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State v. McKean Appellant's Reply Brief Dckt. 41004

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,)	
)	
Plaintiff-Respondent,)	NO. 41004
)	
v.)	CANYON CO. NO. CR 2012-21064 &
)	CR 2012-14826
)	
SHANNON MARIE MCKEAN,)	REPLY BRIEF
)	
Defendant-Appellant.)	

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE THIRD JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CANYON

HONORABLE MOLLY J. HUSKEY
District Judge

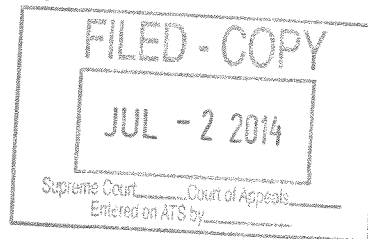
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STATEMENT OF THE CASE

Nature of the Case

Shannon Marie McKean appeals from her judgment of conviction for two counts of delivery of a controlled substance and five counts of possession of a controlled substance with the intent to deliver. Ms. McKean was found guilty following a jury trial, and the district court imposed concurrent unified sentences of five years, with two years fixed. Ms. McKean now appeals, and she asserts that the district court erred by determining that AM-2201 was a controlled substance as a matter of law, and by excluding evidence that she relied on lab reports on the substances she purchased because they were relevant to demonstrate the effect on the listener. Ms. McKean asserts that the recent opinion by the Court of Appeals in *State v. Alley*, 155 Idaho 972 (Ct. App. 2014), controls the first issue, and that the district court erred by determining that the lab reports only demonstrated a mistake of law.

This Reply addresses the State's assertion that *Alley*, a four-month-old case that has the support of all four members of the Court of Appeals, and from which the State opted not to file a petition for review, should be disavowed. The State concedes that that statute governing AM-2201 is ambiguous, but disagrees with the Court of Appeals' analysis of the legislative history. There is no reason to disavow *Alley*. Ms. McKean relies on her initial briefing with respect to the second issue.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. McKean's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Did the district court err by concluding that AM-2201 was a controlled substance as a matter of law?
2. Did the district court err by excluding evidence that Ms. McKean relied on reports indicating that the substances were not synthetic cannabinoids?

ARGUMENT

I.

The District Court Erred By Concluding That AM-2201 Was A Controlled Substance As A Matter Of Law

A. Introduction

Ms. McKean asserts that the district court erred when it determined that AM-2201 was a controlled substance as a matter of law. Whether AM-2201 is a controlled substance is a question of fact for the jury, and because Ms. McKean was precluded from presenting this defense, her convictions must be vacated.

B. The District Court Erred By Concluding That AM-2201 Was A Controlled Substance As A Matter Of Law

The State acknowledges that, “the competing interpretations of I.C. § 37-2705(d)(30)(ii)(a) presented by Owsley and McDougal, both familiar with IUPAC nomenclature, demonstrate that the sub-provision is ambiguous.” (Respondent's Brief, p.9.) All four members of the Idaho Court of Appeals agree.¹ The term that is ambiguous is “alkyl.” The State asserts that, “a search for legislative intent or context behind that technical term is a futile endeavor, if not an empty gesture, toward actually resolving the ambiguity.” (Respondent's Brief, p.10.) The State’s concession that there is no legislative history surrounding the ambiguous term should end the analysis; once legislative history is determined to be unhelpful, the next step in statutory analysis is to apply the rule of lenity, which the Court of Appeals did. *Alley*, 155 Idaho at 979.

¹ The *Alley* decision was unanimous. *State v. Alley*, 155 Idaho 972 (Ct. App. 2014). Further, in a case released on the same day that addressed the same issue, Judge Gratton, the only Court of Appeals judge not to sit on *Alley*, concurred with the *Alley* opinion. See *State v. Mendel*, 155 Idaho 984, 985 (Ct. App. 2014).

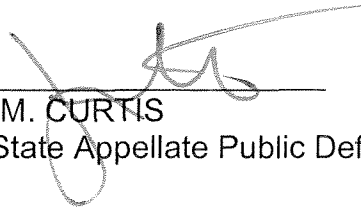
Instead of seeking legislative history with regard to the term, "alkyl," the State asks this Court to consider the "legislature's general purpose to expand the list of schedule 1 substances." (Respondent's Brief, p.10.) While Ms. McKean agrees that the purpose of the statute was to ban synthetic cannabinoids, this does not resolve the question of whether the legislature banned *this* synthetic cannabinoid. That issue can only be resolved by, as held by the Court of Appeals, determining what the legislature meant by the use of the term "alkyl." The State concedes that legislative history does not answer this question. Looking to the "general purpose" of the statute to criminalize synthetic cannabinoids does not answer that question.

The ambiguous term is "alkyl," and the legislative history does not resolve the ambiguity. That is the end of the analysis. Whether AM-2201 is a controlled substance was a question of fact for the jury and the district court erred by instructing the jury that AM-2201 was a controlled substance as a matter of law.

CONCLUSION

Ms. McKean requests that her convictions be vacated and her case remanded for further proceedings.

DATED this 2nd day of July, 2014.



JUSTIN M. CURTIS
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 2nd day of July, 2014, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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