

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

United States Court of Appeals
Fifth Circuit

FILED

March 11, 2019

Lyle W. Cayce
Clerk

No. 18-40454
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee

versus

JUAN GUTIERREZ,

Defendant-Appellant

Appeals from the United States District Court
for the Southern District of Texas
USDC No. 2:10-CR-63-2

Before SMITH, HIGGINSON, and DUNCAN, Circuit Court Judges.

PER CURIAM:*

Juan Gutierrez, federal prisoner # 24776-179, moves for leave to proceed in forma pauperis (IFP) on appeal from the denial of his petition for a writ of audita querela, in which he sought to challenge his sentence for conspiracy to possess with intent to distribute marijuana. Gutierrez contends that his sentence is no longer valid in light of *Mathis v. United States*, 136 S. Ct. 2243 (2016), because his prior Florida drug offense no longer qualifies as a controlled

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 R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR.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

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substance offense for purposes of the career offender guideline enhancement under U.S.S.G. §§ 4B1.1 and 4B1.2. He argues that he should have been allowed to pursue a writ of audita querela because his *Mathis* claim was not cognizable under any other avenue of federal postconviction relief.

By moving for leave to proceed IFP on appeal, Gutierrez is challenging the district court's certification that his appeal is not taken in good faith. *See Baugh v. Taylor*, 117 F.3d 197, 202 (5th Cir. 1997). Our inquiry into his good faith "is limited to whether the appeal involves legal points arguable on their merits (and therefore not frivolous)." *Howard v. King*, 707 F.2d 215, 220 (5th Cir. 1983) (internal quotation marks and citation omitted).

Irrespective of whether a writ of audita querela is available to Gutierrez, his challenge to his sentence does not present a nonfrivolous issue for appeal. *See United States v. Olson*, 849 F.3d 230, 232 (5th Cir. 2017); *United States v. Ford*, 509 F.3d 714, 716 (5th Cir. 2007), *abrogated on other grounds by United States v. Tanksley*, 848 F.3d 347, 350-52 (5th Cir.), *supplemented by* 854 F.3d 284 (5th Cir. 2017). Gutierrez's appeal is without arguable merit and is frivolous. *See Baugh*, 117 F.3d at 202; *Howard*, 707 F.2d at 220.

Accordingly, his motion for leave to proceed IFP is DENIED, and his appeal is DISMISSED as frivolous. *See* 5TH CIR. R. 42.2; *Baugh*, 117 F.3d at 202 & n.24.