No. _____

IN THE SUPREME COURT OF THE UNITED STATES

_____

BARRY BAYS,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

_____

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

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

In the 2017 *Bays* unpublished opinion, the Fifth Circuit disagreed with the Government's argument that at trial the proof of Bays knowledge that he was handling controlled substance analogues was "overwhelming." Applying *McFadden*, the 2017 *Bays* court reversed and remanded holding that "the focus at trial was proving that Bays understood the substances with which he was dealing, and that the substances were in fact analogues, ***but not that Bays knew the substances were [controlled substance] analogues***." (Emphasis supplied). *United States v. Bays*, 680 Fed. Appx. 303309 (5th Cir. 2017) (2017 opinion).

Even after remand, the government never proved that: (1) Bays knew that the substances with which he was dealing were "controlled substance" analogues, and (2) the analogues were in fact controlled. Indeed, the district court dismissed drug counts 4, and 5, and most particularly, Count 3 – conspiracy to distribute a controlled substance analogue in violation of 21 U.S.C. § 846; 21 U.S.C. § 841(a)(1) and (b)(1)(C). ROA.5520.

Nonetheless, at the August 8, 2017 re-sentencing for counts 1 and 2 (Conspiracy to Defraud the United States and Conspiracy to Commit Mail Fraud) ("fraud offenses"), the judge adopted the PSR, which applied 21 U.S.C. § 802(32), USSG § 2B1.1(b)(1), and USSG §2D1.1 and characterized *Bays* as a "controlled substance case." PSR 3rd Addendum paras. 61-64. The PSR 4th Addendum wrote: "21 U.S.C. § 802(32), a controlled substance analogue is defined as a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I and II, ... [and] USSG §2D1.1, the guideline that deals with Offense Involving Drugs, states a controlled substance includes ... any analogue of that controlled substance." ROA.5643. The judge ruled: "This is sentencing. I don't think the Fifth Circuit opinion affects that." ROA.5394-95.

As a result, the base offense level of Mr. Bays was increased by 20 points for loss, together with other enhancements, and worse, jettisoned Mr. Bays out of Criminal History category I into a category III. Although the Fifth Circuit's 2019 unpublished opinion reversed for fact findings on actual loss, the reversal was "[o]n this basis alone." *United States v. Bays*, 765 Fed. Appx. 945, 956 (5th Cir. 2019) (2019 opinion). The Fifth Circuit agreed the *McFadden*'s *scienter* requirement did not apply to sentencing, and affirmed there was "more than ample evidence to support the position that these were [controlled substance] analogues." *Id.* at 951, n.12.

This Court should grant certiorari to answer the important questions:

I. Whether a defendant's sentence for fraud offenses that applied 21 U.S.C. § 802(32), USSG § 2B1.1(b)(1), and USSG §2D1.1 and treated *Bays* as a "controlled substance case," violates his Fifth and Sixth amendment rights, when the government failed to prove and the jury did not find that: (1) the synthetic cannabinoids were controlled-substance-analogues for the designated time period, and (2) the defendant knew the analogues were controlled.

II. Whether a defendant's sentence for fraud offenses that applied 21 U.S.C. § 802(32), USSG § 2B1.1(b)(1), USSG §2D1.1 and treated *Bays* as a "controlled substance case," is an *ex post facto* violation, U.S. Const., Art. I, § 9, cl. 3, because it punished him for lawful conduct, and deprived him of a lawful defense.

LIST OF PARTIES

BARRY BAYS, Petitioner

UNITED STATES OF AMERICA, Respondent

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PETITION FOR WRIT OF CERTIORARI

Petitioner, BARRY BAYS, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in *United States v. Bays*, 765 Fed. Appx. 945 (5th Cir. 2019).

OPINION BELOW

The Fifth Circuit decision sought to be reviewed is *United States v. Bays*, 765 Fed. Appx. 945 (5th Cir. 2019) (2019 opinion).

JURISDICTION

The court of appeals order sought to be reviewed was filed February 27, 2019. The United States obtained an extension of time, and filed a Motion for Panel Rehearing on April 12, 2019. The Fifth Circuit denied the Rehearing Petition on May 10, 2019. This petition for writ of certiorari is timely. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL & STATUTORY PROVISIONS INVOLVED

Title 21 U.S.C. § 802(32) (A)(I) provides in pertinent part:

> "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; ...."

> USSG §2D1.1, "a controlled substance includes ... any analogue of that controlled substance."

U.S. CONST. Amend. V provides:

> "No person shall be ... deprived of life, liberty, or property, without due process of law; ...."

U.S. Const. Amend. VI provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.”

U.S. CONST. ART. I § 9, cl. 3 provides:

"No Bill of Attainder or ex post facto Law shall be passed."

STATEMENT OF THE CASE WITH FACTS RELEVANT TO THE ISSUE

I. Course of Proceedings: The 2015 Trial; Feb 24, 2017 Direct Appeal Opinion

A. The 4th Superseding Indictment & the Charged Offenses

Under the name Operation Log Jam, and alleging violations of the Controlled Substances Act (CSA) and/or the Controlled Substance Analogue Enforcement Act of 1986 (Analogue Act), federal authorities conducted nationwide raids throughout the United States of manufacturers and distributors of "Spice," (*i.e.*, synthetic cannabinoids, or marijuana). ROA15-10385.3202,.3173.

On August 27, 2013, the DEA executed a search warrant of Little Arm, Inc. d/b/a B&B Distribution ("B&B"), a distributor of Spice. ROA15-10385.3022. Mr. Bays, its owner, and eight (8) other defendants were indicted in the Northern District of Texas, Dallas Division. The defendants were: (1) Barry Bays; (2) Samuel Madeley, Texas-based chemical supplier; (3) David (Jay) Muise, YouTube video producer; (4) Holden Bownds, Texas-based chemical supplier & partner of Madeley; (5) Aaron Parrish, bookkeeper & employee; (6) Jennie Miller, employee & Mr. Bays' wife; (7) Kyle Boyer, head of sales & employee; (8) Brandon Zerler, head of production and employee; (9) and Jerad Coleman, employee & brother of Bays. ROA15-10385.40; .84.

The 4th superceding indictment named Mr. Bays in Counts 1-5, and Mr. Coleman in Counts 1-3 (the other defendants entered pleas):

Count 1: Conspiracy to Defraud the United States, in violation of 18 U.S.C. § 371 (max not more than 5 years imprisonment);

Count 2: Conspiracy to Commit Mail Fraud, in violation of 18 U.S.C. § 1349 (max not more than 20 years imprisonment);

Count 3: Conspiracy to Distribute a Controlled Substance Analogue, violation of 21 U.S.C. § 846; 21 U.S.C. § 841(a)(1) and (b)(1)(C) (max not more than 20 years imprisonment);

Count 4: Possession of a Firearm in Furtherance of a Drug Trafficking Crime, in violation of 18 U.S.C. § 924(c)(1)(A) (mandatory minimum not less than 5 years and maximum of Life imprisonment);

Count 5: Using a Communication Facility to Facilitate a Drug Felony under 21 U.S.C. § 841, in violation of 21 U.S.C. § 843(b) (max not more than 4 years imprisonment)

with Forfeiture Notice ROA.807-821.

Count 3 was the predicate offense for the convictions under Counts 4 and 5.

B. The Testifying Codefendants and Other Cooperators

Messrs. Bays and Coleman proceeded to trial before a jury. Employee co-defendants, such as Aaron Parrish, the bookkeeper, ROA15-10385.2981; and Kyle Boyer, the head of sales, ROA15-10385.2932; as well as David Muise, YouTube video-producer, ROA15-10385.3789 entered into plea agreements. In anticipation of a reduced sentence, they agreed to testify against Messrs. Bays and Coleman.

Three of the four chemical suppliers – Alex Reece d/b/a Blue Sky, ROA15-10385.3168; Drew Green, owner of NutraGenomics MFG, LLC, ROA15-10385.3242; and Samuel Madeley, ROA15-10385.4083 (who with his business partner, Holden Bownds, were both named co-defendants in the case at bar) – also testified against Messrs. Bays and Coleman in anticipation of a reduced sentence.

C. The trial proof was that Mr. Bays knew the identity and euphoric effect of the substance(s) and that it was for human consumption. The record is devoid of evidence Mr. Bays knew that at the time of distribution, the substance was a federally controlled substance analogue

The focus at trial was on Count 3, conspiracy to distribute a controlled substance analogue, specifically, AM-2201; or 5f-PB-22; or PB-22; or 5f-UR-144 (a/k/a XLR-11), in violation of 21

U.S.C. § 841(a)(1) and 21 U.S.C. § 841(b)(1)(C). ROA15-10385.4946. The pivotal issue concerned the application of 21 U.S.C. 841(a)(1), which makes it "unlawful for any person knowingly ... to manufacture, distribute, or dispense ... a controlled substance." (Emphasis supplied).

Mr. Bays contended the prosecution must prove, and the jury must find, AM-2201; or 5f-PB-22; or PB-22; or 5f-UR-144 (a/k/a XLR-11) were analogues controlled under federal law; and Mr. Bays knew this. ROA15-10385.1250.

The prosecutor responded: "That's false. Absolutely false. .... that jury charge, ... it's going to have none of that in there." ROA15-10385.4938; *see* jury charge ROA15-10385.1338. The prosecutor contended that the government had to prove that:

> (1) Mr. Bays knew the identity of the substance (e.g., that AM-2201 was an analogue, not that AM-2201 was a substance controlled by federal law, and that Mr. Bays knew this at the time of distribution); ROA15-10385.4938;
>
> (2) Mr. Bays intended AM-2201, or 5f-PB-22, or PB-22, or 5f-UR-144 for human consumption, ROA 10385.4939; and
>
> (3) the substance(s) had physical characteristics (chemical structure and pharmacological (euphoric effect) similar to a substance on the CSA schedules. ROA15-10385.4937.

D. There was *no proof* beyond a reasonable doubt at trial *that* both before and after May 13, 2013, PB-22, 5f-PB-22, and XLR-11 were federally controlled *and that* Mr. Bays knew they were controlled under federal law

1. Between August and Dec 2011/Jan 2012, Reece & Green purported to sell AM-2011 to B&B. They discontinued sales of AM-2011 after Jan 2012. AM-2201 was scheduled on July 9, 2012

In the early to mid-2010 time frame, Drew Green (NutraGenomics MFG, LLC), ROA15-10385.3067, .3244-3245; and Alex Reece (Blue Sky), ROA15-10385.3183-84, were raw chemical suppliers in the Spice industry, and sold JWH-018. ROA15-10385.3182; .3243-45. When

the federal government announced that effective as of March 1, 2011, five chemicals, including JWH-018,would be listed on the CSA Schedules, both Reece and Green switched to selling AM-2201, and other chemicals. ROA15-10385.3182-83; .3213; .3249.

In the August/December 2011 time frame, Blue Sky (according to Reece) sold Mr. Bays what Reece purported to be AM-2201. ROA15-10385.3191-95; GX-109-114. From November 2011 to January 2012, NutraGenomics (according to Green) sold AM-2201 to Mr. Bays. ROA15-10385.3253-3259; 3286-3304, .3311; GX-117-123; 126-135. The government did not introduce any evidence of actual test results, but relied exclusively on invoices, wire transfer documents and shipment tracking papers that the chemical was what Reece and Green purported it to be.

Reece testified to his subjective – and erroneous – belief that AM-2201 was a controlled substance analogue when he sold it to Mr. Bays in the August/December 2011 time frame – in fact it wasn't. ROA15-10385.3323-24, .3328. Reece testified that he had told Mr. Bays that AM-2201 "could be" a controlled substance analogue of JWH-018. "I wasn't sure." ROA15-10385.3209. Reece: "[W]e had a heck of an organics business. So I thought at the time, you know, scare them out of synthetics industry, get them into organics, we had an organics business, and we could make more money." ROA15-10385.3217. Reece agreed that the sales of AM-2201 took place in August of 2011, at a time when there was no public information anywhere that indicated that AM-2201 was a substance controlled by federal law. ROA15-10385.3217.

AM-2201 became a CSA scheduled substance on July 9, 2012. ROA.1343-44 (jury instructions).

2. Prior to July 9, 2012, Mr. Bays stopped purchasing AM-2201; he shipped instead XLR-11, which was not federally controlled at that time

Prior to July 9, 2012, Mr. Bays switched from AM-2201 to purchasing XLR-11 from Reece. ROA15-10385.3191.

The July 25, 2012 testing by a DEA forensic laboratory of the contents of a FedEx package confiscated by DEA Agent Rambo, ROA15-10385.3225, confirmed that B&B was not distributing AM-2201. Forensic Chemist Farrell concluded that each and every unit labeled Natural Potpourri (GX-159), B2 da Bomb Kamakazi (GX-160), Juicee Fruit (GX-161), and Jungle Juice (GX-162), contained XLR-11, not AM-2201. ROA15-10385.3335; .3339-41. XLR-11 was not one of "the five chemicals ... JWH 073, JWH 200, JWH 018, cannabicyclohexanol and CP47," that were banned, effective as of March 1, 2011. ROA15-10385.3213.

The Reece and Green businesses were raided by the DEA on May, 2012 and July 2012, respectively, ROA15-10385.3202; .3251, so they no longer supplied XLR-11 to B&B.

3. From Aug/Sept 2012 to April 2013, Madeley & Bownds supplied Mr. Bays with 5f-UR-144 (a/k/a XLR-11), PB-22 and 5f-PB-22. In May 2013, they were raided by the DEA and shut down

After the Reece and Green businesses were shut down by the DEA, Mr. Bays purchased raw chemical through Samuel Madeley and his partner, Holden Bownds, who were chemical brokers in Denton, TX. ROA15-10385.3508-10; .4090; .4127. Madeley and Bownds brokered 5f-UR-144 (a/k/a XLR-11), A-834,735, PB-22 and 5f-PB-22. ROA15-10385.4094.

In the August/September 2012 time frame, Madeley had an agreement with Mr. Bays for Mr. Bays to produce, Caution, a Spice product that contained 5f-UR-144 supplied to Bays by Madeley. ROA15-10385.4118-19. Madeley and Bownds continued to supply B&B with raw chemical until

May 2013, when their business was raided and shut down. ROA15-10385.3508. DEA Agent Gardner learned from Madeley that Mr. Bays was his customer. ROA15-10385.3508, .3510.

4. Neither text message 3285, nor the DEA Headquarters Release, nor anywhere else in the trial record is there evidence of Mr. Bays' actual knowledge ("we can not verify this anywhere") or knowledge of substantial similarity ("The physiological and toxicological properties of this compound are not known") that XLR-11, PB-22 or 5f-PB-22 were federally controlled on May 16, 2013

On August 27/28, 2013 Indiana Trooper Shafer intercepted a FedEx package from an Indiana FedEx hub that B&B was shipping to High Tyde Trading and Tobacco Company, a smoke shop in Virginia. It contained packets labeled B2 da Bomb and Street Legal. ROA15-10385.3411; .3415-17; GX-272, p.5. Forensic testing concluded the substances in the package, 5-Fluoro-PB-22 and XLR-11, were banned analogues under *Indiana* law. Certificate of Analysis of Hailey Newton, Indiana Police Lab ("Item 005 was found to contain 5-Fluoro-PB-22 and XLR-11, controlled substances."). ROA15-10385.3477-3482; GX-272.

To prove that Mr. Bays knew he was distributing XLR-11, PB-22 or 5f-PB-22, as *federally* controlled substances on May 16, 2013, the prosecutor introduced a text message 3285-86, (GX-168), also dated May 16, 2013, between Salesman Boyer and Chemical Supplier Bownds (admission of co-conspirators to be attributed to Bays & Coleman). *See Bays*, 608 F.3d at 308-309.

Text message 3285-86 reads in pertinent part (emphasis below supplied):

> ***We have a reliable source inform us that tonight May 15th, at midnight this ban will be published for third and final time.*** ***We can not verify this anywhere***, but the source is strong. For those who are wondering the moment it is published the third time, the law is affective [sic] immediately[.] Please confirm by going to DEA's website. Many of you have contacted us about PB-22 and its legality, apparently a few manufacturers are trying to pass this off as the newest legal compound[.] .... PB-22 is an analog of JWH 018 which differs by having 8-hydroxyquinoline replacing the napthalene group of JWH 018**.** ***The physiological and toxicological properties of this compound are not known.*** This product is intended for forensic and research applications[.]" You can go to Cayman's website, and they say the same thing for 5F-PB-22, Pb22-d, BB-22, 5f-BB-22. For those who still carry Herbal incense, or still have some in your possession. [sic] This Ban covers some bath salts, and Synthetic Cannabinoids, UR-144, XLR11, and AKB48. These three compounds have been found in almost all herbal incense on the market today. We find some people use STS 135, but that is an analogue of AKB48, others use PB22, that is even worse as it is an analogue of JWH-018. Our All Natural Smoking Blends do not contain any chemicals and therefore, are not affected by this ban, or any other chemical or synthetic cannabinoid ban. ***The content below was taken from the DEA's website: [line 14 quoted infra]*** .....

(emphasis supplied) Txt msg 3285-86, (GX-168, p.1). *See Bays*, 680 Fed. Appx. at 309.

Beginning at line 14, the text message reproduces the text from a DEA "Headquarters News Release," dated April 12, 2013. The pertinent portion of the April 12, 2013 "Headquarters News Release," found on the DEA's website recites:

> The second Federal Register Notice published today is a Notice of Intent to temporarily control three synthetic cannabinoids (UR-144, XLR11, and AKB48) often seen in falsely marketed "herbal incense" products. DEA has taken action upon finding these three substances pose an imminent hazard to public safety**.** ***This action will become effective upon publishing a Final Order to temporarily control these substances*** as Schedule I substances for up to two years, with the possibility of a one-year extension.

http://www.dea.gov/divisions/hq/2013/hq041213.shtml (Emphasis supplied)

Neither text message 3285, nor the DEA Headquarters Release, nor anywhere else in the trial record, is there evidence of a published DEA a final order listing XLR-11, PB-22 and 5f-PB-22 as federally controlled substances on May 16, 2013.

5. On August 27, 2013, the DEA raided B&B and shut it down. Mr. Bays was arrested

On August 27, 2013, Agent Gardner executed a search warrant for the B&B business in Defiance, Ohio, and Mr. Bays' residence in Fort Wayne, Indiana. ROA15-10385.3529. Coleman testified: "After they arrested my brother, we shut down. They took everything we had." ROA15-10385.4683.

E. The Erroneous Jury Instruction

The judge denied Mr. Bays requested jury instruction that the government must prove that he knew the substances at issue were controlled substance analogues. ROA.4966-68. The jury returned a verdict of guilty as to Mr. Bays on all five counts.

On April 23, 2015, the trial judge sentenced Mr. Bays as follows:

> You are sentenced to a sentence of 60 months on Count 1; 240 months on Count 2; 240 months on Count 3; 48 months on Count 5 to run consecutive with each other but only to the extent it produces a total aggregate sentence of 365 months with the added 60 months on Count 4 to run consecutively to Counts 1, 2, 3 and 5 for a total sentence of 425 months.

ROA.5337. In addition, the judge ordered the forfeiture "of $7,336,248.52 in proceeds from the offense alleged in Count 2 and $1,830,808.75 in proceeds from the offense alleged in Count 3;" no fine, but a special assessment of $100 per count for a total of a $500 special assessment; and supervised release for a term of three years on each of Counts 1, 2, 3, 4 and 5 to run concurrently with each other, ROA.5338-42.

F. The post-trial *McFadden* decision held the government must prove "the defendant knew that the substance was controlled under the CSA or the Analogue Act"

After the *Bays* trial, the United States Supreme Court decided *McFadden v. United States*, __ U.S. __, 135 S. Ct. 2298 (2015). This Court held 21 U.S.C. § 841(a)(1) requires 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 ***[hereinafter the "controlling method"]***.
>
> 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. 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"; "which has a stimulant, depressant, or hallucinogenic effect on the central nervous system that is substantially similar to or greater than" the effect of a controlled substance in schedule I or II; or which is represented or intended to have that effect with respect to a particular person. § 802(32)(A) ***[hereinafter the "second method"]***.
>
> A defendant who possesses a substance with knowledge of those features knows all of the facts that make his conduct illegal, just as a defendant who knows he possesses heroin knows all of the facts that make his conduct illegal. A defendant need not know of the existence of the Analogue Act to know that he was dealing with "a controlled substance."

(Emphasis supplied) *McFadden*, 135 S. Ct. at 2302.

Chief Justice Roberts made clear that "the Court's statements on this issue [the second method of establishing knowledge] 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***." (Emphasis supplied) *McFadden*, 135 S. Ct. at 2308 (Roberts, C.J., concurring).

Chief Justice Roberts reasoned: "[W]hen 'there is a legal element in the definition of the offense,' a person's lack of knowledge regarding that legal element <u>*can*</u> be a defense. *Liparota v. United States*, 471 U.S. 419, 425, n. 9 (1985)." (emphasis in original) *McFadden*, 135 S. Ct. at 2308 (Roberts, C.J., concurring). "[A] defendant needs to know more than the identity of the substance; he needs to know that the substance is controlled." (Emphasis in original). 135 S. Ct. at 2307-08. Chief Justice Roberts explained:

> In cases involving well-known drugs such as heroin, a defendant's knowledge of the identity of the substance can be compelling evidence that he knows the substance is controlled. *See United States v. Turcotte*, 405 F.3d 515, 525 (7th Cir. 2005). But that is not necessarily true for lesser known drugs. A pop quiz for any reader who doubts the point: Two drugs – dextromethorphan and hydrocodone – are both used as cough suppressants. They are also both used as recreational drugs. Which one is a controlled substance?

McFadden, 135 S. Ct. at 2307-2308.

G. The 2017 Unpublished Opinion: Reversed and Remanded

On May 1, 2015, Mr. Bays filed a Notice of Appeal to the Fifth Circuit Court of Appeals. ROA.2493.

1. The Three Exchanges

At oral argument, the prosecutor raised the "Three Exchanges Argument." *See Bays*, 680 Fed. Appx. at 308–09. The Fifth Circuit wrote that "the Government argues the proof of his [Bays] knowledge that he was handling analogues was overwhelming... [The] three exchanges that allegedly demonstrate this point" were:

(1) B&B supplier, Reese, testified that in March 2011 he warned Bays that a chemical Bays was using, AM-2201, was an analogue of JWH-018, a controlled substance under federal law. The government claims that in March 2011, Bays knew AM-2201 was a controlled substance;

(2) Bays's sales supervisor, Kyle Boyer, sent at Bays's direction on May 16, 2013 a text message, which the Government claims reveals Bays's knowledge that two different chemicals—PB-22 and 5f-PB-22—were analogues of JWH-018; and

(3) By September 2012, Bays knew that XLR-11 was an analogue because it had been scheduled as a controlled substance in Indiana on September 14, 2012, and scheduled as a federal controlled substance on May 16, 2013.

United States v. Bays, 680 Fed. Appx. 303, 308-309 (5th Cir. 2017).

2. The Fifth Circuit reversed the drug counts 3, 4, and 5; affirmed the fraud counts 1 & 2; and remanded to the district court

The Fifth Circuit issued an unpublished opinion on February 24, 2017 and reversed and remanded. The opinion set out the jury instruction that the district court gave the jury pursuant to 21 U.S.C. § 802(32(A):

> The district court instructed the jury that to find Bays and Coleman guilty for conspiracy to manufacture or distribute a controlled substance analogue, it must be convinced the Government proved beyond a reasonable doubt:

First:	That two or more persons, directly or indirectly, reached an agreement to manufacture or distribute a particular substance(s);
Second:	That defendants knew what the substance(s) was ... ;
Third:	That [the substance(s)] was a controlled substance analogue;
Fourth:	That defendants knew that the substance(s) was intended for human consumption;
Fifth:	That defendants knew of the unlawful purpose of the agreement;
Sixth:	That defendants joined in the agreement willfully, that is, with the intent to further its unlawful purpose.

Bays, 680 Fed. Appx. at 306–07. The opinion stated: "Bays argued to the district court that the Government must also prove that Bays knew the substances were analogues controlled under federal law. The court rejected Bays's argument." *Id*.

The Fifth Circuit noted that after the trial this Court decided *McFadden*, which "held that the Government must prove 'a defendant knew that the substance with which he was dealing was 'a controlled substance,' even in prosecutions involving an analogue.' *McFadden*, 135 S. Ct. at 2305. This 'knowledge requirement can be established in two ways.'" *Id.*"

> First, it can be established by proving the 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." *Id*.
>
> Second, it can be established by proving the defendant "knew the specific analogue he was dealing with, even if he did not know its legal status as an analogue." *Id*. In other words, if the defendant "knew that [the substance] was substantially similar to [a controlled substance] in its chemical structure and produced a substantially similar 'high,' he had the requisite knowledge that [the substance] was a [controlled substance analogue]."

Bays, 680 Fed. Appx. at 307.

The Fifth Circuit reversed *Bays* on Count Three (Conspiracy to Distribute a Controlled Substance Analogue) based on the issue of whether there was harmless error in the failure to provide the jury with a proper instruction on the element of knowledge:

> Our task in considering this evidence is not to determine whether it could support a jury's finding that Bays possessed the requisite knowledge beyond a reasonable

> doubt. Rather, we must be able to say that the evidence could not "rationally lead to a contrary finding with respect to the omitted element." *See Neder*, 527 U.S. at 19, 119 S.Ct. 1827. ***In this case, the focus at trial was proving that Bays understood the substances with which he was dealing, and that the substances were in fact analogues, but not that Bays knew the substances were [controlled substance] analogues***. In its closing argument, the Government emphatically rejected Bays's suggestion that the Government must prove Bays knew the substances were [controlled substance] analogues: "That's 100 percent untrue, and that's not the law, it's never been the law, and that's not what we have to prove." In light of the intervening decision in *McFadden*, the error in instructing the jury was not harmless beyond a reasonable doubt. We reverse.

(Emphasis supplied) *Bays*, 680 Fed. Appx. at 309.

The Fifth Circuit also reversed as to Counts Four and Five because "Bays's conviction for conspiracy to distribute a controlled substance analogue (Count Three) served as the predicate drug offense for two other counts: possession of a firearm in furtherance of a drug trafficking crime (Count Four) and using a communication facility to facilitate a drug felony (Count Five)." *Id*.

The Fifth Circuit affirmed the convictions for Count 1 (Conspiracy to Defraud the United States) and Count 2 (Conspiracy to Commit Mail Fraud) and remanded the case back to the district court. Mr. Bays filed a petition for writ of certiorari in the U.S. Supreme Court, which was denied. *Bays v. United States*, 137 S.Ct. 2176 (Mem) (2017).

II. Course of Proceedings: Re-Sentencing; 2019 Unpublished Opinion

A. Following remand, the judge adopted the PSR, which treated *Bays* as a "case involving controlled substances," even though there was no conviction for distribution of controlled substance analogues; she dismissed all the drug counts, Counts 3, 4, and 5

Following remand, the government took no action to retry Mr. Bays on the drugs counts, Counts 3, 4, and 5. On August 8, 2017 the district court re-sentenced Mr. Bays and Mr. Coleman on Counts 1 & 2 only (Conspiracy to Defraud the United States and Conspiracy to Commit Mail Fraud). ROA.5366-5409. The district judge dismissed Counts 3 (Conspiracy to Distribute a Controlled

Substance Analogue), 4 (Possession of a Firearm in Furtherance of a Drug Trafficking Crime) & 5 (Using a Communication Facility to Facilitate a Drug Felony) as to Mr. Bays, and Count 3 as to Mr. Coleman. ROA.5520; *Bays*, 765 Fed. Appx. 947, n.4 (2019 opinion).

At the August 8, 2017 re-sentencing hearing, the prosecutor characterized *Bays* as a "case involving controlled substances," even though there was no conviction by a jury that Bays distributed controlled substance analogues *See* ROA.5394 (Prosecutor: "[T]he convictions have been affirmed for the misbranding conspiracy and the mail fraud, part of that here at sentencing is to make this determination with regards to this analogue stuff").

The PSR also treated *Bays* as a "case involving controlled substances," PSR 3rd Addendum, paras. 61-64, ROA.5616-17. The PSR identified PB-22 and 5f-PB-22 as the "controlled substance analogues" in B&B products that were distributed between "January 24, 2013 and April 30, 2013." ROA.5617, ROA.5643; ROA.5379; ROA.5642; *Bays*, 765 Fed. Appx. 951, n.12.

Mr. Bays raised several objections to various paragraphs in the 3rd and 4th Addendums and at the re-sentencing hearing. The overarching objection was that the "government continues to conflate the terms ‘controlled substances' and ‘cannabinoids' ... A cannabinoid is not illegal unless it is scheduled as controlled substance." ROA.5647; ROA.5378-79; ROA.5622-24 (objections to PSR 3rd Addendum, paras. 61-64; ROA.5378-79.

In the PSR 4th Addendum, the probation officer responded to the defense objection to paragraph 62. The "officer contends that a controlled substance analogue is a controlled substance for purposes of the guideline applications. Pursuant to 21 U.S.C. § 802(32), ***a controlled substance analogue is defined as a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I and II***, ... USSG §2D1.1, the guideline

that deals with Offenses Involving Drugs, states ***a controlled substance includes ... any analogue of that controlled substance***." ROA.5643.[1]

The defense asserted at the re-sentencing: "... the 5th Circuit already said, This isn't a controlled substance analogue because ya'll haven't proven that to a jury." ... This isn't a controlled substance case." ROA.5391.

The district court judge exclaimed: "I'm not going to buy [the defense argument]." ROA.5393. The district judge adopted the PRS without change, ROA.5652, necessarily finding that the unscheduled substances, PB-22 and 5f-PB-22, were controlled substance analogues because they were substantially similar to controlled substances listed in the Schedules – and *not* because these facts were found by a jury and proved beyond a reasonable doubt.

Characterizing the case as a controlled substance case, for determining the amount of loss increased the base offense level of 7 by an additional 20 levels. ROA.5618. And the characterization also resulted in other enhancements as well (mass marketing – additional 2 levels; relocation to another jurisdiction to evade local law enforcement – additional 2 levels; adjustment for role in the offense – additional 4 levels). The total base offense level was 35.

Even the Criminal History calculation was driven by the "controlled substance analogues" characterization. The court adopted, in the alternative, the conspiracy time frame – June 4, 2011

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[1] The 2019 Opinion, 765 Fed. Appx. 951, n.12, quotes from the 4th Addendum, but omits the substantial similarity provision from its quotation of the PSR 4th Addendum. The 2019 Opinion reads:

> "[U.S.Probation] pointed out that under 21 U.S.C. § 802(32), a "controlled[-] substance analogue is a controlled substance for purposes of ... [G]uideline[s] applications." She further noted that the guideline dealing with drug offenses, U.S.S.G. § 2D1.1, includes "any analogue of [a ...] controlled substance." *See* U.S.S.G. § 2D1.1 cmt. n.6 (2014) ("Any reference to a particular controlled substance in these [G]uidelines includes all salts, isomers, all salts of isomers, and, except as otherwise provided, any analogue of that controlled substance.").

to August 27, 2013. ROA.5421 – the Criminal History category for Mr. Bays leapt from category I to category III. This was because the relevant conduct period for the alleged drug conspiracy extended back into 2011, rather than starting at May 16, 2013 (arguably when the synthetic cannabinoids were placed on the federally controlled substance list), and captured in the calculation a 1994 child-molestation conviction.

The PSR calculated the guideline range as 210 to 262 months and Criminal History of III. ROA.5619. The court did an upward variance. She sentenced Mr. Bays to 60 months on Count 1, and 115 months on Count 2 to run concurrently. ROA.5517. The forfeiture order was for $662.050. ROA.2575. The district court dismissed all the drug counts, 3, 4, and 5.

For the second time, Mr. Bays filed a timely notice of appeal to the Fifth Circuit. ROA.2587.

B. Although the Fifth Circuit remanded for further fact findings on the loss determination ("on this basis alone"), it affirmed the lower court's characterization of *Bays* as a "controlled substance analogue" case

In the second appeal, *United States v. Bays*, 765 Fed. Appx. 945 (5th Cir. 2019), the Fifth Circuit affirmed the application of the controlled substance guidelines and treatment of *Bays* as a controlled substance analogue case. It held:

> As explained below, while ***we find no reversible error with respect to the challenges asserted solely by Bays***, we conclude that the district court erred in imposing the 20-point enhancement to Defendants' base offense levels without first finding that Defendants' offenses resulted in an "actual loss" or that Defendants intended for their offenses to result in a loss. *Id.* at 949. .....
>
> On this basis alone, we vacate Defendants' sentences and remand this matter to the district court for further proceedings consistent with this opinion." *Id*. at 945.

1. The Fifth Circuit affirmed that *McFadden*'s *scienter* requirement did not apply to sentencing," and that there was "more than ample evidence to support the position that these were [controlled substance] analogues."

The Fifth Circuit affirmed the trial judge's rulings that *McFadden*'s *scienter* requirement for a controlled-substance-analog offense did not apply to sentencing and that there was "more than ample evidence to support the position that these were [controlled substance] analogues." *Bays*, 765 Fed. Appx. at 951, n.12.

2. However, in ruling on relevant conduct, the Fifth Circuit held that *Bays* was re-sentenced on *fraud* offenses. The relevant conduct calculation increased Bays' Criminal History from category I to III

Among the issues was whether a 1994 child-molestation conviction should be counted for Criminal History category purposes. If it was not, then the Criminal History category would be I. If it was, the Criminal History category would be III. The Fifth Circuit held:

> Bays contends that May 16, 2013 is the earliest date that can be considered the onset date for the instant offense since that is the date "when certain substances" used by B&B in its spice manufacturing "were scheduled on the lists of the CSA." According to Bays, "it was legally impossible for any distribution of these substances to be unlawful earlier than [that time], so the relevant conduct period can not begin any earlier than May 16, 2013." Thus, Bays asserts that the relevant date for his child-molestation offense—May 15, 1997—falls outside of the 15-year window, which began, according to Bays, 15 years prior to the inception of the current offense on May 16, 1998.
>
> Bays's suggestion that the date on which chemicals used in B&B's business were scheduled is controlling with respect to the inception date of the instant offense is both disingenuous and contradictory, given that he was resentenced on conspiracy-to-commit-fraud offenses—not drug offenses—and his adamant assertions that this is not a controlled-substance case. Application note 8 to U.S.S.G. § 4A1.2 states that the term "commencement of the instant offense" as used in § 4A1.2(e)(1) includes "any relevant conduct," as defined by § 1B1.3.

Bays, 765 Fed.Appx. at 955.

This petition for writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

I. Mr. Bays' sentence for fraud offenses that applied 21 U.S.C. § 802(32); USSG § 2B1.1(b)(1); and USSG §2D1.1 and treated *Bays* as a "controlled substance case," violates his Fifth and Sixth amendment rights, U.S. Const. V; U.S. Const. VI, because the government failed to prove and the jury did not find that: (1) the synthetic cannabinoids were controlled-substance-analogues for the designated time period, and (2) the defendant knew the analogues were controlled

This Court should grant certiorari to decide an important federal question about whether a defendant can be sentenced for fraud offenses, using the statutory and U.S. sentencing guidelines for a controlled substance case, when the government failed to prove and the jury did <u>not</u> find that: (1) the synthetic cannabinoids were controlled-substance-analogues, and (2) the defendant knew they were controlled, in violation of his Fifth and Sixth amendment rights. U.S. Const. V; U.S. Const. VI.

In *McFadden v. United States*, 135 S.Ct. 2298, 2305 (2015), this Court held 21 U.S.C. § 841(a)(1) requires 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. The *controlling* method to establish knowledge is

> 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.

McFadden, 135 S.Ct. at 2305. *See McFadden*, 135 S.Ct. at 2308 (Roberts, C.J., concurring) ("Those statements [about the second method] should therefore not be regarded as controlling if the issue arises in a future case.").

In the 2017 *Bays* opinion, the Fifth Circuit compared and contrasted the knowledge issue in *Bays* with that in *United States v. Stanford*, 823 F.3d 814, 835 (5th Cir. 2016). Like *Bays*, the defendant in *Stanford* argued that the jury instructions were insufficient because the Government

must prove that he knew the substance at issue was a controlled substance analogue. Like *Bays*, the district court in *Stanford*, rejected that theory. However, unlike *Bays*, in *Stanford* "the district court submitted a special interrogatory to the jury asking: "During the [relevant] time period ... do you find that the defendant ... knew that [the substance] was a controlled substance analogue?" ... The jury answered unanimously, 'yes.'" *Bays*, 680 Fed. Appx. 303, 308 *citing Stanford*, 823 F3d at 826-828.

In contrast, the 2017 *Bays* opinion disagreed with the Government's argument that the proof of Bays knowledge that he was handling controlled substance analogues was "overwhelming." *Id*. at 308. The 2017 *Bays* court reversed and remanded holding that "the focus at trial was proving that Bays understood the substances with which he was dealing, and that the substances were in fact analogues, ***but not that Bays knew the substances were [controlled] analogues***." (Emphasis supplied). Id. at 309.

Moreover, there was no record evidence that PB-22 and 5f-PB-22 were controlled during the time period of January 24, 2013 and April 30, 2013; and no evidence that these substances were substantially similar to a controlled substance as reflect in the text message introduced at trial by the government. *See* Txt msg 3285-86, (GX-168, p.1) ("the physiological and toxicological properties of this compound are not known."). *Bays*, 680 Fed. Appx. at 309.

Even after remand, the government never proved that: (1) Bays *knew* that the substances with which he was dealing were "controlled substance" analogues, and (2) the analogues *were in fact controlled*. Indeed, the government gave up on proving the essential elements of all three drug counts. Counts 4, and 5, and particularly, Count 3 – conspiracy to distribute a controlled substance analogue in violation of 21 U.S.C. § 846; 21 U.S.C. § 841(a)(1) and (b)(1)(C) were dismissed by the district court at the conclusion of the re-sentencing hearing on August 8, 2017. ROA.5520.

However, at the August 8, 2017 re-sentencing following remand, the district judge agreed with the government that it had only to prove by a preponderance of the evidence that the substances were analogues (substantially similar to a controlled substance), and agreed that the government met its burden of proof through its trial experts, who had testified to chemical structure and euphoric effect. ROA.5394. In response to the defense objections, the judge ruled: "This is sentencing. I don't think the Fifth Circuit opinion affects that." ROA.5395.

The PSR identified PB-22 and 5f-PB-22 as the "controlled substance analogues" in B&B products that were distributed between "January 24, 2013 and April 30, 2013," and relied on 21 U.S.C. § 802(32), USSG § 2B1.1(b)(1), and USSG §2D1.1, and characterized the *Bays*' case as a controlled substance case. *Bays*, 765 Fed. Appx. 951, n.12. *See also* PSR 3rd Addendum, paras. 61-64.

In response to the defense objections, the PSR 4th Addendum reads: the probation"officer contends that a controlled substance analogue is a controlled substance for purposes of the guideline applications. Pursuant to 21 U.S.C. § 802(32), a controlled substance analogue is defined as a substance the chemical structure of which is substantially similar to the chemical structure of a controlled substance in Schedule I and II, ... USSG §2D1.1, the guideline that deals with Offense Involving Drugs, states a controlled substance includes ... any analogue of that controlled substance."). ROA.5643.

At the August 8, 2017 re-sentencing hearing, "Bays [had] objected to the probation officer's use of application note 3(F)(vi), "Value of Controlled Substances," arguing that it applies only in cases involving controlled substances—not controlled-substance analogues; that a substance cannot be considered a controlled-substance analog unless it has been judicially determined to be so; and that using application note 3(F)(vi) in sentencing him would violate his due-process rights given the

McFadden-necessitated overruling of his conviction for conspiring to distribute controlled-substance analogues." *Bays*, 765 Fed. Appx. at 951. The district judge ruled the *McFadden* requirement did not apply to sentencing.

"On appeal, Defendants continue[d] to urge similar objections ... none of the substances that they handled was scheduled by the DEA during the time period in question and that this cannot be treated as a controlled-substance-analog case in light of *McFadden*." *Bays*, 765 Fed. Appx. at 952.

Although the 2019 opinion reversed for a finding on actual loss, it was "[o]n this basis alone" that it reversed. *Bays*, 765 Fed. Appx. at 956. As to the remainder of Bays' objections, the 2019 *Bays* opinion also dispensed with the *McFadden scienter* requirement, and affirmed that there was "more than ample evidence to support the position that these were analogues," that is, substantially similar in chemical structure and euphoric effect," quoting the PRS 4th Addendum, that applied 21 U.S.C. § 802(32), USSG § 2B1.1(b)(1), USSG §2D1.1 and characterized the *Bays* case as a "controlled substance case," to determine the base offense level and Criminal History Category for Mr. Bays. *Bays*, 765 Fed. Appx. 951, n.12.

"[T]he Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000). Here the jury never found, and there was no proof beyond a reasonable doubt of, the essential element of knowledge, and that the synthetic cannabinoids were controlled substances. *Apprendi*, 530 U.S. 483-84 ("practice must at least adhere to the basic principles undergirding the requirements of trying to a jury all facts necessary to constitute a statutory offense, and proving those facts beyond reasonable doubt."); *United States v. Haymond*, __ U.S. __, 2019 WL 2605552, *8 (2019) ("The Constitution seeks to safeguard the

people's control over the business of judicial punishments by ensuring that any accusation triggering a new and additional punishment is proven to the satisfaction of a jury beyond a reasonable doubt.).

Treating the *Bays* case as a controlled substances case, and applying the various sentencing guidelines for controlled substances to determine base offense level and Criminal History category exposed Mr. Bays to punishment that exceeded what he would receive if he had been punished according to the facts reflected in the jury verdict as to the two fraud offenses alone, without the application of the controlled substance provisions. *Apprendi*, 530 U.S. at 494 ("the relevant inquiry is one not of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?").

In the case at bar, the application of the controlled substance guidelines enhanced the base offense level of Bays by 20 points for loss. And the characterization of the case as a controlled substance case, absent any proof beyond a reasonable doubt, or fact-finding by a jury that the substances were controlled, also resulted in other enhancements as well (mass marketing – additional 2 levels; relocation to another jurisdiction to evade local law enforcement – additional 2 levels; adjustment for role in the offense – additional 4 levels). Worse, the calculation of the relevant conduct period in the PSR, jettisoned Mr. Bays out of a Criminal History category of I into a category III. *See Bays*, 765 Fed. Appx. at 955. *Apprendi*, 530 U.S. at 483; *Alleyne v. United States*, 570 U.S. 99 (2013); *United States v. Haymond*, __ U.S. __, 2019 WL 2605552, *8 (2019) (a sentence "that comes into play only as a result of additional judicial factual findings by a preponderance of the evidence cannot stand.").

For all the aforementioned reasons, this Court should grant certiorari.

II. Mr. Bays' sentence for fraud offenses that applied 21 U.S.C. § 802(32), USSG § 2B1.1(b)(1), USSG §2D1.1 and treated *Bays* as a "controlled substance case," is an *ex post facto* violation, U.S. Const., Art. I, § 9, cl. 3. It punished him for lawful conduct. It deprived him of a lawful defense

Mr. *Bays*' sentence is an *ex post facto* violation, because it punished him for lawful conduct. It also deprived him of a lawful defense. U.S. CONST., Art. I, § 9, cl. 3. *See Beazell v. Ohio*, 269 U.S. 167, 169–70 (1925) ("any statute which punishes as a crime an act previously committed, which was innocent when done, which makes more burdensome the punishment for a crime, after its commission, or which deprives one charged with crime of any defense available according to law at the time when the act was committed, is prohibited as *ex post facto*.").

In *Bays*, the lower courts retroactively applied at sentencing 21 U.S.C. § 802(32), USSG § 2B1.1(b)(1), and USSG §2D1.1 and characterized *Bays* as a "controlled substance case," to enhance his punishment for fraud offenses. ROA.5643. There an absence of proof that the substances were controlled and that Bays knew the substances were controlled analogues.

- The 2017 Bays opinion made clear that "the focus at trial was "not [on proving] that Bays knew the substances were [controlled] analogues." Bays, 680 Fed. Appx. at 309;
- There is no record evidence that PB-22 and 5f-PB-22 were controlled during the time period of January 24, 2013 and April 30, 2013; and
- There is no evidence that these substances were substantially similar to a controlled substance as reflect in the text message. *See* Txt msg 3285-86, (GX-168, p.1) ("the physiological and toxicological properties of this compound are not known."), *Bays*, 680 Fed. Appx. at 309.

The punishment of Bays case is a classic example of an *ex post fact* law. *See Burgess v. Salmon*, 97 U.S. 381, 384 (1878) ("An ex post facto law is one which imposes a punishment for an act which was not punishable at the time it was committed, or a punishment in addition to that then prescribed.").

Mr. Bays was also deprived of a defense that he did not know the substances were controlled. The PSR characterized the substances as "controlled" because they were substantially similar. But the text message 3285-86, introduced by the government, revealed that during the period in question, "the physiological and toxicological properties of this compound are not known." *Bays*, 680 Fed. Appx. at 309. *See McFadden*, 135 S.Ct. 2298, 2308 (2015) (Roberts, C.J., concurring) (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 (1985). And here, there is arguably a legal element in Section 841(a)(1)—that the substance be "controlled.").

For all the aforementioned reasons, this Court should grant certiorari.

CONCLUSION

For all of the aforementioned reasons, Mr. Bays respectfully requests that this Court grant his petition for writ of certiorari.

Respectfully submitted,

/s Lydia M.V. Brandt

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APPENDICES

Appendix A *United States v. Bays*, 765 Fed. Appx. 945 (5th Cir. 2019)

Appendix B *United States v. Bays*, 680 Fed. Appx. 303 (5th Cir. 2017)