NO: 18-6984

IN THE
SUPREME COURT OF THE UNITED STATES

BENJAMIN TILLMAN
- Petitioner -

VS

UNITED STATES OF AMERICA
- Respondent(s) -

ORIGINAL

DISTRICT COURT NO: 1:16-CV-1304
RECENT APPEAL NO: 17-30067

ON PETITION FOR A WRIT OF CERTIORARI TO THE FIFTH CIRCUIT COURT OF APPEALS FROM THE DENIAL OF A 28 U.S.C. §2241 PETITION IN LIGHT OF McFADDEN V. U.S. 135 S.Ct. 2298 (2015) SOUGHT IN THE WESTERN DISTRICT OF LOUISIANA (ALEXANDRA DIVISION)

Benjamin Tillman
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QUESTIONS PRESENTED

A.

WHETHER PETITIONER WAS ENTITLED TO FILE AN APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. §2241 AND/OR 28 U.S.C. 2255(e) IN LIGHT OF McFADDEN v. U.S. 135 S.Ct. 2298(2015) UNDER THE FIFTH CIRCUIT COURT OF APPEALS "SAVINGS CLAUSE TEST" IN REYES-REQUENA V. U.S. 243 F.3d 893, 904(5th Cir. 2001), WHEN THE DISTRICT COURT (SOLE BASIS) WAS McFADDEN "WAS NOT" RETROACTIVE ON COLLATERAL REVIEW, BUT THE FIFTH CIRCUIT COURT OF APPEALS OVERLOOKED AND FAIL TO ADDRESS WHETHER McFADDEN WAS IN FACT RETROACTIVE ON COLLATERAL REVIEW BY (SIDE-STEPPING) THE MATTER AND MAKING A (MERIT-DETERMINATION). SEE TILLMAN V. BARNHART 728 Fed. Appx. 361(5th Cir. 2018); AND BUCK V. DAVIS 137 S.Ct. 759, 773 (2017)?

B.

WHETHER THIS HONORABLE COURT WILL (INTERVENE) IN THE FIFTH CIRCUIT COURT OF APPEALS AND OTHER COURTS FAILURE TO ESTABLISH THE RETROACTIVITY OF McFADDEN V. U.S. 135 S.Ct. 2298(2015) ON COLLATERAL REVIEW, BUT HAS DONE SO FROM THIS COURT'S HOLDING IN BURRAGE V. U.S. 134 S.Ct. 881, 187 L.Ed.2d 715 (2014). SEE SANTILLANA V. UPTON 846 F.3d 779, 783-84(5th Cir. 2017); HARRINGTON V. ORMOND 2018 U.S. APP. LEXIS 22335(6th Cir. 2018) AND KRIEGER V. U.S. 842 F.3d 490, 499-500(7th Cir. 2016) WHEN (BOTH) McFADDEN AND BURRAGE ARE "STATUTORY INTERPRETATIONS" ANNOUNCED BY THIS HONORABLE COURT REFLECTING 21 USC §841?

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LIST OF PARTIES

All parties does not appear in the caption of the case on the cover page. However, a list of parties as to the proceedings in the lower courts whose judgement and order is as follows:

1) Magistrate Judge (Perez-Montes)
2) District Court Judge: James T. Trimble Jr.
3) Warden: J.A. Barnhart
4) Petitioner: Benjamin Tillman,
5) Fifth Circuit Court of Appeals Judges: Reavley, Graves, and HO, Circuit Judges.

TABLE OF AUTHORITIES

REPORTS OF OPINIONS

Petitioner respectfully prays that a writ of certiorari issue to review the judgements and opinions below:

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in this proceeding appear at: Appendix(A). The opinion denying a Timely Petition for Rehearing appear at: Appendix(B).

The opinions from the District Court appears at: Appendix(C) and (D).

JURISDICTION

The date on which the United States Court of Appeals for the Fifth Circuit denied petitioner's "Petition for Rehearing" was 9-11-2018. See Appendix(B), however, 90 days from that date makes this writ of certiorari timely and this Honorable Court has jurisdiction under 28 U.S.C. §1254(2).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Amendment I: Congress shall make no law respecting an establishment of...the right of the people peaceably to assemble and to petition the government for redress of grievances.

Amendment V: No personal shall be held to answer for a capital, or otherwise infamous crime...without due process of law.

21 U.S.C. §841(a) provides:

(a) Unlawful acts. Except as authorized by this title, 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; or

(2) to create, distribute, or dispense, or possess with intent to distribute or dispense a counterfeit substance.

STATEMENT OF CASE AND FACTS

On August 21, 1996, a Federal Grand Jury in Pensacola, Florida, returned a sealed indictment against petitioner and (3) others: Besler; Conford; and Anthony Jerome Fountain.

Appellant was charged in only Count (1) of the indictment with allegedly Conspiring to Possess "Cocaine Base" with intent to distribute, from January 1, 1995, through August 21, 1996, in violation of Title 21 United States Code, Section 841(b)(2)(A)(iii).

On December 32, 1996, petitioner was arraigned and the trial was then set for February 3, 1997. Following a (2) day Jury Trial, petitioner was found guilty on the Count (1) Conspiracy to Possess "Cocaine Base" with intent to Distribute. Pre-Sentence Report was done and on April 18, 1997, the District Court imposed a sentence which included a term of imprisonment of 480 months followed by 10 years supervised release. Petitioner then appealed to the Eleventh Circuit Court of Appeals in which was

denied March 4, 1998. Thereaftere a writ of Certiorari was filed and denied by the Supreme Court.

Petitioner's initial 28 U.S.C. Section 2255 Petition in which was denied by the Northern District of Florida in Case No. 3:99-CV-406/RV/SMN. Several other Second or Successive petitions were filed based on Supreme Court decisions but were all denied. However, petitioner did file a (Second or Successive 2255 Petition) reflecting McFadden v. U.S. 135 S.Ct. 2298, 102 L.Ed.2d 260 (2015), in the Eleventh Circuit Court of Appeals in which denied such petition, but clearly "stipulated" that McFadden was based on "Statutory Interpretation" Not Constitutional Law. , Petitioner sought Appointment of Counsel and a 28 U.S.C. §2241 petition in the Western District of Louisiana meeting the "Saving Clause Test" set forth in this Court's holding in Reyes-Reguena v. United States, 243 F.3d 893, 904(5th Cir. 2001) in which the Western District of Louisiana issued a Report and Recommendation holding that Appellant's §2241 petition be dismissed for lack of jurisdiction. (See Doc. #3).

However, petitioner submitted (Objections to the R&R) clarifying that he in fact met the "Savings Clause Test," and that McFadden v. United States, 135 S.Ct. 2298, 192 L.Ed.2d 260(2015) can be applied retroactively because it was clearly "Statutory Interpretation," and further relied on the Fifth Circuit Court's holding in United States v. Lopez, 248 F.3d 427 (5th Cir. 2001) where the Fifth Circuit supported a "procedural retroactive claim" identical as petitioner's. See (Doc. #6) and

Appendix(B). Moreover, petitioner relied on this Honorable Court's holding in Garland v. Roy, 477 Fed. 287(5th Cir. 2012) with similar circumstances. Id. However, the District Court Judge (James T. Trimble Jr.) ignored petitioner's (Objections) and adopted the Report and Recommendation on January 9, 2017.

Petitioner, then appealed his denial of 28 U.S.C. §2241 on the "retroactive dispute" of McFadden v. U.S. 135 S.Ct. 2298 (2015) to the Fifth Circuit Court of Appeals, who (side-stepped) the "retroactive dispute," and made a (merit-determination). See Benjamin Tillman v. Barnhart 728 Fed. Appx. 361(5th Cir. 2018). Thereafter, petitioner petitioned for rehearing of this opinion and the Fifth Circuit Court of Appeals still fail to address the "retroactivity dispute." See Appendix(B). This matter follows.

REASONS FOR GRANTING THIS WRIT

The reasons this Honorable Court should grant this writ is because:

In McFadden v. United States, 135 S.Ct. 2298, 192 L.Ed2d 260 (2015) the Supreme Court held that:

> "When a controlled substance is an analogue, §841(A)(1) requires the government to establish that the defendant knew he was dealing with a substance under the Controlled Substance Act or Analogue Act. In order to convict a defendant of violating the Analogue Act, the government must prove that the defendant knew "that the substance he is dealing with is some unspecified substance listed on the federal drug schedules Id 135 S.Ct. at 2304. It further held that when trying to convict a defendant of violating the narcotics statutes using an analogue the government must show that he "knew" the specific analogue he was dealing with, even if he did not know its legal statutes as an analogue. Id at 2305.

However, the lower court of appeals has been following this Honorable Court's holding in which petitioner fully relied upon. See United States v. Terry Perrie Louis, 2017 U.S. App. Lexis 12298(11th Cir. 2017); United States v. Stanford, 2016 U.S. App. Lexis 9108, 2016(5th Cir. 2016); United States v. Ritchie 2018 U.S. App. Lexis 13895(4th Cir. 2018). The question this Honorable Court need to answer is "why can't McFadden apply retroactively on collateral review as Burrage v. United States 134, S.Ct. 881, 187 L.Ed.2d 715(2014), is done by the lower courts of appeals. See Harrington v. Ormond 2018 U.S. App. Lexis 22335(6th Cir.

2018), Krieger v. United States, 842 F.3d 490, 499-500(7th Cir. 2016), and Santillana v. Upton 846 F.3d 779, 783-84(5th Cir. 2017)"? This answer would require petitioner relief and at the least a Factual Finding from the lower Courts. Therefore, this Honorable Court should grant this writ, with more thats discussed further:

A.

WHETHER PETITIONER WAS ENTITLED TO FILE AN APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. §2241 AND/OR 28 U.S.C. §2255(e) IN LIGHT OF McFADDEN V. U.S. 135 S.Ct. 2298(2015) UNDER THE FIFTH CIRCUIT COURT OF APPEALS "SAVINGS CLAUSE TEST" IN REYES-REQUENA V. U.S. 243 F.3d 893, 904(5th Cir. 2001), WHEN THE DISTRICT COURT'S (SOLE BASIS) WAS McFADDEN "WAS NOT" RETROACTIVE ON COLLATERAL REVIEW. BUT THE FIFTH CIRCUIT COURT OF APPEALS OVERLOOKED AND FAIL TO ADDRESS WHETHER McFADDEN WAS IN FACT RETROACTIVE ON COLLATERAL REVIEW, BY (SIDE-STEPPING) THE MATTER AND MAKING A (MERIT-DETERMINATION) SEE TILLMAN V. BARNHART 728 Fed. App. 361(5th Cir. 2018) AND BUCK V. DAVIS, 137 S.Ct. 759, 773(2017)?

Petitioner poses this Honorable Court with the above question before this Honorable can intervene and resolve the conflict the Eastern District of Louisiana(Alexandria Division) and Fifth Circuit Court of Appeals has caused on petitioner receiving relief based upon McFadden on collateral review and states:

First, Initially when petitioner filed his 28 U.S.C. §2241 petition, he presented and met all the requirements of the Fifth

Circuit Court of Appeals "Savings Clause Test," set forth in Reyes-Requena v. United States 243 F.3d 893, 904(5th Cir. 2001). However, the (only) prong the Magistrate Judge (Perez-Montes) found unprevailing was the "Retroactivity of McFadden" see pages 4-5 of Appendix(C), holding the following:

> ...However, McFadden was a direct appeal, and the Supreme Court has not made the case retroactively applicable to cases on collateral review. Therefore, petitioner cannot meet the requirement of the "Savings Clause." Id. at Appendix(C).

However, the District Court adopts this holding and dismissed petitioner's 28 U.S.C. §2241 for lack of jurisdiction (soley upon) the above. See Apendix(D).

Second, petitioner brought this matter to the Fifth Circuit Court of Appeals, soley on the Retroactive Application of McFadden supported by Fifth Circuit Court of Appeals and Supreme Court precedent showing "Statutory Interpretations" from both courts require Retroactive Application. However, the Fifth Circuit Court of Appeals (side-stepped) this "Retroactive Dispute" reflecting McFadden and made a (merits determination), holding the following:

> ...Tillman asserted that under McFadden v. United States, 135 S.Ct. 2298, 192 L.Ed.2d 260(2015), he was convicted of a nonexistent offense because he lacked the requisite mens rea: McFadden applied retroactively; and, as such, his claim fell under 28 U.S.C. §2255's savings clause. The District Court dismissed the case for want of jurisdiction Tillman fails to meet his burden of showing that his claim fell under §2255's savings clause. His contention that the government failed to introduce the controlled substance

> at issue and prove the type of substance does not show he was covicted of a non-existent offense...Accordingly, the district court properly dismissed the motion for lack of jurisdiction. See Appendix(A).

However, see Buck v. Davis, 137 S.Ct. 759, 197 L.Ed.2d1 (2017)(Because a reviewing court inverted the statutory order of operations by deciding the merits of an appeal, and their denying the appeal based on adjudication of the actual merits, it placed too heavy a burden on the prisoner, it is in essence deciding an appeal without jurisdiction).

Third, Petitioner petitioned the Fifth Circuit Court of Appeals for Panel Rehearing pursuant to F.R.A.P. (5th Cir. Rule (40), urging the Court for the following:

> "whether consideration by the full court is necessary because circuit judges (Reavley); (Graves); and (Ho) panel decision overruled and ignored whether McFadden v. U.S. 135 S.Ct. 2292(2015) is (retroactive on collateral review) when this was the sole basis of this appeal between all parties in the district court." and whether consideration by the full court is necessary because circuit judges (Reavley); (Graves); and (Ho); panel decision conflicts with Santillana v. Upton 846 F.3d 779(5th Cir. 2017), where this court applied Burrage v. U.S. 134 S.Ct. 881, 187 L.Ed.2d 715(2014) retroactive to cases on collateral review for purposes of a "savings clause" analysis, when McFadden v. U.S. 135 S.Ct. 2298(2015) DESERVES the (same) treatment because (both) are "statutory interpretations" reflecting 21 U.S.C. §841 announced by the Supreme Court." See Appendix(D).

However, the Fifth Circuit Court of Appeals again fail to address this matter.

And **Fourth**, This Honorable Court should (intervene) on the above because it issued its precedents in Schriro v. Summerlin 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442(2004); Bousley v. United States 523 U.S. 614, 118 S.Ct. 1604, 140 L.Ed.2d 828 (1998); Baily v. United States, 516 U.S. 137, 139, 116 S.Ct. 501, 503, 133 L.Ed.2d 472(1995); Rivers v. Roadway Express Inc. 511 U.S. 298, 812-13, 118 S.Ct. 1510, 128 L.Ed.2d 247(1994); O'Dell v. Netherland, 521 U.S. 151, 157, 117 S.Ct. 1969, 138 L.Ed.2d 351(1997), and Davis v. United States, 417 U.S. 333, 346, 94 S.Ct. 2298, 41 L.Ed.2d 109(1974), where it's clear "Statutory Interpretation" holdings announced by this Honorable Court applies retroactive on collateral review. However, the lower courts are leaving **McFadden** from this treatment and only giving this treatment to **Burrage**.

Based on all the above, this Honorable Court should certify this question to resolve that **McFadden** does apply retroactive on collateral review where petitioner could benefit in a U.S.C. §2241 proceedings.

B.

WHETHER THIS HONORABLE COURT WILL (INTERVENE) IN THE FIFTH CIRCUIT COURT OF APPEALS AND OTHER COURTS FAILURE TO ESTABLISH THE RETROACTIVITY OF McFADDEN V. U.S. 135 S.Ct. 2298(2015) ON COLLATERAL REVIEW, BUT HAS DONE SO FROM THIS COURT'S HOLDING IN BURRAGE V. U.S. 134 S.Ct. 881, 187 L. Ed.2d 715(2014), SEE SANTILLANA V. UPTON 846 F. 3d 779-783-84(5th Cir. 2017); HARRINGTON V. ORMOND 2018 U.S. APP. LEXIS 223 35(6th Cir. 2018) AND KRIEGER V. U.S. 842 F.3d 490, 499-500(7th Cir 2016) WHEN (BOTH) McFADDEN AND BURRAGE ARE "STATUTORY INTRPRETATIONS" ANNOUNCED BY THIS HONNORABLE COURT REFLECTING 21 U.S.C. §841?

Petitioner further poses this Honorable Court with the above question on whether this Honorable Court will (intervene) in the Fifth Circuit Court of Appeals and other courts failure to establish the retroactivity of McFadden v. U.S. 135 S.Ct. 2298 (2015) on collateral review, but has done so from this court's holding in Burrage v. U.S. 134 S.Ct. 881, 187 L.Ed.2d 715(2014), on collateral review and contends:

First, Petitioner has presented preserved and unique circumstances in this case to the lower courts showing how McFadden v. United States 135 S.Ct. 2298(2015) has great impact entitling petitioner to relief on collateral review. However, McFadden is not getting recognition like Burrage v. United States 134 S.Ct. 881, 187 L.Ed.2d 715(2018), where the Fifth Circuit Court of Appeals FAIL TO ADDRESS THE RETROACTIVITY of McFadden in this case. See Tillman v. Barhart 728 Fed. Appx. 361(5th Cir.

under Burrage v. United States, 134 S.Ct. 881, 187 L.Ed.2d 715 (2014), moreover, other Circuit Court of Appeals has done the same. See Harrington v. Ormond 2018 U.S. App. Lexis 22335(6th Cir. 2018)(Burrage is retroactive on collateral review); and Kreger v. United States 842 F.3d 490, 499-500(7th Cir. 2016) (Burrage is retroactive on collateral review). However, the question remains how is Burrage getting this (Retroactive Treatment) and not McFadden? This is what this Honorable Court can answer in this case.

And Second, As mentioned earlier, (both) of these decisions are "Statutory Interpretations" that this Honorable Court examined the meaning of , 21 U.S.C. §841(A)(1) and (b)(1)(C). See McFadden and Burrage Id. However, these holdings are divided on the retroactive treatment on collateral review. Thus, this is the only court that can fix this extension of retroactive treatment to McFadden. Therefore, this Honorable Court should intervene and hold that McFadden deserves the same retroactive treatment as Burrage.

CONCLUSION

WHEREFORE, in consideration of the foregoing, petitioner prays this Honorable Court grant the petitioner his writ of Certiorari, and remand this matter back to the Fifth Circuit Court of Appeals in light of McFadden for relief in petitioner's 28 U.S.C.S. §2241 proceedings.