

No 23-5197

IN THE

SUPREME COURT OF THE UNITED STATES

Supreme Court, U.S.
FILED
APR 18 2023
OFFICE OF THE CLERK

MARSHALL RAY PARTAIN — PETITIONER
(Your Name)

vs.

JASON HALLMARK, ET. AL. — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

Marshall Ray Partain
(Your Name)

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(Address)

Austin, TX 78704
(City, State, Zip Code)

(512) 947-4146
(Phone Number)

QUESTION(S) PRESENTED

Question #1: If a federal district court accepts a Notice of Appeal and an Appellant's Grounds for Appeal, and the opposing party fails to object to an untimely-filed appeal, should the appeal be allowed to proceed?

Question #2: Is it hypocritical for the Court of Appeals to claim that they "liberally construe pro-se filings", and then hold a mentally-ill Appellant to the stringent standards of an attorney for missing a deadline by 12-days due to his confinements for severe mental-illness?

Question #3: Under the Fed. R. Civ. P. Rule 77(d)(1), it uses mandatory words such as IMMEDIATELY and MUST; however, Rule 77(d)(2) contradicts Rule 77(d)(1) by basically stating that Notification By the Clerk is merely a convenience for litigants... does such a contradictory statute depart from the accepted and usual course of judicial proceedings?

LIST OF PARTIES

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

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Officer Jason Hallmark, Badge #6307 Austin Police Dept. ;
Officer Sharday Melero, Badge #8771 Austin Police Dept..

RELATED CASES

United States v. Espinoza, No. 6:07-cr-016(1)RP, U.S. District Court for the Western District of Texas - Waco Division. Judgment entered Oct. 31, 2016.

Rogers v. Hierholzer, No. SA-16-CV-01171-FB, U.S. District Court for the Western District of Texas - San Antonio Division. Judgment entered Oct. 1, 2019

Weeks v. Bottling Grp., No. PE:21-cv-00066-DC-DF, U.S. District Court for the Western District of Texas - Pecos Division. Judgment entered Feb. 23, 2022.

Riel v. Electronic Data Systems Corp., 99 F.3d 678 (5th Cir. 1996)

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APPENDIX B- *Correspondence from U.S.D.C. - Western District of Texas notifying me they would charge me for a copy of the Court's order.*

APPENDIX C- *Motion to Reconsider the Decision of the Court of Appeals - 5th Cir.*

APPENDIX D - *Correspondence from the Clerk of Court notifying me that they are taking no action on my motion for rehearing/reconsideration.*

APPENDIX E

APPENDIX F

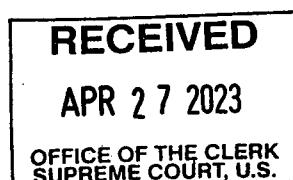
TABLE OF AUTHORITIES CITED

CASES	PAGE NUMBER
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• <u>U.S. v. Nguyen</u> , No. 5:13-cr-580-RCL-5, (W.D. Tex. July 30, 2020)	5
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STATUTES AND RULES

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OTHER



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

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix A to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the United States district court appears at Appendix B to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

reported at _____; or,
 has been designated for publication but is not yet reported; or,
 is unpublished.

JURISDICTION

For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was February 02, 2023.

[] No petition for rehearing was timely filed in my case.

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: February 28, 2023, and a copy of the order denying rehearing appears at Appendix D.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A .

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

[] For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

[] A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

[] An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. A_____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

- U.S. Const. Amend. I: "... and to petition the government for a redress of grievances"
- U.S. Const. Amend. XIV Sec. 1: "...nor shall any state deprive any person of life, liberty, or property without due process of law; nor deprive deny to any person within its jurisdiction the equal protection of the laws."
- 28 U.S.C. Sec. 2107(c): "The district court may, upon motion filed not later than 30 days of the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause."

STATEMENT OF THE CASE

May it please the court, I received a copy of the district court's Final Judgment on Sept. 28, 2022, about 15-days after the order was entered, while I was in state prison. I was released the next day on Sept. 29, 2022. I submitted my notice or intent to appeal within 30-days of receipt of the judge's order, as I believed that the actual "tolling" of my time to appeal began once I became aware of the court's entry. At all times I had diligently pursued this case since Sept. 2021, however, occasionally I'd become unstable and require commitment — either in a hospital or jail.

Notwithstanding, under the provisions of Rule 77(d)(1) of the Federal Rules of Civil Procedure, it states (in pertinent part) that "IMMEDIATELY after entering an order or judgment, the clerk MUST serve notice of the entry (emphasis added)." I contend that Rule 77(d)(1) is in conflict with Rule 77(d)(2); why use the mandatory words of "immediately" and "must" when it's apparent that the clerk is given discretion when to comply with Rule 77(d)(1)? If at all. After not receiving a reply from the district court, I wrote to the clerk for the 5th Circuit, whom eventually notified me that my notice and grounds for appeal had been received by both the district court and 5th Circuit. However, opposing counsel never objected to an untimely filed Notice of Appeal; nor did the district court or the 5th Circuit claim an untimely filed appeal upon receipt.

Under Fed. R. App. P. Rule 4(a)(5)(A)(ii), the district court may extend the time to file for "excusable neglect or good cause"; it was my belief that due to my extensive mental disabilities, as well as other mitigating factors, my mere 12-day untimely notice of appeal was accepted sua sponte.

Moreover, Fed. R. App. P. Rule 4(a)(6), provides a mechanism for granting an extension of time when a party would be unfairly deprived of an appeal because of the failure of the clerk of court to issue a Notice of entry/Appeal. I was prejudiced by the clerk's delay in notifying me of the court's entry and denying me a court-provided form for my Notice of Appeal.

In addition to the district court exercising discretion, the court of appeals exercises its own discretion in permitting later filing. see Fed. R. App. P. Rule 25(a)(2)(A)(iii). And in a futile effort to explain the aforementioned to the 5th Circuit, I filed a motion to reconsider (Appendix C) pursuant to Fed. R. App. P. Rule 27(b), due to being "adversely affected by the district court clerk's inaction."

REASONS FOR GRANTING THE PETITION

I am a layman at law and lack access to an adequate law library. Nonetheless, I believe that compelling reasons exist for this Court to ~~exercise~~ exercise its discretionary jurisdiction. In the case of Tze Wang Consultants, Ltd. v. Bank of Baroda, 749 F.3d 107 (2nd Cir. 2014), albeit a non-jurisdictional bankruptcy case, the court ruled that "when an opposing party fails to object to an untimely appeal, the opposing party forfeits the objection thus allowing the appeal to proceed." It is my contention that both opposing party and district court failed to object and accepted my untimely filed appeal.

Further, I requested copies of the civil docket in my case numerous times to no avail; I wanted the district court to provide me with a timeline of events so that I could perfect my appeal. These requests were made **PRIOR** to the court's entry and **AFTER**; all to no avail. In conformity with U.S. v. Nguyen, No. 5:13-cr-586-RCL-5 (W.D.Tex. 2020), "The Fifth Circuit has emphasized that a defendant **MUST** be provided information about the timeline for filing a notice of appeal." In my case, the clerk ignored me; so I wrote to the 5th Circuit clerk seeking guidance.

Additionally, I requested appointed counsel twice and was denied twice; despite the fact that I suffer from serious mental disabilities. Although Holland v. Florida, 130 S. Ct. 2549, - 2560 (2010), is a criminal case, there are similarities with the instant case before this Court. I am aware that there is no right to appointed counsel in civil cases, but due to my mental condition, I should've been appointed counsel in the best interest of justice. How can the court's claim to "liberally construe my filings", and then hold me to the stringent standards of an attorney by strictly enforcing a deadline which I missed by a mere 12-days due to mental illness confinement?

In Abulkhair v. Liberty Mutual Co., 405 App'x 570 573 (3rd Cir. 2011), the district court dismissed his case because he filed his Notice of Appeal 18-days past the deadline to file; however, the issue was remedied by reopening the time to file his appeal.

In comparison, it was the **DISTRICT COURT** that refused his untimely filing; yet he was still allowed to file... in my case the district court and opposing counsel accepted my untimely appeal without objection. It was the Fifth Circuit that dismissed my appeal as untimely 4-months after the clerk filed it....

Please accept my appeal. Thankyou.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Marshall Ray Partain

Date: April 17, 2023

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