

No: _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

JIMMY STEELE,
Petitioner,

VS.

UNITED STATES OF AMERICA,

Respondent.

On Petition for A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

In Slack v. McDaniel, 529 U.S. 473, 486, 120 S.Ct. 1595 (2000), this Court said there are limited circumstances in which a numerically second § 2255 is not successive merely because it numerically follows a previously -filed motion, Panetti v. Quarterman, 551 U.S. 930, 127 S.Ct. 2842 (2007), if it raises a claim that had not arisen at the time of the earlier petition. In Leal v. Quarterman, 573 F.3d 214, 222 - 24 (5th Cir. 2009), the prisoner's second § 2255 motion was not "second or successive", because the "situation falls within what the Fifth Circuit recognized as a small subset of unavailable claims that must not be categorized as successive".

The Question presented for review in this case is: (1) In denying Steele's Second-in-time §2255 motion, did the lower court(s) err in there finding that the district court lacks jurisdiction to hear Steele's claim, in light of his argument that the claim he has asserted for challenging his sentence did not exist at the time he filed any previous motion and the § 2255(h)'s gatekeeping provision did not apply? (A) Are the considerations the Panetti v. Quarterman, 551 U.S. 930 (2007), court identified in support of its holding specifically limited to Ford type claims? (2) Does Steele's claim of an intervening change in the law which established new precedent's in the Fifth Circuit constitute an "extraordinary or 'rare circumstance'" under the equitable tolling analysis and "new fact" that forms the basis of a challenge under § 2255? (3) Does Steele's unconstitutional and illegal designation as a career offender which resulted in an increase in his term of imprisonment that deprived him of liberty without due process of law, constitute a fundamental defect resulting in a miscarriage of justice? (4) Did the lower court(s) err by denying Steele a "COA", when he raised a constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, and a constitutional right to be treated on equal terms as other similarly situated defendants in other cases, and jurists of reason would have found it debatable whether he stated a valid claim of a constitutional right?

INTERESTED PARTIES

Pursuant to Supreme Court Rule 14.1(b), Steele certifies that the names of all parties to this proceeding appear in the caption of this Petition for Writ of Certiorari.

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No. _____

IN THE SUPREME COURT
OF THE UNITED STATES OF AMERICA

JIMMY STEELE
Petitioner - Appellant,

v.

UNITED STATES OF AMERICA
Respondent - Appellee.

On Petition for Writ of Certiorari to
the United States Court of Appeals for the Fifth Circuit
Appeal No.:17-10743

COMES NOW Petitioner - Appellant, Jimmy Steele ("Steele"), appearing pro se, respectfully petitions the Supreme Court of United States of America, for a Writ of Certiorari to review the judgement of the United States Court of Appeals for the Fifth Circuit, rendered and entered in Case No.17-10743 in said court on March 6, 2018, Jimmy Steele v. United States, USDC No. 4:17-CV-515, which affirmed the judgement and commitment of the United States District Court for the Northern District of Texas, Fort Worth Division, entered on June 26, 2017, and Petition for Rehearing to the Panel and En Banc, that was denied on July 11, 2018.

OPINION BELOW

The judgement of the United States Court of Appeals for the Fifth Circuit is found at Appendix B. Petition for Rehearing to the Panel and En Banc was denied and the decision is found at Appendix C. The Judgement of the United States District Court for the Northern District of Texas, Fort Worth Division is found in Appendix A.

STATEMENT OF JURISDICTION

The Fifth Circuit Court of Appeals decided this matter on July 11, 2018. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254(1)(2018).

STATUTORY PROVISIONS

The following statutory provisions with this case:

28 U.S.C. § 2255 provides, in pertinent part:

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, that the court lacked jurisdiction to impose such a sentence, that the sentence exceeded the maximum authorized by law, or that the sentence is otherwise subject to collateral attack. Section 2255 is an extra ordinary measure; an allegation of legal error that is neither constitutional nor jurisdictional is not cognizable on collateral review "unless the claimed error constituted a fundamental defect which inherently results in a complete miscarriage of justice".

28 U.S.C. § 2253 provides, in pertinent part:

(c)(2) A Certificate of Appealability (COA) "may issue... only if the applicant has made a substantial showing of the denial of a constitutional right". If a petitioner seeks a COA to challenge the district court's denial of the petitioner's constitutional claims on the merits," [t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong "or" that the issues presented were adequate to deserve encouragement to proceed further". When the district court denies a habeas

corpus petition on procedural grounds without considering the underlying constitutional claim, a COA will be granted if the petitioner "shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurist of reason would find it debatable whether the district court was correct in its procedural rulings.

CONSTITUTIONAL PROVISIONS AND STATUES INVOLVED

The following constitutional provisions and statutes involved with this case:

The Constitution's Fifth Amendment provides, in pertinent, part: their guarantees and prohibits the government from depriving someone of life, liberty or property without due process of law (i.e. certain legal procedures), and their guarantees of equal protection of law, to fair procedure and guarantee against fundamental unfairness.

U.S. SENTENCING GUIDELINES MANUAL § 4B1.1(a) provides, in pertinent part: A defendant is a career offender if (1) the defendant was at least eighteen years old at the time defendant committed the instant offense of conviction; (2) the instant offense is a felony that is either a crime of violence or a controlled substance offense; and (3) the defendant has at least two prior felony convictions of either a crime of violence or a controlled substance offense.

Tex. Health & Safety Code Ann. § 481.112(a) provides in pertinent part: Except as authorized by this chapter, a person commits an offense if the person knowingly manufactures, delivers, or possesses with intent to deliver a controlled substance...

21 U.S.C. § 851 provides in pertinent part: That no drug trafficking defendant can face an enhanced mandatory minimum unless certain procedures, including the filing of a prior felony information by the prosecutor, are followed. Unless the prosecutor files a timely prior felony information pursuant to 21 U.S.C. § 851 listing the prior felony or felonies to be relied upon, the enhanced mandatory minimums will not

apply. § 841 specifically, it provides that where a defendant was previously convicted of a felony drug offense, the five year and ten-year mandatory minimums are doubled. For a defendant with two or more prior drug felonies, the ten-year mandatory minimum is increased to mandatory life in prison.

Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") provides in pertinent part: see Appendix D

28 U.S.C. § 2255(h) provides in pertinent part: A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain-

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court that was previously unavailable. 28 U.S.C. § 2255(h).

STATEMENT OF THE CASE

On December 24, 2008, Steele was sentenced to 360 months in prison and an eight-year term of supervised release after a jury convicted him of possessing with the intent to distribute more than 500 grams of cocaine, possessing a firearm in furtherance of a drug-trafficking crime, and possessing a firearm as a convicted felon, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(B), and 18 U.S.C. § 924(c) and 922(g)(1).

On November 23, 2009, the United States Court of Appeals for the Fifth Circuit ("Fifth Circuit") issued an Order affirming Steele's judgment and certiorari review was denied on May 24, 2010.

On April 11, 2011, Steele filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside, or Correct Sentence by a Person in Federal Custody ("§2255").

On August 8, 2011, the Court issued an Order denying Steele's § 2255 motion.

On June 27, 2016, Steele filed for Authorization to File A Successive Application under 28 U.S.C. § 2255.

On June 29, 2016, the Court issued an Order dismissing Steele's Successive § 2255 motion.

On June 21, 2017, Steele filed a Second-in-Time § 2255 motion and the United States District Court for the Northern District of Texas, Fort Worth Division, the Court issued a Order dismissing Steele's Second-in-Time § 2255 motion on June 26, 2017.

On August 15, 2017, Steele filed an Application for Certificate of Appealability to appeal the District Court's judgment to the Fifth Circuit Court of Appeals, the Fifth Circuit issued a Order affirming Steele's (COA) on March 6, 2018.

On March 19, 2018, Steele timely filed a Petition for Rehearing to the Panel and En Banc, the Court issued a Order denying the petition, July 11, 2018.

Steele timely files this Writ of Certiorari.

STATEMENT OF THE FACTS

On December 24, 2008, Steele was sentenced to 360 months in prison and an eight-year term of supervised release. On Count 1 & 3, based on the PSR, Steele was held accountable for 1.397 kilograms of cocaine. Using the November 1, 2007 Sentencing Guidelines, Steel's Base Offense Level is 26, pursuant to § 2D1.1(c)(7). However, Steele has at least two prior felony convictions for controlled substance offense, therefore, classified Steele as a career offender and he was subjected to an enhanced sentence under the provisions of U.S.S.G. § 4B1.1.

Also, pursuant to the Penalty Enhancement, the statutory penalty range for Count 1 is 10 years to Life and at least 8 years term of supervised release.

On Count 2, the guideline sentence is the minimum term of imprisonment required by statute, which is 60 months, pursuant to U.S.S.G. § 2k2.4(b).

Steele's total criminal history score is 12 which results in a Criminal History Category V.

However, pursuant to U.S.S.G. § 4B1.1(b), a career offender's Criminal History Category in every case under this shall be category VI.

On Count 1 & 3, based on a Criminal History Category of VI and a Total Offense Level of 37, the Guideline Range of imprisonment is 360 months to Life. On Count 2, the sentence is the minimum term of imprisonment required by statute.

Therefore, the guideline range became 60 months. Count 2 shall be imposed to run consecutive to Count 1 & 3.

Steele objected to the PSR findings to the career offender enhancement under U.S.S.G. § 4B1.1., all calculations affected thereby. His objection was overruled and the PSR stated that the prior felony convictions qualified as controlled substance offense, and they have been held as such by the Fifth Circuit in United States v. Ford, 509 F.3d 714, 715 (5th Cir. 2007).

Now based on those judicial fact finding, Steele was sentence as a career offender under § 4B1.1. and received a 360 months sentence.

In light of the Supreme Court's new rule of statutory construction establish in Mathis v. United States, 136 S.Ct. 2243 (2016) (the Supreme Court set forth how a court determines whether a statute is divisible and therefore whether, in employing the modified categorical approach, documents pertaining to the prior conviction may be used to ascertain if conviction comes within a federal definition of an offense or has the elements of an enumerated offense.), the Fifth Circuit granted a motion for panel rehearing in United States v. Tanksley, 848 F.3d 347, 352 (5th Cir. 2017), to decide whether Ford still represents the law. The court in Tanksley held that Ford could not stand and a "conviction for possession with intent to deliver a controlled substance under section 481.112(a) of Texas Health and Safety code (Section 481.112(a))" could no longer qualify for career offender enhancement purpose. Now based on the intervening change in Fifth Circuit law, the new precedent's establish in Tanksley, Steele filed a Second-in-time § 2255 motion, to challenge his unconstitutional enhanced sentence under the career offender provision § 4B1.1. The District Court dismissed Steel's § 2255 motion for lack of jurisdiction in light of Steele's argument that the grounds he has

asserted for challenging his sentence did not exist at the time he filed his previous motion to vacate.

Steele timely appealed requesting a COA from the Fifth Circuit Court of Appeals. The Fifth Circuit denied his request. Steele should have had a full and fair opportunity to raise his claim in his prior motion because prior precedent's had absolutely foreclosed Steele's current argument and the claim was unavailable to him. The record should be clear that Steele preserved this issue at sentencing when he objected to the PSR finding as to him being classified as a career offender.

Steele then filed a Petition for Panel Rehearing and En Banc in the Fifth Circuit. That motion was denied without opinion.

Steele now seeks a Writ of Certiorari from this Court.

REASONS FOR GRANTING THIS PETITION

In Steele's Second-in-time § 2255 and his COA, he clearly sets out the facts surrounding his claim that the basis for his claim, the unconstitutionally enhanced sentence as a career offender did not exist before his initial 28 U.S.C. § 2255 petition concluded and his numerically second petition was not "second or successive" and the § 2255(h)'s gatekeeping provision did not apply as the failure to seek the requisite permission was not fatal to his claim and the district court had jurisdiction to consider his claim. The lower court(s) failed to follow a well established standard governing numerically second § 2255 petition, and did not state with any specification any rules bound by the court(s) or precedents that preclude its consideration of Steele's petition. The 360 months sentence imposed on Steele as a result of the improper career offender enhancement, which is more than 15 years additional prison time, Steele would have to serve because of the erroneous career offender enhancement is significant enough to warrant habeas review and constitute a fundamental defect which inherently results in a complete miscarriage of justice. A postconviction clarification in the law has rendered the sentencing court's decision unlawful.

Steele's illegal designation as a career offender resulted in an

increase in his term of imprisonment that deprived him of liberty without due process of law. Tanksley rendered the sentencing court's previous decision affirming Steele's sentence "demonstrably wrong", and failing to correct this fundamental defect would produce an unwarranted disparity between him and similarly situated defendants in other cases, violating his due process right's to equal protection of law. Steele's sentence is based on conduct were "for an act the law does not make criminal". Steele, should have an absolute right not to stand before the courts as a career offender when the law does not impose that label on him and to do so, amounts to complete deprivation of freedom by virtue of a longer-than-deserved prison sentence. The lower court(s) should have limited themselves to the threshold question whether the merits were debatable. A court may grant a COA even if it might ultimately conclude that the underlying claims is meritless, so long as the claim is debatable. Therefore, the lower courts decision are in direct conflict with well-established law, as to call for an exercise of this Court's supervisory power.

DISCUSSION

Steele respectfully requests that this Court be mindful that he is proceeding pro se. Pro se pleadings are reviewed under a less stringent standard than those drafted by attorneys and are entitled to a liberal construction that includes all reasonable inferences which can be drawn from them. See Erickson v. Pardus, 551 U.S. 89, 94 (2007); Haines v. Kerner, 404 U.S. 519, 520 (1972) (explaining the lower standard for pro se pleadings). Additionally, when the complaint is filed pro se, a court must observe its duty to construe the allegations liberally and more permissively. S.E.C. v. AMX, Intern'l, Inc, 7 F.3d 71, 75 (5th Cir. 1993).

1. In denying Steele's Second-in-time § 2255 motion, did the lower court(s) err in there finding that the district court lacks jurisdiction to hear Steele's claim, in light of his argument that the claim he has asserted for challenging his sentence did not exist at the time he filed

any previous motion and the § 2255(h)'s gatekeeping provision did not apply?

The Anti-terrorism and Effective Death Penalty Act's (AEDPA) restrictions on second or successive petitions are meant to forestall abuse of the writ of habeas corpus, by, for instance, barring successive motions raising habeas claims that could have been raised in earlier motions where there was no legitimate excuse for failure to do so. There are limited circumstances in which a numerically second § 2255 petition may not be "second or successive" under AEDPA. *Slack v. McDaniel*, 529 U.S. 473, 486, 120 S.Ct. 1595 (2000) (explaining that the phrase "second or successive", as used in AEDPA, is a term of art); See *Panetti v. Quarterman*, 551 U.S. 930, 943-44, 127 S.Ct. 2842 (2007) (The phrase "second or successive" is not self - defining. It takes its full meaning from our case law, including decisions predating the enactment of the [AEDPA]).

Mindful of the "implications for habeas practice , the purpose of AEDPA, and its prior habeas decisions - including those applying the abuse-of-the-writ doctrine - this Court determined "that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the unusual posture. Under that rule, to determine whether an application is "second or successive", a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application. *Panetti*, 551 U.S., at 947.

Steele assert's that at Sentencing he objected to the PSR findings as to the career offender enhancement under U.S.S.G. § 4B1.1, and all calculations affected therby. The sentencing court overruled Steele's objection, finding that his two prior felony state convictions: (1) Possession with intent to Deliver Controlled Substance of 4 grams or more, but less than 200 grams: Cocaine, Case No. 0854047D, Tarrant County Criminal District Court No. 2, Fort Worth, Tx; and (2) Possession with Intent to Deliver Controlled Substance of 4 grams or more, but less than

200 grams: Cocaine, Case No. 0887952D, (same), qualified as a "controlled substance offense" within the meaning of the U.S.S.G. § 4B1.1, and have been held as such by the Fifth Circuit in United States v. Ford, 509 F.3d 714, 715 (5th Cir. 2007) (the Court in Ford held that intent to deliver a controlled substance under Section 481.112(a) of the Texas Health and Safety Code ("Section 481.112(a)"), qualifies as a "controlled substance offense" under the United States Sentencing Commission Guidelines Manual (the "Guidelines").

At the conclusion of Steele's direct appeal and initial § 2255 motion, the claim he alleges in his Second-in-time § 2255 motion was foreclosed by Fifth Circuit controlling law in United States v. Ford, 509 F.3d 714 (5th Cir. 2007), and any prior attempt to obtain judicial correction would have been deemed frivolous or meritless with circuit precedent's against him and stare decisis would make the court unwilling (in all likelihood) to listen to him.

In light of this Court new rule of statutory construction established in Mathis v. United States, 136 S.Ct. 2243 (2016) (the Court in Mathis set forth how a court determines whether a statute is divisible and therefore whether, in employing the modified categorical approach, documents pertaining to the prior conviction may be used to ascertain if conviction comes within a federal definition of an offense or has the elements of an enumerated offense), the Fifth Circuit granted a motion for panel rehearing in United States v. Tanksley, 848 F.3d 347, 352 (5th Cir. 2017), to decide whether Ford still represents the law. The Court in Tanksley held that Ford could not stand and a "conviction for possession with intent to deliver a controlled substance under Section 481.112(a) of the Texas Health and Safety Code ("Section 481.112(a)"), could no longer qualify for career offender enhancement purposes. Now based on the intervening change in Fifth Circuit law, which establish that Steele's sentence is now for an act that the law does not make criminal, only then did his Second-in-time § 2255 motion become "ripe". A postconviction clarification in the law has rendered the sentencing court's decision unlawful. It is now clear that Steele never should have been classified as a career offender and never should have been subjected to the enhanced punishment reserved for such repetitive and violent offenders.

Therefore Steele's motion pursuant to § 2255 is not successive merely because it follows a numerically previously filed motion. See Panetti v. Quarterman, 551 U.S. 930, 127 S.Ct. 2842 (2007), Id. at 862-65, if it raises a claim that had not arisen at the time of the earlier petition; see also Leal v. Quarterman, 573 F.3d 214, 222-24 (5th Cir. 2009) ("if however, the purported defect did not arise, or the claim did not ripen, until after the conclusion of the previous petition, the later petition based on that defect may be non-successive"). This Court should find that Steele's proposed petition satisfies the requirements of a second-in-time § 2255 motion, that this Court established in Panetti, and his claim falls within what the Fifth Circuit has recognized as a small subset of unavailable claims that must not be categorized as successive and the district court had jurisdiction to hear his Second-in-time § 2255 motion. Steele now has a full and fair opportunity to raise his claim, where as before extraordinary circumstances had prevented him from filing his claim in a earlier motion because prior precedent's had absolutely foreclosed Steele's current argument and the claim was unavailable to him. This Court has made clear that a decision framed in general terms can be deemed to have "clearly established" a rule with respect to the variety of fact - specific scenarios that come within the general rule. Steele's actions do not constitute an abuse of the writ, and his claim was not ripe for disposition until now and he should not be barred under any form of resjudicata because he has established a legitimate excuse for filing his numerically second § 2255 motion. Therefore, Steele's sentence was unconstitutionally enhanced under the career offender guidelines § 4B1.1 and his prior felony convictions under that statute do not qualify as a controlled substance offense, requiring resentencing without the career offender enhancement and if not, such results amounts to complete deprivation of freedom by virtue of a longer - than - deserved prison sentence.

A. Are the considerations the Panetti v. Quarterman, 551 U.S. 930 (2007), Court identified in support of its holding specifically limited to Ford type claims?

In this case Steele present's an issue that did not become ripe until after his initial § 2255 motion was decided. *Panetti v. Quarterman*, 551 U.S. 930, 127 S.Ct. 2842 (2007) (holding that a habeas petitioner's previously unavailable claim that he was incompetent to be executed under *Ford v. Wainwright*, 477, U.S. 399, 106 S.Ct. 2595 (1986), was not barred as second or successive petition); *Leal Garcia v. Quarterman*, 573 F.3d 214 (5th Cir. 2009) (holding that a petition for relief based on an intervening Supreme Court decision was not second or successive). This Court should note that the lower court(s) overlooked or misapprehended points of law and facts presented by Steele, because the record should clearly reflect that Steele sets out the facts surrounding his claim, that the basis for his claim - - the unconstitutionally enhanced sentence as a career offender - - did not exist before his initial § 2255 motion concluded, and his numerically second petition was not "second or successive", and the § 2255(h)'s gatekeeping provision did not apply as the failure to seek the requisite permission is not fatal to his claim when the district court had jurisdiction to consider his claim. The intervening change in law constitutes a rare and extraordinary circumstance, which created a new fact supporting the claim, making Steele's numerically second petition "ripe". Particularly when a petitioner raises a claim that could not have been raised in a prior habeas petition, courts have interpreted *Panetti* to permit that claim to be raised in a subsequent petition. *United States v. Buenrostro*, 638 F.3d 720, 725 (9th Cir. 2011) (per curiam) ("Panetti do[es] not apply only to Ford claims. Prisoners may file second-in-time petitions based on events that do not occur until a first petition is concluded."); *Johnson v. Wynder*, 408 F.App'x 616, 619 (3rd Cir. 2010) ("We see no reason to avoid applying *Panetti* in the context of other types of claims that ripen only after an initial federal habeas petition has been filed."); *United States v. Lopez*, 577 F.3d 1053, 1064 (9th Cir. 2009) ("The considerations the [Supreme] Court identified in support of its holding are not specifically limited to Ford claims, and therefore must be considered in deciding whether other types of claims that do not survive a literal reading of AEDPA'S gatekeeping requirements may none the less be addressed on the merits."); *Stewart v. United States*, 646 F.3d 856 (11th Cir. 2011) ("holding that the prisoner's second § 2255 motion was not "second or successive" because the "situation falls within what the Fifth Circuit

recognized as a small subset of unavailable claims that must not be categorized as successive").

Therefore this Court should determine that Steele's second-in-time § 2255 motion, satisfies the requirements established in Panetti and must be considered in deciding whether other types of claims that do not survive a literal reading of AEDPA'S gatekeeping requirements may none the less be addressed on the merits. In sum, it appears that whether the AEDPA'S ban on successive petitions without prior authorization may be lifted in any particular case is a fact - specific inquiry. It is a close question and may be of first impression, but may form the basis for enlarging the grounds for collateral attack to include claims like Steele's.

(2) Does Steele's claim of an intervening change in the law, which established new precedent's in the Fifth Circuit, constitute an "extraordinary or rare circumstance" under the equitable tolling analysis and "new fact" that forms the basis of a challenge under § 2255?

In Johnson v. United States, 544 U.S. 295, 125, S.Ct. 1571 (2005), the Supreme Court held that the state court vacator of a predicate conviction is a new "fact" that triggers a fresh one - year statute of limitations under § 2255(f)(4), so long as the petitioner exercised due diligence in seeking that order. 544 U.S. at 302, 125 S.Ct. at 1577. The Court's rationale was based, in part, on its previous holdings in Custis v. United States and Daniels v. United States, which explain that only after an underlying conviction is successfully challenged may a defendant seek relief in federal courts. Id. at 303-04, 125 S.Ct. at 1577-78. Having concluded that a defendant's ability to pursue federal habeas relief was contingent upon his success at the state level, the Court was left to determine how such a defendant was to obtain relief. The Court ultimately decided that, because success in the state courts is a prerequisite for federal habeas relief, and because the facts supporting a state court challenge "cannot by themselves be the basis of a § 2255 claim", the vacator order itself gives rise to a movant's claim. Id. at 305-07, 125 S.Ct. at 1578.80. Johnson established that the basis for a claim challenging a sentence predicated on faulty state

convictions arises when the order vacating those predicate convictions issues. *Id.*, 125 S.Ct. at 1579-80. The vacator order gives a defendant both the basis to challenge an enhanced federal sentence and a new one-year period in which to pursue that challenge.

Now Steele argues unlike Johnson, his claim is not based on the complete vacator of his prior predicate state conviction, but this does not mean that its reasoning cannot extend to his claim, which is a fundamental defect sentence considering the extraordinary deprivation of liberty at stake. The basis for Steele's claim - the unconstitutional enhanced sentence under the career offender provision (i.e. "the two prior felony drug convictions for possession with intent to deliver controlled substance under section 481.112(a) of the Texas Health and Safety, Code used for career offender enhancement purposes") do not qualify as a controlled substance offense under that statute. Because *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2007), now represents the law, only then did Steele's claim become "ripe" and Steele should have an absolute right not to stand before the court as a career offender when the law does not impose that label on him. The intervening change in the law as to the applicability of the career offender guidelines to Steele's improperly enhanced sentence, should constitute a "rare" or "exceptional circumstance", that would justify equitable tolling of the statute of limitations. Steele's case, however, does not come within the general rule. If presents a special and very narrow exception, a postconviction clarification in the law has rendered the sentencing court's decision unlawful. This Court's decision in *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298 (1974), speaks to the situation here. In *Davis* the petitioner sought § 2255 relief after a subsequent interpretation of the statute, under which he was convicted established that his conviction and punishment were "for an act that the law does not make criminal". The Court concluded that "[t]here can be no room for doubt that such a circumstance inherently results in a complete miscarriage of justice". Therefore, the fact remains that the two prior felony drug convictions

used to support Steele's enhanced sentence under the career offender provision (U.S.S.G. § 4B1.1) can no longer serve as predicates for purpose of his enhanced sentence, which should constitute a "new fact", because it forms the new factual basis for reversing his sentence under § 2255. More precisely, it is now clear that Steele never should have been classified as a career offender and never should have been subjected to the enhanced punishment reserved for repetitive and violent offender. The loss of his liberty as a result of his sentencing proceeding, and what is characterizes as an erroneous career offender enhancement, which has placed him in a specific subset of offenders who sentences are illegal and fundamentally unfair ... violating his due process of law to fair procedure, equal protection, and liberty interest. This Court should find that Steele's situation is similar enough to the facts of Johnson and that it is fair to conclude that Steele's § 2255 motion is not successive, and thus should have been considerable on its merits by the lower court(s), and this Court should decide whether there is a "basis for enlarging the grounds for collateral attack to include claims" like Steele's that presents a close question.

3. Does Steele's unconstitutional and illegal designation as a career offender which resulted in an increase in his term of imprisonment that deprived him of liberty without due process of law, constitute a fundamental defect resulting in a miscarriage of justice?

The term "miscarriage of justice" comes form the U.S. Supreme Court's holding that a non-jurisdictional, non-constitutional error of law is not a basis for collateral attack under 28 U.S.C.S. § 2255 unless the error is a fundamental defect which inherently results in a complete miscarriage of justice. See *Davis v. United States*, 417 U.S. 333, 346, 94 S.Ct. 2298 (1974) ("for example, the Supreme Court collaterally reviewed a prisoner's conviction for conduct that was no

longer illegal. Because the prisoner was incarcerated "for an act that the law does not make criminal", [t]here [could] be no room for doubt that such a circumstance inherently resulted in a complete miscarriage of justice").

Steele argue at sentencing he was alleged to have had two prior felony convictions for controlled substance offense, therefore, classified him as a career offender and subject him to an enhanced sentence under the provisions at U.S.S.G. § 4Bl.1, and also, Steele's mandatory minimum and maximum increased from 5 to 40 years to 10 year to life, because he was subject to a Penalty Enhancement pursuant to 21 U.S.C. § 851, based on the same two prior felony convictions. Now based on the fact that the § 851 enhancement, now exposed Steele to a maximum of Life, his career offender guidelines range were affected as well and his career offender guidelines range increased dramatically to 360 months to Life. Steele objected to these findings at sentencing and all calculations affected thereby. The sentencing court overruled Steele's objections finding that his two prior felony convictions qualify for career offender purposes, and held as such by the Fifth Circuit in United States v. Ford, 509 F.3d 714, 715 (5th Cir. 2007). Had Steele attempted to raise his claim on direct appeal or in his initial § 2255 motion, it would have been an empty formality, with circuit precedent against him and stare decisis would make the higher courts unwilling (in all likelihood) to listen to him, foreclosing Steele's claim, denying him any opportunity for judicial rectification. Steele states that the lower court(s) failed to address the question whether the error alleged by Steele - the erroneous application of the career offender enhancement - meets the miscarriage of justice standard. The Supreme Court's decision in Mathis v. United States, 136 S.Ct. 2243 (2016), supported Steele's position that his prior conviction under Section 481.112(a) of the Texas Health and Safety Code ("Section 481.112(a)") for possession with intent to deliver a controlled substance is a indivisible statute. In Mathis, the Supreme Court determining if a prior conviction is for an offense enumerated or defined by the USSG section and compares those elements to the elements

of the prior offense for which the defendant was convicted. Some criminal statutes, however, are divisible, meaning a single statute defines multiple crimes. The Supreme Court has approved the modified categorical approach for use with statutes having multiple alternative elements, permitting courts to examine a limited class of documents, for example, the indictment, jury instructions, or plea agreement and colloquy to determine what crime, with what elements, a defendant was convicted of. With the precise crime thus identified, a court can then apply the categorical approach, asking whether that precise crime matches the Guidelines offense at issue.

Some criminal statutes appear divisible but are not. Those statutes, rather than providing alternative elements, instead list various factual means of committing a single element. In the Mathis decision, the Supreme Court held that the modified categorical approach is not appropriate for that species of criminal statute. Most importantly, it also provides helpful guidance for determining whether a predicate statute of conviction is divisible.

In light of *Mathis v. United States*, 136 S.Ct. 2243 (2016), and *United States v. Hinkle*, 832 F.3d 569 (5th Cir. 2016), the Fifth Circuit Court of Appeals, granted a motion for panel rehearing in *United States v. Tanksley*, 848 F.3d 347, 352 (5th Cir. 2017), to decide whether *United States v. Ford*, 509 F.3d 714 (5th Cir. 2007), still represents the law. *Ford* held that a conviction for possession with intent to deliver a controlled substance under section 481.112(a) of the Texas Health and Safety Code ("Section 481.112(a)") qualifies as a "controlled substance offense" under the United States Sentencing Commission Guidelines Manual (the "Guidelines"). The court in *Tanksley* held that *Ford* could not stand. Section 481.112(a) is an indivisible statute to which the modified categorical approach does not apply. Because the modified categorical approach is inappropriate in this case, we cannot use it to "narrow" *Tanksley*'s conviction to "possession with intent to deliver" a controlled substance. We instead look to Section 481.112(a) as a whole in determining whether his conviction thereunder qualifies as a controlled substance offense under the Guidelines. Section 481.112(a) "criminalizes a greater swath

of conduct than the elements of the relevant [Guideline] offense". Hinkle, 832 F.3d at 576 (quoting Mathis, 136 S.Ct. at 2251). Tanksley's conviction under that statute does not qualify as a controlled substance offense under the Guidelines. Now based on the intervening change in the law established by Mathis and Tanksley, Steele's unconstitutional enhanced sentence constitute a fundamental defect which inherently resulted in a complete miscarriage of justice. A postconviction clarification in the law arguably rendered the sentencing court's previous decision upholding Steele's sentence "demonstrably wrong", and produce an unwarranted disparity between Steele and similarly situated defendants in other cases. It is now clear that Steele never should have been classified as a career offender or subject to a penalty enhanced pursuant to 21 U.S.C. § 851 and he never should have been subject to the enhanced punishments reserved for such repetitive and violent offenders. Steele was sentenced based upon the equivalent of a nonexistent offense, his sentence is based on conduct "the law does not make criminal". Steele points to an "objectively ascertainable [legal] error", and one that is of a "fundamental character", that error being the unconstitutional and prejudicial career offender enhancement and § 851 enhancement used to enhance his sentence in violation of the Constitution or laws of the United States. The increase in Steele's mandatory minimum and maximum from 5 to 40 to 10 to life and the 360 months sentence imposed on him as a result of this grave error is an error sufficiently grave to be deemed a fundamental defect. Without the two prior felony drug conviction predicates Steele statutory minimum and maximum would not have "doubled and nor would he have received a sentence of 360 months, more than three times the sentence he may have receive.

Tanksley now represents the law, Steele should have an absolute right not to stand before the courts as a career offender when the law does not impose that label on him. And to do so, amounts to complete deprivation of freedom by virtue of a longer than - deserved prison sentence.

Therefore, the fact remains that Steele's two prior felony convictions used to support his enhanced sentence under the career offender provision (U.S.S.G. § 4B1.1) and 21 U.S.C. § 851, can no longer serve as predicates for the purpose of Steele's enhanced sentence. Today Steele has served

about 126 months of his 360 months sentence. However, had Steele been sentenced without the career offender and § 851 enhancement, he mostly likely would have received a guideline range at about 110-137 months, a significantly less harsh guideline range and his statutory minimum and maximum would not have changed. The loss of Steele's liberty as a result of his sentencing proceeding, and what is characterized as an erroneous career offender enhancement has placed him in a specific subject of offenders whose sentences are illegal and fundamentally unfair ... violating his due process rights under the Fifth Amendment to fair procedure, equal protection, and liberty interest.

4. Did the lower court(s) err by denying Steele a "COA", when he raised a constitutional right to be deprived of liberty as punishment for criminal conduct only to the extent authorized by Congress, and a constitutional right to be treated on equal term as other similarly situated defendants in other case, and jurists of reason would have found it debatable whether he stated a valid claim of a constitutional right?

One of the requirements for obtaining a certificate of appealability is that an applicant must make "a substantial showing of the denial of a constitutional right". 28 U.S.C. § 2253(c)(2). The Supreme Court has explained that, in this context, a substantial showing requires "a demonstration that ... reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further". *Slack v. McDaniel*, 529 U.S. 473, 483-84, 120 S.Ct. 1595 (2000). But in this case, the lower court(s) denied Steele a COA by finding that is, he has not made the requisite showing "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right, and that jurist of reason would find it debatable whether the district court was correct in its procedural ruling".

In Steele's "COA", he clearly sets out the facts surrounding his claim

that the basis for his claim - - the unconstitutionally enhanced sentence as a career offender - - did not exist before his initial 28 U.S.C. § 2255 petition concluded, and his numerically second petition was not "second or successive"; and the § 2255(h)'s gatekeeping provision did not apply as the failure to seek the requisite permission is not fatal to his claim when the district court had jurisdiction to consider Steele's claim.

Mindful of the "implications for habeas practice," the purpose of AEDPA, and its prior habeas decisions - including those applying the abuse-of-the-writ doctrine - the Supreme Court determined "that Congress did not intend the provisions of AEDPA addressing "second or successive" petitions to govern a filing in the unusual posture. Under that rule, to determine whether an application is "second or successive", a court must look to the substance of the claim the application raises and decide whether the petitioner had a full and fair opportunity to raise the claim in the prior application. Panetti 551 U.S., at 947.

The lower court(s) should have limited themselves to the threshold question whether the merits were debatable. A court may grant a COA even if it might ultimately, conclude that the underlying claims is meritless, so long as the claim is debatable. Miller-El, *supra*, at 396, 123 S.Ct. 1029 (2003).

In this case, Steele's certificate of appealability raises a claim that he was illegally designated as a career offender resulting in an increase in his term of imprisonment that deprived him of liberty without due process law. The sentencing court designated Steele as a career offender based on two prior felony drug convictions, under Texas Health and Safety Code section 481.112(a), possession with intent to deliver a controlled substance offense. Steele was also subject to a § 851 enhancement based on the exact two prior felony drug convictions. The § 851 enhancement change Steele's statutory minimum and maximum from 5 to 40 years to 10 to Life. This enhancement alone increased Steele's then mandatory minimum and maximum sentencing range. But since Steele's mandatory maximum now exposed him to life, this now affected his career offender status which

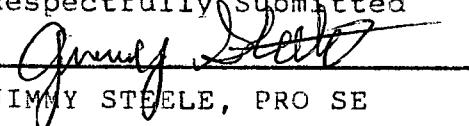
increased Steele's sentencing range to 360 to life. The sentencing court sentenced him to 360 months imprisonment. Had Steele not been subject to either enhancement he most likely would have received a guideline range at about 110 to 137 months. Steele's claim presents a special and very narrow exception. A postconviction clarification in the law has rendered the sentencing court's decision unlawful. Steele's claim did not exist and only became ripe with the Supreme Court's recent decision in Mathis v. United States, 136 S.Ct. 2243 (2017), and the Fifth Circuit intervening change in controlling law in United States v. Tanksley, his two prior felony drug convictions for possession with intent to deliver controlled substance under section 481.112(a) of the Texas Health and Safety Code do not qualify as "controlled substance offense" within the meaning of the career offender guidelines. More precisely, it is now clear that Steele never should have been classified as a career offender, nor should he have been subject to a § 851 enhancement and never should have been subject to the enhanced punishment reserved for such repetitive and violent offenders. With the imposition of the "drug felony" status under the § 851, Steele faced, at a minimum, ten years of imprisonment that the law otherwise could not impose upon him under his statute of conviction and because his statutory maximum was increased to life, his career offender guidelines increased as well as results to 360 to life, because Steele was now exposed to life and not 40 years. Such an increase in punishment is certainly a substantive liability. Therefore career offender status and § 851 enhancement illegally increased Steele sentence approximately 25 years beyond that authorized by the sentencing scheme. Steele was sentenced based upon the equivalent of a non existent offense and he does have an absolute right not to stand before the court as a career offender or § 851 when the law does not impose that label on him. This Court should find the foregoing errors affected Steele's substantial rights because there is a reasonable probability those errors impacted his unconstitutionally enhanced sentence, violating his due process rights to liberty and surely a reasonable jurist would find it debatable or wrong whether Steele stated a valid claim of the denial of a constitutional right. And that jurist of reason would find it debatable that the lower court(s) where wrong in its procedural ruling.

Therefore Steele has clearly established that the lower court(s) failed to follow well - established law by overlooking or misapprehending points of law and facts presented by him; nor did the lower court(s) state with any specification a rule the court's were bounded by or precedent's that precluded any consideration of Steele's claim on the merits. And it should be determine that Steele is entitled to postconviction relief as a legal matter or whether there is a "basis for enlarging the grounds for collateral attack to include claims" like Steele's, when the facts indicate that a particular result is completely unjust. Finality is an important principle of vital importance to our system of justice, but "without justice", finality is nothing more than a bureaucratic achievement.

CONCLUSION

Wherefore, Steele requests that certiorari be granted and the case be remanded to the court below to issue a COA on his claims presented to allow him to appeal the lower court(s) judgement or any other relief this Court deems just. For all of the reasons stated herein Steele's Petition for Writ of Certiorari should be granted.

Respectfully Submitted



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that a copy of the above and foregoing Writ of Certiorari was mailed out the 3 day of October, 2018, to the Solicitor General of the United States, Department of Justice, Room 5614, 950 Pennsylvania Ave, NW., Washington, DC 20530 and the United States Supreme Court, 1 First Street, N.E. Washington, DC 20543.

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