

No. 19-5990

**ORIGINAL**

IN THE  
SUPREME COURT OF  
THE UNITED STATES OF AMERICA  
October Term, 2019

Supreme Court, U.S.

FILED

**AUG 27 2019**

OFFICE OF THE CLERK

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DAVID ALAN VOGEL,  
Petitioner

v.

UNITED STATES OF AMERICA,  
Respondent

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PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Pro Se Indigent Prisoner

David A. Vogel  
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August 21, 2019

QUESTION PRESENTED

1. By Denying the Petitioner the right to appeal based on a minor defect in his NOTICE OF APPEAL, did the Fifth Circuit Court of Appeals conflict with the applicable decision of this Supreme Court as well as every other Circuit Court of Appeals?

LIST OF PARTIES

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

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

Petitioner David Alan Vogel asks the Court to grant a writ of certiorari to review the decision of the United States Court of Appeals for the Fifth Circuit denying.

OPINION BELOW

The Opinion of the Fifth Circuit, David Alan Vogel v. United States, No. 18-40925 (5th Circuit July 9, 2019), is attached as Appendix A. The opinion of the Fifth Circuit, United States v. Vogel No. 18-40925 (5th Circuit August 7, 2019) denying Petitioner's Motion For Reconsideration is attached as Appendix B.

JURISDICTION

The Fifth Circuit Court of Appeals filed its opinion finalizing all issues on August 7, 2019. This Petition for a writ of certiorari is filed within ninety days of that decision, and pursuant to Supreme Court Rule 10 (c) and this Court has jurisdiction pursuant to U. S. C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Federal Rule of Appellate Procedure Rule 3(c)(4) which states: An Appeal must not be dismissed for informality of form or title of the notice of appeal, or for failure to name a party whose intent to appeal is otherwise clear from the notice.

STATEMENT OF RELEVANT FACTS

David Alan Vogel, Petitioner, is a federal prisoner who was convicted by a jury in 2010 of one drug conspiracy count (U. S. C. § 846), and three money laundering counts (18 U. S. C. § 1956 and § 1957). Mr. Vogel appealed his conviction, but the 5th Circuit Court of Appeals affirmed. Mr. Vogel subsequently filed a 2255 Motion to Vacate which was denied by the District Court. The District Court also denied a Certificate of Appealability. Mr. Vogel subsequently filed a Motion for Reconsideration (on his 2255 denial), but that Motion was also denied. Mr. Vogel then filed a Notice of Appeal and a 25 page brief with the 5th Circuit requesting a Certificate of Appealability.

On July 9, 2019 Mr. Vogel was denied a Certificate of Appealability, NOT ON THE MERITS, but because the 5th Circuit:

(1) Construed his Notice of Appeal as appealing the denial of his Rule 59 Motion for Reconsideration (of his 2255 denial Order), as opposed to the denial of his original 2255 Motion.

(2) Concluded that part of his Rule 59 Motion was a successive 2255 Petition, and the only proper subjects of his Rule 59 Motion were limited to issues Mr. Vogel did not brief in his request for COA. In other words, Mr. Vogel briefed issues appealing the denial of his original 2255 Motion.

Mr. Vogel subsequently filed a Petition for ReHearing, which the 5th Circuit construed as a Motion for Reconsideration. Mr.

Vogel argued that his Notice of Appeal should be construed liberally based on his obvious intent to appeal the original judgment denying his 2255 Motion. Mr. Vogel argued that Supreme Court precedent, as well as the prior precedent of the 5th Circuit (as well as precedent in every other circuit) supported his position.

On August 7, 2019 in direct conflict with its own precedent on the very issue, and in direct conflict with the rulings of this Supreme Court, the 5th Circuit denied Mr. Vogel's Motion for Reconsideration without any explanation or comment. The 5th Circuit simply ruled "IT IS ORDERED that the motion is DENIED."

#### REASONS FOR GRANTING THE WRIT

The Supreme Court already ruled on the question presented in this Writ, and the 5th Circuit is in direct conflict with established Supreme Court precedent.

In State Farm Mutual Insurance v. Palmer, 350 US 944 (Supreme Court 1956) this Court reversed the dismissal of an appeal based on the fact that the Notice of Appeal designated the trial court's denial of a Motion for New Trial (a Rule 59 Motion) as opposed to the underlying judgment itself. In a later case affirming its prior reasoning this Supreme Court in Foman v. Davis, 371 US 178 (Supreme Court 1962) once again ruled on the instant issue in this Writ, stating . . . "It is too late in the day and



entirely contrary to the spirit of the Federal Rules of Civil Procedure for decisions on the merits to be avoided on such mere technicalities."

The 5th Circuit also contradicted its prior precedent in Kicklighter v. Nails by Jannee, 616 F. 2d 734 (5th Circuit 1980). In that case the 5th Circuit reasoned "It is well settled that an appeal is not lost if a mistake is made in designating the judgment appealed from where it is clear that the overriding intent was to effectively appeal". In this case, the 5th Circuit in line with prior Supreme Court precedent, further ruled that "a notice of appeal designating an order denying a Motion For Judgment Notwithstanding the Verdict was effective to appeal the underlying judgment." As late as 2018, the 11th Circuit adopted the same standard in Hill v. Johnson, (2018 U. S. App. Lexis 24215 No. 18-1225-AA . . .ruling delivered August 24, 2018). In Hill the 11th Circuit proffered "This Court embraces a liberal construction of notices when unnoticed claims or issues are inextricably intertwined with noticed ones.."

All Circuit Courts and this Supreme Court have agreed that Notices of Appeal should be construed liberally as to reflect the intention of the appellant, especially when the litigant is Pro Se. Mr. Vogel is not an attorney and inartfully drafted his Notice of Appeal, but his intent should be clear. Mr. Vogel did state in his Notice of Appeal that he "appeals from final judgment entered by the District Court named above on September 6, 2018." Albeit, the September 6, 2018 date is the order denying Mr. Vogel's Motion

for Reconsideration (of his 2255) and not the date of the underlying order denying him 2255 relief, Mr. Vogel also proffered in his Notice of Appeal that he is appealing the "Order that denied Petitioner a Writ of Habeas Corpus. The September 6, 2018 date was the date the matter became final in District Court . . . not the Order or judgment being appealed. Moreover, in an accompanying document sent in with the same Notice of Appeal (Mr. Vogel's Motion For Extension of Time to file Brief in Support of Request for Certificate of Appealability), Mr. Vogel plead in the very first line: "Now Comes Petitioner David A. Vogel who has appealed from the District Court the denial of his Writ of Habeas Corpus". Mr. Vogel's Motion (again sent in simultaneously with the Notice of Appeal) more than makes his intent. Furthermore, in Mr. Vogel's Memorandum (brief) in Support of a Certificate of Appealability, Mr. Vogel's intent to appeal the underlying Order is crystal clear.

The 5th Circuit, after denying Mr. Vogel appealability based on its hyper-technical ruling was asked to construe Mr. Vogel's Notice of Appeal as a notice to appeal the original judgment. Mr. Vogel filed an appropriate Petition for Rehearing (heard as a Motion For Reconsideration) where he argued Supreme Court and 5th Circuit precedent (previously mentioned herein). The 5th Circuit simply denied Mr. Vogel's Motion without explanation or comment.

In the interest of fairness and justice a Pro Se litigant's

filings should be construed liberally. Considering Mr. Vogel's claim of actual innocence it would be a travesty of justice if Mr. Vogel's case was not decided on its merits. The 5th Circuit has issued a hyper-technical avoidance ruling that is contrary to the rulings of this Supreme Court, other circuits and its own precedent.

The importance of this case, not only to Mr. Vogel, but to the public in general is of extreme importance. Any criminal defendant who is actually innocent and also can meet the high burden of proving a Constitutional error should not be subject to summary dismissal based on a narrow hyper-technical construction of a Notice of Appeal, that defies decades of precedent.

CONCLUSION

Petitioner Prays that this Writ be granted.

Respectfully submitted,

 8-26-19

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August 26, 2019

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