

JUL 20 2021

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No. 21-

IN THE  
Supreme Court of the United States

21-5603

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

v.

ALPHONSE GAINER,

*Petitioner-Appellant.*

*On Petition for a Writ of Certiorari to the United States  
Court of Appeals For The Eleventh Circuit*

**PETITION FOR A WRIT OF CERTIORARI**

ALPHONSE GAINER  
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APPEARING *PRO SE*

**ORIGINAL**

## **QUESTIONS PRESENTED**

- I. Whether the United States Court of Appeals for the Eleventh Circuit abused its discretion in denying Gainer's Motion for Reconsideration of Denial of His Appeal Re: Motion for Sentence Reduction pursuant to Section 404 of the First Step Act of 2018.

## **PARTIES TO THE PROCEEDINGS**

Petitioner-Appellant, ALPHONSE GAINER (“Gainer”), was a criminal defendant in the United States District Court for the Northern District of Florida, Panama City Division, in USDC Criminal No. 5:94-cr-05004-LC-MD-1; and as Appellant in the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) in USCA No. 20-13642. Respondent, United States of America, was the Plaintiff in the District Court and Appellee in the Eleventh Circuit.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioner respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

### **OPINION BELOW**

The opinion of the United States Court of Appeals for the Eleventh Circuit is non-published, *USA v. Alphonse Gainer*, No. 20-13642 (11<sup>th</sup> Cir. 2021), is attached in the Appendix at 1a and 2a.

### **STATEMENT OF JURISDICTION**

The judgment of the court of appeals was entered on April 27, 2021. A petition for rehearing was denied on June 9, 2021. On August 29, 2018, The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### **CONSTITUTIONAL 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 January 12, 1994, a grand jury sitting in the United States District Court for the Northern District of Florida, Panama City Division, returned a one (1) count Indictment charging Gainer. See Doc. 1. Count 1 charged Gainer with Possession with Intent to Distribute Cocaine Base, in violation of 21 U.S.C. §§ 841(a)(1) and (b)(1)(A). *Id.*

On March 2, 1994, the government filed an Information to Establish Prior Conviction with the intention to seek enhanced sentence, pursuant to 21 U.S.C. § 851 (851 Enhancement”). See Doc. 14.

On March 22, 1994, the jury found Gainer guilty on Count 1 of the Indictment. See Doc. 19.

On May 17, 1994, Gainer was sentenced to a term of 540 months’ imprisonment, 10 years of Supervised Release, no Fine or Restitution, and a Mandatory Special Assessment Fee of \$50. See Doc. 28.

On May 23, 1994, Gainer timely filed a Notice of Appeal. See Doc. 29.

On October 12, 1995, the United States Court of Appeals for the Eleventh Circuit (“Eleventh Circuit”) affirmed the District Court’s conviction and sentence. See Doc. 53.

On February 11, 1998, Gainer filed a Motion under 28 U.S.C. § 2255 to Vacate, Set Aside or Correct Sentence by a Person in Federal Custody (“§ 2255 Motion”), which was amended on March 26, 1998. See Docs. 54, 57.

On October 2, 1998, the Court issued an Order denying Gainer’s § 2255 Motion. See Doc. 64.

On April 30, 2008, Defendant’s 540-month term of imprisonment was reduced to 405 months pursuant to Amendment 706, which was at the highest end of the guideline range as calculated under that amendment (324 to 405 months). See Doc. 146, 147.

On June 7, 2019, Gainer filed a Motion for Sentence Reduction pursuant to Section 404 of the First Step Act of 2018, which was denied on August 20, 2020. See Docs. 204, 2018.

On September 2, 2020, Gainer timely filed a Notice of Appeal Re: Denial of his Motion for Sentence Reduction. See Doc. 219. Gainer’s counsel has moved to withdraw from further representation of the appellant and filed a brief pursuant to *Anders v. California*, 386 U.S. 738 (1967). On April 27, 2020, the Eleventh Circuit granted counsel’s motion to withdraw and affirmed the District Court’s denial of Gainer’s Motion for Sentence Reduction. See Doc. 230.

On May 25, 2021, Gainer filed a Motion for Reconsideration Within 21 Days Pursuant to Cir R. 27-2, which was construed as a Petition for Panel Rehearing and was denied on June 9, 2021.

## REASONS FOR GRANTING THE PETITION

As a preliminary matter, Gainer respectfully requests that this Honorable Court be mindful that *pro se* litigants are entitled to liberal construction of their pleadings. *Estelle v. Gamble*, 429 U.S. 97, 106 (1976); and *Haines v. Kerner*, 404 U.S. 519, 520 (1972).

### The United States Court of Appeals for the Eleventh Circuit Abused its Discretion in Denying Gainer's Motion for Reconsideration of the Denial of His Appeal Re: Motion for Sentence Reduction Pursuant to Section 404 of the First Step Act of 2018

Gainer contends that the Eleventh Circuit abused its discretion when it denied his Motion for Reconsideration of the Denial of Motion for Sentence Reduction, for the following facts and reasons:

The Eleventh Circuit's Order dated June 9, 2021, denying Gainer's Motion for Reconsideration reads:

The "Motion for Reconsideration Within 21 Days Pursuant to Cir. R. 27-2," construed as Petition for Panel Rehearing, filed by Alphonse Gainer is DENIED.

See Appendix at 1a.

In his Motion to Reconsider, Gainer raises the issue: "In the Court's Order, the justices claim that independent review of the entire record was assessed with the *Anders* Brief, but no mentioned of reviewing Mr. Gainer's *pro se* motion."

The Eleventh Circuit presumed that “the review of the entire record reveals that counsel’s assessment of the relative merit of the appeal is correct. Further, the Eleventh Circuit opined that “because independent examination of the entire record reveals no arguable issues of merit, counsel’s motion to withdraw is GRANTED, and the district court’s denial of Gainer’s motion for a sentence reduction pursuant to the First Step Act is AFFIRMED.” See Appendix 3a.

Under *Anders* if an attorney examines a case and determines that an appeal desired by his client would be “wholly frivolous,” counsel may “so advise the court and request permission to withdraw.” *Anders*, 386 U.S. at 744. Counsel must submit a brief to both the appellate court and the client, pointing to anything in the record that could potentially present an appealable issue. See *Id.* The client may then choose to offer argument to the court. See *Id.* If, upon close examination of the record, the court determines that the appeal is frivolous, it may grant counsel’s request to withdraw and dismiss the appeal. See *Id.*

In this court, Gainer does not pursue his claims argued in his Motion for Sentence Reduction Pursuant to Section 404 of the First Step Act of 2018 but complains only about how his appeal was handled. He contends that the Eleventh Circuit Court improperly permitted appellate counsel to withdraw without considering his [Gainer’s] Brief or Response.

See *United States v. Dawson*, No. 18-10160 (11<sup>th</sup> Cir. Jul. 17, 2018). Patricia Jean Kyle, appointed counsel for Keith Dawson, in this direct criminal appeal, has moved to withdraw from further representation of the appellant and filed a brief pursuant to *Anders v. California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967). She has also moved for limited remand on the issue of Dawson’s

cooperation with the government. Our independent review of the entire record reveals that counsel's assessment of the relative merit of the appeal is correct. Because independent examination of the entire record reveals no arguable issues of merit, counsel's motion to withdraw is GRANTED, and Dawson's conviction and sentence are AFFIRMED.

In *Dawson*, although the Eleventh Circuit affirmed Dawson's conviction and sentence, he was afforded the right to respond to counsel's *Anders* brief, and the Eleventh Circuit Court considered his arguments before issuing an Order to deny Dawson's appeal.

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 Eleventh Circuit that the 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 Eleventh 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).

Gainer 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**

For the above and foregoing reasons, Gainer's petition for a writ of certiorari should be granted.

Respectfully submitted,

Dated: July 19, 2021

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