IN THE SUPREME COURT OF THE UNITED STATES

NO. 18-8589

DEMETRIUS S. RANKIN, 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 A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Whether the Fifth Circuit Court of Appeals misapplied and ignored the procedural pronouncements made in Anders v. California, 386 US 738(1967)?

II. Whether the Fifth Circuit Court of Appeals' practice is out of step with the other circuit court of appeals that apply Anders?

III. Whether Court Appointed Appellate Counsel's Anders brief was deficient?

LIST OF PARTIES

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

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Petitioner, Defendant-Appellant-DEMETRIUS S. RANKIN, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals appears at Appendix "A" of this petition.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on October 30, 2018, A petition for rehearing was not filed. On January 18, 2019, Justice Alito extended the time to file a petition for a writ of certiorari to and including March 29, 2019, in Application No. 18A743. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part: "No person shall be ***deprived of life, liberty, or property, without

due process of law."

The Sixth Amendment to the Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed and to have the Assistance of Counsel for his defence."

§3583(e)(3) of Title 18 provides: "The Court may, after considering the factors set forth in section 3553, revoke a term of supervised release, and require the defendant to serve in prison all or part of the term of supervised release authorized by statute for the offense that resulted in such term of supervised release without credit for time previously served on post release supervision, if the court, pursuant to the Federal Rules of Criminal Procedure applicable to revocation of probation or supervised release, finds by a preponderance of the evidence that the defendant violated a condition of supervised release, except that a defendant whose term is revoked under this paragraph may not be required to serve on any such revocation more than 5 years in prison if the offense that resulted in the term of supervised release is a class A felony, more than 3 years in prison if such offense is a class B felony, more than 2 years in prison if such offense is a class C or D felony, or more than one year in any other case. 18 U.S.C. §3583(e)(3).

STATEMENT

On September 19, 2006, in the Southern District of Mississippi, Demetrius S. Rankin, Defendant-Appellant pleaded guilty to possession with the intent to distribute a controlled substance and criminal forfeiture. On April 17, 2007, Petitioner was sentenced to 143 months

in the Bureau of Prisons, followed by 5 years of supervised release. On February 16, 2015, the district court reduced Petitioner's sentence to 120 months of imprisonment pursuant to §3582(c)(2), of Title 18, with 5 years of supervised release to follow.

On july 12, 2017, Petitioner was arrested during a traffic stop by Louisiana State Police who discovered two kilos of cocaine found hidden in a shoe box under items in the trunk of a rental car registered to a Richard Jasper. ROA.787. A dash cam video captured the incident. Gov's ex.4. On July 17, 2017, Respondents' probation officer filed a petition for warrant for offender under supervision alleging that Petitioner violated four conditions of his supervised release. ROA.615-617.

The district court signed the petition and ordered the issuance of a warrant for Petitioner's arrest. ROA.615-617. The Petition alleged that Petitioner violated the mandatory condition of his supervised release prohibiting the commission of another federal, state or local crime. Specifically, that Petitioner committed the offense of distribution/manufacture or possession with the intent of a Schedule II Controlled Substance in violation of LA REV STAT §40:967, and by committing the offense of following too close with a vehicle in violation of LA REV STAT §32:81. The Petition also alleged that Petitioner violated two standard conditions: (1) the standard condition prohibiting leaving the jurisdiction without permission of the court or probation officer. Specifically, that Petitioner traveled to Louisiana without approval; and, (2) the standard condition of paying any fine imposed in the judgment. Specifically, failing to make monthly payments as ordered. ROA. 616.

Petitioner appeared for a revocation hearing on November 15, 2017.

At the hearing, the government introduced testimony from the probation officer and two Louisiana State Troopers as well introduced exhibits.

Petitioner's attorney urged to the Court that the state of the law in the Fifth Circuit is that Respondent must make some kind of showing that there's some connection between Petitioner and the cocaine in the trunk of the car. Counsel pointed out that Petitioner was driving a car that was rented by another individual by the name of Richard Jasper, and that's uncontradicted in the record. Counsel maintained that the state of the law in the Fifth Circuit is that there has to be a showing by Respondent when a package, cocaine, for instance, is hidden in a vehicle like this cocaine was, there has got to be a showing that there is a connection between the hidden cocaine and the person being charged with it, Petitioner. ROA.787-788. The district court found that because the cocaine was hidden, Respondent must present circumstantial evidence beyond mere control of the vehicle that is suspicious in nature or demonstrates guilty knowledge, which may include consciousness of guilt, conflicting statements, or an implausible account of events. ROA.829. United States v. Mendez, 693 Fed.Appx.335,217(5th Cir.2017).

Of Central relevance here, the district court found by a preponderance of the evidence (but explicitly did not find beyond a reasonable doubt) that Petitioner, did, in fact, commit the offense of possession of a controlled substance in the state of Louisiana. The Court concluded, based on a preponderance of the evidence, without viewing the dash cam video, that Petitioner, whether he is the mastermind of a drug organization or whether he is simply a courier, went to the state of Texas, the city of Houston, wherein he aquired two kilos of cocaine. On his way back, he had the misfortune of being stopped by Louisiana State Troopers, who discovered the cocaine in a shoe box hidden under materials and

hidden under clothing that both the Petitioner and the passenger of the vehicle admitted were theirs. ROA.828-831. There was not a scintilla of evidence to support the district court's conclusion that Petitioner or the passenger of the vehicle claimed ownership to anything in the trunk of the vehicle where the cocaine was found, except the arresting officer's arrest report which was contradicted by his own testimony and the dash cam video of the traffic stop.

The district court sentenced Petitioner to a term of 60 months imprisonment to run consecutive to any sentence that he may serve for the underlying offense in the state of Louisiana. ROA.833. Petitioner timely appealed.

On June 5, 2018, Court Appointed Appellate Counsel moved to withdraw in accordance with Anders v. California, 386 US 738(1967), because: Petitioner's appeal presents no nonfrivolous issue as to either the revocation of his probation or his revocation sentence; that Petitioner was found to have violated the mandatory condition against using or possessing drugs while on probation, a condition that triggers mandatory revocation; that the district court substantially complied with the procedural requirements of Federal Rule of Criminal Procedure 32.1 and other applicable law governing revocation proceedings; that the revocation sentence was within the range recommended by the sentencing guidelines' policy statements and far below the applicable statutory maximum term; that nothing in the record suggest the sentence was imposed in violation of the law or is plainly unreasonable, either procedurally or substantively; and, that after examining the facts of the case in light of the applicable law, it is counsel's opinion that there is no basis presenting any legally nonfrivolous issue for appellate review.

On August 8, 2018, Petitioner filed a Anders reply brief contending that his constitutional right to counsel on his first appeal as of right had been denied and that Appellate Counsel failed to conduct a conscientious examination of the case and acts in bad faith by alleging that the appeal is wholly frivolous. Petitioner alleged that Appellate Counsel failed to support the appeal to the best of his ability and under his duty to act zealously for Petitioner's interest should have pointed out in a merits brief, that Petitioner's right to due process was violated during the revocation hearing and that the district court abused its discretion when it revoked Petitioner's term of supervised release and imposed a 60 month non-guideline sentence based upon clearly erroneous factual findings made related to his arrest for possession of a controlled substance, which triggered mandatory revocation of his supervised release.

Petitioner maintained that Respondent failed to carry its burden of establishing by preponderance of the evidence or otherwise, that he had constructive possession of the cocaine found in the trunk of a rental car occupied by him and a female passenger; that the district court committed clear reversible error by finding that Petitioner claimed ownership to clothing found in the trunk of the rental vehicle where the cocaine was found to establish his knowing possession and control over the cocaine; that the district court erroneously relied on the officer's arrest report when the dash cam video quite clearly, contradicted the version of the story told by the arresting officer and adopted by the district court(ROA.826 and Gov's ex.4.); that the district court abused its discretion and violated Rule 32.1 and Petitioner's right to due process by admitting and considering unreliable hearsay evidence, namely, the officer's arrest report and testimony by police

of out-of-court statements made by the passenger related to Petitioner's arrest for possession of a controlled substance which triggered mandatory revocation; that the out-of-court statements made by the passenger were inherently unreliable and undermined the fact finding process and contravened Petitioner's right to confrontation under the due process clause and was not harmless; that the district court abused its discretion and violated Petitioner's right to due process by relying on clearly erroneous and materially false information related to his arrest for possession of a controlled substance in formulating its sentence; and, that the district court's erroneous consideration of Petitioner's arrest for possession of a controlled substance in formulating its non-guidelines sentence tainted the sentence. Accordingly, Petitioner alleged that these issues were arguable on their merits and therefore not frivolous.

On October 30, 2018, the Fifth Circuit Court of Appeals under United States v. Flores, 632 F.3d 229(5th Cir.2011), reviewed counsel's brief, relevant portions of the record referred to in counsel's brief, Petitioner's response and concurred with Counsel's assessment that the appeal presents no non-frivolous issue for appellate review. Accordingly, the Court granted Counsel's motion to withdraw and dismissed the appeal.

REASONS FOR GRANTING THE PETITION

The Fifth Circuit Court of Appeals opinion, attached as the Appendix of this petition, is contrary to the decisions of this Court in Anders v. California, 386 US 738(1967), McCoy v. Court of Appeals of Wis, 486 US 429(1988), and Penson v. Ohio , 488 US 75(1988), and at odds with other circuits that follow the procedural pronouncements made in Anders, McCoy, and Penson. The Fifth Circuit Court of Appeals in Flores, 632

F.3d 229, adopted an intermediate position taken by the Seventh Circuit in United States v. Wagner, 103 F.3d 551, which misapplies and ignores the safe-harbor procedures as outlined in Anders, and is out of step with the practice of the Second, Sixth, Ninth, Tenth, Eighth, Eleventh, and DC circuits. The Third Circuit also follows the Seventh Circuit's approach in United States v. Youla, 241 F.3d 296.

This case involves one or more constitutional questions of exceptional importance and makes consideration by this Court necessary to secure and maintain uniformity of the decisions of this Court. Under Supreme Court Rule 10, one principal purpose of this Court's certiorari jurisdiction is to resolve conflicts among the circuit court of appeals in issues of law. In these situations in which a United States Court of Appeals has departed from the usual and accepted course of judicial proceedings, certiorari may be granted. Sup. Ct. R. 10.

This Court should grant certiorari to correct the Court of Appeals' error on this significant and recurring question of federal law as it affects the constitutional rights of a great number of defendants.

A. THE FIFTH CIRCUIT MISAPPLIED AND IGNORED THE PROCEDURAL PRONOUNCEMENTS MADE IN ANDERS

Petitioner respectfully submits that, the Fifth Circuit Court of Appeals erred in dismissing his appeal based on its decision in Flores, which misapplies and ignores the procedural pronouncements made in Anders vs. California.

The Anders opinion recognized that in some circumstances counsel may withdraw without denying the indigent appellant fair representation provided that certain safeguards are observed: Appointed Counsel is first required to conduct "a conscientious examination" of the case. Anders, 386 US at 744.

If he or she is then of the opinion that the case is wholly frivolous, counsel may request leave to withdraw. The request must, however, "be accompanied by a brief referring to anything in the record that might arguably support the appeal." Ibid.

Once the appellate court receives this brief, it must then itself conduct "a full examination of all the proceedings to decide whether the case is wholly frivolous." Ibid. Only after this separate inquiry, and only after the appellate court finds no non-frivolous issue for appeal, may the court proceed to consider the appeal on the merits without the assistance of counsel.

As explained in McCoy v. Court of Appeals of Wis, 486 US 429(1988), "To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous." Ibid.

The Fifth Circuit followed its opinion in Flores, which adopted an intermediate position taken by the Seventh Circuit. The intermediate position is for the appellate court to be guided in reviewing the record by the Anders brief itself, provided that the brief is adequate on its face.

If the brief explains the nature of the case and fully and intelligently discusses the issues that the type of case might be expected to involve, the appellate court shall not conduct an independent top-to-bottom review of the record in the district court to determine whether a more resourceful or ingenious lawyer might have found additional issues that may not be frivolous. The appellate court shall confine its scrutiny

of the record to the portions of it that relate to the issues discussed in the brief.

In light of this scrutiny if it is apparent that the lawyer's discussion of the issues that he chose to discuss is responsible and there is nothing in the district court's decision to suggest that there are other issues the brief should have discussed, the appellate court shall have enough basis for confidence in the lawyer's competence to forgo scrutiny of the rest of the record. The resources of the court of appeals are limited and time of staff attorneys and law clerks that is devoted to searching haystacks for needles is unavailable for more promising research. Id. at 632, F.3d at 234.

The Fifth Circuit erred in two respects in granting counsel's motion to withdraw. First, the motion should have been denied because counsel's "certification of a meritless appeal" failed to draw attention to "anything in the record that might arguably support the appeal."

The problem to which Anders responds arises when counsel views his client's appeal as frivolous, leaving him duty barred from pressing it upon a court. The rub is that although counsel may properly refuse to brief a frivolous issue and a court may just as properly deny leave to take a frivolous appeal, there needs to be some reasonable assurance that the lawyer has not relaxed his partisan instinct prior to refusing, in which case the court's review could never compensate for the lawyer's failure of advocacy. The "Anders brief" serves the valuable purpose of assisting the court in determining both that counsel in fact conducted the required detailed review of the case and that the appeal is indeed so frivolous that it may be decided without an adversary presentation. The importance of this twin function of the Anders brief was noted in Anders itself, 386 US at 745, and again in McCoy, where it was clearly

stated that the Anders brief is designed both "to provide the appellate courts with a basis for determining whether appointed counsel has fully performed their duty to support their client's appeal to the best of their ability, "and also to help the court make "the critical determination whether the appeal is so frivolous that counsel should be permitted to withdraw." Id at 486 US at 439.

Second, the Court of Appeals should not have acted on the motion to withdraw without conducting an independent full examination of all of the proceedings to decide whether the case is wholly frivolous. Only after this separate inquiry, and only after the appellate court finds no non-frivolous issue for appeal, may the court proceed to consider the appeal on the merits withoutthe assistance of counsel. Moreover, the court of appeals erred by limiting its review of the record to portions of the record referred to by counsel in the Anders brief.

The Court of Appeals should not have acted on the motion to withdraw before it made its own independent examination of the entire record to determine whether counsel's evaluation of the case was sound. This requirement was plainly stated in Ellis v. united States, 356 US 674(1958), and repeated in Anders at 386 US at 744, an reiterated in McCoy, 486 US at 442, and Penson, 488 US at 83. (emphasis added).

1. COUNSEL'S ANDERS BRIEF WAS DEFICIENT

The brief filed by court appointed appellate counsel on Petitioner's direct appeal clearly fell short of Anders as this Court has applied it. The fourteen page brief reads like a summary of the proceedings, with emphasis given to reasons in favor of affirming the district court's decision to revoke Petitioner's term of supervised release. No arguments are made for reversal and no cases are cited which might arguably support Petitioner's appeal.

In short, the brief reads like the amicus brief forbidden in Anders. As this Court said in Anders, "briefing must be done as an advocate," and "counsel did not act as an advocate for [Petitioner] when he briefed all issues in favor of the government and concluded [Petitioner's] claims were meritless.

Two services of appellate counsel should have been done here: Appellate counsel examines the trial record with an advocate's eye, identifying and weighing potential issues for appeal. This is review not by a dispassionate legal mind but by a commtted representative, pledged to his client's interests, primed to attack the conviction on any ground the record may reveal. If counsel's review reveals arguable trial error, he prepares and submits a brief on the merits and argues the appeal.

The right to the first of these services, a partisan scrutiny of the record and assessment of potential issues, goes to the irreducible core of the lawyer's obligation to a litigant in an adversary system, and this Court has consistently held that it is essential to substantial equality of representation by assigned counsel. "The paramount importance of vigorous representation follows from the nature of our adversarial system of justice." Penson v. Ohio, 488 US 75(1988). Without the benefit of the lawyer's statement of the strongest claims, the appellate panel cannot act as a reviewing court, but relegated to an inquisitorial role.

If the Anders procedure is to work, therefore, the lawyer filing the Anders brief must, to the extent possible, remain in his-role-as-advocate; at this stage of the proceedings it is not for the lawyer to act as an unbiased judge of the merits of particular grounds for appeal. He is required to set out any irregularities in the trial process or other potential error which, although in his judgment not a basis for appellate relief, might, in the judgment of his client or another couns-

elor or the court, be arguably meritorious. This is done in order that these potential claims not be overlooked. The objective of these potential claims is for the court's determination, not the advocate's. United States v. Blackwell, 767 F.2d 1486, 1487-88(11th Cir.1985). Accordingly, because the brief reads like the amicus brief in Anders, and briefed all issues in favor of the Respondent with emphasis given to reasons in favor of affirming the district court, appellate counsel's brief was inadequate under Anders and Penson holds that appellate review cannot take place without a full adversarial briefing by appellate counsel.

B. THE FIFTH CIRCUIT COURT OF APPEALS' PRACTICE IS OUT OF STEP WITH THE PRACTICE OF OTHER CIRCUITS THAT APPLY ANDERS

The Fifth Circuit's intermediate position in Flores, 632 F.3d 229, that it adopted from the Seventh Circuit in Wagner, 103 F.3d 551, is at odds with the procedural pronouncements made in Anders, and is out of step with practice of the Second, Sixth, Eighth, Ninth, Tenth, Eleventh, and DC circuits that have applied Anders and its progeny. See, United States v. Bennett, 989 F.2d 100(2d Cir.1993); Freels v. Hill, 843 F.2d 958, 962(6th Cir.1988); Evans v. Clarke, 868 F.2d 267 (8th Cir.1989); United States v. Griffy, 895 F.2d 561(9th Cir.1990); United States v. Snitz, 342 F.3d 1154, 1157(10th Cir.2003); United States v. Blackwell, 767 F.2d 1486(11th Cir.1985); Suggs v. United States, 391 F.2d 971(DC Cir.1968).

In Bennett, the Second Circuit held that an Anders brief performs a dual function: to assist the appellate court in reviewing the appeal and to ensure that indigent criminal appellants receive effective assistance of counsel. Id. at 989 F.2d at 104.

An appellate court therefore has two tasks on defense counsel's motion

to be relieved: (1) it must be satisfied that counsel has diligently searched the record for any arguably meritorious issue in support of his client's appeal and (2) in order to permit defense counsel to withdraw, it must be satisfied that defense counsel's declaration that the appeal would be frivolous is, in fact, legally correct. Id. citing, McCoy, 486 US at 442.

In Freels, the Sixth Circuit held that the failure of a court appointed appellate counsel to follow case law procedural requirements during an appeal is not harmless when it resulted in the deprivation of a convicted felon's constitutional right to appellate review. The obligation of advocacy required of counsel by Anders is of such quality that it is not subject to waiver or excuse. Freels, 843 F.2d at 963.

In Evans, the Eighth Circuit illustrated its continued dedication to the vigorous enforcement of Anders requirements. The purpose of this requirement is twofold: it affords the indigent defendant "that advocacy which a non-indigent defendant is able to obtain," and it enables "the court to pursue all the vigorously, its own review because of the ready references not only to the record, but also to the legal authorities as furnished by counsel." Griffy, 895 F.2d at 562, citing Anders, 386 US at 744-45.

An appellate court's obligation does not end once it concludes counsel reviewed the record and found no errors, an independent review by the Appeals court of all the proceedings is necessary. Snitz, 342 F.3d 1154, 1157. Accordingly, the Fifth Circuit's intermediate practice which does not require the appellate court to conduct an independent top-to-bottom review of the record and allows the appellate court to confine its scrutiny of the record to portions of it that relate to the issues discussed in the Anders brief itself, violates Petitioner's

constitutional right to appellate review. Additionally, the failure by the Fifth Circuit to require appellate counsel submit a brief referring to anything in the record that might arguably support his client's appeal, denies Petitioner the constitutional right to effective assistance of counsel on his first appeal as of right as explicated in Anders v. California.

C. THE QUESTION(S) PRESENTED WARRANTS THIS COURT'S REVIEW

This case reveals an interesting gap between the circuits that apply Anders and creates the type of conflict that can be resolved only through intervention by this Court. This case warrants certiorari review because the decision below if left undisturbed, will continue to ignore this Court's procedural pronouncements made in Anders and allows the Fifth Circuit Court of Appeals to continue to depart from the usual practice and accepted course of judicial proceedings. It introduced an irreconcilable anomaly into the otherwise uniform view of the courts of appeals that court appointed appellate counsel must remain in his role as an advocate and set out any potential claims that might arguably support his client's appeal. It also introduced an irreconcilable anomaly into the otherwise uniform view of the court of appeals that have held that the court of appeals conduct its own independent full examination of all of the proceedings to decide whether a case is wholly frivolous and whether appellate counsel's evaluation of the case is sound.

Every court of appeals to have addressed the question(s) have concluded that court appointed appellate counsel submitting an Anders brief must remain in-his-role-as-advocate and refer to anything in the record that might arguably support his client's appeal. The appropriateness

of this Court's review is heightened here by the court of appeals' creation of erroneous exceptions to a rule of law that is otherwise uniform across the circuits.

The decision below is in even greater tension with the decisions in Anders, McCoy, and Penson supra, and has created incentives for further litigation, which will inevitably result in either a full blown circuit conflict or more widespread and erroneous application and exceptions to a rule of law that is otherwise uniform across the circuits.

Accordingly, this Court's intervention is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted and this case should be remanded to the Fifth Circuit Court of Appeals in light of this Court's decision in Anders, with instructions to re-instate Petitioner's appeal and appoint new appellate counsel to perfect the Petitioner's appeal. Additionally, Petitioner prays this Court will sua sponte review this case for error in light of its expected ruling in United States v. Haymond, currently pending before this Court.

Respectfully submitted.

Demetrius S. Rankin
Petitioner-Appellant
(S) Demetrius Rankin