

18-8690 ORIGINAL

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
APR 05 2019
OFFICE OF THE CLERK

DAGOBERTO ONTIVEROS — PETITIONER

vs.

MICHAEL PACHECO, Warden, Wyoming State Penitentiary, and
THE WYOMING ATTORNEY GENERAL — RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO
TENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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Petitioner, *pro se*
Dagoberto Ontiveros, #30457
Wyoming Medium Correctional Institution
7076 Road 55F
Torrington, Wyoming 82240

QUESTION(S) PRESENTED

When rejecting a criminal defendant's direct appeal under the provisions of *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967), must there be a finding of frivolity?

LIST OF PARTIES

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

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IN THE
SUPREME COURT OF THE UNITED STATES
PETITION FOR WRIT OF CERTIORARI

Petitioner Dagoberto Ontiveros (“Ontiveros”), *pro se*, respectfully requests that a writ of certiorari issue to review the decision below.

DECISIONS BELOW

The Order denying petition for rehearing of the United States Court of Appeals for the Tenth Circuit is appended hereto in Appendix A.

The Order Denying Certificate of Appealability of the United States Court of Appeals for the Tenth Circuit is appended hereto in Appendix B.

The Order Granting Summary Judgment and dismissing petition for writ of habeas corpus of the United States District Court is appended hereto as Appendix C.

The Opinion of the Wyoming Supreme Court dismissing the direct appeal and affirming the judgment and sentence is appended hereto as Appendix D, and is otherwise reported at *Ontiveros v. State*, 380 P.3d 91 (Wyo. 2016).

JURISDICTION

The final judgment (Order denying petition for rehearing) of the United States Court of Appeals for the Tenth Circuit was entered on February 14, 2019.

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

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 2254, in its pertinent part, provides:

“(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.”

STATEMENT OF THE CASE

On July 17, 2015, Ontiveros pleaded no contest to the charge of second degree murder. The State District Court sentenced Ontiveros to twenty to twenty-four years imprisonment.

Ontiveros timely pursued and appeal before the Wyoming Supreme Court, but his court appointed Appellate Counsel ultimately filed a motion to withdraw as counsel and a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S. Ct. 1396, 18 L. Ed. 2d 493 (1967). In the *Anders* brief, Appellate Counsel summarized the record, stated he “conscientiously reviewed the entire file, as well as other materials, had spoken with Ontiveros, and found no appealable issues.” Appellate Counsel noted due to Ontiveros’ no contest plea, Appellate Counsel could only appeal issues regarding jurisdiction or the voluntariness of the plea. Appellate Counsel analyzed the voluntariness of Ontiveros’ plea, citing the legal standard and the record and found that the State District Court had properly advised Ontiveros under the requirements of W.R.Cr. P. 11. Appellate Counsel also identified the issues Ontiveros believed the Wyoming Supreme Court should

examine and determined there were no appealable issues.

After receiving the motion to withdraw and *Anders* brief, the Wyoming Supreme Court granted an extension permitting Ontiveros to file a *pro se* brief, so he could specify the issues he wanted the Wyoming Supreme Court to consider. The Wyoming Supreme Court granted a second extension for Ontiveros to file a *pro se* brief, but he did not file a brief.

On September 26, 2016, the Wyoming Supreme Court entered an order affirming the state district court's judgment and sentence. The Wyoming Supreme Court stated, "following a careful review of the record and the '*Anders* brief' submitted by appellate counsel, this Court finds that appellate counsel's motion to withdraw should be granted and the district court's Judgment and Sentence should be affirmed."

Although relying on *Anders*, neither Appellate Counsel nor the Wyoming Supreme Court determined that an appeal on behalf of Appellant would be "frivolous." In this regard, Appellate Counsel merely offered that "there are no meritorious, arguable issues for appeal.

On September 25, 2017, Ontiveros filed a petition under 28 U.S.C. § 2254 with the United States District Court for the District of Wyoming ("USDC"). Ontiveros alleged appellate counsel ("Counsel") and the Wyoming Supreme Court violated the requirements set forth in *Anders*. Specifically, Ontiveros alleged he received ineffective assistance from his appellate counsel when he filed the *Anders* brief and sought to withdraw. Additionally, Ontiveros alleged the Wyoming Supreme Court denied his right of appeal when it permitted Counsel to withdraw and permitted Ontiveros to file a *pro se* brief.

After an initially entering a *Scheduling Order* and therein requiring Ontiveros to submit an *Opening Brief*, the USDC ordered the *Petition* served on Appellee, who subsequently, by and through the Wyoming Attorney General's Office, submitted a *Response to Petition for Writ of Habeas Corpus* on December 26, 2017, and on April 11, 2018, the USDC entered an *Order Setting Deadlines for Dispositive Motions*.

The Appellee then filed a *Respondents' Motion for Summary Judgment* and supporting *Brief*, to which Ontiveros submitted a *Response*, therein arguing, *inter alia*, that there were factual disputes and that *Anders* clearly specifies that a finding of frivolity should support a state court's decision to permit an attorney to withdraw, which was not present in the Appellant's case. The USDC then granted the *Respondents' Motion for Summary Judgment* and dismissed Appellant's *Petition* with prejudice.

Ontiveros appealed to the United States Court of Appeals for the Tenth Circuit and was denied relief on January 10, 2019. Ontiveros specifically argued that when an attorney utilizes an *Anders* brief, a finding of "frivolity" is absolutely mandatory and a finding that an appeal has no merit is not adequate.

The Tenth Circuit presumed that the Wyoming Supreme Court's decision included a determination that the appeal was frivolous. Ontiveros requested a rehearing and rehearing en banc, therein specifically arguing that the Wyoming Supreme Court was actually required to determine that the case is wholly frivolous and that Tenth Circuit precedent was replete with notations regarding the finding of frivolity when an *Anders* brief is utilized.

On February 14, 2019, the Tenth Circuit refused Ontiveros' request for a rehearing and rehearing en banc.

REASONS FOR GRANTING THE PETITION

The presumption by the Tenth Circuit that the Wyoming Supreme Court's careful review included a determination that the appeal was frivolous effectively nullifies the central teaching of *Anders* and clearly conflicts with this Court's requirement of a "frivolity" finding by a court entertaining an *Anders* brief.

In this regard, the Court found it necessary to specifically identify that in *Anders* and *Ellis v. United States*, 356 U.S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060 (1958) (per curiam), "neither counsel, the state appellate court on direct appeal, nor the state habeas courts had made any finding of frivolity." *Smith v. Robbins*, 528 U.S. 259, 270, 120 S. Ct. 746, 145 L. Ed. 2d 756 (2000). The Court also clearly referred to its conclusion in *Anders* that a characterization that an appeal had no merit was inadequate because it did not mean that the appeal was so lacking in prospects as to be frivolous. *Id.* at 270-71. Moreover, an appellate court must determine if counsel's evaluation of the case was sound. See *Penson v. Ohio*, 488 U.S. 75, 82-83, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988). Therefore, it goes without saying that these holdings clearly advocate that a court must actually make a finding of frivolity when an *Anders* brief is before it.

Consequently, the presumption by the Tenth Circuit that the Wyoming Supreme Court's careful review included a determination that the appeal was frivolous is no different than the no merit characterization discussed by the Court in *Smith* and firmly rejected in *Anders* and *Ellis*. Accordingly, the Tenth Circuit's decision is clearly contrary to this Court's case law in *Anders*, *Ellis* and *Smith* and it will only serve to deny adequate and effective appellate review to indigent defendants. See *Douglas v.*

California, 372 U.S. 353, 354-56, 83 S. Ct. 814, 9 L. Ed. 2d 811 (1963).

Ontiveros submits that the issue presented by this petition is of significant concern and an important public issue deserving of the Court's attention. In this regard, there is a legitimate need for the Court to render an opinion which makes clear that a court must actually make a finding of frivolity when an *Anders* brief is before it.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted this 27th day of March, 2019.



Petitioner, *pro se*

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APPENDIX A