

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2020

JOSE LUPE CORRALL,
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

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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?

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PETITION FOR WRIT OF CERTIORARI

Petitioner Jose Lupe Corral 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 Corral's conviction and sentence is styled: *United States v. Corral*, ___ F. App'x ___, 2020 U.S. App. LEXIS 38986 (5th Cir. 2020).

Jurisdiction

The opinion of the United States Court of Appeals for the Fifth Circuit affirming the Corral's conviction and sentence was announced on December 11, 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

Corrall ostensibly plead guilty to conspiracy to (1) possess with intent to manufacture and (2) possess with intent to distribute a controlled substance (methamphetamine) in violation of 21 U.S.C. §§ 841(a)(1) and 846. Corrall is a citizen of Mexico who completed the fifth grade in Mexico and who does not speak English. The following exchange comprises the totality of what could possibly be construed as an attempt by the magistrate court to make sure Corrall understood of the nature of the charge to which he was pleading; i.e. that he knew the substance at issue was in fact a controlled substance:

Magistrate Court: I'd like for us to now turn and talk about your Factual Basis; and I have the original of that in my hands as well. If I turn to the final page of this document, I'm just going to ask: Mr. Corrall, is that your signature there?

Corrall: Yes.

Magistrate Court: And did you have this Factual Basis translated into your own language before you signed it?

Corrall: Yes.

Magistrate Court: So, Mr. Corrall, having gone over each of these changes, I'm just going to confirm at this time. Are you comfortable that you understand everything in this Factual Basis, sir?

Corrall: Yes.

Magistrate Court: If I can ask the government to please read it into the record at this time.

AUSA: Yes, your Honor. The defendant, Jose Lupe Corral, hereby stipulates and agrees that at all times relevant to the Indictment herein, the following facts were true:

...

[T]hat Jose Lupe Corral and one or more persons in some way or manner made an agreement to commit the crime charged in Count 1 of the Indictment, to knowingly and intentionally possess with the intent to manufacture and distribute 4.5 kilograms or more of methamphetamine (actual);

[T]hat Jose Lupe Corral knew the unlawful purpose of the agreement and joined in it with the intent to further it;

T]hat Jose Lupe Corral knew that the amount involved during the term of the conspiracy involved 4.5 kilograms or more of methamphetamine (actual). This amount was involved in the conspiracy after the defendant entered the conspiracy, was reasonably foreseeable to the defendant, and was part of jointly undertaken activity;

T]hat Jose Lupe Corral's role in the conspiracy was to supply co-conspirators with kilogram quantities of methamphetamine from various sources which would then be distributed to other co-conspirators and codefendants during the term of the conspiracy in the Eastern and Northern Districts of Texas.

Magistrate Court: Notwithstanding that I have this Factual Basis, I am still going to ask for you to tell me in your own words. What did you do in this case? What was your role?

Corral: I delivered to the other person so I can help them to bring the meth to Houston.

Magistrate Court: *And were you aware that the substance that you were assisting in distributing or moving was methamphetamine?*

Corrall: Well, *I didn't know what it was; but I did know that it was drugs.*

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Magistrate Court: So, I'll ask both government and defense counsel at this time. Having had the Factual Basis read into the record *as supplemented with Mr. Corrall's statements here in open court*, are you each satisfied there is a Factual Basis to support this plea? Are there any further questions that the government would care to ask at this time?

AUSA: I just want to confirm Mr. Corrall did know that they were drugs -- there were drugs that he was transporting.

Corrall: Yes.

Magistrate Court: And, so, *you've now come to learn, sir, that the drugs that you were transporting was methamphetamine; is that correct?*

Corrall: *Yes.*

Corrall argued on appeal that the factual basis did not support his guilty plea because his own words established only that he was transporting “drugs.” He did not admit – as required by *McFadden v. United States*, ---U.S.---, 135 S.Ct. 2298 (2015) – (1) that he didn’t know the name of the substance, but knew it was listed on the federal drug schedules, or (2) he actually knew the identity of the substance.

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 Corral 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,

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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 21st day of December 2020.

/s/ John A. Kuchera
John A. Kuchera, Attorney for
Petitioner Jose Lupe Corral