

No. _____

**IN THE
SUPREME COURT OF THE UNITED STATES**

**FAYEZ ABU-AISH,
Petitioner**

v.

**UNITED STATES OF AMERICA,
Respondent.**

**On Petition for Writ of Certiorari to the
United States Court of Appeals
For the Eleventh Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Government must prove that a defendant had specific knowledge of a controlled substance identified as XLR-11 in order to convict the defendant of distributing and conspiring to distribute XLR-11 in violation of 21 U.S.C. §§841 and 846.

The Petitioner, Fayez Abu Aish, asserts that the Government is required to prove such specific knowledge and failed to do so in the present case.

The present case affords the Supreme Court an excellent opportunity to address the concerns expressed by Chief Justice John Roberts in his concurrence in *McFadden v. United States*, 576 U.S. _____, 135 S. Ct. 2298, 192 L.Ed.2d 260 (2015). Chief Justice Roberts stated in *McFadden* that in “cases involving well-known drugs such as heroin, a defendant’s knowledge of the substance can be compelling evidence that he knows the substance is controlled. [citation omitted]. But that is not necessarily true for lesser known drugs....”

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner, Fayez Abu Aish, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINION BELOW

The Eleventh Circuit's initial opinion was unpublished and was issued on December 21, 2018. The Co-defendant, Nedal Abu Aish, filed a petition for panel rehearing on January 11, 2019. The Eleventh Circuit denied rehearing in an order issued on March 4, 2019.

JURISDICTION

The Eleventh Circuit denied rehearing on March 4, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

The United States District Court for the Middle District of Florida had original jurisdiction of this federal criminal case pursuant to 18 U.S.C. §3231.

RELEVANT STATUTORY PROVISIONS

Section 841(a)(1) of Title 21 provides in relevant part:

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 841(b)(1)(C) of Title 21 provides in relevant part:

Except as otherwise provided in section 849, 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows: ...

(C) In the case of a controlled substance in schedule I or II Such person shall be sentenced to a term of imprisonment of not more than 20 years....

Section 846 of Title 21 provides in relevant part:

Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

1. The Controlled Substances Act has been the principal anti-drug statute in the United States since its enactment in 1970. See *United States v. Moore*, 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975). XLR-11 was not designated as a controlled substance until May 16, 2013. See Doc. 149, page 41, Government's

opening statement. “If asked yesterday by the Judge [during jury selection] if any of you knew or heard anything about cocaine, marijuana, heroin, probably all hands would have gone up. Instead, Judge Merryday’s question concerned the controlled substance in this case, XLR-11. Originally no hands went up.” Doc. 149, pages 40 – 41, Government’s opening statement.

2. On July 14, 2016, the Grand Jury indicted Fayez Abu-Aish and his brother, Nedal Abu-Aish, for allegedly committing three drug offenses involving distribution of XLR-11. Count One of the Indictment alleged that from May 16, 2013 to March 28, 2014, the Abu-Aish brothers violated 21 U.S.C. §846 and 841(b)(1)(C) by conspiring “to possess with intent to distribute a mixture and substance containing a detectable amount of XLR-11, a Schedule 1 controlled substance, contrary to the provisions of Title 21, United States Code, Section 841(a)(1).” See Indictment, Doc. 1, page 1.

Count 2 alleged that on February 20, 2014, the Abu-Aish brothers violated 21 U.S.C. §841(a)(1) and 841(b)(1)(C) and 18 U.S.C. §2 by “knowingly and intentionally distribut[ing], and aid[ing] and abet[ting] each other in distributing a mixture and substance containing a detectable amount of XLR-11, a schedule I controlled substance.” See Indictment, Doc. 1, page 2.

Count 3 alleged that on March 28, 2014, the Abu-Aish brothers violated 21

U.S.C. §841(a)(1) and 841(b)(1)(C) and 18 U.S.C. §2 by “knowingly and intentionally possess[ing] with intent to distribute, and aid[ing] and abet[ting] each other in possessing with intent to distribute a mixture and substance containing a detectable amount of XLR-11, a schedule I controlled substance.” See Indictment, Doc. 1, page 2.

3. Both defendants pleaded not guilty at an arraignment before the Honorable Thomas Wilson on July 21, 2016, and the case proceeded to trial before the Honorable Steven Merryday and a jury from April 10 through 13, 2017. After the Government completed its case in chief on April 12, both defendants moved for judgments of acquittal. Fayez Abu-Aish argued that the Government had failed to present sufficient evidence that he knew that he was dealing in an illegal substance. See Tr. of Trial, Day 3, April 12, 2017, Doc. 150, pages 85-87.

4. The District Court denied both motions for judgment of acquittal and stated, “And upon consideration, I agree that the evidence in the case is sufficient that a reasonable juror could conclude beyond a reasonable doubt that the United States has met its burden of proof as to each count as to each defendant. So the motions are due to be denied....” See Tr. of trial, Day 3, April 12, 2017, Doc. 150, page 94.

5. On April 13, the jury found both defendants guilty of all three counts

alleged in the Indictment. See Doc. 83, Jury Verdict as to Fayeze Abu-Aish; Doc. 84, Jury Verdict as to Nedal Abu-Aish.

6. On August 21, 2017, the District Court conducted an evidentiary hearing to determine the substance most similar to XLR-11 for sentencing purposes.

7. Fayeze Abu-Aish was sentenced on September 6, 2017, to concurrent terms of 168 months on each count of conviction. See Tr. of Sentencing, Doc. 153, p. 49. Judgment was entered the same day. See Doc. 122. Nedal Abu Aish was sentenced on September 7, 2017, and he too received concurrent terms of 168 months on each count of conviction. See Judgment as to Nedal Abu Aish, Doc. 125.

8. Fayeze Abu-Aish filed his timely Notice of Appeal on September 12, 2017. See Doc. 125. Nedal Abu-Aish filed his timely Notice of Appeal on September 18, 2017. See Doc. 133.

9. Fayeze Abu Aish primarily argued in his Initial and Reply Briefs to the Eleventh Circuit that the Government had failed to prove that he knew that XLR-11 was a controlled substance.

10. On December 21, 2018, the Eleventh Circuit issued its decision in the present case and affirmed the judgments and sentences against Fayeze Abu Aish

and his brother. In rejecting Abu Aish's challenge to the sufficiency of the evidence, the Eleventh Circuit stated, "the Abu-Aishes' argument is equal parts true and irrelevant. The jury did not convict them for possessing or distributing a generic substance but rather XLR-11. The district court never broadened their indictment in a manner analogous to that in [*United States v. Narog*, 372 F.3d 1243 (11th Cir. 2004)]. The question is thus whether ---- viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in favor of the jury's verdict ---- a rational trier of fact could have found that the Abu-Aishes knew they were working with XLR-11. The evidence presented indicated that Fayez and Nedal manufactured and packaged significant quantities of product in a clandestine lab, sold it out of trash bags on the street, and had suggested to a buyer (an undercover officer) that he should avoid being caught with the product. This evidence supported the jury's finding that the brothers knowingly dealt with a controlled substance." See Eleventh Circuit decision, Appendix A, pages 4 – 5.

11. The Eleventh Circuit then acknowledged that the "government also had to show that the brothers knowingly dealt with *the* controlled substance of XLR-11. In *United States v. Clay*, we noted that although 'the government's evidence of [the requisite mens rea] was circumstantial ... guilty knowledge can rarely be established by direct evidence.' 832 F.3d 1259, 1309 (11th Cir. 2016) (internal

quotation marks omitted), cert. denied, 137 S.ct. 1814 (2017). Thus, ‘[m]ens rea elements such as knowledge or intent may be proven by circumstantial evidence.’ Id. We find that a reasonable juror could infer from the substantial circumstantial evidence presented that Fayeze and Nedal knew that the mixture that they possessed and distributed contained XLR-11.” See Eleventh Circuit decision, Appendix A, pages 4 - 5.

REASONS FOR GRANTING THE WRIT

The Petition should be granted so that the Supreme Court can determine whether a little known substance such as XLR-11 may serve as the basis for convicting a defendant even though there is no proof of the defendant’s specific knowledge of the substance.

Fayeze Abu Aish has been convicted of trafficking in XLR-11, a substance that was unknown to him. An instructive description of XLR-11 can be found in *United States v. Hossain*, 2016 WL 70583 (S.D. Fla. 2016), where the District Court emphasized the obscurity of this particular substance in the United States:

XLR-11 is a "synthetic cannabinoid." Synthetic cannabinoids act on two receptors in the human body, CB1 and CB2, to cause a "high" similar to what users experience while consuming marijuana. XLR-11, like other synthetic cannabinoids, typically comes to the United States from China as a powder, which is then applied to plant materials to be smoked, or liquidated to be used in vaporizers. (DE 229, Tr. at 65). Synthetic cannabinoids laced

on plant materials are often marked as "herbal incense" products and can be purchased online or at gas stations.

Reports of XLR-11 use in the United States began in the first half of 2012. Because XLR-11 appeared only three years ago in the United States, knowledge about XLR-11 is limited. (DE 217-4, *Acute Kidney Injury Associated with Synthetic Cannabinoid Use*). Information about the effects of XLR-11 is further limited because in the synthetic drug market it is common for the drugs to be replaced by new, unregulated chemicals once one synthetic has been regulated. By one account, products are available for only about twelve to twenty four months before they are replaced by the next, unregulated wave. (DE 217-8, *Pharmacology, Toxicology, and Adverse Effects of Synthetic Cannabinoid Drugs*).

XLR-11 was temporarily made a Schedule I substance by the DEA's emergency scheduling power in May 2013. 78 Fed. Reg. 23735 (May 16, 2013). Shortly before the two-year temporary period was scheduled to expire in May 2015, the temporary scheduling of XLR-11 was extended for an additional year, and the DEA moved to have XLR-11 placed permanently onto the Controlled Substances List. 80 Fed. Reg. 27611 (May 14, 2015); 21 U.S.C. § 811(h)(2). As of this date [January 5, 2016], XLR-11 is still temporarily scheduled under Schedule I. 21 C.F.R. § 1308.11.

(Underscoring added)

Given the limited knowledge of XLR-11, it is hardly surprising that the Eleventh Circuit's decision did not cite a single instance in which the Abu-Aish brothers ever used the term XLR-11; heard anyone else use it; saw it in any writing or other material; or even knew that such a term existed. Nevertheless, Fayez Abu-Aish and his brother were accused and convicted of three drug offenses allegedly involving XLR-11.

The present case exemplifies the concerns expressed by Chief Justice Roberts in his concurrence in *McFadden v. United States*, 576 U.S. ____ , 135 S.Ct. 2298, 192 L.Ed.2d 260 (2015). The concurrence asserted that little known drugs should be assessed differently from more familiar drugs.

According to the concurrence, in “cases involving well-known drugs such as heroin, a defendant’s knowledge of the substance can be compelling evidence that he knows the substance is controlled. [citation omitted]. But that is not necessarily true for lesser known drugs...” See *McFadden*, 135 S.Ct. at 2307 (underscoring added)

Relying on *Liparota v. United States*, 471 U.S. 419, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985), the concurrence stated that a lack of knowledge concerning a substance’s controlled status can be a defense to a prosecution under §841(a)(1): “The Court says that knowledge of the substance’s identity suffices because ‘ignorance of the law is typically no defense to criminal prosecution.’ Ante, at 2304. I agree that is ‘typically’ true. But when ‘there is a legal element in the definition of the offense,’ a person’s lack of knowledge regarding that legal element *can* be a defense. *Liparota v. United States*, 471 U.S. 419, 425, n. 9, 105 S.Ct. 2084, 85 L.Ed.2d 434 (1985). And here, there is arguably a legal element in Section 841(a)(1) --- that the substance be ‘controlled.’” See *McFadden*, 135

S.Ct. at 2308 (underscoring added) .

The Chief Justice stated that if the knowledge issue were to arise again, it would not be hamstrung by the majority's comments: "Ultimately, the Court's statement's on this issue are not necessary to its conclusion that the District Court's jury instructions 'did not fully convey the mental state required by the Analogue Act.' Ante, at 2307. Those statements should therefore not be regarded as controlling if the issue arises in a future case." See *McFadden*, 135 S.Ct. at 2308 (underscoring added).

Abu Aish respectfully submits that his case is the "future case" anticipated in *McFadden's* concurrence. XLR-11 is unquestionably a little known substance, and Abu Aish's lack of knowledge with respect to XLR-11's status as a controlled substance should provide a defense to a three counts of conviction.

The Petition for Writ of Certiorari should be granted and the case heard on the merits.

CONCLUSION

For the foregoing reasons, Fayeze Abu-Aish respectfully requests that his Petition for Writ of Certiorari be granted.

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