

No. \_\_\_\_\_

---

IN THE SUPREME COURT OF THE UNITED STATES

---

October Term, 2020

---

**JOSHUA CATO,**  
Petitioner

v.

**UNITED STATES OF AMERICA,**  
Respondent

---

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

---

PETITION FOR WRIT OF CERTIORARI

---

JOHN A. KUCHERA  
210 N. 6th St.  
Waco, Texas 76701  
(254) 754-3075  
(254) 756-2193 (facsimile)  
johnkuchera@210law.com  
SBN 00792137

*Attorney for Petitioner*

### Question Presented

1. Under *McFadden v. United States*, ---U.S.---, 135 S.Ct. 2298 (2015), when a defendant pleads guilty to “knowingly” distributing a controlled substance (or conspiring to do so), must the trial court, in determining that the defendant understands the nature of the charge and making sure there is a factual basis in support of the plea, make sure the defendant understands and admits either (1) although he didn’t know the name of the substance, he knew it was listed on the federal drug schedules, or (2) he actually knew the identity of the substance?

## Table of Contents

	Page
Question Presented	ii
Table of Contents	iii
Table of Authorities	iv-v
Citation to Opinion Below	1
Jurisdiction	1
Rules of Criminal Procedure	2
Statement of the Case	3-5
<u>First Reason for Granting the Writ:</u> <i>McFadden v. United States</i> changed the legal landscape. It should no longer be sufficient for a defendant to simply state that he “knowingly” violated 21 U.S.C. § 841(a).	6-7
<u>Second Reason for Granting the Writ:</u> This Court should make it clear that <i>McFadden</i> applies to all controlled substance offenses, not just drug analogue offenses.	7-9
Conclusion	9
Certificate of Service	10
Appendix A: Opinion of Fifth Circuit Court of Appeals	

## Table of Authorities

### Page(s)

#### Cases

<i>Dowell v. Quintana</i> , 2018 U.S. App. LEXIS 11736 (6th Cir. 2018).....	8
<i>McFadden v. United States</i> , ---U.S.--, 135 S.Ct. 2298 (2015).....	6, 7, 8, 9
<i>United States v. Makkar</i> , 810 F.3d 1139 (10th Cir. 2015).....	7
<i>United States v. McKenzie</i> , 686 F. App'x 77 (2d Cir. 2017) .....	8
<i>United States v. Newbold</i> , 686 F. App'x 181 (4th Cir. 2017).....	7
<i>United States v. Torres</i> , 716 F. App'x 379 (5th Cir. 2018).....	8
<i>United States v. Tuttle</i> , 646 F. App'x 120 (2d Cir. 2016) .....	8
<i>United States v. Way</i> , 2015 U.S. Dist. LEXIS 168419 (E.D. Cal. Dec. 15, 2015) (unpublished) .....	7
<i>Walker v. United States</i> , 731 F. App'x 88 (3d Cir. 2018) .....	8

#### Statutes

21 U.S.C. § 841(a)(1).....	6, 8
----------------------------	------

#### Other Authorities

Fed. R. Crim. P. 11(b)(1) .....	2
---------------------------------	---

Fed. R. Crim. P. 11(b)(3) .....	2
---------------------------------	---

## **PETITION FOR WRIT OF CERTIORARI**

Petitioner Joshua Cato respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

### **Citation to Opinion Below**

The opinion of the United States Court of Appeals for the Fifth Circuit affirming Cato's conviction and sentence is styled: *United States v. Cato*, \_\_\_ F. App'x \_\_\_, 2020 U.S. App. LEXIS 28471 (5th Cir. 2020).

### **Jurisdiction**

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Cato's conviction and sentence was announced on September 9, 2020 and is attached hereto as Appendix A. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the date of the judgment. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

## Rules of Criminal Procedure

### **Fed. R. Crim. P. 11(b)(1)**

Before the court accepts a plea of guilty or nolo contendere, the defendant maybe placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

. . .

(G) the nature of the charge to which the defendant is pleading;

### **Fed. R. Crim. P. 11(b)(3)**

Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

## Statement of the Case

Cato ostensibly plead guilty to knowingly conspiring to distribute and possess with intent to distribute fifty grams or more of “actual” methamphetamine, in violation of Title 21 U.S.C. §§ 841(a)(1), 841(b)(1)(A), and 846. The following exchange comprises the totality of what could possibly be construed as an attempt by the magistrate court to make sure Cato understood of the nature of the charge to which he was pleading:

Magistrate Court: I'm going to go over this with you on the record. A federal grand jury, sitting here in the Midland-Odessa Division, returned an indictment against you on June 26, 2019. It's a one-count indictment. In that indictment, the grand jury charges in Count 1:

That beginning on or about March 1st, 2019 and continuing until on or about June 4th, 2019, in the Western District of Texas, the defendants, Joshua Cato, Stevin Webb, Randy McClain and Justyce Brianna Small, did combine, conspire, confederate, and agree together, with each other, and others, known and unknown to the grand jury, to possess with intent to distribute and distribute a controlled substance, which offense involved 50 grams or more of actual methamphetamine, contrary to Title 21, United States Code, Sections 841(a)(1) and 841(b)(1)(A), in violation of Title 21, United States Code, Section 846.

...

Do you understand that charge, Mr. Cato, in that indictment?

Cato: Yes, sir. Absolutely.

The relevant portions of the factual basis set forth in the written plea agreement are as follows:

On June 2, 2019 Officers with the Midland Police Department responded to 4517 North Midland Drive (Walmart) in reference to a theft by a male and female, who were already detained by loss prevention. During the course of the investigation Officers learned there was another male subject later identified as Stevin Webb, who was with the above-mentioned individuals prior to them being detained by loss prevention. Surveillance footage showed Webb had exited the store and entered into a white 2007 Ford pickup Texas paper-tag 369-00C7 in the parking lot. Surveillance footage also showed Webb was possibly in possession of a firearm in his waistband and appeared to be under the influence. *The male subject involved in the theft, who was identified as JOSHUA CATO, had the keys to the pickup on his person.*

After the pickup was cleared by EOD, Officers continued to search the vehicle. During that time Officers were advised by Webb that there was a magnetized box under the truck that contained Methamphetamine. Officers in fact located the above-mentioned box which contained approximately 95.6 grams of Methamphetamine and a digital scale.

...

~~Cato admitted to conspiring with Webb and others to possessing with intent to distribute and distributing actual methamphetamine (including the 95.6 grams recovered from the vehicle)[.]~~

The magistrate judge confirmed at arraignment that it was Cato's decision to take out the lined out portion of the factual basis because he believed it to be incorrect.

Cato argued on appeal (among other things) that the factual basis did not support his guilty plea because the magistrate court did not articulate the elements of the crime to which Cato was pleading, did not ask Cato to state in his own words the factual conduct underlying the conviction, and given that the lined-out portion of the factual basis removed from consideration, nothing in the remaining portion established that Cato admitted to agreeing with anyone to do anything, let alone possessing methamphetamine with the intent to distribute it.

The Fifth Circuit disagreed:

[T]he factual basis . . . establish[ed] every element of the offense to which Cato pleaded guilty.

*First Reason for Granting the Writ:* *McFadden v. United States* changed the legal landscape. It should no longer be sufficient for a defendant to simply state that he “knowingly” violated 21 U.S.C. § 841(a).

Title 21 U.S.C. § 841(a) provides in relevant part: “[I]t shall be unlawful for an person *knowingly* or intentionally to . . . distribute . . . or possess with intent to distribute . . . a controlled substance[.]” 21 U.S.C. § 841(a)(1). The mens rea of “knowledge” in controlled substance cases is now a term of art. In *McFadden v. United States*, ---U.S.---, 135 S.Ct. 2298 (2015), the Supreme Court addressed, among other things, what is required in terms of proof to convict someone of “knowingly” manufacturing, distributing, possessing, etc., a controlled substance. The court held there are only two ways the government can prove that a defendant “knowingly” associated himself in some *illegal* way with a federal controlled substance: *McFadden*, 135 S.Ct. at 2304. The Supreme Court rejected the government's proposed broader definition that the knowledge requirement would be met if the “defendant knew he was dealing with an illegal or regulated substance under *some* law.” *Id.* at 2306.

*McFadden* changed the legal landscape, not just for drug analog cases, but also for Controlled Substance Act cases. *See United States v. Newbold*, 686 F. App'x 181, 183 (4th Cir. 2017) (*McFadden* clarified the knowledge element for the crime of distributing a controlled substance); *United States v. Way*, 2015 U.S. Dist. LEXIS 168419, at \*5 (E.D. Cal. Dec. 15, 2015) (unpublished) (“Granting motion for grand jury transcripts in CSA case where “[t]he Supreme Court's decision in *McFadden* altered the element of knowledge for the crimes charged.”); *United States v. Makkar*, 810 F.3d 1139, 1146 (10th Cir. 2015) (An Analogue case but “*McFadden* imposes a far more challenging mens rea requirement than the government is willing now to admit.”).

**Second Reason for Granting the Writ: This Court should make it clear that *McFadden* applies to all controlled substance offenses, not just drug analogue offenses.**

The *McFadden* Court could not have been more clear in holding that the opinion applied to all controlled substance cases:

*We hold that §841(a)(1) requires the Government to establish that the defendant knew he was dealing with ‘a controlled substance.*

*McFadden v. United States*, 135 S. Ct. 2298, 2302 (2015). Nonetheless, at least four circuits have suggested or held that the opinion applies only to drug analogue cases. *See United States v. Torres*, 716 F. App’x 379, 380 (5th Cir. 2018) (“It is not clear or obvious that *McFadden* extends beyond application of the Controlled Substance Analogue Enforcement Act or that it changes our precedent in non-analogue cases.”); *Dowell v. Quintana*, 2018 U.S. App. LEXIS 11736, at \*4 (6th Cir. 2018) (“The district court correctly concluded that *McFadden* does not apply to Dowell’s case because he was not charged with attempting to possess a controlled substance analogue.”); *Walker v. United States*, 731 F. App’x 88, 90 (3d Cir. 2018) (“In *McFadden*, the Supreme Court addressed the mens rea requirement for possession of a controlled substance analogue (bath salts). The Supreme Court did not change the substantive law for an offense involving a non-analogue controlled substance[.]”); *United States v. Tuttle*, 646 F. App’x 120, 121 n.1 (2d Cir. 2016) (“*McFadden* was not a supervening decision as it dealt with prosecutions involving a drug analogue whereas Tuttle’s offenses involved a scheduled controlled substance.”); *United States v. McKenzie*,

686 F. App'x 77, 79 (2d Cir. 2017) (“McKenzie misunderstands *McFadden*, "which held that in prosecutions under the Analogue Act the Government must prove a defendant knew he was dealing with a substance regulated under the Analogue Act." . . . The controlled substances involved in McKenzie's charge were not analogue drugs.”).

### Conclusion

For the foregoing reasons, Petitioner Cato respectfully urges this Court to grant a writ of certiorari to review the opinion of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ John A. Kuchera  
JOHN A. KUCHERA  
210 N. 6th St.  
Waco, Texas 76701  
(254) 754-3075  
(254) 756-2193 (facsimile)  
johnkuchera@210law.com  
SBN. 00792137

*Attorney for Petitioner*

**Certificate of Service**

This is to certify that a true and correct copy of the above and foregoing Petition for Writ of Certiorari has this day been mailed by the U.S. Postal Service, First Class Mail, to the Solicitor General of the United States, Room 5614, Department of Justice, 10th Street and Constitution Avenue, N.W. Washington, D.C. 20530.

SIGNED this 12th day of October 2020.

/s/ John A. Kuchera  
John A. Kuchera, Attorney for  
Petitioner Joshua Cato