No. 19-5589 ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

MARLON LEROY PORCH — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

MARLON LEROY PORCH
(Your Name)
USP BEAUMONT
P.O. BOX 26030
(Address)

BEAUMONT, TEXAS 77720
(City, State, Zip Code)

(Phone Number)

QUESTION(S) PRESENTED

I. WHEIHER A FUNDAMENTAL DEFECT IS SUFFICIENT TO SATISFY THE SAVING CLAUSE WHERE PETITIONER ERRONEOUS ENHANCE SENTENCE FELL BENEATH THE STATUTORY MAXIMUM.

LIST OF PARTIES

[XX] All parties appear in the caption of the case on the cover page.

[ ] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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BOUSLEY V. UNITED STATES, 523 U.S. 614, 620-21 (1998).

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UNITED STATES V. HILL, 368 U.S. 424, 428 (1962).

UNITED STATES V. JONES, 226 F.3d (4th Cir. 2000).

UNITED STATES V. DAVIS, 417 U.S. at 346.

STATUTES AND RULES

§ 2255(e) SAVING CLAUSE.

4B1.1 Career Offender

IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

[ ] For cases from **federal courts:**

The opinion of the United States court of appeals appears at Appendix A to the petition and is

[ ] reported at No. 18-41155; or,
[ ] has been designated for publication but is not yet reported; or,
[X] is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

[ ] reported at 1:18-CV-122; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

[ ] For cases from **state courts:**

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

[ ] reported at n/a; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

The opinion of the n/a court appears at Appendix _____ to the petition and is

[ ] reported at _____; or,
[ ] has been designated for publication but is not yet reported; or,
[ ] is unpublished.

JURISDICTION

[ ] For cases from **federal courts:**

The date on which the United States Court of Appeals decided my case was OCTOBER 24, 2018.

[X] No petition for rehearing was timely filed in my case.

[ ] A timely petition for rehearing was denied by the United States Court of Appeals on the following date: N/A, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including N/A (date) on n/a (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

[ ] For cases from **state courts:** N/A

The date on which the highest state court decided my case was n/a. A copy of that decision appears at Appendix n/a.

[ ] A timely petition for rehearing was thereafter denied on the following date: n/a, and a copy of the order denying rehearing appears at Appendix _____.

[ ] An extension of time to file the petition for a writ of certiorari was granted to and including n/a (date) on n/a (date) in Application No. A_____.

n/a

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S.S.G. 4B1.1, Career Offender provision provided in relevant part: "A defendant is a Career Offender if (3) the defendant has at least (2) two prior felony convictions of either a crime of violence or a controlled substance offense.

28 U.S.C. § 2255(e): The Saving Clause states: An application for a writ of habeas in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section shall not be entertained if it appears that the applicant has failed to apply for relief by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention 28 U.S.C § 2255(e).

Ark. Code Ann. 5-64-401 (a) states in relevant part:

Ark. Code Ann. 5-64-401(a) Controlled Substance - Manufacturing, Delivering, or Possessing with intent to Manufacture or Deliver. Except as authorized by subchapters 1-6 of this chapter, it is unlawful for any person to manufacture, deliver, possess with intent to manufacture or deliver a controlled substance.

STATEMENT OF THE CASE.

On March 01, 2010, Petitioner, Marlon L. Porch appeared with his attorney before The Honorable William R. Wilson, Jr. pursuant to a written plea agreement, Petitioner pled guilty to Count One of the Indictment, Conspiracy to Distribute Cocaine and the forefeiture allegation. The remaining counts were dismissed upon Motion of the Aissistant U.S. Attorney. The parties stipulated to: A base level of 24; at least 5 grams but less than 20 grams of cocaine base; no enhancement under 21 U.S.C. § 851 will be filed; if the defendant meets requirements of U.S.S.G. 4B1.1 Because Mr. Porch had (2) two prior felony drug offense convictions for **(1)** Possession of cocaine w/intent to deliver, Possess controlled substance, Docket No. **(CR2000-4095)** and **(2),** Possession of cocaine w/intent to deliver, Docket No. **(CR2001-2519)** under **Ark. code Ann § 5-64-401 (a)** - The District Court had no choice but to sentence petitioner as a career offender to a 220 month term. In 2016, The Supreme Court decided the case of **United States V. Mathis, 136, S.Ct. 2243, 195 L.Ed 2d 604,** which ruled how the modified categorical approach is applied in the context of federal sentencing. Thus, in determining whether a prior conviction is included within the § 846 offense defined, or enumerated in the 4B1.1 U.S.S.G. you only have to look to the elements of the prior offense and [not] the actual conduct of the defendant committing the offense. For Petitioner Porch this means that insufficient due process concerns are heightened under **Mathis**

because his prior Arkansas drug offense convictions no longer qualifies as a controlled substance offense within the meaning of the federal generic definition. The government filed a career criminal provision under 4B1.1.

Ark. Code Ann § 5-64-401(a) for "Possession with intent to deliver and manufacture a controlled substance are separate offenses under **Mathis**. Petitioner was under the circumstances uniquely impacted by U.S.S.G. 4B1.1 Career Offender enhancement originally applied - which is now deemed to be illegal and received a 220 month sentence where [both] mandatory minmum and maximum punishment was raised solely on prior felonies under a divisible statute. Under Arkansas State's own admission, **Ark. Code Ann. § 5-64-401.** is a divisible statute and cannot serve as a predicate offense under 4B1.1.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit Court of Appeal erred in denying Porch's appeal because he challenges the validity of his enhance sentence, rather than his Conviction.

28 U.S.C. § 2241 is typically used to challenge the manner in which a sentence is executed. See. **Warren V. Miles, 230 F.3d 688, 694 (5th Cir. 2000).** 28 U.S.C. § 2255, on the other hand is the primary means under which a federal prisoner may collaterally attack the legality of his conviction or sentence. **Cox V. Warden, Fed. Detention Ctr, 911 F.2d 1111, 1113 (5th Cir. 1990).** ("Relief under [§2255] is warranted for any error that occured at or prior to sentencing." (quoting **United States V. Flores, 616 F.2d 840, 842 (5th Cir. 1980)).**

However, § 2241 may be utilized by a federal prisoner to challenge the legality of his conviction or sentence if he can satisfy the mandate of the so called § 2255 "Saving Clause." Under **Reyes-Requena,** The petitioner bears the burden to demonstrate that section § 2255 remedy is inadequate or ineffective before proceeding under 28 U.S.C. § 2241.

The Fifth Circuit interpretation of § 2255's saving clause is stated as followed: (1) The petitioner raises a claim based on a retroactively applicable Supreme Court decision; (2) The claim was previously foreclosed by circuit law at the time when it should have been raised in petitioner's trial, appeal, or first §2255

motion; and (3) The retroactively applicable decision establishes that "the petitioner may have been **convicted** of an non-existent offense."

The District Court's reliance on **Reyes-Requena** 2255(e) saving clause, deprived petitioner of any "meaningful opportunity" to demonstrate that he is being held pursuant to the erroneous application or interpretation of relevant law.

Petitioner raised a **Mathis** claim based on a statutory interpretative retroactively applicable Supreme Court decision, which was foreclosed by Circuit Law at the time of Petitioner's Trial, Appeal, and First § 2255 Motion. Petitioner is not able to bring his claim in a second or successive under §2255 because section § 2255(h) provides that a second or successive 2255 motion may be authorized only when a defendant makes a prima-facie showing that his petition relies on a new retroactive rule of Constitutional law, or factual evidence of actual innocence. **28 USC § 2255 (h) (Supp. v. 2011).**

The District Court erred in concluding that the saving clause does not permit petitioner to seek relief under section § 2241 purely because he challenges the legality of his sentence rather than his conviction. The saving clause pertains to one's "detention" or "offense," as it did elsewhere in §2255. See. 28 U.S.C. §2255(h)(1) (referencing "the offense"), id § 2255(f)(1) (reference "conviction"). See. **Russello v. United States, 464 U.S. 16-23 (1983)**(Where Congress includes particular language in one section of a statute but omits it in another section of the same act. It is generally presumed that

Congress acts intentionally and purposely in the disparate inclusion or exclusion. (alteration and internal quotation marks omitted)).

Moreover, a sentence imposed above the otherwise - applicable statutory maximum based on a legal error is a fundamental defect, which is redressable under the saving clause. See. **Brief in opposition at 11-13 & nn. 3-4, Dority v. Roy, 131 S.Ct. 3023 (No. 10-8286).** A conviction for non-criminal conduct implicates seperation of power principles that "it is only Congress, and not the court's," which makes conduct criminal. **Bousley v. United States, 523 U.S. 614, 620-6212(1998).** Similarly, A sentence above the statutory maximum implicates the separation -of- powers principles that "the power *** to prescribe the punishments to be imposed upon those found guilty of [federal crimes] resideswholly with Congress. **Whalen v. United States, 445 U.S. 684, 689 (1980).**
Federal Courts do not have the authority to impose a sentence without legislative authorization, and a sentence above the statutory maximum represents just such an unarthorized sentence. (sentencing courts may impose any sentence that has been authorized by statute").

The imposition of an erroneous mandatory minimum sentence is likewise a fundamental error that raises separation -of- powers concerns analogous to those implicated by a sentence above the statutory maximum. Congress has the exclusive maximum and minimum penalties for a criminal offense. See. **United States v. Wiltberger, 18 U.S. (5 Wheat.) 76, 95 (1820)** (It is the legislature - not the court, which define a crime and ordain it's punishment.") When courts cmmit legal error in determining that

a defendant is required to be sentenced to a mandatory minimum term - they transgress the authority that Congress established and effectively erroneously sentence the defendant to a aggravated crime. Thus, the imposition of a mandatory minimum term based on a legal error significantly affects a defendant's liberty interest in a way that implicates due process concerns.

Under pre-**Mathis**, the prevailing misunderstood career offender and statutory enhancements led courts to use prior convictions predicated under [divisible] statutes that legislature regarded as not serious to be considered a "felony drug offense" to justify a significant increase in the federal 4b1.1 guidelines for those defendant's who, unlike the Petitioner have been convicted of two prior "felony drug offenses" in appliance with the federal generic definition. The erroneous imposition of a 220 month sentence based on a legal error wrongly deprives the court of discretion to impose a lower sentence after considering all the mitigating and aggravating factors surrounding the offense. The resulting sentence therefore represents an unwarranted loss of liberty.

Clearly, this is a due process violation because petitioner has a substantial and legitimate expectation that he would be deprived of his liberty only to the extent determined by the sentencing body in the exercise of its statutory discretion. See. **Hicks v. Oklahoma**, 447 U.S. 343 (1980). Similary in **United States v. Tucker**, 404 U.S. 443, 444-45 (1972), The Supreme Court quoted: ("We deal here, not with a sentence imposed in the informed

discretion of a trial judge, but with a sentence founded at least in part upon misinformation of Constitutional magnitude.") **id. at 447.** It continued, [t]his prisoner was sentenced on the basis of assumptions concerning his criminal record - which were materially untrue. **id** (quoting **Townsend v. Burk, 334 U.S. 736 (1948)).** Likewise here in the instant matter the District Court assumed that the (2) prior Arkansas convictions was sufficient to impose a 220 month sentence, creating a "fundamental defect," which inherently results in a miscarriage of justice.

In **Brown v. Caraway, 719 F.3d at 588 (7th Cir. 2013),** the Court held that "an increase amounted to a miscarriage of justice and fundamental sentencing defect" because the "period of incarceration exceeded that permitted by law." **id. at** 587 (alteration and internal quotation marks omitted).

Naravez v. United States, 674 F.3d 621, 629 (4th Cir. 2011), The Court held that an "erroneous increase has been the basis for granting habeas relief." **id.** (citing **Tucker, 404 U.S. at 447).** Congress has bestowed "the courts broad remedial powers to secure the historic office of the writ." **Boumediene v. Bush, 553, U.S. 723, 776 (2008).** It is "Uncontroversial ... that the privlege of habeas corpus entitles the prisoner to a meaningful opportunity to demonstrate that he is being held pursuant to "the erroneous application or interpretation of relevant law." **id** at 779 (quoting **Ins v. St. Cyr, 533 U.S. 289, 302 (2001).**

Habeas Corpus is "above all, an adaptable remedy," and its precise application and scope change depending upon the circumstances." **id.**

Thus, The District Court erred by not ensuring petitioner has a meaningful opportunity to demonstrate that he is entitled to relief from his erroneous enhance sentence.

Reyes-Requena do not address whether an erroneously enhanced imposed sentence is sufficient to "invoke the saving clause or whether it could be a fundamental defect," as it had no occasion to do so. To the contrary, **Jones** court stated "section § 2255 ... was [not] intended to limit the rights of federal prisoners to collaterally attack their convictions and sentences," suggesting that the saving clause encompasses challenges to one's sentence. **id. United States v. Jones, 226 F.3d at 332 (4th Cir. 2000).** (Emphasis added). Including sentencing errors in the ambit of the saving clause also finds support in the statutory language.

In addition, The Supreme Court has long recognized a right to traditional habeas Corpus relief based on an illegal extended sentence. See. **Nelson v. Campbell, 541 U.S. 637, 643 (2004),** ("[T]he 'core' of habeas corpus has included challenges to the duration of [the prisoner] sentence.") Indeed, one purpose of traditional habeas relief was to remedy statutory, as well as Constitutional claims presenting a "fundamental defect which inherently results in a complete miscarriage of justice" and "exceptional circumstances where the need for the remedy afforded by writ of habeas corpus is present. **Davis, 417 U.S. at 346** (quoting **Hill v. United States, 368 U.S. 424, 428 (1962)).**

But if the District Court held that a prisoner was foreclosed from seeking collateral relief from a fundamentally defective

sentence, and "through no fault of his own - has no source of redress," this purpose would remain unfulfilled. **Jones, 226 F.3d at 333 n.3 (4th Cir. 2000).** Therefore, 2255(e) must provide an avenue for prisoners to test the legality of their sentence pursuant to § 2241, and **Reyes -Requena** should be applicable to sentencing error's, as well as underminded convictions. Since Congress and The Supreme Court presidents established that prisoners are able to challenge their illegal sentence in a § 2241 petition, and that § 2255(e) contemplates such a challenge, then the Fifth Circuit erred in denying Porch's appeal because he challenges the validity of his enhance sentence, rather than his conviction.

Clearly, Congress could have made "Saving Clause" relief dependant only on changes in Supreme Court constitutional law by using the identical language in 2255(e), But it did not. This is underscored by the fact that Congress anticipated the saving clause would apply to prisoners who had already been "denied ... relief" by the sentencing court, sweeping in those prisoners filing a successive § 2255 motion. **id § 2255(e).**

Thus, to honor the tradition of habeas corpus and the language, and context of the provision, petitioner should be granted access to proceed with the merits of his claim because an increase in the Congressionally mandated sentencing floor implicates separation of powers principles and due process rights fundamental to our justice system.

CONCLUSION

The petition for Writ of Certiorari should be granted, the judgment of the Court of Appeals vacated, and the case remanded for further proceedings in light of the position expressed in this brief.

Respectfully Submitted.

Marlon L. Porch

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PROOF OF SERVICE

I, Marlon L. Porch #25685-009, hereby certify that I have served a true and correct copy of the following: "CERTIORARI" which is deemed filed at the time it was delivered to prison authorities for forwarding, **Houston v. Lack, 101 L.Ed. 2d 245 (1988)** upon placing same in a sealed, postage prepaid envelope addressed to:

UNITED STATES SUPREME COURT
1 first st., NE
WASHINGTON, DC 20543-0002

UNITED STATES COURT OF APPEAL FOR THE FIFTH CIRCUIT
F. EDWARD HERBERT BLDG.
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130-3408

I DECLARE UNDER THE PENALTY OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. EXECUTED ON 5TH DAY OF AUGUST, 2019.