

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 18-31197

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ROBERT CARRENO, JR.,

Petitioner - Appellant

v.

CALVIN JOHNSON, USP Pollock,

Respondent - Appellee

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Appeal from the United States District Court  
for the Western District of Louisiana

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ON PETITION FOR REHEARING EN BANC

(Opinion 9/24/19, 5 Cir., \_\_\_\_\_, \_\_\_\_\_ F.3d \_\_\_\_\_ )

Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:



Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

( ) Treating the Petition for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The court

having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor (FED. R. APP. P. and 5<sup>TH</sup> CIR. R. 35), the Petition for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

  
\_\_\_\_\_  
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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No. 18-31197  
Summary Calendar

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United States Court of Appeals  
Fifth Circuit

**FILED**

September 24, 2019

Lyle W. Cayce  
Clerk

ROBERT CARRENO, JR.,

Petitioner-Appellant

v.

CALVIN JOHNSON, USP Pollock,

Respondent-Appellee

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Appeal from the United States District Court  
for the Western District of Louisiana  
USDC No. 1:18-CV-996

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Before DAVIS, SMITH, and HIGGINSON, Circuit Judges.

PER CURIAM:\*

Robert Carreno, Jr., federal prisoner # 84477-280, appeals the dismissal of his 28 U.S.C. § 2241 petition in which he contested the 300-month sentence imposed after his conviction for conspiracy to distribute a controlled substance. The district court for the Western District of Louisiana, where Carreno was in prison at the time he filed his § 2241 petition, found that he did not satisfy the

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\* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

savings clause of 28 U.S.C. § 2255(e). We review the dismissal of the petition de novo. *Christopher v. Miles*, 342 F.3d 378, 381 (5th Cir. 2003).

A prisoner may use § 2241 to challenge his conviction only if the remedy under § 2255 is inadequate or ineffective to contest the legality of his detention. § 2255(e). A § 2241 petition is not a substitute for a § 2255 motion, and Carreno must establish the inadequacy or ineffectiveness of a § 2255 motion by meeting the savings clause of § 2255. *See* § 2255(e); *Jeffers v. Chandler*, 253 F.3d 827, 830 (5th Cir. 2001); *Reyes-Quena v. United States*, 243 F.3d 893, 904 (5th Cir. 2001). Under that clause, Carreno must show that his petition sets forth a claim that is based on a retroactively applicable Supreme Court decision that supports that he may have been convicted of a nonexistent offense and that the claim was foreclosed when it should have been raised in his trial, direct appeal, or original § 2255 motion. *See Reyes-Quena*, 243 F.3d at 904.

Carreno asserts that he erroneously was found to have at least two prior felony drug offenses that rendered him eligible for an enhanced sentence under 21 U.S.C. § 841(b). He maintains that the definition of “felony drug offense” is unconstitutionally vague and inapplicable. Carreno contends that § 2241 relief is available to him under *Mathis v. United States*, 136 S. Ct. 2243 (2016), and *Descamps v. United States*, 570 U.S. 254 (2013), and he argues that he otherwise may contest his invalid sentence to avoid a miscarriage of justice.

However, Carreno does not assert that he was convicted of a nonexistent offense or is actually innocent. His claim that he was ineligible for an enhanced sentence does not meet the requirements of the savings clause of § 2255(e). *See Padilla v. United States*, 416 F.3d 424, 426-27 (5th Cir. 2005); *Wesson v. U.S. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002). He otherwise has not cited a retroactively applicable Supreme Court decision that addresses whether he was convicted of conduct that is not a crime. *See Padilla*, 416 F.3d

at 425-26; *Reyes-Querena*, 243 F.3d at 904. There is no authority that would allow him to proceed under § 2241 without satisfying the savings clause.

Accordingly, the judgment of the district court is AFFIRMED. Carreno's motions to consolidate and for the appointment of counsel are DENIED.

# *United States Court of Appeals*

FIFTH CIRCUIT  
OFFICE OF THE CLERK

LYLE W. CAYCE  
CLERK

TEL. 504-310-7700  
600 S. MAESTRI PLACE,  
Suite 115  
NEW ORLEANS, LA 70130

September 24, 2019

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW

Regarding: Fifth Circuit Statement on Petitions for Rehearing  
or Rehearing En Banc

No. 18-31197 Robert Carreno, Jr. v. Calvin Johnson  
USDC No. 1:18-CV-996

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Enclosed is a copy of the court's decision. The court has entered judgment under FED. R. APP. P. 36. (However, the opinion may yet contain typographical or printing errors which are subject to correction.)

FED. R. APP. P. 39 through 41, and 5TH Cir. R.s 35, 39, and 41 govern costs, rehearings, and mandates. **5TH Cir. R.s 35 and 40 require you to attach to your petition for panel rehearing or rehearing en banc an unmarked copy of the court's opinion or order.** Please read carefully the Internal Operating Procedures (IOP's) following FED. R. APP. P. 40 and 5<sup>th</sup> CIR. R. 35 for a discussion of when a rehearing may be appropriate, the legal standards applied and sanctions which may be imposed if you make a nonmeritorious petition for rehearing en banc.

Direct Criminal Appeals. 5<sup>th</sup> CIR. R. 41 provides that a motion for a stay of mandate under FED. R. APP. P. 41 will not be granted simply upon request. The petition must set forth good cause for a stay or clearly demonstrate that a substantial question will be presented to the Supreme Court. Otherwise, this court may deny the motion and issue the mandate immediately.

Pro Se Cases. If you were unsuccessful in the district court and/or on appeal, and are considering filing a petition for certiorari in the United States Supreme Court, you do not need to file a motion for stay of mandate under FED. R. APP. P. 41. The issuance of the mandate does not affect the time, or your right, to file with the Supreme Court.

Court Appointed Counsel. Court appointed counsel is responsible for filing petition(s) for rehearing(s) (panel and/or en banc) and writ(s) of certiorari to the U.S. Supreme Court, unless relieved of your obligation by court order. If it is your intention to file a motion to withdraw as counsel, you should notify your client promptly, **and advise them of the time limits for filing for rehearing and certiorari.** Additionally, you MUST confirm that this information was given to your client, within the body of your motion to withdraw as counsel.

Sincerely,

LYLE W. CAYCE, Clerk

*Laney Lampard*

By: Laney L. Lampard, Deputy Clerk

Enclosure(s)

Mr. Robert Carreno Jr.