

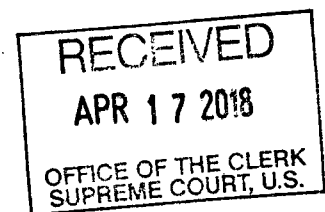
No: _____

IN THE
SUPREME COURT OF THE UNITED STATES
District Court No: 5:16-cv-603-oc-10PRL
Recent Appeal No: 17-14018-B

Benjamin Tillman,
Petitioner,

vs

UNITED STATES OF AMERICA
Respondent.



ON PETITION FOR A WRIT OF CERTIORARI TO THE
ELEVENTH CIRCUIT COURT OF APPEALS FROM THE
DENIAL OF A 28 U.S.C. § 2241 PETITION IN THE
MIDDLE DISTRICT OF FLORIDA

Benjamin Tillman
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P.O. Box 1032
F.C.I. Coleman-
Medium
Coleman, FL. 333521

QUESTIONS PRESENTED

A.

IS A PERSON IN FEDERAL CUSTODY STILL ENTITLED TO FILE AN APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. § 2241 AND/OR 28 U.S.C. § 2255(e) (AFTER) THE ELEVENTH CIRCUIT COURT OF APPEALS HOLDING IN McCarthan v. Dir. of Goodwill Industries-Suncoast Inc., 2017 U.S. App. Lexis 4485 (11th cir. 2017) CONSISTENT WITH HIS (1ST AMENDMENT) RIGHTS TO "PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES" WHEN PRESERVED AND UNIQUE CIRCUMSTANCES IN HIS CASE SUPPORTS THAT HE'S "ACTUALLY INNOCENT" OF A CRIMINAL STATUTE (STATUTORY INTERPRETATION) THAT'S INTERVENING AND RETROACTIVELY APPLICABLE. SEE McFadden v. U.S. 135 S. Ct. 2298 (2015) AND FURTHER SUPPORTED BY CIRCUIT COURT OF APPEAL COURTS. SEE U.S. v. Terry Pierre Louis 2017 U.S. App. Lexis 12298 (11th cir. 2017); U.S. v. Makkar 810 F. 3d 1139 (10th cir. 2015)?

B.

WHETHER THIS HONORABLE COURT WILL FINALLY SET PRECEDENT IN A 28 U.S.C. § 2255(e) PROCEEDINGS AND/OR THE "SAVING CLAUSE TEST" APPLIED IN A 28 U.S.C. § 2241 PROCEEDINGS, BECAUSE THE TENTH CIRCUIT AND ELEVENTH CIRCUIT COURT OF APPEALS ARE SPLIT FROM ALL OTHER CIRCUIT COURTS OF APPEALS ON THIS MATTER AND HAS FORECLOSED ANY (STATUTORY INTERPRETATION) HOLDINGS ANNOUNCED FROM THIS COURT. SEE Prost v. Anderson, 636 F. 3d 578 (10th cir. 2011) AND McCarthan v. Dir. of Goodwill Industries-Suncoast Inc., 2017 U.S. App. Lexis 448 (11th cir. 2017)?

TABLE OF CONTENTS

QUESTIONS PRESENTED.....	i
TABLE OF CONTENTS.....	ii
LIST OF PARTIES.....	iii
TABLE OF AUTHORITIES.....	iv
REPORTS OF OPINIONS.....	vii
JURISDICTION.....	viii
STATEMENT OF CASE.....	ix
REASON FOR GRANTING THE WRIT.....	1
QUESTIONS/ARGUMENTS PRESENTED.....	16
CONCLUSION.....	23
CERTIFICATE OF SERVICE.....	23

LIST OF PARTIES

All parties do not appear in the caption of the case on cover page. However, a list of parties and the proceeding in the court whose judgment is the subject of this petition is as follows:

1) DISTRICT JUDGE IN LOWER

COURT PROCEEDING:

WM. TERRELL HODGES

2) MAGISTRATE JUDGE:

PHILLIP R. CAMMENS

3) WARDEN, FCC COLEMAN:

M. OCASIO

4) U.S. ATTORNEY:

JEFFREY S. DOWNING

5) Petitioner:

Benjamin Tillman.

TABLE OF AUTHORITIES CITED

Pages

<u>Bryant v. Warden</u> , 738 F. 3d 1253 (11th cir. 2013)	x
<u>McCarthan v. Director of Goodwill Industries-Suncoast Inc.</u> , 851 F. 3d 1076, 1079 (11th cir. 2017)	i, x, 16, 17, 18, 19, 20, 23
<u>McFadden v. U.S.</u> , 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015)	3
<u>Tillman v. U.S.</u> , 535 U.S. 1030, 152 L. Ed. 2d 644 S. Ct. (2002)	i, ix, x, 1, 4, 9, 10, 11, 12, 13, 14, 15, 16, 18, 19
<u>Tillman v. U.S.</u> , 98-5339 S. Ct. (October 5, 1998)	8
<u>U.S. v. Terry Pierre Louis</u> , 2017 U.S. App. Lexis 12298 (11th cir. 2017)	8
<u>U.S. v. Stanford</u> , 2016 U.S. App. Lexis 9108, 2016 (2016)	i, 9, 10, 16, 18
<u>U.S. v. Bay's</u> , 2017 U.S. App. Lexis 3419 (5th cir. 2017)	10, 16, 18
<u>U.S. v. Makkar</u> , 810 F. 3d 1139 (10th cir. 2015)	11
<u>U.S. v. Al-Omari</u> , 2016 U.S. Dist. Lexis 72645 (Dist. of Mexico 2016)	1, 11, 16, 18
<u>U.S. v. Fisher</u> , 289 F. 3d 1329, 1337 (11th cir. 2002)	12
	13

<u>U.S. v. Baggett</u> , 954 F. 2d 674, 677 (11th cir. 1992)	13
<u>Schriro v. Summerlin</u> , 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004)	14
<u>Bousley v. U.S.</u> , 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998)	14
<u>Bailey v. U.S.</u> , 516 U.S. 137, 138, 116 S. Ct. 501, 503, 133 L. Ed. 2d 472 (1995)	
<u>Rivers v. Roadway Express Inc.</u> , 511 U.S. 298, 312-13, 114 S. Ct. 1510, 128 L. Ed. 2d 2117 (1994)	14
<u>O'Dell v. Netherland</u> , 521 U.S. 151, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997)	14
<u>Weeks v. U.S.</u> , 382 Fed. App. 845 (11th cir. 2010)	15
<u>U.S. v. Peter</u> , 310 F. 3d 709 (11th cir. 2002)	15
<u>McQuiggin v. Perkins</u> , 133 S. Ct. 1924, 1932-35, 185 L. Ed. 2d 1019 (2013)	16
<u>House v. Bell</u> , 547 U.S. 518, 522, 126 S. Ct. 2064, 165 L. Ed. 2d 1 (2006)	16
<u>Bernard v. F.C.C. Coleman Warden</u> , ____ Fed. Appx. ____, 2017 WL 1430875 (11th cir. April 24, 2017)	17
<u>Granada v. U.S.</u> 702 Fed. Appx. 938 (11th cir. 2017)	17

<u>Venta v. Warden</u> 2017 U.S. App. Lexis (11th cir. 2017)	17
<u>Humphrey's v. Warden</u> 699 Fed. App. 854 (11th cir. 2017)	17
<u>McDowell v. Warden F.C.C. Coleman-Medium</u> 694 Fed. Appx. 692 (11th cir. 2017)	17
<u>Prost v. Anderson</u> 636 F. 3d 578 (10th cir. 2011)	i, 19, 20, 23

REPORTS OF OPINIONS BELOW

The opinions of the United States Court of Appeals for the Eleventh Circuit Court of Appeals in this proceeding appears at: Appendix (A).

The opinion from the Middle District of Florida appears at: Appendix(B), (C), and (D).

This matter follows:

JURISDICTION

The date on which the United States Court of Appeals for the Eleventh Circuit Court of Appeals dismissing Petitioner's appeals for inability to pay the District Court filing fee. is at **Appendix(A)**. 90 days from **March 14, 2018** makes this writ of Certiorari timely filed until **June 14, 2018** and this Honorable Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF CASE

On August 21, 1996, a grand jury in the Federal District in Northern Florida returned a (four) count Indictment only charging and/or placing Petitioner in (Count One) violation of 21 U.S.C. § 841(A) and (b)(1)(iii).

On December 23, 1996, Petitioner was arraigned and the Jury Trial was then set for February 3, 1997. Following a (2) day Jury Trial, petitioner was found guilty on the (1) count Conspiracy to Possess Cocaine Base with the Intent to Distribute. Pre-Sentence Report was done and on April 18, 1997, the District Court imposed a sentence which included a term of imprisonment of 480 followed by 10 years supervised release.

Petitioner then appealed to the Eleventh Circuit Court of Appeals in which was denied March 4, 1998. A writ of certiorari was filed and denied on Oct. 4, 1998. See case No: 98-5339. Thereafter, petitioner submitted his initial 28 U.S.C. § 2255 petition which was further denied by the Northern District of Florida at Civil No: 3:99-cv-406/RV/SMN, and denied by the Eleventh Circuit (C.O.A.), and further denied by this Court.

Upon announcement in McFadden v. U.S. 135 S. Ct. 2298, 192 L. Ed. 2d. 260 (2015), petitioner submitted a (second or successive) 2255 petition reflecting McFadden in which the Eleventh Circuit Court of Appeals denied, but clearly

"stipulated" that McFadden was based on "Statutory Interpretation" "not" Constitutional Law" see Appendix (E). Thereafter, petitioner, while being housed at F.C.C. Coleman Medium filed his 28 U.S.C. § 2241 petition initially under the Bryant v. Warden, 738 F. 3d 1253 (11th cir. 2013) test, then submitted additional pleadings in light of the McCarthan v. Director of Goodwill Industries-Suncoast Inc., 851 F. 3d 1076, 1079 (11th cir. 2017) criteria proving survival of his McFadden claim, however the District Court of the Middle District of Florida dismissed ALL pleadings without and factual or legal finding reflecting petitioner's claims. See Appendix ().

Thereafter, petitioner appealed to the Eleventh Circuit Court of Appeals who dismissed petitioner's appeal for inability to pay the Docketing and filing fees. See Appendix (A). This proceeding follows.

REASONS FOR GRANTING THE WRIT

The reasons this Honorable Court should grant this writ because:

In McFadden v. United States, 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015) this court held:

"When a controlled substance is an analogue, § 841(A)(1) requires the Government to establish that the defendant knew he was dealing with a substance under the Controlled Substance Act or Analogue Act. In order to convict a defendant of violating the Analogue Act, the government must prove that the defendant knew" that the substance that he is dealing with is some specified substance listed on the federal drug schedules Id. 135 S. Ct. at 2034. It further held that when trying to convict a defendant of violating the narcotics statutes using an analogue, the government must show that he "knew" the specific analogue he was dealing with, even if he did not know its legal status as an analogue. Id at 2305.

However, the preserved; unique; and singular; facts/circumstances reflects the following in this case consistent with McFadden:

This case represents a (1) Count Conspiracy pursuant to 21 U.S.C. § 841(A) and (b)(1)(A)(iii), (that petitioner was only

charged in) see Appendix(F)(Indictment). However, there were no drugs ever recovered as evidence and/or introduced in this case as to the "scientific identity" of the alleged Controlled Substance. Moreover, this absence of drug went on through-out the (Grand Jury Proceedings)(Jury Instructions);(Jury Trial);(Pre-Sentencing) and(Sentencing Proceedings); the following occurred:

GRAND JURY PROCEEDINGS

Petitioner(Grand Jury Proceedings) were clearly Absent to any "Drugs" and however, the testimony of(1) witness(Agent Gravat) conflicted on whether(crack cocaine) or (powder cocaine) was the actual drug in this case, all reflecting the "Hearsay Testimony" attempting to connect Petitioner in Count(1) of the indictment. See Appendix(G).

JURY TRIAL PROCEEDINGS

However, during petitioner's(Jury Trial) the government attempted to introduce some drugs in this case but the district court "rejected" this introduction finding it to be "tenuous", in which occurred:

"...Q: Did easy say who had crack cocaine before you?

A: Little Bean.

Q: Did he say who he provided the crack cocaine to?

A: He said he gave some crack to Little Bean and Little Bean went to jail and they went to get it and Joseph gave it and said this is all Bean had.

Mr. Knight: Your Honor, that's the proffer

The Court: Well, it's a problem because we've got a "Tenuous", at best, attribution to the defendant here. Sustained. All right, bring the jury back in.

See Appendix(H).(Jury Trial Transcript, page 116).

Moreover, the following occurred:

...The Court: All right, Mr. Knight?

Mr. Knight: Well, Your Honor, again just relying on the argument that was made earlier, its time when basically, you know, since the cocaine was not admitted involving Mr. Hicks I've had to try a dry conspiracy and this is some evidence that Mr. Tillman was present at the time that other cocaine was present and, you know, it corroborates what Mr. McSwain testifies to. And Mr. McSwain is testifying as to Mr. Tillman at that time.

In terms of the prejudicial impact I'm not sure what this incident three years before the conspiracy was charged, why that's so prejudicial.

The Court: This is the only evidence you've been able to come up with that specifically has a law enforcement officer arresting the defendant in a drug matter? Is that what distinguishes this from everything else we've been getting during the course of the conspiracy?

Mr. Knight: Yes, Your Honor.

The Court: "Aside from that its all basically secondhand testimony of convicted drug dealers.

Mr. Knight: "That's correct."

See Appendix(I)(Jury Trial Transcript pg. 277).

RULE 29 MOTION BEFORE THE DISTRICT COURT
IN THE NORTHERN DISTRICT OF FLORIDA

Petitioner further presents the matter set forth at his Jury Trial Proceedings, the defense preserved pursuant to Fed. Rule of Crim. P. Rule 29 motion:

Mr. Sheehan: Your Honor, I have a motion. Your Honor, pursuant to Federal Rules of Criminal Procedure we are moving for judgment of acquittal in this case and based on the motion, based on the following, that the government has not made a prima facie case to present this case to a jury. The only thing that the government has presented in this case as evidence of any kind of guilt is the testimony of certain witnesses. There is no physical evidence to connect Mr. Tillman to these crimes. There is, there are no drugs. There are no wiretaps. There are no recorded conversations. There are no fingerprints. There's no video surveillance. There's no tape-recorded conversations between the convicted felons who have all testified against Mr. Tillman. And we make the case to the court that their testimony alone should not, there is no case to make for us to defend against before the jury and we ask that the court consider all that evidence and dismiss the case against Mr. Tillman.

The Court: Well, the motion is denied. Certainly there's a lot of evidence in this case incriminating Mr. Tillman. "It is a dry conspiracy in the sense we don't have any drugs and we don't have any evidence of Mr. tillman being arrested with any drugs"...

See Appendix(J) (Jury Trial Transcript pg. 307).

JURY INSTRUCTIONS

Petitioner further presents the (Jury Instructions) that were given in his Jury Trial Proceedings that are clearly contrary and in direct conflict to the holding in McFadden v. United States, 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015) See Appendix(K).

PRESENTENCING AND SENTENCING REFLECTING THE "ABSENCE" OF THE ALLEGED "CONTROLLED SUBSTANCE"

However, during (Pre-Sentencing) and (Sentencing) (Then) (Attorney Donald M. Sheehan) preserved and/or contested the amount of drugs and the (lack of identity) of the drug alleged in this case. See Appendix(L). (Doc#101).

SENTENCING HEARING PROCEEDINGS

At Petitioner's Sentencing Hearing the following arose relevant to the alleged "Controlled Substance" in these proceedings:

Mr. Sheehan: Your Honor, he objects to, of course, the entire amount of cocaine attributed to him, and I've recited that in my objections at paragraph thirteen, I think twenty-four, twenty-seven, twenty-nine, thirty-four, and he points out that what's interested about this case, Your Honor, is that factually when we went to trial the government, despite their attempt to do so never introduced any drugs attributable to Mr. Tillman into his trial. He was convicted based on the testimony of various witnesses who attributed certain amounts of drugs to him. Your Honor... but the fact remains that the court, this was a conspiracy charge. This was not a specific violation of the defendant possessing with intent to distribute cocaine. In other words it wasn't an indictment that said on such and such a date he possessed with intent to distribute crack cocaine and put, you know, amounts and they were going to come in and bring in the seventy-two kilos and do that. So it's our legal and factual assertion here today, Your Honor, that on a conspiracy of course they didn't they don't need amount of drugs. I mean they could have found it was one gram. They could have found , there's no telling, but so the jury did, and what you have to do at this sentencing hearing is decide whether you have any credible evidence to attributer those amounts of drugs to him. And we submit to the court that there is none as far as seventy-two kilos of crack cocaine and he objects to all those amounts and that those witnesses exaggerated and that they didn't have any firm evidence that those amounts were done at the same time. And he specifically objects to those amounts. See (sentencing Hearing Tr. Pgs. 20-21) (Appendix(m)).

Moreover, during Petitioner's Sentencing Hearing the key Agent, (Agent Charles Gravat's) testimony reflected:

Q: That wasn't my question. My question was did you have any credible evidence today that anybody in law enforcement testified or told you he was selling forty cookies a week?

A: I've heard about it from several different law enforcement sources yes sir.

Q: That he sold forty kilos, cookies?

A: Large amounts of crack cocaine.

Q: Talking about forty cookies a week?

A: Nobody ever mentioned that figure, no, sir.

Q: And during Mr. Tillman's trial there was no government chemist that testified that, what you just testified to, was crack cocaine, is that right?

A: No sir, just the gentleman telling they provided it and the gentleman that brought it and sold it and testified. No chemist.

See Appendix (N) (Sentencing Hearing Tr. Pg.29).

DIRECT-APPEAL PROCEEDINGS

Petitioner then appealed the Judgment to the Eleventh Circuit Court of Appeals where Circuit Judges (Hatchett); (Tjoflat); and (Carnes) "Stipulated" to the following:

Moreover, during Petitioner's Sentencing Hearing the Key Agent, (Agent Charles Gravat's) testimony reflected:

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A: I've heard about it from several different law enforcement sources, yes sir.

Q: That he sold forty kilos, cookies?

A: Large amounts of crack cocaine.

Q: Talking about forty cookies a week?

A: Nobody ever mentioned that figure, no, sir.

Q: And during Mr. Tillman's trial there was no government chemist that testified that, what you just testified to , was crack cocaine, is that right?

A: No sir, just the gentleman telling they provided it and the gentleman that brought it and sold it and testified. No chemist.

See Appendix()(Sentencing Hearing Tr. Pg. 29).

DIRECT-APPEAL PROCEEDINGS

Petitioner then appealed the Judgment to the Eleventh Circuit Court of Appeals where Circuit Judges (Hatchett); (Tjoflat); and (Carnes) "Stipulated" to the following:

...After the Government had established the amount of drugs involved, appellant's attorney, while objecting to the court's consideration of the testimony of cooperating co-conspirators, stated: "There was never any testimony from a qualified expert witness, a chemist, that testified that this was crack cocaine." This statement constituted appellant's sole challenge in the district court to the identity of the drug involved in the case. Counsel said nothing of the identity of the substance when the court asked for the parties objections prior to the following imposition of the sentence. To preserve an objection for appeal, a party must raise the objection clearly enough for a trial court to recognize it and address it... We therefore treat the issue as abandoned...See Appendix(O) (Opinion from the Eleventh Circuit Court of Appeals Honorable Court on Petitioner's Direct-Appeal).

However, this opinion came from the below at Petitioner's Sentencing Hearing:

Mr. Sheehan: I do, Your Honor, briefly, on the amounts. Your Honor, I point out for the record that there were never any amounts of drugs introduced in his trial. There was never any testimony from a qualified expert witness, a chemist, that testified this was crack cocaine. Your Honor, basically my arguments to you succinctly put, is we ask the court to give the defendant the benefit of the doubt on this argument. Why charge him the cutoff, my argument is to go with 1.5 kilos, okay, an ounce here, ounce there, adds up. I understand that I'm not

trying to tell the court it's a minor dealing, but are you going to give him a two-level increase and put him in level thirty-eight just based on these convicted felons walking into court? The government doesn't qualify them in any manner whatsoever. There's no foundation evidentiary wise in the record that they know that this was crack cocaine, that, you know, that they buy and sell crack cocaine and that they test every bit of it and every bit attributable to Mr. Tillman and is crack cocaine. And because of the lack, argue, we argue because of the lack of evidence in this case, scientifically to corroborate that, the court shouldn't just attribute all these amounts of drugs to him based on these convicted felons. So we ask the court to consider that and if you're weighing the evidence, as you do in a sentencing hearing, then fine, go with 1.5 if that's what you have to do. But we still object to it and think it's wrong to attribute those amounts of drugs to him. See Appendix(9)(Sentencing Hearing Tr. pg. 34-35).

Thus, the Petitioner took these same arguments to the Supreme Court on Writ of Certiorari. See Tillman v. United States, 98-5339 S. Ct. (October 5, 1998). Moreover, attempted to pose these arguments under(Ineffective Assistance of Counsel) in Petitioner's initial 28 U.S.C.S. § 2255 proceedings. See Civil Action No. 3:99-cv-406/RV/SMN, then (C.O.A.) in the district court , and to the Eleventh Circuit Court of Appeals. See(Appeal No. 02-1309-D), and then finally to the Supreme Court again. See Tillman v. United States, 535 U.S. 1030, 152 L. Ed. 2d 644 (S. Ct. April 22, 2002). Therefore preserved and unique circumstances supports justification for the reasons why this writ should be granted.

RECENT PRECEDENT FROM THE PETITIONER'S CIRCUIT
AND OTHER (SISTER-CIRCUIT) COURT'S HOLDING THE SAME
REFLECTING McFadden

Recently, and finally, Petitioner's Circuit Court followed

this court's holding in McFadden, by a case of United States v. Terry Pierre Louis, 2017 U.S. App. Lexis 12298 (11th cir. 2017) which held:

"To sustain a conviction of the substance offense of possession §841, the government must prove knowing possession of a controlled substance with intent to distribute it. The government must therefore prove that the defendant knew the substance was a controlled substance...Recently in McFadden v. United States, the Supreme Court reemphasized this knowledge requirement. 576 U.S. __, __, 135 S. Ct. 2298, 2302, 192 L. Ed. 2d 260 (2015). Justice Thomas writing for a near unanimous court, wrote that §841 "requires the government to establish that the defendant knew he was dealing with a controlled substance". See Id. The 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....Following the clear guidance in McFadden to prove that Louis "knowingly or intentionally possessed with intent to ...distribute... a controlled substance" under §841 the government would have to prove that Louis knew the boxes contained a controlled substance, and not a contraband illegal under some law. Id. After a careful review of the record and the parties briefs, we conclude that no reasonable jury could find from the little evidence presented

during the two-day trial that Louis is guilty of violating §846 and 841 beyond reasonable doubt. See Terry Pierre Louis, 2017 U.S. App. Lexis 12298 (11th cir. 2017)(Appendix(Q) pg. 4-5).

The Eleventh Circuit Court of Appeals reversed judgment following McFadden. However, this holding supporting McFadden is Identical to the facts and circumstances set forth in Petitioner's (criminal case) as shown earlier. But also see United States v. Stanford, 2016 U.S. App. Lexis 9108, 2016 (5th cir. 2016) where the Fifth Circuit Court held:

"Stanford contended that for the government to prove him guilty of conspiracy to distribute or possess with intent to distribute a controlled substance (count one), it must demonstrate that he knew that the substance was a (CSA). ID. Stanford contended that the district court erred by determining that the knowledge was not a required element under (count one), Id. Stanford claimed that because the district similarly failed to instruct the jury regarding knowledge in relation to (count one) conspiracy to distribute and possession with intent to distribute a CSA--it erred, and the error was not harmless... In turn the government conceded that the court's ruling about proof of knowledge and its failure to instruct the jury on that element were likely error but maintains that any error was harmless. We conclude that the error was not harmless...Based on the intervening decision in McFaddenv. United States, 135 S. Ct. 2298, 192 L. Ed. 2d 260 (2015), announced after trial, we reverse the conviction of conspiracy to distribute a CSA because

the district court's error, in ruling that the government was not required to prove that Stanford knew the...compound distributed by the conspirators was a (CSA), was not harmless." See Stanford 2016 U.S. App. Lexis 9108, 201 (5th cir. 2016).

Then again, in United States v. Bay's, 2017 U.S. App. Lexis 3419 (5th cir. 2017) the Fifth Circuit held:

"Defendant's conviction for conspiracy to distribute a controlled substance analogue, in violation of 21 U.S.C.S. §846, was reversed because the jury was not properly instructed on the element of knowledge as the government was required to prove that the defendant knew the substances were analogues... After the district court entered judgment, the Supreme Court decided McFadden,... There, the court 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... As the government acknowledges; in light of McFadden the jury was not properly instructed on the element of knowledge. There was error... In light of the intervening decision in McFadden, the error in instructing the jury was not harmless beyond a reasonable doubt, reverse. See Bay's Id.

Moreover, in United States v. Makkar, 810 F. 3d 1139 (10th cir. 2015)(...At trial, the government did not introduce any evidence that defendant knew anything about the chemical structure of the incense and the instruction permitted the jury to infer that the defendants knew the incense had a substantially similar effect to marijuana thus the government's instruction

collapsed two separate mens rea burdens into one... Convictions for violating the Analogue Act based on sales of incense were vacated because the jury instructions did not require the government to show that the defendants knew that the incense was unlawful under the Controlled Substance Act, but instead, the instruction collapsed two mens rea elements into one element... Convictions Vacated). Also see United States v. Al-Omari, 2016 U.S. Dist. Lexis 72645 (Dist. of Mexico, June 3, 2016) where the court held:"...This defense is clearly allowed under the Supreme Court's recent McFadden decision. In McFadden, the court rejected the government's then-proposed standard for providing knowledge on Controlled Substance Act cases (that the Government must merely prove that a defendant knew his conduct was illegal under any law) and ruled that when prosecuting a Controlled Substance Act or Analogue Enforcement Act...As Chief Justice Roberts pointed out in his concurring opinion in McFadden, simply demonstrating that Mr. Al-Omari knew the identity of the substance in this case would be insufficient to support a finding by the jury that Mr. Al-Omari knew that the substance was a controlled substance...Because of the heightened burden of proof that the Government must bear in Controlled Substances Act cases following McFadden, Dr. Trecki's testimony regarding the pharmacological effects may be used to establish the effects of AM-2201 to help further the Government's case that Mr. Al-Omari was aware of those effects at the time period specified in the indictment).

However, in this Particular case, the Government cannot and

did not prove the Petitioner knew that he was dealing with some controlled substance, and further did not prove the Petitioner knew the specific feature of the substance that make it a controlled substance analogue in which the **record** and **facts** in this case supports this position. As mentioned earlier the Government's case rested clearly on the credibility of it's witnesses to convince the jury that the Petitioner was involved in (1) **Count** of Conspiracy to Distribute drugs in the Pensacola, Florida area.

**"FORECLOSURE" OF McFadden BY PETITIONER'S
CIRCUIT BEFORE THE DECISION RENDERED IN
McFadden.**

Petitioner further points out that despite his **preserved circumstances** and **facts** consistent with McFadden, the Eleventh Circuit Court of Appeals had precedent foreclosing any type of claim as held in McFadden. See United States v. Fisher, 289 F. 3d 1329, 1337 (11th cir. 2002)("All substances that meet the definition of a controlled substance analogue are illegal. No list of controlled substances analogues is necessary. Failure to specifically identify a substance is a controlled substance analogue is of no consequence. See 21 U.S.C. § 813 and 21 U.S.C.S. § 802(32)(A)... "No list of controlled substance analogue is necessary"). Also see United States v. Baggett, 954 F. 2d 674, 677 (11th cir. 1992)(Co-conspirators who were familiar with the substance involved--established that the substance was crack cocaine), relied upon in Petitioner's (Direct-Appeal Proceedings) See Appendix(). Therefore this Honorable Court can further

intervene in this matter.

RETROACTIVE APPLICATION OF McFadden CONSISTENT
WITH SUPREME COURT AND ELEVENTH CIRCUIT

PAGE 10

PRECEDENT

It is indisputable that McFadden can be applied retroactively if Petitioner is entitled to the sought relief from this Honorable Court finds just, see the Supreme Court's long established precedents. Schriro v. Summerlin, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004), Bousley v. United States, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998); Bailey v. United States, 516 U.S. 137, 139, 116 S. Ct. 501, 503, 133 L. Ed. 2d 472, 995; Rivers v. Roadway Express Inc., 511 U.S. 298, 312-13, 114 S. Ct. 1510, 128 L. Ed. 2d 2117 (1994)("A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction"); O'Dell v. Netherland, 521, U.S. 151, 117 S. Ct. 1969, 138 L. Ed. 2d 351 (1997)(Noting that new rules are to be applied retroactively where they forbid criminal punishment of certain primary conduct"). However, the Supreme Court's above jurisprudence about the Stricter Statutory retroactivity requirements in 28 U.S.C. § 2255(h), which governs Second or Successive §2255 motions, in which to qualify as retroactive "New Rule" of constitutional law under § 2255(h) the Supreme Court itself must make the rule retroactive, therefore this retroactive application of McFadden can be applied to Petitioner.

Moreover, see Eleventh Circuit Court of Appeals precedent. Weeks v. United States, 382 Fed. Appx. 845 (11th cir. 2010)("United States Supreme Court Decisions that result in a new substantive rule retroactively apply to final convictions. Decision of the Supreme Court construing substantive federal criminal statutes must be given retroactive effect. New Substantive Rules include decisions that narrow the scope of a criminal statute by interpreting its terms. Retroactive application is warranted because such rules necessarily carry a significant risk that a defendant stands convicted of an act that the law does not make criminal or faces a punishment that the law cannot impose upon him"); Also see United States v. Peter, 310 F. 3d 709 (11th cir. 2002)("Decisions of the United States Supreme Court construing substantive federal criminal statutes "must be given retroactive effect"). Importantly McFadden examines the meaning of 21 U.S.C. § 841(A) and construed the reach of a federal statute more narrowly than its broadest possible meaning, thus requiring the Government to prove additional facts and burden in order to convict a person under § 841(A). Therefore, this Honorable Court can have no problem with applying the retroactive application of McFadden to Petitioner.

As all set forth above, Petitioner sits in federal prison for 22 years with a 2033 release date for now a non-existent crime consistent with Supreme Court and his Circuit's precedent, that Petitioner has previously preserved in his case. However, as mentioned earlier, Petitioner is unable to file a second or

successive § 2255 motion to vacate based on the Supreme Court's interpretation in McFadden, that is because § 2255(h) prohibits "Statutory Interpretation" claims. If Petitioner, who is innocent of the charge that has landed him in prison, (cannot even file a second or successive :2255 motion-- and by definition cannot succeed on a motion-- and other habeas relief is not clear for adjudication of the merits on such type of claim, This Honorable Court can grant writ of certiorari and should intervene because "Innocence" is so strong a concept that, when sufficiently proven, it even constitutes a judge-made vehicle for avoiding hurdles like procedural barriers. See McQuiggin v. Perkins, 133 S. Ct. 1924, 133 S. Ct. 1932-35, 135 L. Ed. 2d 1019 (2013); House v. Bell, 547 U.S. 518, 522, 126 S. Ct. 2064, 138 L. Ed. 2d 1 (2006). Therefore, reasons are justified for granting this writ of certiorari.

QUESTIONS/ARGUMENTS PRESENTED

IS A PERSON IN FEDERAL CUSTODY STILL ENTITLED TO FILE AN APPLICATION FOR HABEAS CORPUS UNDER 28 U.S.C. § 2241 AND/OR 28 U.S.C. § 2255(e) (AFTER) THE ELEVENTH CIRCUIT COURT OF APPEALS HOLDING IN MCCARTHAN v. DIR. OF GOODWILL INDUSTRIES-SUNCOAST INC., 2017 U.S. App. Lexis 4485 (11th cir. 2017) CONSISTENT WITH HIS (1ST AMENDMENT RIGHTS) "TO PETITION THE GOVERNMENT FOR REDRESS OF GRIEVANCES "WHEN PRESERVED AND UNIQUE CIRCUMSTANCES IN HIS CASE SUPPORTS HE'S ACTUAL INNOCENT" OF A CRIMINAL STATUTE (STATUTORY INTERPRETATION) THATS INTERVENING AND RETROACTIVELY APPLICABLE. SEE McFadden v. U.S., 135 S. Ct. 2298 (2015) AND FURTHER SUPPORTED BY CIRCUIT COURT OF APPEAL COURTS. SEE U.S v. Terry Pierre Louis, 2017 U.S. App. Lexis 12298 (11th cir. 2017); U.S. v. Stanford, 2016 U.S. App. Lexis 9108, 2016 (5th cir. 2016); AND U.S. v. Makkar, 810 F. 3d 1139 (10th cir. 2015). ?

Petitioner poses this Honorable Court with the above question on whether this Honorable Court will finally intervene and resolve the conflict the Eleventh Circuit Court of Appeals is causing (after) it's holding in McCarthan v. Dir. of Goodwill-Industries-Suncoast INC., 2017 U.S. App. Lexis 4485 (11th cir. 2017) in an application for Habeas Corpus under 28 U.S.C. § 2241 and/or 28 U.S.C. § 2255(e):

First; The Eleventh Circuit Court of Appeals recently sitting en banc, overruled prior precedent and held 28 U.S.C. § 2244 is not available to challenge the validity of a sentence or conviction except upon grounds that rarely will ever exist. See McCarthan, 851 F. 3d at 1079(quoted 28 U.S.C. § 2255(e)). See Also Bernard v. F.C.C. Coleman Warden, __ Fed. Appx. __, 2017 WL 1430875 (11th cir. April 24, 2017). However, this has foreclosed any relief in a 28 U.S.C. §2241 and/or 28 U.S.C. § 2255(e) proceedings, regardless if its a "Retroactive Applicable" decision from this Honorable Court. See Granada v. United States, 702 Fed. Appx. 938 (11th cir. 2017); Venta v. Warden, 2017 U.S. App. Lexis (11th cir. 2017); Humphrey's v. Warden, 699 Fed. Appx. 854 (11th cir. 2017); and McDowell v. Warden F.C.C. Coleman-Medium, 694 Fed. Appx. 692 (11th cir. 2017).

Second; The 1st Amendment to the U.S. Constitution provides in relevant part:

" Congress shall make no law respecting an establishment of...the right of the people peaceably to assemble and to petition the

government for a redress of grievances."

However, if 28 U.S.C. § 2255(h) is only for a "New Rule of Constitutional Law", then what course is left open for this Honorable Court announcement of a "Retroactive Statutory Interpretation Decision"? Therefore, this Honorable Court should fill in this gap consistent with the 1st Amendment.

Third; This case represents preserved and unique circumstances supporting Petitioner's prima facie of "Actual Innocence" for the conduct of criminal statute 18 U.S.C. § 841(A) imposed upon him. See McFadden v. United States, 135 S. Ct. 2298 (2015) and pages 1 to 8 previously mentioned earlier in this petition. However, Petitioner has pointed out that Circuit Courts of Appeal have supported the same. See United States v. Terry Pierre Louis, 2017 U.S. App. Lexis 12298 (11th cir. 2017); United States v. Stanford, 2016 U.S. App. Lexis 9108, 2016 (5th cir. 2016), and United States v. Makkar 810 F. 3d 1139 (10th cir. 2015). Therefore, further, this case is appropriate for an application for habeas corpus under 28 U.S.C. § 2241 and/or 28 U.S.C. § 2225(e) in light of McFadden, where the Middle District of Florida erred in dismissing without any factual finding.

And Fourth; This is the only Court that can overturn the en banc of the Eleventh Circuit Court of Appeals holding in McCarthan, otherwise, inmates housed in Federal Prisons in the (Alabama)(Florida) and (Georgia) districts will remain foreclosed

on any relief from a (Retroactive Statutory Interpretation) announced from this Honorable Court, or intervening changes of law in a criminal context in a 28 U.S.C. § 2241 proceedings.

Based on all above, this Honorable Court should certify this question to resolve this matter with the preserved and unique circumstances this case represents consistent with McFadden v. U.S., 135 S. Ct. 2298 (2015), supported by circuit court of appeals precedent all triggering habeas relief under 28 U.S.C. § 2241 and/or 28 U.S.C. § 2255(e).

B

WHETHER THIS HONORABLE COURT WILL FINALLY SET PRECEDENT IN A 28 U.S.C. § 2255 (e) PROCEEDINGS AND/OR THE "SAVING CLAUSE TEST" APPLIED IN A 28 U.S.C. § 2241 PROCEEDING BECAUSE THE TENTH CIRCUIT AND ELEVENTH CIRCUIT COURT OF APPEALS ARE SPLIT FROM ALL OTHER CIRCUIT COURTS OF APPEALS ON THIS MATTER AND HAVE FORECLOSED ANY (STATUTORY-INTERPRETATION) HOLDINGS ANNOUNCED FROM THIS COURT. SEE PROST v. ANDERSON 636 F. 3d 578 (10th cir. 2011) AND McCarthy v. Dir. of Goodwill-Industries-Suncoast INC., 2017 U.S. App. Lexis 4485 (11th cir. 2017)?

Petitioner further contends that this Honorable Court should finally set precedent in a 28 U.S.C. § 2255(e) proceedings and/or the "saving clause test" applied in a 28 U.S.C. § 2241 proceeding, because:

First; The Tenth Circuit Court of Appeals holds in a 28 U.S.C. § 2241 proceedings that:

"The plain language of § 2255 means what it says and says what it means: A prisoner can proceed to § 2241 only if his initial § 2255 motion was itself inadequate or ineffective to the task of providing the petitioner with a chance to test his sentence or conviction. The intervening change in case law does not mean that the "process was ineffective or inadequate to test his argument." See Prost v. Anderson 636 F. 3d 578 (10th cir. 2011).

Moreover, the Eleventh Circuit Court of Appeals recently (followed) this holding in Prost v. Anderson 636 F. 3d 578 (10th cir. 2011) sitting en banc and overruled prior precedent holding:

A change in case law does not make a motion to vacate a prisoner's sentence inadequate or ineffective to test the legality of his detention. 28 U.S.C. § 2255(e). A motion to vacate is inadequate or ineffective to test the legality of a prisoner's detention only when it cannot remedy a particular kind of claim. Even if a prisoner's claim fails under circuit precedent a motion to vacate remains an adequate and effective remedy for a prisoner to raise the claim and attempt to persuade the court to change its precedent, and failing that, to seek certiorari in the United States Supreme Court. See McCarthan v. Dir of Goodwill Industries-Suncoast 2017 U.S App. Lexis 4485 (11th cir. 2017).

Second, It's (sister-circuit courts) have all found a total different interpretation regarding the "saving clause test" pursuant to 28 U.S.C. § 2241 and/or 2255(e). See the (First Circuit) In Sustache-Rivera v. United States 221 F. 3d 8 (1st cir. 2000); (Second Circuit) In Triestman v. United States 124 F. 3d 361 (2nd cir. 1997) (if the claim petitioner seeks to raise was previously available to him, the failure to permit review of that claim would raise serious constitutional questions.); (Third Circuit) In In re Dorsainvil 119 F. 3d 245

(3rd cir. 1997) Where no other avenues of judicial review were available for a party who claimed that he was factually or legally innocent as a result a previously unavailable statutory interpretation, the court would be faced with a constitutional issue);(Fourth Circuit) In In re Jones 226 F. 3d 328 (4th cir. 2000)(28 U.S.C. § 2255 is inadequate and ineffective to test the legality of a conviction when:(1) At the time of conviction, settled law of this Circuit of the United States Supreme Court established the legality of the conviction;(2) subsequent to the prisoner's direct-appeal and first §2255 motion, the substantive law changed such that the conduct of which the prisoner was convicted is deemed not to be criminal; and (3) the prisoner cannot satisfy the gate keeping provisions of §2255 because the law rule is not one of constitutional law);(Fifth Circuit) In Reyes-Requena v. United States, 243 F. 3d 893, 904 (5th cir. 2001)("The savings clause of 28 U.S.C. § 2255 applies to a claim (i) that is based on a retroactively applicable United States Supreme Court decision which established that petitioner may have been convicted of a nonexistent offense and(ii) that was foreclosed by circuit law at the time when the claim should have been raised in the petitioner's trial, appeal, or first §2255 motion);(Sixth Circuit) In Hill v. Masters 836 F. 3d 591(6th cir. 2016)(Petitioner's challenge to his misapplied career offender enhancement was properly brought under 28 U.S.C. § 2241. Petitioner satisfied the requirements of the savings clause of § 2255(e); (Seventh Circuit) In In re Davenport 147 F. 3d 605 (7th cir. 1998)(A petitioner who seeks to invoke the savings clause of § 28 U.S.C.S. § 2255(e) to proceed under 28 U.S.C.S.

§2241 must demonstrate that:(1) he relies on not a constitutional case, but a statutory interpretation case, so that he could not have invoked it by means of a second or successive section 2255 motion;(2) the new rule applies retroactively to cases on collateral review and could not have been invoked in his earlier proceeding; and (3) the error is grave enough to be deemed a miscarriage of justice corrigible therefore in a habeas corpus proceeding, such as one resulting in a conviction for a crime of which he was innocent); (Eighth Circuit) in Abdullah v. Hedrick 392 F. 3d 957 (8th cir. 2004)(The United States Court of Appeals for the Eighth Circuit has held that 28 U.S.C.S. § 2255 is not inadequate or ineffective where a petitioner had any opportunity to present his claim before hand); And finally the (Ninth Circuit) in Stephens v. Herrera 464 F. 3d 895 (9th cir. 2006)(A 28 U.S.C.S. § 2241 petition is available under the "escape hatch" of 28 U.S.C.S. § 2255 when petitioner (1) makes a claim of actual innocence, and (2) has not had an "unobstructed procedural shot" at presenting that claim).

And Third This Honorable Court has not made recent precedent since United States v. Hayman 96 L. Ed. 232, 342 U.S. 205 (1952). However, after the (ADEPA), this Honorable Court must intervene in this matter because it's announcements of **Statutory-Interpretation** decisions are clearly (**Foreclosed**) in a 28 U.S.C.S. § 2241 context in the (**Tenth**) and (**Eleventh Circuits**). Therefore, this Honorable Court should grant writ of certiorari on this question.

CONCLUSION

WHEREFORE, in consideration of the foregoing, Petitioner prays this Honorable Court grant the petition for Writ of Certiorari; and remand this matter back to the Eleventh Circuit Court of Appeals(overturning) McCarthan v. Director of Goodwill Industries-Suncoast Inc., 851 F. 3d. 1077, 1079 (11th cir. 2017) followed by the Tenth Circuit's holding in Prost v. Anderson, 636 F. 3d 578 (10th cir. 2011), contrary to ALL other (9) sister circuit court of appeal decisions reflecting 28 U.S.C.S. § 2241 and/or 28 U.S.C.S. § 2255(e) "Saving Clause Test".

CERTIFICATE OF SERVICE

I, Benjamin Tillman certify that I served (1) copy of the foregoing upon the Solicitor General at:

Room 5616
Department of Justice
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20503-0001

On this 11 day of ^{April}~~March~~ 2018.

#04060-017

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