analogue.

That knowledge requirement can be established in two ways. First, it can be established by evidence that a defendant knew that the substance with which he was dealing is some controlled substance—that is, one actually listed on the federal drug schedules *or treated as such by operation of the Analogue Act*—regardless of whether he knew the particular identity of the substance. Second, it 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. * * * A defendant need not know of the existence of the Analogue Act to know that he was dealing with “a controlled substance.”

McFadden, 135 S.Ct. at 2304-2305 (emphasis added).

The Court characterized the “shall be treated” requirement as a “command” and criticized the lower courts for not adhering to it.

The Court of Appeals *did not adhere to § 813’s command to treat a controlled substance analogue “as*

a controlled substance in schedule I,” and, accordingly, it did not apply the mental-state requirement in § 841(a)(1). * * * Because that interpretation is inconsistent with the text and structure of the statutes, we decline to adopt it.

McFadden, 135 S.Ct. at 2305-2306 (emphasis added).

The Court emphasized that the knowledge requirement in § 841 applied to “controlled substances”, which “includes only those drugs listed on the federal drug schedules *or treated as such by operation of the Analogue Act.*” *Id.* at 2306 (Emphasis added). The requisite knowledge for the crime of distribution in § 841 can be established “either by knowledge that a substance is listed *or treated as listed by operation of the Analogue Act*, §§ 802(6), 813, or by knowledge of the physical characteristics that give rise to *that treatment.*” *Id.* at 2306 (Emphasis added).

The Court rejected the defendant’s claim that a stricter knowledge standard must be adopted to avoid constitutional vagueness problems. The Court held that the constitutional-avoidance canon is inapplicable “in the interpretation of an unambiguous statute such as this one.” *Id.* at 2307.

3.

As a decision addressing the largely-identical federal “shall be treated” requirement for analogs, the *McFadden* decision should carry great weight in addressing Ohio’s provision in R.C. 3719.013. The Ohio provision was plainly modeled after the federal provision, and their nearly-identical language should be given the same judicial construction. See, e.g., *Johnson v. Microsoft Corp.*, 106 Ohio St.3d 278, 2005-Ohio-4985, 834 N.E.2d 791, ¶¶ 8, 13; *State v. Miranda*, 138 Ohio

St.3d 184, 2014-Ohio-451, 5 N.E.3d 603, ¶ 15; *State v. Schlosser*, 79 Ohio St.3d 329, 332, 681 N.E.2d 911 (1997); *In re Morgan's Estate*, 65 Ohio St.2d 101, 103-104, 419 N.E.2d 2 (1981).

Accordingly, *McFadden* provides substantial support for the State's position and severely undercuts the *Smith* decision. The *McFadden* Court saw no difficulty in applying the analog concept to crimes like distribution. The "shall be treated" requirement mandated that courts treat analogs like "controlled substances" in "schedule I," and the *McFadden* Court determined that courts must follow this "statutory command" equating analogs with "controlled substances."

As *McFadden* shows, the "shall be treated" requirement applies by operation of law. It plugs analogs into other statutes and as a result *extends* those statutes to include analogs.

4.

McFadden confirms that the "shall be treated" provision is unambiguous. In fact, the *McFadden* Court relied heavily on the "shall be treated" requirement as the chief basis for its decision to equate knowledge of "controlled substances" with knowledge of analogs. The Court views them as interchangeable by operation of law.

Because the "shall be treated" requirement is unambiguous, the *Smith* panel had no basis to apply the rule of strict construction.

5.

The *Smith* panel contended that Ohio's "shall be treated" requirement was "confusing" and created a "seeming[] contradict[ion]" because analogs are not

“controlled substances” under R.C. 3719.01(HH) and yet R.C. 3719.013 requires that they be treated as “controlled substances” for purposes of other statutes. But there is no real confusion or contradiction. Yes, analogs are knock-offs of “controlled substances” listed in schedule I or II, and such analogs are not themselves already listed in any schedule. But, legally, R.C. 3719.013 operates to treat them as “controlled substances” listed in “schedule I” as a matter of law for purposes of all other relevant statutes in the Revised Code.

McFadden recognized this exact point under the nearly-identical federal “shall be treated” requirement. It recognized that the federal Controlled Substances Act applied to “controlled substances” and that analogs are “treated as such by operation of the Analogue Act” and are “treated as listed by operation of the Analogue Act”. The federal provision “instructs courts to treat those analogues * * * as controlled substances” and thereby “extends the framework of the CSA to analogous substances”. By operation of law, analogs are “controlled substances” just as much as substances listed in the drug schedules. There is no contradiction.

6.

The *Smith* panel also made various locational criticisms regarding how the “shall be treated” requirement was placed in R.C. 3719.013 instead of in R.C. Chapter 2925. In the process, the *Smith* panel attempted to contrast the “overall statutory structure” in federal law and Ohio law. *Smith*, ¶ 15.

Although *Smith* noted differences in the “structure” of the federal statutes, the *McFadden* discussion of the federal provision shows that there is no distinction based

on locational “chapters” or “subchapters” or “parts”. *McFadden* noted that the “shall be treated” requirement applied “for purposes of federal law.” It recognized that the “shall be treated” language required that it “must turn first to the statute that addresses controlled substances, the CSA.” Thus, the controlling consideration was not “subchapters” or “parts,” but, rather, whether the other statute “addresses controlled substances”. The Court further emphasized that the term “controlled substance” includes “those drugs listed on the federal drug schedules or *treated as such* by operation of the Analogue Act.”

As shown by *McFadden*, the determining consideration is whether the other statute “addresses controlled substances.” The “shall be treated” requirement extends the analog concept to any such statute – wherever it might be found – because analogs are “controlled substances” by operation of law.

The same approach leads to the rejection of the *Smith* panel’s locational contentions. Under Ohio law, both R.C. Chapters 2925 and 3719 address controlled substances. And under R.C. 3719.013, the analog concept extends by operation of law to *any* provision in the entire *Revised Code*. The analog concept therefore easily reaches the trafficking and possession statutes in R.C. 2925.03 and R.C. 2925.11, both of which address “controlled substances”.

The *Smith* panel’s locational and “structure” contrasts between federal and Ohio law are ultimately self-defeating. The General Assembly had already deviated from the “structure” of federal law by setting up the prohibition and regulation of controlled substances in at least two chapters, R.C. Chapter 2925 and R.C. Chapter

3719. By copying the federal “shall be treated” requirement into R.C. 3719.013 and by expressly indicating that this applied to *any* provision of the *Revised Code*, the General Assembly was necessarily signaling that the different “structuring” of Ohio law should make no difference.

As *McFadden* recognizes, federal law in sections 813 and 841 were operating in tandem to prohibit the distribution and possession of analogs. As *Smith* conceded at ¶ 6, the purpose of the federal analog provision was to make analogs “subject to the restrictions imposed on controlled substances.” The General Assembly was adopting that same approach by copying federal law on this point.

It is counterintuitive to think that the General Assembly intended to deviate from federal law. If anything, the General Assembly’s copying of federal law was indicating that it wanted exactly what federal law had, i.e., a broad provision extending the “controlled substance” prohibitions to analogs, thereby subjecting analogs to all such similar prohibitions under Ohio law.

7.

In *Mobarak*, the Tenth District tried to defend *Smith* by contending that the *McFadden* Court “merely assumed” that the controlled substance analog was included as a controlled substance. *Mobarak*, ¶ 10. But *McFadden* did not just “assume” that a controlled substance analog must be treated as a controlled substance. Rather, the Court specifically discussed the interplay between 21 U.S.C. 813 and the other federal drug statutes, and it repeatedly referred to 21 U.S.C. 813 as *commanding* that analogs be treated as “controlled substances” for purposes of federal law. The operation of

Sec. 813 represented the central ratio decidendi of the *McFadden* decision. It was a holding, not just an “assumption.”

Likewise, the *Mobarak* panel erred in observing that the *McFadden* Court “was not asked to directly interpret the ‘shall be treated’ language” in federal law. *Mobarak*, ¶ 10. In fact, the briefing in *McFadden* shows that the Court *was* directly asked to interpret and apply the “shall be treated” requirement. See Petitioner’s 3-2-15 Brief in *McFadden v. U.S.*, 2015 WL 881768, at 6-7, 16, 21, 24, 25, 40-41. In any event, the *McFadden* Court *did* directly apply the federal “shall be treated” provision by using it to decide the case.

In contrast to the clarity in *McFadden*, the Tenth District’s reasoning has now become a moving target. In *Smith*, the Tenth District touted the federal statutes as clearly indicating that analogs must be treated as controlled substances because “the requirement that such analogues be treated as controlled substances were placed into the same portion of federal law that contained the prohibitions on possession and sale of controlled substances * * *.” *Smith*, ¶ 15. *Smith* conceded that the purpose of the federal analog provision was to make analogs “subject to the restrictions imposed on controlled substances.” *Smith*, ¶ 6. But now, with *McFadden* repeatedly relying on the federal provision to equate analogs with “controlled substances,” the Tenth District expresses doubts about whether the federal analog provision accomplished anything, contending in *Mobarak* that the *McFadden* Court “merely assumed that the analog was included as a controlled substance”. *Mobarak*, ¶ 10. In fact, *McFadden* did not “merely assume” it; it recognized that very point, which the Tenth District itself had already

recognized in *Smith* as to federal law.

In the end, the *Mobarak* panel’s defense of *Smith* boiled down to the contention that “we do not find that *McFadden* demands a different result * * *.” *Mobarak*, ¶ 10. As a federal decision applying federal law, *McFadden* of course does not “demand” adherence by state courts. But, under Ohio law, this Court’s precedents call for Ohio courts to employ federal judicial constructions when Ohio statutory law is modeled on or copied from federal law. It is *Ohio law* that compels the overruling of *Smith* in light of the obvious legislative intent to adopt the federal analog approach under Ohio law.

E. Conclusion

For the foregoing reasons, the State respectfully requests that this Court reconsider and accept review of the State’s appeal.

The appeal need not take up much of the Court’s time. The State respectfully submits that R.C. 3719.013 and *McFadden* are so clear that they would support a summary reversal now. A summary reversal might look like this:

This cause, here on appeal from the Court of Appeals for Franklin County, was considered in the manner prescribed by law. On consideration thereof, the judgments of the court of appeals are reversed on the authority of R.C. 3719.013 (as eff. 10-17-11) and *McFadden v. United States*, 135 S.Ct. 2298 (2015). The indictments are hereby reinstated and the cause is remanded to the trial court in each trial court case for further proceedings.

Respectfully submitted,

/s Steven L. Taylor
STEVEN L. TAYLOR 0043876
(Counsel of Record)
Chief Counsel, Appellate Division
Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing was sent by e-mail on September 8, 2015, to Joseph Landusky, joelandusky@aol.com, 901 South High Street, Columbus, Ohio 43206-2534, counsel for defendant, and to Eric E. Murphy, State Solicitor, eric.murphy@ohioattorneygeneral.gov, 30 East Broad Street, 17th Floor, Columbus, Ohio 43215, counsel for amicus curiae Ohio Attorney General Michael DeWine.

/s Steven L. Taylor
STEVEN L. TAYLOR