

No. 19-993

**In The
Supreme Court Of The United States**

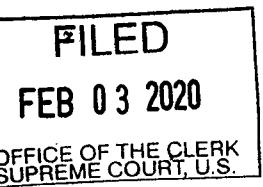
IRMA ROSAS

Petitioner,

v.

AUSTIN INDEPENDENT SCHOOL DISTRICT;
TEXAS DEPARTMENT OF STATE HEALTH
SERVICES; TEXAS RIOGRANDE LEGAL AID,
INCORPORATED,

Respondents.



**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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QUESTIONS PRESENTED

- (1) WHETHER THE LOWER COURT ERRED IN DISMISSING PETITIONER'S CLAIMS WHEN IT DENIED HER MOTION TO REOPEN HER APPEAL, CONTRARY TO FEDERAL RULE OF APPELLATE PROCEDURE 27(c) and
- (2) WHETHER FEDERAL RULE OF APPELLATE PROCEDURE 27(b) REQUIRES MORE GUIDANCE FROM THIS COURT.

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PETITION FOR WRIT OF CERTIORARI

Irma Rosas (“Ms. Rosas”), respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The order of the court of appeals denying appellant’s motion for reconsideration, No. 19-50202, is not published and is attached. (App’x. at 1). The order of the district court adopting the report and recommendation of magistrate judge and dismissing petitioner’s claims without prejudice, No. 1:18-CV-472, is not published, and is also attached. (App’x at 2-6).

JURISDICTION

The order of the court of appeals, denying appellant’s motion for reconsideration was entered on November 18, 2019. (App’x. at 1). This petition is timely filed pursuant to Supreme Court Rule

13.1. This Court has jurisdiction under 28
U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

(1) Federal Rule of Appellate Procedure 27(c) provides,

[a] circuit judge may act alone on any motion, *but may not dismiss or otherwise determine an appeal or other proceeding*. A court of appeals may provide by rule or by order in a particular case that only the court may act on any motion or class of motions. The court may review the action of a single judge. FED. R. APP. P. 27(c). (emphasis added).

(2) Federal Rule of Appellate Procedure 27(b) provides,

“[t]he court may act on a motion for a procedural order—including a motion under 26(b)—at any time without awaiting a response, and may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions. A party adversely affected by the court’s, or the clerk’s, action may file a motion to

reconsider, vacate, or modify that action. Timely opposition filed after the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed.” FED. R. APP. P. 27(b). (emphasis added).

STATEMENT OF THE CASE

On June 1, 2018, Plaintiff-Appellant Irma Rosas (“Ms. Rosas”) filed her civil complaint in district court (ROA.19-50202.1) along with a motion to proceed in forma pauperis (ROA.19-50202.29) and a motion to appoint counsel (ROA.19-50202.48).

Leslie Dusing (“Dusing”), the Principal at Hart Elementary School with Austin Independent School District, hired Ms. Rosas as a 4th grade Bilingual Teacher for the 2010-2011 school year. (ROA.50202.4). Early in the school year, Ms. Rosas alleged that administrators and specialists at Hart Elementary instructed her to identify one of her students as needing specialized services because he

struggled with assessments in mathematics. (ROA.19-50202.8). Ms. Rosas alleged she completed the paperwork but she did so to draw attention to the fact that the student needed a hearing aid to remediate the deafness in one ear. (ROA.19-50202.8). Until the student received a hearing aid, Ms. Rosas—as his teacher of record—could not conclude that he needed specialized services in mathematics. (ROA.19-50202.8).

Ms. Rosas also alleged that her portable classroom was a hazard to her and her students' health. (ROA.19-50202.11). On October 17, 2010, Susane Smith (“SSmith”), Secretary at Hart Elementary, told the Ms. Rosas to go home because Ms. Rosas was coughing badly. (ROA.19-50202.12). She went to Texas MedClinic and was diagnosed with “reactive airway disease w/o status ashtmaticus” and “allergic rhinitis nos” and was prescribed aggressive medication. (ROA.19-50202.12).

After the third or fourth time that students vomited in class, Ms. Rosas alleged she informed SSmith that she wanted the classroom tested for

health hazards, especially the foul smell. (ROA.19-50202.12). On February 24, 2011, Austin ISD found that the roof needed replacing; water was leaking and it was wetting the ceiling tiles. (ROA.19-50202.12). Austin ISD also found that the filter in the electric furnace had not been changed in a long time and was extremely filthy. (ROA.19-50202).

Ms. Rosas alleged that the administrators at Hart Elementary purchased an air purifier for the classroom. (ROA.19-50202). Ms. Rosas further alleged that on February 25, 2011, after the administrators instructed her to go home, the administrators had an indoor air quality assessment of Ms. Rosas' classroom. (ROA.19-50202.12).

The Mold Analysis Report for Ms. Rosas' classroom included comments by Chris Paprick, Mold Assessment Consultant for Department of State Health Services, which were:

[w]indows has [sic] been open most of [the] day. [I] told [the] Assistant [p]rincipal to close [the windows and] turn [the] air condition[er] on. There is a[n] air [f]ilter machine [that was]

[j]ust [b]ought for [the] classroom.
(ROA.19-50202.12).

Prior to Ms. Rosas being sent home that day, the air purifier had been on. (ROA.19-50202.12). The sample was taken under all these conditions and sent to Environmental Analytical Services, LLC (“EAS”) in Houston for analysis. (ROA.19-50202.13).

On March 1, 2011, Angela Kinzee, Environmental Safety Foreman for Texas Department of State Health Services notified Dusing that the “[i]ndoor mold levels appear acceptable. At this time, we do not recommend further air sampling.” (ROA.19-50202.13).

On October 21, 2010, Ms. Rosas alleged she notified Dusing that she was having surgery in early November and that Dusing told her to postpone it. (ROA.19-50202.4). When Ms. Rosas did not comply and returned from medical leave, she alleged Dusing and David Dean, Assistant Principal, began harassing her with the intention of forcing her to resign or by building a case to terminate her employment. (ROA.19-50202.5). Ms.

Rosas alleged she notified Meria Carstarphen (“Carstarphen”), Superintendent, of the harassment by e-mail and further alleged Carstarphen did nothing to resolve her complaint. (ROA.19-50202.5). Ms. Rosas alleged that that she contemplated suicide twice (ROA.19-50202.20); the harassment continued unabated.

When Ms. Rosas did not resign willfully, Dusing moved to terminate her by constructing false/unqualified allegations against her. (ROA.19-50202.15). Ms. Rosas’ Texas Educator Certificate included no EDUCATOR SANCTIONS by Texas Education Agency (ROA.19-70212.17), which still hold true to this day.

On March 9, 2011, Ms. Rosas alleged that Beverly Stringer, Supervisor of Employee Relations at Austin ISD, informed her that the Board of Trustees *could* finalize her termination at their meeting on March 28, 2011. (ROA.19-50202.5). Ms. Rosas alleged that she was not informed prior to the end of the school year that the Board of Trustees had finalized her termination. (ROA.19-50202.5). Ms. Rosas learned of it when personnel at

Hart Elementary requested that she turn in her district laptop computer, since she, they said, was not returning the following school year. (ROA.19-50202).

Ms. Rosas alleged that she was never officially notified that her employment with Austin ISD was terminated in accordance to Texas Education Code Section 21.103 (ROA.19-50202.19).

On August 14, 2017, Ms. Rosas reviewed the agenda for the board of trustee's meeting on March 28, 2011. (ROA.19-50202.19). She alleged that the only Probationary Contract terminated from employment at Hart Elementary School was that of Kimberly Berba's. (ROA. 19-50202.19). Ms. Rosas' name appeared nowhere on the agenda for that meeting or any subsequent meetings. (ROA.19-50202.19).

When Ms. Rosas received her personnel file from Austin ISD on or about July 27, 2017 (ROA.19-50202.19), included was a photocopy of the "Notice of Termination of Probationary Contract." (19-50212.5-6). The notice, addressed to Ms. Rosas, was dated March 28, 2011 and was

signed by Mark Williams (“Williams”), President, Board of Trustees. (ROA.50212.6). Williams wrote:

It was the judgment of the Board that the best interests of the District will be served by terminating your employment. The decision of the Board of Trustee is final and by State Law [Education Code 21.103(a)] may not be appealed. (ROA.19-50202.20).

Ms. Rosas alleged that her rights were violated when compared to teachers on Continuing Contracts and Term Contracts. (ROA.19-50202.20). In 2011, teachers on Probationary Contracts were not afforded an opportunity to contest and/or appeal the allegations against them. (ROA.19-50202.20).

Ms. Rosas alleged that she contacted Texas RioGrande Legal Aid Inc. for legal assistance and was informed that they could not assist her because her income was too high. (ROA.19-50202.20). She explained that she no longer had an income (ROA.19-50202.20), which mattered nil.

On June 4, 2018, Deputy Clerk/AD notified Ms. Rosas of “receipt of your Civil Rights

Complaint and Application to Proceed *in Forma Pauperis*]. (ROA.19-50202.56). The receipt stated,

Your case has been assigned docket number 1:18-CV-0472-RP and assigned to the Honorable Robert Pitman. The file has been referred to Magistrate Judge Mark Lane for a determination of the Application to Proceed *in Forma Pauperis* and a recommendation on the merits. (ROA.50212.56).

The magistrate judge issued the “Order and Report and Recommendations” (“Report”) on August 17, 2018.

The standard of review by the magistrate judge stated, in part,

Pro se complaints are liberally construed in favor of the plaintiff. *Haines v. Kerner*, 404 U.S. 519, 20-21 (1972). However, pro se status does not offer a plaintiff an “impenetrable shield, for one acting pro se has no license to harass other, clog the judicial machinery with meritless litigation, and abuse already overloaded court dockets.” *Ferguson v. MBank Houston N.A.*, 808 F.2d 358, 359 (5th Cir. 1986). (ROA. 19-50212.63).

The Report discussed the following:

One,

[h]er complaint does not identify her disability...Because Plaintiff states that she was discriminated against on the basis of her disability, the undersigned assumes Plaintiff intended this claim to be brought under the Americans with Disabilities Act (ADA). (ROA.19-50202.63). (emphasis added).

Two,

Plaintiff has not included any information in her Complaint that suggests that she has timely filed an EEOC charge against Austin ISD and received a right-to-sue letter prior to initiating this lawsuit. (ROA.19-50202.63). (emphasis added).

Three,

[a]s to her claim against DSHS, it is unclear what specific cause of action Plaintiff intends to maintain against the agency... The undersigned assumes that Plaintiff intends to bring this claim under § 1983. (ROA.19-50202.64). (emphasis added).

Fourth,

[a]s to her claim against Texas RioGrande Legal Aid, Inc., *Plaintiff appears to challenge the denial of services she received based on her income level but does not allege any facts that bring this within the ambit of her alleged based for this suit, the Civil Rights Act or 42 U.S.C. § 1983.* (ROA.50202.65). (emphasis added).

In regards to Ms. Rosas' motion to appoint counsel, the magistrate judge concluded,

The court has applied the factors delineated in *Ulmer v. Chancellor*, 691 F.2d 209, 212 (5th Cir. 1982), to the case at hand. *Plaintiff has not, as of this date, established to this court's satisfaction that the issues are too complex, that she is incapable of bringing them, or that appointed counsel is necessary to present meritorious issues to the court.* Plaintiff's Motion to Appoint Counsel (Dkt. #4) is denied. (ROA.19-50202.65). (emphasis added).

On September 13, 2018, Ms. Rosas filed notice of appeal along with the affidavit accompanying motion for permission to appeal in forma pauperis. (ROA.19-50202.69-73).

The court issued an order for Ms. Rosas to

submit written objections to the Report and Recommendation (Dkt 7), on or before September 28, 2018. (ROA.19-50202.77).

Ms. Rosas filed her “Objections to Magistrate Judge’s Report and Recommendation” on September 26, 2018. (ROA. 19-50202.80-98). Ms. Rosas’ objections centered on being wrongfully terminated by Austin ISD. (ROA.19-70202.81-82).

On February 8, 2019, Judge Pitman issued his “Order.” (ROA. 19-50202.102-104). The court overruled Ms. Rosas’ objections and adopted the report and recommendation as its own order. (ROA.19-50202.103).

Ms. Rosas timely appealed on March 7, 2019. (ROA.19-50202.106).

On or about May 10, 2019, Ms. Rosas was notified by mail of,

Under 5th CIR. R. 42.3, the appeal is dismissed as of May 6, 2019, for want of prosecution. The appellant failed to timely file appellant’s brief and record excerpts. App’x at 6-7.

On June 7, 2019, Ms. Rosas motion for

reconsideration was filed. (App. Doc. 4).¹ Ms. Rosas argued that she did not receive a briefing schedule,² still had not paid the filing fee or filed her brief and record excerpts. (App. Doc. 4 at 5). She cited *Grant v. Cuellar*, 59 F.3d 524, 524 (5th Cir. 1995) (holding that while “[p]ro se parties must still brief issues and reasonably comply with [federal rules of appellate procedure],” courts “liberally construe briefs of pro se litigants to apply less stringent standards to parties proceeding pro se than to parties represented by counsel.”) and requested an extension of time to file the brief and record excerpts. (App. Doc. 4 at 5).

In a letter dated June 11, 2019,³ Roeshawn A. Johnson, Deputy Clerk, notified Ms. Rosas that “[t]he default must be remedied before your case can be reopened, you must file your appellant’s brief and record excerpts.” (App’x. at 7-8).

¹ The Appellate Docket is not numbered. Ms. Rosas numbered them from 1-10 as they appeared on the PACER Service Center on January 5, 2020.

² The 7th Circuit, on the other hand, issues briefing schedules.

³ This letter is missing from the Appellate Docket but appears here in the Appendix at 7-8. A photocopy can be provided upon request.

On October 18, 2019, Ms. Rosas filed her appellant's brief and record excerpts. (App. Doc. 5-6). Ms. Rosas argued that the District Court erred (1) when it assigned her case to a magistrate judge without her consent, and (2) by never requesting a more definite statement regarding Ms. Rosas' two suicidal attempts.⁴ (App. Br. at 15). And as such, she would benefit from an opportunity to amend her original complaint and have the statute of limitations tolled for her claims. (App. Br. at 15).

On October 23, 2019, Lisa E. Ferrara, Deputy Clerk, notified Ms. Rosas that "the court ha[d] denied appellant's motion to reinstate the appeal." (App. Doc. 23; App'x 8-10).

On November 7, 2019, Ms. Rosas again filed a motion for reconsideration. (App. Doc. 8). She reminded the court of Deputy Clerk Roeshawn A. Johnson's ("Johnson") letter and how Johnson had specified *no deadline*.⁵ (App. Br. at 5). Deputy Clerk Lisa E. Ferrara's notification that "[t]he

⁴ Ms. Rosas' complaint stated that she attempted suicide twice. (ROA.19-50202.20).

⁵ Ms. Rosas also included a photocopy of the letter in Tab 1 of her Appellate Brief.

Court ha[d] denied appellant's motion to reinstate the appeal", contradicted Johnson's letter. (App. Br. at 5; App'x 8-9). Ms. Rosas again cited *Grant v. Cuellar*, 59 F.3d 524, 524 (5th Cir. 1995).

The lower court denied Ms. Rosas' motion for reconsideration on November 18, 2019. (App. Doc. 9, App'x 1-2). Ms. Rosas is now seeking review of that opinion by this Court.

This writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD RESOLVE THE QUESTION WHETHER THE LOWER COURT ERRED IN DISMISSING PETITIONER'S CLAIMS WHEN IT DENIED HER MOTION TO REOPEN HER APPEAL, CONTRARY TO FEDERAL RULE OF APPELLATE PROCEDURE 27(c).

Federal Rule of Appellate Procedure 27(c) provides,

[a] circuit judge may act alone on any motion, but may not dismiss or otherwise determine an appeal or other proceeding. A court of appeals may provide by rule or by order in a

particular case that only the court may act on any motion or class of motions. *The court may review the action of a single judge.* FED. R. APP. P. 27(c). (emphasis added).

5th Circuit Rule 27.2 provides

Single Judge May Rule on Certain Motions. Pursuant to FED. R. APP. P. 27(c), *any single judge of this court has discretion*, subject to review by a panel upon a motion for reconsideration made within the 14 or 45 day period set forth in FED. R. APP. P. 40, *to take appropriate action on the following procedural motions.* (5TH CIR. R. 27.2.) (emphasis in original).

One such procedural motion is 5th Circuit Rule 27.2.1, which provides,

[t]he motions listed in 5th CIR. R. 27.1 that have been referred to a single judge for initial action, *or for single judge reconsideration of a ruling made by the clerk*, but the judge is not limited to the time restrictions in 5TH CIR. R. 27.1.1. (5TH CIR. R. 27.2.1) (emphasis added).

According to Federal Rule of Appellate Procedure and 5th Circuit Rule 27.2, the

appellant or appellee has two (2) opportunities to motion for reconsideration of a ruling.

On May 6, 2019, the clerk dismissed Ms. Rosas' appeal pursuant to 5th Circuit Rule 42 for failure to file her brief and record excerpts. (App. Doc. 3; App'x at 6-7). On or about June 7, 2019, Ms. Rosas filed a *motion for reconsideration* to reopen her case. (App. Doc. 4). In a letter dated June 11, 2019, Roeshawn Johnson, Deputy Clerk, informed Ms. Rosas that in order to reopen the case she had to remedy the default and file her brief and record excerpts; she gave no deadline. (App'x at 8). Ms. Rosas filed her brief and record excerpts on October 18, 2019. (App. Doc. 5-6).

In a letter dated October 23, 2019, Ms. Rosas received a letter from Lisa E. Ferrera, Deputy Clerk, informing her that "*the court* has denied appellant's motion to reinstate the appeal." (App'x at 9-10). (emphasis added). On or about November 7, 2019, Ms. Rosas filed another *motion for reconsideration*. On November 18, 2019, Circuit Judge Jerry E. Smith ordered that Ms. Rosas' motion for reconsideration be denied. (App. Doc. 9;

App'x at 1-2).

Pursuant to Federal Rule of Appellate Procedure 27(c), a circuit judge could act alone on any motion. FED. R. APP. P. 27(c). According to 5th Circuit Rule 27.2, any single judge...has discretion...to take appropriate action on [] [certain] procedural motions. 5TH CIR. R. 27.2. “The court”, wrote Ferrara, “denied appellant’s motion to reinstate the appeal.” (App. Doc. 7; App’x at 9-10). Presumably a panel denied the motion for reconsideration given her use of the word ‘court,’ even though their names and/or signatures appeared nowhere on the “letter.”

Also pursuant to Federal Rule of Appellate Procedure 27(c), the court may review the action of a single judge. FED. R. APP. P. 27(c). According to 5th Circuit Rule 27.2, a single judge’s ruling is subject to review by a panel upon a motion for reconsideration made within the 14 or 45 day period set forth in FED. R. APP. P. 40. 5TH CIR. R. 27.2. Ms. Rosas’ second motion for reconsideration filed on or about November 7, 2019 was not reviewed by a panel of circuit judges; instead,

Judge Smith acted alone and dismissed or otherwise determined Ms. Rosas' appeal. As such, Ms. Rosas exhausted the provisions pursuant to Federal Rule of Appellate Procedure 27(c) and 5th Circuit Rule 27.2 to have her appeal reopened and adjudicated on the merits.

A circuit judge may act alone on any motion, but she/he may not dismiss or otherwise determine an appeal. FED. R. APP. P. 27(c). *See Daker v. Comm'r, Ga. Dept. of Corr.*, 820 F.3d 1278 (11th Cir. 2016) (explaining that "when a single judge concludes that a prisoner is ineligible to proceed *in forma pauperis*, the judge enters an order 'denying' the prisoner's petition, not an order 'dismissing' the action or appeal."). In this instant matter, however, the order denying the motion to reopen the appeal unequivocally dismissed it.

According to the appellate docket, Ms. Rosas' brief and record excerpts were *withdrawn* the same day Judge Smith denied Ms. Rosas' second motion for reconsideration. The docket read, "COURT ORDER". "If a merits panel were bound by a single-judge order denying a motion to proceed *in forma*

pauperis on the grounds of frivolousness, then any subsequent appeal automatically would be meritless and the single judge would be vested with a power that Rule 27(c) expressly prohibits.” (citing *McCoy v. Michigan*, 369 Fed. Appx. 646, *653; 2010 U.S. App. LEXIS 5283, **14, 19, n.3). *See Thomson v. Merit Sys. Prot. Bd.*, 772 F.2d 879, 882 (Fed. Cir. 1985); cf. *Friends of Earth v. Reilly*, 966 F.2d 690, 696 n.7, 296 U.S. App. D.C. 170 (D.C. Cir. 1992) (expressing doubt that a “single judge acting on a motion for stay can bind a full panel” and invoke the law-of-case doctrine).

Judge Smith denied Ms. Rosas’ second motion for reconsideration as follows, “[o]n October 23, 2019, the clerk denied appellant’s motion to reopen. Appellant’s motion for reconsideration is DENIED.” (App’x at 1-2). If Ms. Rosas must infer that Judge Smith affirmed the clerk’s ruling, then the question becomes what was the ruling on October 23rd. That day, the clerk ruled that “[t]he court has denied appellant’s motion to reinstate the appeal.” (App’x at 9-10).

While “[p]ro se parties must still brief the

issues and reasonably comply with [federal rules of appellate procedure], courts “liberally construe briefs of pro se litigants to apply less stringent standard to parties proceeding pro se than to parties represented by counsel.” *Grant v. Cuellar*, 59 F.3d 524, 524 (5th Cir. 1995). (App. Doc. 4 at 5).

Ms. Rosas’ seeks this Court to resolve the question whether the lower court erred in denying her motion to reopen her appeal.

II. THIS COURT SHOULD RESOLVE THE QUESTIONS WHETHER FEDERAL RULE OF APPELLATE PROCEDURE 27(b) REQUIRES GUIDANCE FROM THIS COURT.

Federal Rule of Appellate Procedure 27(b) provides,

“[t]he court may act on a motion for a procedural order—including a motion under 26(b)—at any time without awaiting a response, and may, *by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions*. A party adversely affected by the court’s, *or the clerk’s*, action may file a motion to reconsider, vacate, or modify that action. Timely opposition filed after

the motion is granted in whole or in part does not constitute a request to reconsider, vacate, or modify the disposition; a motion requesting that relief must be filed." FED. R. APP. P. 27(b). (emphasis added).

5th Circuit Rule 27.1 provides,

Under FED. R. APP. P. 27(b), *the clerk has discretion to act on, in accordance with the standards set forth in the applicable rule, or to refer to the court, the procedural motions listed below.*

The clerk's action is subject to review by a single judge upon a motion for reconsideration made within the 14 or 15 days period set by FED. R. APP. P. 40. 5th CIR. R. 27.1. (emphasis added).

The procedural motions are:

To extend the time. 5th CIR. R. 27.1.1

To rule on motion to file briefs out of time. 5th CIR. R. 27.1.2

To stay further proceedings in appeals. 5th CIR. R. 27.1.3

To correct briefs or pleadings filed in this court at counsel's request. 5th CIR. R. 27.1.4

To stay the issuance of mandates pending certiorari in civil cases... 5th CIR. R. 27.1.5

To reinstate appeals dismissed by the clerk. 5th CIR. R. 27.1.6

To enter and issue consent decrees... 5th CIR. R. 27.1.7

To enter CJA Form 20 orders... 5th CIR. R. 27.1.8

To consolidate appeals. 5th CIR. R. 27.1.9

To withdraw appearances. 5th CIR. R. 27.1.10

To supplement or correct records. 5th CIR. R. 27.1.11

To incorporate records or briefs on former appeals. 5th CIR. R. 27.1.12

To file reply or supplemental briefs... 5th CIR. R. 27.1.13

To file an amicus curiae brief under Fed. R. APP. P. 29... 5th CIR. R. 27.1.14

To enlarge the number of pages of optional contents in record excerpts. 5th CIR. R. 27.1.15

To extend the length limits... 5th CIR.
R. 27.1.16

To proceed in forma pauperis... 5th
CIR. R. 27.1.17

To appoint counsel or to permit
appointed counsel to withdraw; 5th
CIR. R. 27.1.18

To obtain transcripts at government
expense. 5th CIR. R. 27.1.19, and

To rule on an unopposed motion by the
government or a defendant in a direct
criminal appeal to gain access to
matters sealed in the case and for the
use in prosecution of its appeal. 5th
CIR. R. 27.1.20.

**A. Whether The Rule Provides A
Circuit Court To Authorize Its Clerk To
Act On *Any* Type of Procedural Motion.**

Lyle W. Cayce ("Cayce") is the Clerk for the
U.S. Court of Appeals for the Fifth Circuit. Cayce,
however, is not a registered attorney in the State of
Louisiana. Yet, Cayce is authorized to act on
motions that are beyond "clerical" in nature. For
instance, Cayce is given authority "to rule" in at
least two instances:

To rule on motion to file briefs out of time. 5th CIR. R. 27.1.2, and

To rule on an unopposed motion by the government or a defendant in a direct criminal appeal to gain access to matters sealed in the case and for the use in prosecution of its appeal. 5th CIR. R. 27.1.20.

Many of the motions specified by 5th Cir. R. 27.1 are questionable as to whether they qualify as "procedural motions." Then Cayce is also delegating his authority to deputy clerks, individuals whose position does not even require a degree.

B. Whether The Rule Authorizes Deputy Clerks To Act On Behalf Of The Clerk.

On June 11, 2019, Roeshawn A. Johnson ("Johnson"), Deputy Clerk, informed Ms. Rosas that her appeal would be reopened on the condition that she file her brief and records excerpts. (App. Br. at Tab 1; App'x at 7-8). Johnson did not set a deadline.

Ms. Rosas filed her brief and record excerpts on October 18, 2019. Ms. Rosas argued that she never consented for her case to be transferred to a magistrate judge and that the magistrate judge had “discern[ed] the shortcomings in the complaint” but “forgot’ to address Ms. Rosas’ two suicidal attempts that occurred in conjunction with the harassment from Austin ISD. Instead of ordering a more definite statement from her, [the magistrate judge] issued the Report and Recommendations.” (Pet. Br. at 19-20). Ms Rosas requested that the court of appeals reverse the district court’s dismissal, and allow her the opportunity to amend her original complaint in order to have the statutes of limitations tolled for her claims. (Pet. Br. at 20).

On October 23, 2019, Lisa E. Ferrara (“Ferrara”), Deputy Clerk, informed Ms. Rosas that the “court [had] denied appellant’s motion to reinstate the appeal.” (App. Br. at Tab 2; App’x at 8-10). Ferrara’s letter stated “[t]he court has denied” but it did not include judges’ names and/or signatures. (emphasis added). The appellate

docket, on the other hand, read “*CLERK ORDER* denying Motion to reopen case filed by Appellant Ms. Irma Rosas.” (emphasis added). The only signature on Ferrara’s letter was her own. (App’x at 8-9).⁶

Ferrara’s letter also included a postscript notifying Ms. Rosas that her brief contained deficiencies. (App’x at 9-10). After Ms. Rosas submitted the original brief and record excerpts for *Rosas v. San Antonio Housing Authority*, et al. No. 18-50766 (5th Cir. 2019),⁷ the clerk’s office informed her that it was deficient. She resubmitted her brief and record excerpts and again was informed that the brief was deficient again. She resubmitted again. The brief was finally accepted even though Ms. Rosas included no statement pertaining to oral argument. Ms. Rosas gained experience in writing appellate briefs with the ordeal. The record excerpts were never deficient.

⁶ See *Brown v. Fifth Third Bank*, 730 F.3d 698 (7th Cir. 2013) (holding that Rule 58 of Federal Rules of Civil Procedure “requires...that the separate document be signed [or initialed] by the court clerk.”).

⁷ This case is currently on petition for a writ of certiorari to the Supreme Court of the United States as No. 19-707.

Ferrara now claimed that the brief for this instant matter did not contain a statement of oral argument, the certificate of service was out of order,⁸ and some citations to the record were not in proper form. (App'x at 8-10). Ferrara also wrote that the record excerpts were deficient because the citations to the record were not in the proper form. (App'x at 10). If in the past Ms. Rosas had the opportunity to address deficiencies, the clerk's office did not afford it to her here.

After she learned about the electronic public access service of the United States federal documents on PACER on January 5, 2020, she learned of several inconsistencies. First, the appellate docket entry on October 18, 2019,

WITHDRAWN APPELLANT'S BRIEF
FILED by Ms. Irma Rosas.
Additionally the Brief requires a statement of oral argument, certificate of service must be placed before the certificate of compliance, some citations are not in the proper form.
Instructions to Attorney: PLEASE READ THE ATTACHED NOTICE FOR INSTRUCTIONS ON HOW TO

⁸ The defendants in this case were never served.

REMEDY THE DEFAULT. # of Copies
Provided: 7. [19-50202] (LEF)⁹
[Entered: 10/22/2019 01:13 PM] (App.
Doc. 5).

That same day, the appellate docket entry also read,

WITHDRAWN RECORD EXCERPTS
FILED by Ms. Irma Rosas. Record
Excerpts NOT Sufficient as they
require the table of contents must
include citations to the record in the
proper form. Instructions to Attorney:
PLEASE READ THE ATTACHED
NOTICE FOR INSTRUCTIONS ON
HOW TO REMEDY THE DEFAULT.
of Copies Provided: 4. [19-50202]
(LEF) [Entered: 10/22/2019 01:16 PM]
(App. Doc. 6).

Ms. Rosas was never notified about the insufficient appellate brief and record excerpts. It is not clear whether the entries were made on October 18th or on October 22nd. The next day on October 23, 2019, the appellate docket entry read,

CLERK ORDER denying Motion to
reopen case filed by Appellant Ms.
Irma Rosas [9072729-2] [19-50202]

⁹ LEF are Lisa E. Ferrara's initials.

(LEF) [Entered: 10/23/2019 02:55 PM]
(App. Doc. 7).

Ms. Rosas was informed about the insufficient appellate brief and record excerpts on October 23, 2019, *in a postscript* (App'x at 8-10), the next day after she was allegedly notified of the deficiencies.

Second, the appellate docket entry read,

BRIEFING NOTICE ISSUED A/Pet's Brief Due on 04/30/2019 for Appellant Irma Rosas. [19-50202] (DDL) [Entered: excerpts [9045378-2] [19-50202] (RAJ) [Entered: 05/06/2019 10:21 AM] (App. Doc. 2).

Ms. Rosas was never issued a briefing notice.

Third, Johnson's letter dated June 11, 2019 was never entered on the appellate docket. (App'x at 7-8). A photocopy of the letter, nevertheless, had been included in her motion for reconsideration. (App. Doc. 8).

Fourth, Ferrara's letter stated that the “[t]he court has denied” (App'x at 8-10) and yet the docket read “CLERK ORDER.” (App. Doc. 7). The only signature on the letter was Ferrara’s, a Deputy Clerk.

On January 5, 2020, Ms. Rosas also noticed another peculiarity on the appellate docket.

Ferrara entered,

COURT ORDER denying Motion for reconsideration filed by Appellant Ms. Irma Rosas [9186795-2] [19-50202] (LEF) [Entered: 11/18/2019 08:37 AM] (App. Doc. 9).

Then she entered,

COURT ACTION to withdraw the Appellant Brief [9172668-2], Record Excerpts [9172672-2] [9191324-2]; withdrawing Appellant Brief filed by Appellant Ms. Irma Rosas [9172668-2], withdrawing Record Excerpts filed by Appellant Ms. Irma Rosas [9172672-2] [19-50202] (LEF) [Entered: 11/18/2019 08:50 AM] (App. Doc. 10).

No document was attached. (App. Doc. 10). It follows that Ferrara had no court authorization to withdraw Ms. Rosas' brief and record excerpts from the appellate docket. Her reasons for doing so are unknown.

Again, Federal Rule of Appellate Procedure 27(b) "authorize[s] its clerk to act on specified types

of procedural motions.” FED. R. APP. P. 27(b). The Rule, however, does not authorize *deputy clerks* to act on specified types of procedural motions. To close a letter from the United States Court of Appeals, Fifth Circuit, Office of the Clerk, with

Sincerely,
LYLE W. CAYCE, Clerk
By: /s/ Lisa E. Ferrera
Lisa E. Ferrera, Deputy Clerk
504-310-7675 (App’x at 8-10).

did not in any manner equate to an “act” carried out by Lyle W. Cayce (“Cayce”), Clerk of Court, Fifth Circuit Court of Appeals, especially when his signature nor his initials were no where on this or other letters from the Office of the Clerk. Federal Rule of Appellate Procedure 27(b) and 5th Circuit Rule 27.1 do not authorize deputy clerks to act on procedural motions.

**III. THIS CASE PRESENTS QUESTIONS OF
EXCEPTIONAL IMPORTANCE
WARRANTING THIS COURT’S IMMEDIATE
RESOLUTION.**

The questions presented in this case are of exceptional importance warranting this Court's immediate resolution. After the clerk ordered that Ms. Rosas' appeal be dismissed pursuant to 5th Circuit Rule 42 for failure to file appellant's brief and record excerpts, she filed a motion for reconsideration. Presumably a panel denied the motion for reconsideration given the use of the word 'court,' even though their names and/or signatures appeared nowhere on the "letter." Ms. Rosas filed another motion for reconsideration. Judge Smith denied the motion for reconsideration. Ms. Rosas had two provisions under Federal Rule of Appellate Procedure 27(c) to file motions for reconsideration: the first ruling was nebulous and a single judge made the second. The second and last ruling contradicts Rule 27(c).

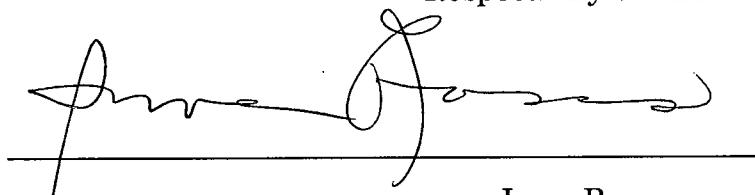
This Court should highly consider guiding circuit courts on Federal Rule of Appellate Procedure 27(b). Rule 27(b) provides, that a court "may, by rule or by order in a particular case, authorize its clerk to act on specified types of procedural motions." FED. R. APP. P. 27(c).

However, it is unclear what the “specified types of procedural motions” are. If discretion is given to courts to decide what those specified types of procedural motions are and such being the case, then we have a Rule that defeats the purpose of having standard sets of federal rules. As argued, there were many transactions in this instant matter that were prejudicial against Ms. Rosas, a *pro se* litigant.

CONCLUSION

For all the foregoing reasons, petitioner Ms. Rosas respectfully requests that the Petition for Writ of Certiorari be granted.

Respectfully submitted,



02/03/2020

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