

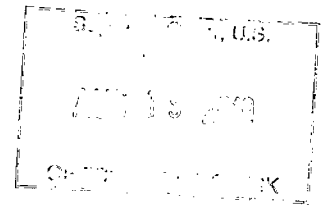
19-6469

IN THE

ORIGINAL

**SUPREME COURT OF THE UNITED STATES**

October Term 2019



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Kenneth N McFall

Petitioner

-VS-

THE STATE OF INDIANA

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On Petition for Writ of Certiorari

To the Indiana Court of Appeals and the Perry County Circuit Court

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**PETITION FOR WRIT OF CERTIORARI**

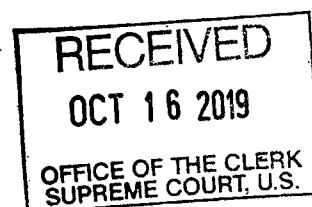
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Kenneth N. McFall #269514

Branchville Correctional Facility

21390 Old St. Rd. #37 Branchville In.

47514



## QUESTION FOR WHICH REVIEW IS SOUGHT

1.) Whether trial courts abuse of discretion in not allowing an alleged accomplice, and sole defense witness to testify at trial for the defense violated the Petitioners Fourteenth Amendment due process rights and Sixth Amendment and did the decisions of the courts below construct an avenue that allows the State of Indiana of Indiana to bypass the Sixth Amendment of the Constitution of the United States of America?

2.) Whether the Indiana Court of Appeals decision below created a trap for the unwary that will enable the State of Indiana deny due process and impeded the appeals process, and did the Petitioner actually waive *all* his rights to appeal *any* of the evidence seized from his home in violation of the Fourth Amendment and Section One Article Eleven of The Indiana Constitution?

3.) Whether the Indiana Court of Appeals ruled contrary its own Supreme Court This Court and federal and state court of last resorts throughout the United States, ruling that petitioner was not entitled to an instruction on his theory of defense when it upheld the trial court's refusal of the petitioners instruction that the weight of the Methamphetamine is a factor to consider when deciding whether the defendant had the intent to deal Methamphetamine? And does said ruling allow for the State of Indiana to deny the accused rights guaranteed by the Constitution of The United States of America?

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## **OPINIONS BELOW**

### **Direct Appeal to Indiana Court of Appeals**

On April 29<sup>th</sup>, 2019, the Court of Appeals affirmed in all aspects.

With regard to the first issue, the Court found McFall waived it by stating that he had “no objection” even after the trial court noted a continuing objection from McFall to all evidence seized under the warrant. *Slip op. at 12-13*.

With regard to the second issue, the Court held that McFall did not have the right to call Kellems as a witness just to have him plead the Fifth Amendment in front of the jury. *Slip op. at 15*.

Finally, with regard to the third issue, the trial court found that McFall’s tendered instruction would have improperly focused the jury’s attention on one piece of evidence. *Slip op. at 16-17*.

### **Transfer to Indiana Supreme Court**

On June 18<sup>th</sup> 2019 the Petitioners was denied review of the Indiana Court of Appeals decisions

## **JURISDICTION**

### **Trial Court**

On May 24<sup>th</sup>, 2018, McFall filed a motion to suppress on the grounds that the search warrant affidavit did not articulate probable cause and that the search was unreasonable. (Appellant's App. Vol. II p. 33).

The trial court denied this motion to suppress on June 13<sup>th</sup>, 2018. (Appellant's App. Vol. III p. 11).

Trial by jury was held in the Perry Circuit Court from August 6<sup>th</sup> through August 8<sup>th</sup>, 2018. (Appellant's App. Vol. II p. 8-9).

August 8<sup>th</sup>, 2018, the jury found McFall guilty as charged on all counts. (Appellant's App. Vol. II p.9, 120-25).

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## STATEMENT OF CASE

### Introduction

The Petitioner respectfully and humbly brings forth important recurring questions of violations of the Fourth Amendment, the Sixth Amendment, and the Fourteenth Amendment of the United States Constitution by the State of Indiana in the decisions of the courts below regarding decisions of the trial court prior to the petitioners trial and throughout his trial, decisions that squarely conflict with the established views of this court.

The petitioner seeks examination and review under the proper light of the United States Supreme Court so that these violations can be seen and corrected so that the decisions of the courts below not be used to violate and bypass the constitutional rights the citizens of the State of Indiana as has been done to the petitioner in the case at hand.

The courts below have violated the most sacred amendments of The United States Constitution in this petitioner's case. These decisions below now allow for further violations of individual rights by the State of Indiana. These decision for which review is sought will illustrate an emerging pattern of an ever evolving trend toward how our nations constitution and our constitutional rights have begun to slowly erode and be washed away in the river of time, one decision at a time, in the flood of cases that pass through the courts below.

The decisions in cases like the petitioners allow for the construction of new vessels that the State of Indiana can then use to sail into, and invade the waters of its citizen's lives, their beliefs, and their homes, enabling them to do so without any warrant, any resistance, enabling them to pillage and plunder at will, and then to bind and tie individuals up in a way they can no longer defend themselves from such trespasses.



Amendments like the Sixth and Fourteenth are intended to level the playing field when the lines are crossed and these levees are breeched by the government, or by others, and/or we find ourselves having to defend ourselves in a court of law or engaged in some other type legal process.

As we grow up in the United States through our childhood on into our adulthood we are taught and led to believe that the constitution and these amendments mean something, that the constitution and its amendments are more than mere fancy words written on paper, that they are absolute, unwavering, and are to be followed by every law enforcement agent, prosecuting attorney and judge throughout our nation, and that if these factions of our government do not abide by these rules, then they are not allowed to proceed further in the prosecution of an individual.

We are instilled with the belief that this court is the referee of all referees whose function is to reset the rules and call foul when the rules have been bent and the courts below run astray. Thus the Petitioner prays that what he has been taught and led to believe in of this court and our constitution are true and reflected in the results of this courts review of this case at hand.

Cases like the petitioners are paramount as to the collective affect that the decisions of the courts below have. These decisions strike at and tear at the core beliefs that construct the collective conscience of our nation and strike at the foundation of our constitutional rights and the protections it offers.

Most citizens of the United States of America at the end of their day whether it was a good day or a bad day believe that our nation is the greatest nation and civilization to have ever existed in the known history of the world.

What makes this latter belief true for most of us is the democratic form of government that we are able to enjoy through the formulation and construction of our Constitution, and to the individual Amendments that serve as the levees and protective barriers installed to protect against the establishment of a tyrannical government and also to keep the government that we do have in check and from entering into our lives, our beliefs, and most of all our homes unwanted and unwarranted.

Before we move forward into the further statement of the Petitioners case, an introduction of the Petitioner is in order. Kenneth N. McFall is the pro se petitioner who stands truly and respectfully before this court through this petition hoping to have his voice heard, his case reviewed and the miscarriage of justice in it all seen.

The Petitioner is a sixty year old male and the quintessential hard working blue collar citizen of the United States of America. He is from a small town in southern Indiana situated on the Ohio River where he since the age of 13 has been a productive member of family and his community.

Kenneth McFall has maintained gainful employment, and paid taxes every year since he was 13 years old, he has also raised his family there, and there he has also buried a mother, father, and a brother, he is an individual that one would believe that our laws and constitutional amendments are especially meant to provide protection.

If Mark Twain were alive today and lived on the Ohio River rather than the Mississippi, and had created the All-American characters he did then, Kenneth McFall and his small town would surely fit the stories that he would write.

Like one of Twain's characters, McFall is a likable individual who is a little rough around the edges who has all the American problems and the struggles in life that give each of us our own individual defining character, he has strived to be the best man he could be in an age and a society that isn't always so easy to live in and through.

As with many modern Americans the Petitioner had found himself in the grips of an addiction in which he slid into following the divorce from his wife and the deaths of his mother and father, the Petitioner had become a functional addict, and his addiction had not yet taken him in and out of trouble with the law like

it tends to do most individuals. This case here before you was the petitioners first arrest and conviction for anything other than one misdemeanor infraction for a driving offense that he had acquired years ago.

Under the review of this courts light the petitioner's believes this court will be able to see that On April 23<sup>rd</sup>, 2018, the Petitioners home was invaded and searched by police in a violation of Section I, Article II of the Indiana Constitution and the Fourth Amendment of the United States Constitution.

That the information used in the warrant affidavit authored by law enforcement was not credible, that the statements incorporated in it were either perjured, and or likely resulted from police battering the witness who allegedly provided them.

That these before mentioned facts are supported by the witness sworn testimony at depositions, that these facts and said witness were not allowed before the jury through the misconduct of the prosecution and the courts abuse of discretion.

That this conduct and abuse of discretion violated McFall's Constitutional Rights and denied him anything that resembled a fair trial.

That the Indiana Court of Appeals errored in not remanding the case for retrial and the Indiana Supreme Court errored in its denial to accept transferee. And that these decisions now can be used to bypass constitutional requirements established by this most honorable court.

### **Procedural History**

Law enforcement obtained a search warrant for McFall's residence based upon an anonymous tip and based upon the fact that an individual named Kellems was stopped and found in possession of methamphetamine after visiting McFall. ) Tr, Vol. III p. 151, 159, 202-03, 205).

During the ensuing search of McFall's residence, officers discovered marijuana and methamphetamine. (Tr. Vol. III p. 162-164,210). The marijuana weighed 7.92 grams. (Tr. Vol. III p. 246-47); State's Exhibit 8. The methamphetamine weighed a total of 2.11 grams. (Tr. Vol. III p. 245-46)

On April 24<sup>th</sup>, 2018, the State charged McFall with Counts I-II, Dealing in Methamphetamine, Level 3 Felonies, Count III, Possession of Methamphetamine, a Level 5 Felony, Count IV, Maintaining a Common Nuisance, a Level 6 Felony, Count V, Possession of Marijuana, a Class B Misdemeanor, and Count VI, Possession of Paraphernalia, a Class C Misdemeanor. (Appellant's App. Vol. II p. 11-16)

On May 24<sup>th</sup>, 2018, McFall filed a motion to suppress on the grounds that the search warrant affidavit did not articulate probable cause and that the search was unreasonable. (Appellant's App. Vol. II p. 33). The trial court denied this motion to suppress on June 13<sup>th</sup>, 2018. (Appellant's App. Vol. III p. 11).

On       Depositions of Kellems and Officers were held in attendance of McFall his defense counsel and Perry County Prosecuting Attorney Jason Koch. Where Kellems testifies that he did not make the statements to police that were included in the affidavit for probable cause in support of the search warrant for McFall's home. Kellems also testifies that he did not buy any drugs from McFall or see McFall in Possession of any drugs the day he was stopped after leaving McFall's home. Kellems also testifies he was battered by police in the course of his encounter with police that day.

Trial by jury was held in the Perry Circuit Court from August 6<sup>th</sup> through August 8<sup>th</sup>, 2018. (Appellant's App. Vol. II p. 8-9). On August 8<sup>th</sup>, 2018, the jury found McFall guilty as charged on all counts. (Appellant's App. Vol. II p.9, 120-25).

On August 28<sup>th</sup>, 2018, the trial court held a sentencing hearing. (Appellant's App. Vol. II p. 9). At the hearing, the trial court vacated the convictions under Counts II-IV based on the prohibition against double jeopardy. (Tr. Vol. IV p. 73-74). The trial court then sentenced McFall to eight (8) years on Count I; to 180 days on Count V; and to 60 days on Count VI. (Appellant's App. Vol. II p. 145). The trial court ordered all of these sentences to run concurrently. (Appellant's App. Vol. II p. 145).

On appeal, McFall raised the following issues: (1) that the search in this case violated the Fourth Amendment and Article I, Section II of the Indiana Constitution because the underlying search warrant affidavit lacked indicia of probable cause and because the search *was* unreasonable;

(2) that the trial court abused its discretion when it refused the defense the opportunity to call an alleged accomplice to testify in front of the jury even though the accomplice intended to plead the Fifth Amendment;

(3) That the trial court abused its discretion when it refused McFall's tendered instruction on possession with intent to deliver.

On April 29<sup>th</sup>, 2019, the Court of Appeals affirmed in all aspects. With regard to the first issue, the Court found McFall waived it by stating that he had "no objection" even after the trial court noted a continuing objection from McFall to all evidence seized under the warrant. *Slip op. at 12-13.*

With regard to the second issue, the Court held that McFall did not have the right to call Kellams as a witness just to have him plead the Fifth Amendment in front of the jury. *Slip op. at 15.*

Finally, with regard to the third issue, the trial court found that McFall's tendered instruction would have improperly focused the jury's attention on one piece of evidence. *Slip op. at 16-17.*

On June 18<sup>th</sup> 2018 the Petitioner was denied transfer for review of his case to the Indiana Supreme Court

## REASONS FOR GRANTING WRITT

**THE DECISION OF THE INDIANA COURT of APPEALS THAT THE TRIAL COURT DID NOT ABUSE ITS DISCRETION WHEN IT DID NOT ALLOW AN ALLEGED ACCOMPLICE AND THE PETITIONERS SOLE DEFENSE WITNESS TO TESTIFY IN FRONT OF JURY VIOLATED THE PETITIONERS SIXTH AMENDMENT AND FOURTEENTH AMENDMENT RIGHTS THIS RULING NOW ALLOWS FOR FURTHER SUCH VIOLATIONS of ACCUSED RIGHTS by THE STATE INDIANA AND PROVIDES AN AVENUE WHICH INDIANA PROSECUTORS CAN NOW BYPASS THE ACCUSED SIXTH AMENDMENT RIGHTS**

The prosecutors conduct violated the underlying views and principles that this court established in Brady vs. Maryland and violated a broad spectrum of the Sixth Amendment provisions when prosecutor moved to block Kellems from testifying at McFall's trial to prevent the jury from hearing a reiteration of Kellems deposition testimony.

The trial court abused its discretion when it did not allow Kellems to testify. McFall had the right through the Compulsory Cause to have Kellems provide this testimony to the jury in person so that the jury be able to look at the witness and to judge for itself through the manner which Kellems delivered his testimony if the witness was credible or worthy of believing.

Since Kellems was the foundation of the State of Indiana's case and was the petitioner's key defense witness the trial court's decision violated several provisions of McFall's Sixth and Fourteenth Amendment rights not to have allowed for Kellems to testify.

Kellems testimony at depositions was favorable to the defense and Kellems showed up at trial ready to testify on behalf of the defense. Kellems was the sole defense witness other than McFall himself. McFall's Fourteenth and Sixth Amendment rights were violated through a series of acts of misconduct by the prosecution and abuse of discretion by the judge.

The Prosecuting Attorney over stepped ethical boundaries in his efforts to encourage Kellems to invoke his Fifth Amendment protections against self-incrimination following the reminding and lecturing

of Kellems about the pending charges he was still facing and how he could be charged with perjury if he testified for McFall. Thus behavior by judge or prosecutor has been found unacceptable by this court in Webb vs. Texas

The Prosecuting Attorneys reminders and counseling were enough to drive Kellems (the sole witness called to testify by the defense) away from the stand and from in front of the jury and was deliberate intentional disruption and distorting of the judicial fact finding process that denied McFall due process of law when considering the effect Kellems sworn deposition testimony would have had to the jury's determination of reasonable doubt.

This Court established that if a Defendant in a state criminal prosecution is deprived of due process of law under Fourteenth Amendment, his conviction will be reversed, where (1) trial judge, on his own initiative when defense's sole witness was called, admonished witness, who was serving prison sentence, that he was not required to testify, that if he lied under oath, court would personally see that his case went to grand jury, that he could be convicted for perjury, and that if he lied on stand, he would probably have to serve more time and it would be held against him when he was considered for parole, (2) judge's threatening remarks, which were made in jury's absence, were directed only at defense's single witness, and implied that judge expected witness to lie, (3) witness refused to testify after judge's admonition, and (4) circumstances of case warranted conclusion that judge's threatening remarks effectively drove witness off stand; defendant's failure to object until after judge had completed his admonition to witness afforded no grounds for finding waiver of defendant's rights. Webb v Texas (1972) 409 US 95, 34 L Ed 2d 330, 93 S Ct 351

All 50 states have immunity statutes that are implemented on a regular basis by judges and prosecuting attorneys to allow a witness to testify truthfully and without the apprehension of saying something that can later be used against him or her.

Rarely in the criminal justice system is a witness who has provided or alleged to have provided vital information for the prosecution and or has testimony vital to the defense simply just allowed to just invoke the 5<sup>th</sup> Amendment and walk out of court room without being offered a grant of Immunity

McFall as a criminal defendant had a Sixth Amendment right to present evidence in his favor through Kellems testimony, and to present the information and testimony Kellems provided at his deposition, the prosecuting attorney had a duty not to intimidate to Kellems or interfere with his testimony and furthermore had a duty to enable and allow Kellems to testify without the worry of incriminating himself, this should have been done in the interest of truth and of justice. Most of all it should have been done to protect the integrity and image of modern juris prudence.

Obviously a person who testifies on behalf of an individual who the state is seeking to convict of a crime is not doing any favor for the state and may cause a witness to be apprehensive or in plainer words anxious or worried about the reaction of the state to their testimony for the defense, especially, if the witness is actually of the criminal lifestyle or facing legal issues of their own those fears may be more realistic rather than imagined, for this reason courts have generally held that *any* oppression of a defense witness by the prosecution is a violation of the defendant's constitutional rights .

This court has ruled that the accused due process is violated when the interaction of judge or prosecutor (such as in McFall's case) deters a witness from testifying. The prosecutor's broad discretion to refuse immunity *is limited* by the defendant's due process rights. *A defendant's due process rights are violated* when the prosecutor abuses his authority to immunize witnesses with the intention of distorting the fact-finding process. . *United States v. Schweich's*, 971 F.2d 1302, 1315. Although a court cannot order the prosecution to immunize a defense witness, courts can dismiss an indictment where the prosecutor's refusal to grant immunity has violated the defendant's right to due process. Here, McFall is arguing that the prosecutor interfered with his Sixth Amendment guarantee "to have compulsory process for obtaining witnesses in his favor." By driving Kellems from the stand and not allowing Kellems to testify under a grant of immunity. *United States v. Herrera-Medina*, 853 F.2d 564



U.S. Constitution Amendment VI. "This means that the defendant has a right to present his defense and to call witnesses favorable to him without interference by the prosecutor or other agencies of government." Prosecutorial Misconduct, *supra*. In *Washington v. Texas*, 388 U.S. 14, 18 L. the Supreme Court, speaking through Chief Justice Warren, outlined the Sixth Amendment ramifications of this issue.

The right to offer the testimony of witnesses, and to compel their attendance, if necessary, in plain terms is the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony McFall had the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law. *Webb v. Texas*, 409 U.S. 95, 34 L. Ed. 2d 330, 93 S. Ct. 351 (1972)

The State of Indiana in its decisions ruled that McFall could not be allowed to call his co-defendant in front of the witness just to have him invoke the Fifth Amendment as a defense strategy even though courts have ruled that doing so is a viable defense strategy, and if that were McFall's intentions the trial court not allowing Kellems to testify denied McFall the right to present a defense to the jury.

Here the opposite is true, McFall fully expected Kellems to testify at trial as he did freely at the depositions and did not expect Kellems to invoke his Fifth Amendment rights. Especial after Kellems made the declarations that he wanted to testify and wanted the truth of the matter to be known.

Whatever the States argument may have been the fact as this court must be able to see under its light is that McFall's Sixth Amendment and Fourteenth Amendment Rights were violated by the courts abuse of discretion and prosecutors misconduct and that McFall Was denied a fair trial.

Under Sixth Amendment right of compulsory process, defendant has general right to place on stand any witness who is physically and mentally capable of testifying to events that witness had personally

observed, and whose testimony would have been relevant and material to defense. *Washington v Texas* (1967) 388 US 14, 18 L Ed 2d 1019, 87 S Ct 1920

Criminal defendants, under Compulsory Process Clause, have right to government's assistance in compelling attendance of favorable witnesses at trial and right to put before jury evidence that might influence determination of guilt. *Pennsylvania v Ritchie* (1987) 480 US 39, 94 L Ed 2d 40, 107 S Ct 989, 22 Fed Rules Evid Serv 1 (criticized in *Wallace v Price* (2002, WD Pa) 2002 US Dist LEXIS 19973)

Sixth Amendment right to have compulsory process for obtaining witnesses is violated when state arbitrarily denies defendant opportunity to put on stand witness whose testimony would be relevant and material to his defense. *Singleton v Lefkowitz* (1978, CA2 NY) 583 F.2d 618, cert den (1979) 440 US 929, 59 L Ed 2d 486, 99 S Ct 1266

Exclusion of relevant exculpatory evidence infringes upon Sixth Amendment right of accused to present witnesses in his own defense; once such right is implicated, state must offer sufficiently compelling purpose to justify practice complained of. *Pettijohn v Hall* (1979, CA1 Mass) 599 F.2d 476, cert den (1979) 444 US 946, 62 L Ed 2d 315, 100 S Ct 308 and (criticized in *Cochran v Merrill* (2001, DC Me) 2001 US Dist LEXIS 11467)

Sixth Amendment establishes right of defendant to require presence of witness at trial and implies reciprocal right for government. *Harris v White* (1984, CA8 Mo) 745 F.2d 523. The State of Indiana in this ruling has arbitrarily created a ruling that gives the State of Indiana the authority to allow individuals connected to common alleged criminal activities to testify or provide for the State of Indiana only and in turn prohibits them from testifying for each other in a manner similar to a Texas statute this court found to violated the accused constitutional rights in *Washington v. Texas*, 388 U.S. 14, 18.

McFall seeks reversal of conviction and remand to trial court and the annulment of the lower courts decisions so that said decisions do not enable the further violation of Citizens of the State of Indiana's rights that are guaranteed by the Constitution of the United States of America such McFall's has been by the State of Indiana through the case at hand.

**THE COURTS BELOW HAVE CONSTRUCTED THE PRESERVATION RULE INTO A TRAP THAT WILL SNAR THE UNWARY AND HAMPER THE JUDICIAL FACT FINDING PROCESS AND APPEALS PROCESSSS IN THE STATE OF INDIANA**

The raid on McFall's home by police resulted from a search warrant that was based on information from unverified sources that were not credible in addition to containing statements police knew to be false or that resulted from the battering of the witness who provided them.

The statements contained in the warrants supporting affidavit clearly violated the underlying views and principles established by this court in *Franks vs. Delaware* and other cases before this court regarding the quality and credibility of the information used in a warrant affidavit.

The courts below allowed for the clear violation of McFall's Fourth Amendment and Section One Article Eleven rights of the Indiana Constitution in its decision that McFall's attorney waived McFall's rights to appeal through the actions he undertook during the trial that were prescribed by the judge to McFall's attorney concerning the objection of evidence during the trial.

The ruling takes the understandable misunderstanding created in the mind of the attorney by the judge's instructions, and use the confusion to prohibit McFall from challenging the evidence seized from his home. This court and federal courts of appeals throughout the United States routinely decline to overrule a lower court's finding of waiver of appeal rights *when* its show that the waiver was made on *solid grounds*, and not under the shaky and shadowy circumstances as those of McFall's case and jury trial.

The Courts below and This Court have long refused to use rules regarding "waiver" to create technical traps for the unwary, and as this court and the courts below have stated and held the view that, rules regarding preservation of appellate issues are not to create a procedural traps but to enhance trial fairness and to facilitate appellate review. The courts have held that an objection is sufficient to preserve an issue for later appeal where it fully alerts the trial court to the legal issues being raised

Here the petitioner made extensive pretrial objections, clearly alerting the trial court to the error he wanted to preserve and later challenge: the lack of probable cause in the search warrant affidavit, and *any* evidence seized in violation of the Fourth Amendment and Section One Article Eleven of the Constitution of the State of Indiana

(Tr. Vol. III p.4-8) McFall filed a *pretrial motion to suppress* in which he argued that *all* evidence found and seized from his home pursuant to this warrant must be excluded from trial under the Fourth Amendment of the U. S. Constitution and Article I Section 11 of the Indiana Constitution. Because the search warrant was not supported by sufficient probable cause and because the search was unreasonable.

(Appellant's App. Vol.11 p 33). At the pretrial hearing on the motion to suppress, McFall asserted his right to appeal this evidence through the raising of these arguments. (Tr. Vol.III p. 4-11) Then again at trial Mcfall objected when the State of Indiana attempted to introduce evidence obtained pursuant to the warrant.

Furthermore the trial court acknowledged McFall's previous arguments when McFall asked whether the trial court would prefer an objection each time such evidence was introduced or a single continuing objection. The trial court stated that it would prefer to note a continuing objection, did so, and overruled the objection.

At one point in the trial defense counsel uttered no objection to certain evidence meaning other than the evidence covered by the continuing objection and pretrial motion. The Appeals Court rested its decision on that one utterance of an overwhelmed Attorney taking his first venture through the process of a jury trial.

Given these facts, and given the fact that the trial court itself specifically expressed its preference that McFall not object to each and every piece of evidence seized under the warrant, it defies credulity to believe that the trial court was not completely aware of the specific issue being raised.

In Indiana for over a century the Indiana Supreme Court had held that it is contrary to the spirit of modern jurisprudence to permit technical rules of procedure to operate as mere traps for the unwary.” In the century and several decades that this view has been held the Indiana Supreme Court along with other State and also Federal Courts throughout our nation have declined to interpret rules of procedure such that they become traps for the unwary, that is until the Indiana Court of Appeals averted course and sided on the side of the State in McFall’s case where arbitrarily it created such a trap that has been allowed to stand by the courts below.

This trap is now operational and functioning and goes against the fundamental fairness and established views of modern day *juris prudence* and of this court. Most all the court’s decisions below creates a rule that prohibits a defendant from making the slightest of technical errors while still allowing the police to blatantly overreach, and freely violate procedural rules in the arrests and searches of citizens, or also allows the evidence that was seized illegally be salvaged under the cover of good faith.

If Justice is blind and *juris prudence* unbiased then what’s good for the goose then must be good for the gander? The rules that have been established on the foundation of our constitutional amendments are intended to level the playing field, not create an unfair advantage to a process that no matter the intention of fairness is inherently tilted in the favor of the State.

If the State is allowed to recover from a technical error or over stepping of boundaries of significant proportions then shall a defendant whose attorney who uttered one wrong phrase of word after making clear his intent clear in an agreement with the judge, and must be seen as a misstep while walking upon uneven and shaky grounds.

The trial court in this case expressly declared that it would preferred to note a continuing objection rather than hear individual objections throughout trial (*Tr.Vol.III p.163*). Defense Counsel’s continuing objection was based upon a *motion in limine* and extensive pretrial arguments- could not have been clearer or solidly articulated.

Defense counsels subsequent declarations of “no objection” was simply honoring the courts desire that he not reiterate objections and hamper the course of the trial. Under such circumstances this court should find that McFall pretrial motions and continuing objection was sufficient and that the courts below should have reached the merits of Mc Falls argument.

McFall seeks reversal of conviction and remand to trial court and the annulment of the lower courts decisions so that said decisions do not enable the further violation of citizens of the State of Indiana’s rights which are guaranteed by the Constitution of the United States of America such McFall’s has been by the State of Indiana through the case at hand.

**THE COURT DOWN BELOW RAN AFOUL OF THEIR OWN PRECEDENTS AND LONG ESTABLISHED VIEWS OF THIS COURT THAT A DEFENDANT IS ENTITLED TO AN INSTRUCTION ON THEORY OF DEFENSE**

At petitioner's trial, *Defense Counsel tendered the following instruction: "Because possession with the intent to deliver is a mental state, it can be established only by considering the behavior of the relevant actor, the surrounding circumstances, and the reasonable inferences to be drawn therefrom.*

*Circumstantial evidence of intent may support a conviction. Possession of a large amount of narcotic substance is circumstantial evidence of the intent to deliver. The more narcotics a person possesses, the stronger the inference that he intended to deliver it rather than consume it personally."*

(Tr. Vol. IV p. 43) The trial court refused this instruction without explaining its reasons for doing so. (Tr. Vol. IV p. 43). The Court of Appeals found that instruction, while a correct statement of the law, unnecessarily "emphasized one piece of evidence, namely the amount of methamphetamine that McFall possessed." *Slip op.* at 16-17. However,

The Petitioner's entire defense rested on the proposition that he did not possess enough methamphetamine to demonstrate intent to deliver. *See e.g.* (Tr. Vol. IV p. 53-56).

It is well-settled that a defendant is entitled to an instruction on any theory of defense which has some foundation in the evidence, even such evidence is weak or inconsistent. *Hernandez v. State*. McFall's proffered instruction was central to his defense, and he was denied it in contravention of *Hernandez* and the well-settled principle that a defendant is entitled to an instruction on his theory of defense. Because the Court below contravened *Hernandez* in this matter, the trial court in this decision denied the petitioner his Sixth Amendment constitutional right to a fair trial, and Fourteenth Amendment right to be found guilty beyond a reasonable doubt. The Indiana Court of Appeals decision went against its own Supreme Court and this courts views and rulings concerning this matter.

McFall seeks reversal of conviction and remand to trial court and the annulment of the lower courts decisions so that said decisions do not enable the further violation of Citizens of the State of Indiana's rights that are guaranteed by the Constitution of the United States of America such McFall's has been by the State of Indiana through the case at hand.

## CONCLUSION

McFall now rest his case in the light of this most honorable and supreme court for its review and prays for what decision this court deems just and correct.

Respectfully Submitted

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KENNETH N. MCFALL

BRANCHVILLE CORRECTION FACILITY  
21390 OLD STATE ROAD #37  
BRANCHVILLE INDIANA 47514

I Kenneth N. McFall Swear and affirm under the penalties of perjury that all statements and information asserted in this petition and or attached to said petition are true and factual representations to the best of my ability, knowledge and recollection.

I affirm under penalties of perjury that a true and accurate copy of this petition has been served upon all listed and interested parties.

STATE OF INDIANA )

) SS:

COUNTY OF PERRY )

Before me, Stephanie Chapman, a Notary Public in and for Perry County, State of Indiana, Personally appeared Kenneth McFall, D.O.C. # 26954, and he being first duly sworn upon his oath, says that the foregoing statements are true.

My Commission Expires:

04 10 2027

Month

Day

Year

Stephanie L. Chapman

Notary signature

Perry  
County of Residence