

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

STEFONE DWAYNE PALOMO,
a.k.a. Wayne,

Petitioner,

v.

UNITED STATES OF AMERICA.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

- I. Does Petitioner's right to an appeal require either a decision on the merits or an *Anders* review with a finding that all issues are frivolous?
- II. Did the Fifth Circuit comply with its Local Rules and law by *sua sponte* dismissing a claim without full appellate review?

LIST OF PARTIES

Stefone Dwayne Palomo is the Petitioner, who was the Defendant-Appellant below. The United States of America is the respondent, who was the Plaintiff-Appellee below.

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OPINIONS BELOW

Petitioner pled guilty of Conspiracy to Possess with the intent to Distribute 50 grams or more of “actual” methamphetamine in violation of U.S.C. §§ 846 and 841(a)(1). The United States District Court for the Eastern District of Texas sentenced him May 2, 2017. [Appx. C]. Petitioner timely appealed to the United States Court of Appeals for the Fifth Circuit, which dismissed his appeal August 7, 2018. [Appx. A]. The court denied Petitioner’s August 21 motion for rehearing on August 28, 2018. [Appx. B].

STATEMENT OF JURISDICTION

Petitioner invokes the Supreme Court’s jurisdiction pursuant to 28 U.S.C. § 1254(1). Petitioner has timely filed this Petition within ninety days after the Fifth Circuit denied his motion for reconsideration on August 7, 2018. The Fifth Circuit had jurisdiction over the matter pursuant to 28 U.S.C. § 1291.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

This petition seeks the Court’s review of issues involving the Fifth Amendment to the US Constitution; *Anders v. State of Cal.*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493(1967); and *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 78 S. Ct. 1061, 1062, 2 L. Ed. 2d 1269 (1958). Petitioner also questions whether Fifth Circuit Local Rules 34 and 42.2 as applied violate Petitioner’s Fifth Amendment right to due process. *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970); *United States v. Gibson*, 55

F.3d 173, 179 (5th Cir. 1995); and *United States v. Williams*, 668 Fed. Appx. 561, 562 (5th Cir. 2016), cert. denied, 138 S. Ct. 103, 199 L. Ed. 2d 29 (2017).

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit’s Local Rules allowed summary dismissal of Petitioner’s appeal without explanation or opinion or a thorough review of the entire record pursuant to *Anders v. State of California*. As applied the rule violated Petitioner’s right to appellate review.

This Court has recognized the right to full appellate review of a criminal conviction. *Anders v. State of Cal.*, 386 U.S. at 742 (1967); *Coppedge v. United States*, 369 U.S. 438, 441, 82 S. Ct. 917, 919, 8 L. Ed. 2d 21 (1962); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. at 216 (1958). The right to appeal is “fundamental to the concept of due process of law.” *Arrastia v. United States*, 455 F.2d 736, 739 (5th Cir. 1972). The only exception is this Court’s opinion in *Anders*, which requires the appellate court to conduct “a full examination of all the proceedings, to decide whether the case is wholly frivolous” prior to dismissal. *Anders v. State of Cal.*, 386 U.S. at 744.

Petitioner properly appealed his conviction claiming that his plea agreement was not knowing or voluntary. [Appx. E]. The Fifth Circuit dismissed his appeal without opinion, so the reason for dismissal is not clear. [Appx. A]. Only one local rule appears to allow dismissal, and it allows a three-judge panel to declare an appeal “frivolous” and dismiss without performing an *Anders* review. *Id.*

II. The Circuits are split regarding summary dismissal of a criminal appeal without a decision on the merits.

The First, Fourth, Fifth, Eighth, and Eleventh Circuits allow a criminal appeal to be dismissed without full appellate review. *See* 1st Cir. R. 27.0(c) (allowing dismissal *sua sponte*); 3rd Cir. R. 27.4(a)(same); 4th Cir. R. 27(f)(2) (allowing *sua sponte* summary disposal of any appeal at any time); 5th Cir. R. 42.2 (allowing panel dismissal as frivolous or entirely without merit); 8th Cir. R. 47A (allowing summary dismissal of any appeal on its own motion for lack of jurisdiction or if frivolous and entirely without merit); 11th Cir. R. 42-4 (allowing panel dismissal as frivolous or entirely without merit).

These rules directly conflict with those in the Sixth, Seventh, Ninth, and Tenth Circuits, which strictly limit dismissal. *See* 6th Cir. R. 27(d) (allowing motion to dismiss only for lack of jurisdiction and limiting other motions); 7th Cir. R. 51; 9th Cir. R. 3-6 (limiting summary disposition on certain grounds to civil appeals); 10th Cir. R. 27-3(A)(1) (limiting dispositive motions to statutory reasons, change in law, mootness, remand, or to enforce a waiver). The Third Circuit also allows dismissal only for lack of jurisdiction. *Pierce v. Allen B. Du Mont Labs., Inc.*, 278 F.2d 323 (3d Cir. 1960).

The Federal Rules of Appellate Procedure require unanimous opinion by a three-judge panel *after review of the record and briefs* before refusing oral argument. Fed. R. App. P. R. 34(a)(2). This Court has held that due process requires a full review of the record by the appellate court prior to dismissal of a

frivolous appeal, even when a Petitioner's own attorney has conscientiously reviewed the record and found no non-frivolous grounds to appeal. *Anders v. State of Cal.*, 386 U.S. at 744 (1967).

A three-judge panel of the Fifth Circuit dismissed Petitioner's appeal without explanation or opinion, and with no indication that the appellate court had performed an *Anders* review of the record as a whole. The circumstances clearly demonstrate the divide in the Circuits about when summary dismissal is appropriate and what the appellate court's due process obligations are when it considers a criminal appeal meritless.

STATEMENT OF THE CASE

A. District Court Proceedings.

The grand jury indicted Petitioner on September 7, 2017 for multiple counts of conspiracy with intent to distribute narcotics.¹ After multiple continuances and several substitutions of counsel, he eventually agreed to plead guilty to Count 1 as a part of a binding plea agreement. *See* ROA.44-47, 52-56; 63-66, 69-72, 91-94, 104-107, 111-13, 114-18, 122-25, 137-38, and 139-143. Pursuant to the agreement Petitioner changed his plea to guilty. ROA.199-04. The district court accepted the

¹ Conspiracy to Possess with the intent to Distribute 50 grams or more of "actual" methamphetamine in violation of U.S.C. §§ 846 and 841(a)(1) ("Count 1"); Conspiracy to Possess with the intent to Distribute 5 kilograms or more of a mixture or substance containing a detectable amount of cocaine HCL, in violation of U.S.C. §§ 846 and 841(a)(1) ("Count 2"); and Conspiracy to Possess with the intent to Distribute 28 grams or more of a mixture or substance containing a detectable amount of cocaine base in violation of U.S.C. §§ 846 and 841(a)(1) ("Count 3") (Third Superseding Indictment). ROA.129-32.

plea on November 15, 2016 and sentenced Petitioner to 180 months according to the terms of the plea agreement. ROA. 205, 227-34, 461.²

On August 30, 2017, Petitioner mailed a *pro se* notice of appeal and motion requesting appointment of counsel to the district court. ROA.244-45.³ The district court denied the motion as moot because Petitioner had not timely pursued his appeal. ROA.247-49; Fed. R. App. P. 4(b). On February 16, 2018, the appellate court granted Petitioner an appeal because his trial attorney had withdrawn during a critical stage of the proceedings. ROA.373; 18 U.S.C. § 3006A.

B. Appellate Court Proceedings

Petitioner filed his brief on May 23, 2018. [Appx. E]. He argued that his plea agreement was neither knowing nor voluntary because he did not know about a change in the law in the months prior to his agreement. The change resulted in Petitioner no longer being classified as a “habitual offender.”

The record established that the attorney was not aware that the change had occurred prior to Petitioner executing the plea agreement. Petitioner also claimed that his attorney should have notified him of the change prior to signing the plea agreement. Because he had not, Petitioner claimed violation of his 6th Amendment right to effective assistance of counsel.

The Government filed a motion for summary dismissal. [Appx. D]. Its motion reframed Petitioner’s claim that his plea was unknowing and involuntary and

² The judgment was amended to remedy a clerical error on June 12, 2017. ROA.235-243.

³ Those were filed September 7, 2017. *Id.*

characterized it as purely an ineffective assistance claim that was not raised in the trial court and not ripe for appeal. The Government never claimed that Petitioner's appeal was wholly frivolous and without merit.

A split, three-judge panel granted the Government's motion without opinion dismissing the appeal. [Appx. A]. Petitioner filed a motion for reconsideration on August 21, 2018 which was denied on August 28, 2018. [Appx. B].

C. Statement of the Facts.

Petitioner appealed his case to the Fifth Circuit Court of Appeals arguing that his plea was not knowingly and voluntarily because it was based on incorrect legal advice about his status as a career offender. ROA.460. The record demonstrates that Petitioner became aware of the incorrect advice when he received the PSR after pleading guilty but before the court assessed punishment. *Id.* Rather than placing him in his pre-plea position, the district court offered to allow him to withdraw his plea but only at the cost of losing his credit for cooperating with the Government. ROA.457-58.

According to the PSR, Petitioner and others operated a drug trafficking organization ("DTO") that acquired, transported, and distributed methamphetamine and cocaine. ROA.267-273. Wiretaps conducted between August and October of 2014 intercepted conversations between DTO members discussing the sale of methamphetamine and cocaine. ROA.268. The Government subsequently seized money, drugs, and firearms during controlled purchases from the DTO and its members. ROA.269. Petitioner participated in some of the

intercepted phone conversations and delivered drugs to the Government's agents during the operation. *Id.*

On August 2, 2015, the Government indicted Petitioner for participating in the conspiracy to possess with the intent to manufacture and distribute methamphetamine, cocaine HCl and cocaine base in violation of 21 U.S.C. § 846. ROA.13-18. After several months of extensive discovery and two substitutions of counsel Petitioner agreed to plead guilty to Count 1. ROA.59-66; 104-13. On October 17, 2016, Petitioner changed his plea to guilty and agreed to a mandatory plea agreement recommending 180 months confinement. ROA.199, 415.

The district court convened a sentencing hearing May 2, 2017. ROA.450. During the hearing, Petitioner expressed frustration about the plea agreement after receiving the PSR, which noted that he was not classified as a "career offender". ROA.460 *et. seq.* He told the district judge that he would not have agreed to the 180 month sentence if he had known he was not a career offender prior to changing his plea. *Id.*

The record indicates that Petitioner's trial counsel told him that he was a career offender during plea negotiations. As a result, the amount of drugs he admitted to would not affect his sentence. ROA.455. In fact Petitioner was not a career offender. A few months prior to the plea both this Court and the Fifth Circuit published opinions that prevented some state offenses from being used to enhance federal sentences under the career offender statute. ROA.456. As a result of the

change Petitioner was no longer classified as a career offender and the amount of drugs did affect his sentence. *Id.*

The Government did not dispute that the agreement had been reached on the false premise that Petitioner was a career offender. ROA.456-59. The district court examined Petitioner to make sure that he fully understood his situation but neither the court nor the Government offered to put Petitioner back into the position he occupied before signing the plea agreement. ROA.456-61. Instead, Petitioner was left with what amounted to a Hobson's choice: Plead guilty to a quantity of drugs he disagreed to in order to provide the factual basis for a 180-month sentence, or move to withdraw his plea and lose credit for accepting responsibility.⁴ ROA.459.

Petitioner declared an understanding of the situation and decided to accept the plea. *Id.* The district court sentenced him to 180 months and signed the judgment May 2, 2017. ROA.236. Had Petitioner been correctly informed of the law, he likely would have pled differently.⁵

SUMMARY OF THE ARGUMENT

Petitioner's appeal should have been considered by the Fifth Circuit rather than summarily dismissed without opinion or a thorough review of the record. The Panel dismissed Petitioner's appeal over a disagreement by one of its members. The majority that ordered the dismissal did not issue an opinion or refer to any

⁴ Resulting in an increase in his guideline range to 210-262 months.

⁵ The Government, however, would not have been obligated to offer him the same plea arrangement.

authority to summarily dismiss the appeal.

Petitioner's issues are supported by the trial court's record and established precedent. They are not frivolous or entirely without merit. Therefore, the decision below should be overturned and Petitioner's issues determined on their merit.

ARGUMENT

I. Does Petitioner's right to an appeal require either a decision on the merits or an Anders review with a finding that all issues are frivolous?

Dismissal of Appellant's claim without full review violates due process and equal protection because the dismissal falls outside the rule of law. Once appellate review is granted, appellants are protected by the Due Process and Equal Protection Clauses. *Griffin v. Illinois*, 351 U.S. 12, 18, 76 S. Ct. 585, 590, 100 L. Ed. 891 (1956). This Court's jurisprudence recognizes the fundamental importance of the appellate process by requiring appointment of appellate counsel to indigents, finding a constitutional right to a trial record, and requiring a written *Anders* analysis prior to an attorney requesting to withdraw on the basis of no non-frivolous issues to appeal. *Ross v. Moffitt*, 417 U.S. 600, 607, 94 S. Ct. 2437, 2442, 41 L. Ed. 2d 341 (U.S. 1974); *Anders v. State of Cal.*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). This Court also recognizes the necessity of a thorough review by the court. *Anders v. State of Cal.*, 386 U.S. at 744-45 ("the court—not counsel—then proceeds, after a full examination of all the proceedings to decide whether the case is wholly frivolous."); an *Anders* brief "would also induce the court to pursue all the

more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel.”)

After Petitioner filed his brief the Government filed a motion asking for dismissal arguing that Petitioner’s appeal raised ineffective assistance claims not ripe for review. [Appx. D]. Petitioner’s brief raised three issues on appeal, only one of which claimed ineffective assistance of counsel. [Appx. E]. The other two issues raised questions of whether Petitioner’s plea was knowing and voluntary. *Id.* The Government’s motion does not address the other claims, nor does it characterize Petitioner’s appeal as frivolous. [Appx. D].

The three-member panel of the court granted the Government’s motion to dismiss without opinion. [Appx. A]. The Order noted one panel member would deny the motion and require the Government to submit a brief. *Id.* The Motion and Order are entirely devoid of any allegation or finding that Petitioner’s issues are wholly frivolous and without merit.

(A) Dismissal of Petitioner’s appeal violated Petitioner’s right to an appeal.

Once Petitioner exercised his right to appeal, due process does not allow for summary dismissal without consideration of the merits of his complaints or a determination that there are no non-frivolous issues. All defendants have the right to full appellate review when an appeal is properly brought. *Anders v. State of Cal.*, 386 U.S. at 742 (1967); *Coppedge v. United States*, 369 U.S. 438, 441 (1962); *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. at 216 (1958). Oral argument must be allowed in every case unless a three-judge panel unanimously agrees the appeal is frivolous, the dispositive issues have been

authoritatively decided, or the facts and issues are adequately presented in the briefs and record so that oral argument would not significantly aid the decision. Fed. R. App. P. § 34(a)(2).

The government is free to file a motion to dismiss when the issues raised are wholly frivolous. *United States v. Gregg*, 393 F.2d 722, 723 (4th Cir. 1968). The requirements to conclude that there is no arguable merit in an appeal require careful consideration of the grounds asserted by the court. *Anders v. State of Cal.*, 386 U.S. at 742; *United States v. Andrade*, 545 F.2d at 1033; *United States v. Gregg*, 393 F.2d at 723. The case may be summarily dismissed only upon a finding that the case is wholly frivolous and without merit after a full review. *Anders v. State of Cal.*, 386 U.S. 738, 742-43;⁶ *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. 214, 216.

The Panel's dismissal was apparently based on the Government's interlocutory motion under Fifth Circuit Local Rule 42.2. The rule states:

If upon the hearing of any interlocutory motion or as a result of a review under 5th Cir. R. 34, it appears to the court that the appeal is frivolous and entirely without merit, the appeal will be dismissed.

5th Cir. R. 42.2. The Panel's decision contains no *Anders* analysis, nor does the Panel state that such an analysis occurred. [Appx. A]. *See Anders v. State of Cal.*, 386 U.S. at 742; *United States v. Andrade*, 545 F.2d at 1033; *United States v. Gregg*, 393 F.2d at 723. The court did not make a finding that the appeal was wholly

⁶ This Court noted that the Supreme Court of California did not write an opinion in the case and there was no finding of frivolity. This Court found that procedure failed to provide "full consideration and resolution in the matter." *Anders v. State of Cal.*, 386 U.S. at 743.

frivolous and without merit. *See id.* The Court’s summary dismissal violates Petitioner’s right to full appellate review in the absence of an *Anders*-type analysis. *See Anders v. State of Cal.*, 386 U.S. at 743; *Eskridge v. Washington State Bd. of Prison Terms & Paroles*, 357 U.S. at 216.

(B) The Court Acted Impermissibly by Dismissing the Appeal

The authority by which the appeal was granted is unclear. The Court granted the Government’s Motion to Dismiss, indicating agreement with its arguments. [Appx. A]. However, the only authority for dismissal provided by the Government include two unpublished, non-precedential cases involving claims for ineffective assistance of counsel. [Appx. D at 10].⁷ In contrast, Petitioner claims his plea was not made knowingly or voluntarily and is therefore invalid. [Appx. E].

No authority was provided by the Panel or the Government indicating the appeal was not dismissed arbitrarily. The Panel did not write an opinion. Without an opinion Petitioner cannot determine the Panel’s rationale for dismissing his appeal or the authority on which his appeal was dismissed. The absence of an opinion limited Petitioner’s ability to comply with the Fifth Circuit’s local rule in a Petition for Rehearing, which requires presentation of “claimed errors of fact or law in the [Court’s] opinion.” 5th Cir. R. 40.2.

⁷ *United States v. Millender*, 517 Fed. Appx. 284 (5th Cir. 2013) (noting that an ineffective assistance claim will survive an appeal waiver when the alleged ineffectiveness “directly affected the validity of that waiver or the plea itself.”); *United States v. Gualdron-Lamus*, 697 Fed. Appx. 324 (5th Cir. 2017). In both these cases the Panel wrote an opinion and acknowledged each of the claims raised by appellant. *Id.*

II. Did the Fifth Circuit comply with its Local Rules and law by sua sponte dismissing a claim without full appellate review?

(A) Petitioner's argument that his plea was unknowing and involuntary is not frivolous.

The Fifth Circuit's rules or their application allowed dismissal of Petitioner's meritorious appeal without review. The State's *Motion for Summary Dismissal* frames all of Petitioners' arguments as claims of "ineffective assistance of counsel" and not ripe for review. [Appx. D]. This is an incorrect characterization. Petitioner primarily claimed that his plea agreement was not knowing or voluntary because it was based on an incorrect assumption about the law. The appellate record makes it clear that this incorrect assumption was made by both the Government and Petitioner's own counsel.

To be a valid waiver of constitutional rights a plea agreement must be voluntary and knowing "with sufficient awareness of the relevant circumstances and likely consequences." *Brady v. United States*, 397 U.S. 742, 748, 90 S. Ct. 1463, 1469, 25 L. Ed. 2d 747 (1970). Voluntariness of a plea can be determined "only by considering all of the relevant circumstances surrounding it." *Id.* at 749. Petitioners' plea agreement was not knowing or voluntary because both the Government and his attorney based the agreement on the faulty assumption that he was a career offender. In fact, he was not.

The faulty assumption was discovered prior to Petitioner's sentencing hearing. ROA.456. Despite this Petitioner was never given the opportunity to renegotiate his plea agreement without losing credit for cooperating with the

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Government. ROA.456-61. In other words, despite identifying the problem with the plea agreement, the District Court did not offer to place Petitioner back into the position he occupied before signing the plea agreement.

The Government's motion did not address Petitioner's argument that his plea was not knowing and voluntary. [Appx. D]. The Court made no mention of any of Appellant's arguments in its dismissal order. [Appx. A]. The Fifth Circuit Rules allowing a dismissal of the appeal without analyzing all of Petitioner's claims essentially deprived Petitioner of his due process right to intermediate appellate review. *See id.*

(B) Petitioner's ineffective assistance claim is ripe for consideration and should also have been considered by the court.

Generally, ineffective assistance claims cannot be resolved on direct appeal unless adequately raised in the district court. *United States v. Gibson*, 55 F.3d 173, 179 (5th Cir. 1995); *United States v. Wallace*, 32 F.3d 921, 930 (5th Cir. 1994). This generally involves developing a record about how and why an attorney's services were ineffective. However, where a sufficient record exists to show that counsel was ineffective, the claim is ripe for review on direct appeal. *United States v. Williams*, 668 Fed. Appx. 561, 562 (5th Cir. 2016), cert. denied, 138 S. Ct. 103, 199 L. Ed. 2d 29 (2017);⁸ *United States v. Gibson*, 55 F.3d at 179.

⁸ ("Nevertheless, because [Defendant] presented the issue in district court, there is no impediment to our consideration of his [Ineffective Assistance of Counsel] claims now [on direct appeal]").

The record clearly shows that Petitioner raised the issue that he had received incorrect advice from his attorney prior to sentencing. He discussed the issue directly with the district judge. ROA.456. *See United States v. Gibson*, 55 F.3d at 179. The following discussion occurred on the record during Petitioner's sentencing hearing:

MR. CHARANZA: I explained to Mr. Palomo that at the time we negotiated the agreement, the existing law at the time, he would have been a career offender. There was a change -- I've explained this to him -- in the Fifth Circuit case law which still put him in the guideline range, this plea agreement, as it's reflected, and that we have an agreement with the U.S. Attorney's office along those lines. I know he's **had some complaints about the attorneys prior to me**, but I don't think he has any complaints as to my conduct.

Is that correct?

THE DEFENDANT: Yes, sir.

MR. CHARANZA: Okay. I want the court to be clear about that. He had two prior attorneys, and that was **most of his issue**.

THE COURT: Well, but he's complaining about it today; and this is really a concern.

ROA.456-57 (emphasis added).

Petitioner's trial counsel acknowledged that he gave Petitioner incorrect advice that he was a career offender and explained that the case law changed just before Petitioner signed the plea agreement. ROA.456. Development of the facts outside the existing record would not add anything. *See United States v. Williams*, 668 Fed. Appx. at 562. There is no reasonable strategic basis for offering or relying

on incorrect legal advice when deciding to accept a plea agreement. Therefore, the issue should not have been summarily dismissed without full appellate review.

(C) Fifth Circuit Rules, or their application, do not comply with the Law

Petitioner's case was dismissed under a Fifth Circuit rule that contradicts case law and starkly contrasts with dismissal rules in other circuits. The rule allowed less than a unanimous three-judge panel to dismiss Petitioner's appeal without opinion. At a minimum, the panel should have written an opinion. If not, it was required to conduct a thorough *Anders* style review of the record prior to any dismissal. *See Anders v. State of Cal.*, 386 U.S. at 743.

Unless the panel then found the issues raised as entirely frivolous and wholly without merit by a unanimous three-panel judge, a decision should be made on the merits. *See Fed. R. App. P. § 34(a)(2)*. The panel should include the finding in the order if the case is determined to be wholly frivolous and without merit. *Anders v. State of Cal.*, 386 U.S. at 743. Petitioner was deprived of "full consideration and resolution in the matter" by the Fifth Circuit's dismissal in derogation of law. *See id.*

CONCLUSION

Stefone Dwayne Palomo's due process rights have been violated because he has not received full appellate review of his appeal. The Panel did not explain the rationale for its order through an opinion. For these reasons Petitioner requests the Court to reverse the Fifth Circuit's order dismissing his appeal and remand the appeal to the Fifth Circuit for full consideration of the issues he raised.

Respectfully submitted this 5th day of November, 2018.



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