NOTICE

PRACTITIONER'S GUIDE TO THE U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT

We are pleased to offer this Practitioner's Guide to the U.S. Court of Appeals for the Fifth Circuit. We intend this document to make it easier for both pro se litigants and lawyers to practice in our court. For the lawyers, we provide information about electronic case filing which became mandatory on March 15, 2010. While we have taken all efforts to ensure that the guide was current at the time of publication, the guide does not relieve practitioners of responsibility to comply with the Federal Rules of Appellate Procedure, the Fifth Circuit Rules, our Internal Operating Procedures, and, of course, case law and statutes.

This guide is in PDF format and you can download or print it from our site. There is a limited search capability you can access by clicking on the binocular icon near the top of the screen and using the interactive "find" box. You can then type in the word or words for which you are searching, and select an option to match the word, the case or to search backwards. You can also access the "find" box by right clicking your mouse.

There are ten appendices for reference. Because of their length, the PDF version of the Guide is in several sections. If you print a "hard copy" of the complete Guide, download or print the Appendices separately and then assemble the complete product. To print Appendices go to the clerk's office page of the court's web site at <**http://www.ca5.uscourts.gov**>, and then select the

Appendices as shown below:

Appendix A - Clerk's Office Employee Listing and Telephone Numbers

Appendix B - FED. R. APP. P., 5TH CIR. R. and Internal Operating Procedures (IOPs)

PRACTITIONERS' GUIDE

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

June 2017

Distributed by:

CLERK'S OFFICE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

JOHN MINOR WISDOM UNITED STATES COURTHOUSE

600 SOUTH MAESTRI PLACE

NEW ORLEANS, LOUISIANA 70130

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Appendices as shown below:

INTRODUCTION

We want to make it easier for lawyers to practice in our court. To do that, this Practitioner's Guide walks the reader through an appeal:

THE DECISION TO APPEAL lists facts about the court that will help parties and their lawyers decide whether to appeal.

THE CLERK'S OFFICE AND ATTORNEY RESPONSIBILITIES explains how the clerk's office works, states the requirements for admission to practice before the court, outlines the duties of counsel, and sets out our mandatory Electronic Case Filing requirements for attorneys.

GETTING A CASE TO THE COURT covers the steps necessary to get an appeal before the court and ready for briefing.

APPELLATE CONFERENCE PROGRAM lets you know how cases are selected for the program and how the confidential settlement process works.

WRITING YOUR BRIEF AND PREPARING RECORD EXCERPTS tells you what the clerk's office needs to see before it can present a brief and record excerpts to the court.

MOTIONS PROCESSING explains how motions are routed and decided.

CASE SCREENING tells how and why most cases are decided without oral argument.

ORAL ARGUMENT discusses rules for argument and offers suggestions.

DECISIONS AND OPINIONS tells how court panels are selected for decisions, how opinions are issued, when they are published, and what the effect of non-publication is.

POST DECISION MATTERS discusses petitions for rehearing and issuance of the mandate.

MISCELLANEOUS PROCEDURES addresses stays, release pending appeal, certificates of appealability, and habeas corpus.

APPENDICES show the organization of the clerk's office, the people who work there, and their office telephone numbers (A); provide the rules governing federal appeals (B); rules for complaints about judges (C); the order controlling the appellate conference program (D); the clerk's office briefing checklist (E); a flow chart of the life of an appeal (F); maps of the courthouse (G); answers to frequently asked questions (H); a statistical overview (I).

Electronic case filing for attorneys became mandatory effective March 15, 2010. In addition to the information in this Guide, please see **CM/ECF Information Page** for more information regarding electronic filing in our court.

This guide is not law. For authoritative answers, practitioners should look to the Federal Rules of Appellate Procedure, the Fifth Circuit Rules, our Internal Operating Procedures, and, of course, case law and statutes.

The court's rules and procedures are posted, along with other useful information, on the court's web site, <**http://www.ca5.uscourts.gov/**>. In addition, practitioners may want to consult a comprehensive guide to Fifth Circuit practice, George Rahdert and Larry Roth, APPEALS TO THE FIFTH CIRCUIT (2001).

We hope you will find this guide useful. If you have suggestions for improvement, write me at 600 South Maestri Place, New Orleans, LA 70130.

Lyle Cayce

Clerk of Court

JUDGES OF THE UNITED STATES COURT OF APPEALS

FIFTH CIRCUIT

CIRCUIT JUSTICE:

Clarence Thomas — Washington, D.C.

CIRCUIT JUDGES:

	Home Chambers	Date of Appointment
Carl E. Stewart, Chief Judge	Shreveport, Louisiana	May 9, 1994
E. Grady Jolly	Jackson, Mississippi	July 30, 1982
Edith Hollan Jones	Houston, Texas	April 4, 1985
Jerry E. Smith	Houston, Texas	December 21, 1987
James L. Dennis	New Orleans, Louisiana	October 2, 1995
Edith Brown Clement	New Orleans, Louisiana	November 26, 2001
Edward C. Prado	San Antonio, Texas	May 5, 2003
Priscilla R. Owen	Austin, Texas	June 3, 2005
Jennifer W. Elrod	Houston, Texas	October 13, 2007
Leslie H. Southwick	Jackson, Mississippi	October 29, 2007

	Home Chambers	Date of Appointment
Catharina Haynes	Dallas, Texas	April 18, 2008
James E. Graves, Jr.	Jackson, Mississippi	February 17, 2011
Stephen A. Higginson	New Orleans, LA	November 2, 2011
Gregg J. Costa	Houston, TX	June 2, 2014

SENIOR CIRCUIT JUDGES:

Thomas M. Reavley	Houston, Texas	July 13, 1979
Carolyn Dineen King	Houston, Texas	July 13, 1979
Patrick E. Higginbotham	Austin, Texas	July 30, 1982
John M. Duhe, Jr.	Lafayette, Louisiana	October 17, 1988
Jacques L. Wiener, Jr.	New Orleans, Louisiana	March 12, 1990
Rhesa Hawkins Barksdale	Jackson, Mississippi	March 12, 1990
Fortunato P. Benavides	Austin, Texas	May 9, 1994
W. Eugene Davis	Lafayette, Louisiana	November 16, 1983

Brief biographies of the judges are available on the Federal Judicial Center's Internet page at **www.fjc.gov/public/home.nsf/hisj**

FIFTH CIRCUIT CLERK'S OFFICE

600 South Maestri Place

New Orleans, LA 70130

Main telephone number - (504) 310-7700

A listing of clerk's office employees and telephone numbers is at Appendix A

THE DECISION TO APPEAL

SHOULD I APPEAL?

You should not read further in this guide until you objectively review your case and decide that an appeal is worthwhile. Of course you should consider the cost of further proceedings, and the delay in getting a decision from the court, but most importantly, you need to consider whether the error you see in the district court or agency decision will cause this court to reverse.

WHAT IS THE STANDARD OF REVIEW?

First look at the applicable "standard of review" this court must employ in deciding your appeal. For example, one standard requires the court to ask whether the district court's factual determinations are "clearly erroneous?" If not, you will lose the appeal. If you are seeking review of an agency determination, is the agency determination supported by "substantial" evidence? If it is, you will lose the appeal. Look carefully at your case. Put yourself in the place of a judge, apply the proper standard of review, and determine the likelihood this court can overturn a decision under the law. To assist you in finding the correct standard of review, there are many books which discuss the law and give examples of the standards of review. Two are "Federal Standards of Review," by Steven Alan Childress and Martha S. Davis, and "Appeals to the Fifth Circuit" by George Rahdert and Larry Roth.

You should also analyze whether the error or errors are "harmless," or if they are of such magnitude as to require reversal. Only after you determine that you can satisfy the correct standard of review and that the error requires reversal, should you consider other factors, such as cost and time.

WHAT ARE MY CHANCES FOR SUCCESS?

Even though you think you have a valid basis for an appeal, you need to consider the court's record in deciding appeals. For the 12 month period which ended on June 30, 2014, and in rounded numbers, this court reversed only 5.9%of the 4,272 cases decided on the merits. Statistics from the Administrative Office of the U. S. Courts show that about 3.7% of criminal

appeals, 14.2% of non-prisoner "U.S. Civil Cases," and about 13.9% of nonprisoner "Private Civil" cases resulted in reversal.

If you are interested in further statistical information, we post our annual statistical report on the clerk's office page of our internet site, under the "About the Court" tab, in the "Court Statistics" section.

HOW LONG DOES IT TAKE TO GET A DECISION?

As of September 30, 2014, there were 4,712 cases pending in the Fifth Circuit. Administrative Office of the U. S. Courts statistics showed the median time from filing the notice of appeal to issuance of the court's opinion was 8.9 months.

WHAT IF I FILE A MERITLESS APPEAL?

A frivolous appeal is one when the result is obvious and the arguments of error are wholly without merit. If the court finds you filed a frivolous appeal, it may award damages and single or double costs, pursuant to FED. R. APP. P. 38. Costs may be awarded against a counsel if the lawyer is at fault. Pro se litigants who file frivolous appeals may be barred from further filings unless they get prior written approval from a judge. 5TH CIR. R. 35.1 discusses the power of the court to impose sanctions on its own initiative under Rule 38 and 28 U.S.C. § 1927 if you file a groundless petition for rehearing en banc.

THE CLERK'S OFFICE AND ATTORNEYS

THE CLERK'S OFFICE

Assuming you have decided to appeal, you need to know how the clerk's office works and how we can or cannot assist you in processing your appeal.

CLERK'S OFFICE RESPONSIBILITIES

The clerk's office is the custodian of the court's records and papers. To ensure we are aware of all matters and unless otherwise directed, all communications with the court **must** be made through the clerk's office.

Among the clerk's duties are to:

Receive and account for monies paid to the court;

Initiate a docket for each appeal;

Enter all filings in appeals;

Issue calendars of cases for court oral argument sessions;

Enter orders and opinions of the court as authorized by the judges; and

Decide or refer to the court the procedural motions set forth in 5TH CIR. R. 27.1 and 31.4.

LOCATION AND HOURS OF OPERATION

The Fifth Circuit Clerk's Office is located in Room 200 of the F. Edward Hebert Building, 600 South Maestri Place, New Orleans, LA 70130. The office is open for business from 8:00 a.m. until 5:00 p.m. Monday through Friday. The court is always open to accept pleadings. The office is staffed on all days except Saturdays, Sundays, designated federal holidays, and Mardi Gras. A limited staff is on duty in the clerk's office for four federal holidays (Martin Luther King Jr.'s Birthday, Washington's Birthday, Columbus Day, and Veterans' Day), but the office is **not staffed** on all other federal holidays.

TELEPHONE NUMBERS

Clerk's office telephone numbers are at Appendix A and are posted on our website under the "About the Court" tab in the "General Information" section.

EMERGENCY CONTACT

When the clerk's office is not staffed, you can reach a deputy clerk by dialing (504) 310-7700, listening to the instructions from the automated attendant, and selecting the option which connects you to the emergency duty clerk. This service is designed for **true emergency matters only.** Assistance with E-filing is **NOT** an emergency. Requests for extension of time

to file briefs or to pay fees and other procedural matters are **NOT** considered emergency matters; see also "Emergency Motions" under the Motions Processing section of this guide. If you think you will need to file documents outside normal business hours, we ask you to make advance arrangements with the clerk's office.

CASELOAD HIGHLIGHTS

Cases. For the 12 month period which ended June 30, 2016, we docketed 8,675 actions. We had 6,156 appeals from Texas district courts; 1,459 from Louisiana courts; and 508 from Mississippi courts. The remaining cases included appeals from Agency decisions, Bankruptcy and Tax court decisions, and motions to file successive habeas corpus petitions, among other matters. Pro se litigants filed 46.1% of the notices of appeal, and 56.6% of the cases were proceeding pro se at the time the case terminated.

CASE MANAGEMENT RESPONSIBILITIES WITHIN THE CLERK'S OFFICE

The judicial support division processes all specific case related matters, except for the calendaring of oral argument cases and the issuance of opinions. Most case processing responsibilities are assigned to one of three teams.

The case management teams are as follows:

Northern and Western District Courts of Texas;

Southern and Eastern District Courts of Texas;

Louisiana and Mississippi District Courts, and Agency cases.

You can tell to which team your case is assigned by the case number you receive when we docket your appeal. All cases have two digit numbers showing the year the case was docketed, e.g., 08, 09, 10, etc. Following the two digit case year number is a hyphen and then a five-digit number:

Northern District of Texas cases begin with "**1**," e.g., 09-10025;

Southern District of Texas (Houston) cases begin with the number "**2**," e.g., 09-20875;

Louisiana District Court cases begin with the number "**3**," e.g., 0930154;

Southern District of Texas (non-Houston) and Eastern District of Texas cases begin with "**4**," e.g., 10-41002;

Western District of Texas cases begin with the number "**5**," e.g., 10-50881;

Mississippi District Court cases and most agency cases begin with the number "**6**," e.g., 09-60214.

Newly docketed **death penalty** cases begin with the number "**7**," e.g., 10-70010.

By understanding this numbering system, you can determine which case management team is handling your case and who to contact. A listing of the employees and their telephone numbers is at Appendix A.

HOW DO I GET INFORMATION ABOUT MY CASE'S STATUS?

Because of the large number of telephone calls we receive, we encourage you to use our automated systems to answer routine questions about the status of a case. You may check the case status by accessing our internet home page web site, <**http://www.ca5.uscourts.gov/**>, and selecting the "Docket Information" option in the "Case Info" tab near top of the screen or by using the Quick Link at the bottom of the screen to the PACER site. Both links will take you to the PACER system. The fee is $ .10 per page for electronic access to case information with a cap of $3.00 for any "single document," after you have accrued $15 in fees in a quarterly billing cycle. However, transcripts of federal court proceedings are not subject to the $3.00 cap. Electronic case filers can receive a "free look" at documents filed under the ECF and PACER rules. To access the PACER system, you will need to register with the PACER Center. Our web site provides a link to PACER Registration and instructions how to set up an account and about billing information through the PACER system - go to the "Case Info & E-filing" tab,

under "Electronic Case Filing" and then click "Register for a PACER account" or use this link PACER Registration .

HOW DO I GET GENERAL PROCEDURAL INFORMATION ABOUT

BRIEFS, RECORD EXCERPTS, DUE DATES FOR DOCUMENTS,

COPIES OF OPINIONS, FILING FEES, OR THE CLERK'S OFFICE ADDRESS?

You can obtain much useful information on these and other matters 24 hours a day simply by calling (504) 310-7700, listening to and selecting the correct prompts. You can then select the subject matter which interests you and receive prerecorded information.

INFORMATION AVAILABLE ON THE INTERNET

We provide a wide variety of information about the court at our web site <**http://www.ca5.uscourts.gov**>. Among the items available are the FED. R. APP. P., and our implementing 5TH CIR. R. and IOPs under "Rules and Procedures Tab"; Checklist for Preparation of Briefs, Record Excerpts, Motions and Other papers, under the "Guides" tab and "Brief Guidance." Additionally, the website provides links to numerous helpful sources, including frequently asked questions (FAQ), forms and samples, and helpful checklists.

AVAILABILITY OF OPINIONS ON THE INTERNET

You can access published and unpublished opinions decided between 1992 to the present on the court's internet site. (NOTE: Some older opinions are not available because we experienced technical difficulties in converting them from earlier software versions).

We frequently receive requests for opinions on a subject, e.g., "search and seizure." We do not perform legal research for you, although you can search our database using the software available through our website, under

the "Other Resources" title on the home page and "Opinions Keyword Search" (or click text for link).

I STILL NEED HELP GETTING INFORMATION. HOW DO I GET IT?

If you cannot get the information you need from these sources, please contact the case management team responsible for your case by calling the number shown on correspondence you receive or by consulting the directory in Appendix A. Please understand we have trouble answering the large number of incoming telephone calls we receive each day. We ask for your patience in calling us and suggest that you call at the non-peak times of 8:30 to 9:30 a.m.; and 11:30 a.m. to 1:30 p.m. If the particular person you wish to speak to is not present, you may leave a voice mail message, speak to another individual, or leave a message if necessary.

ATTORNEYS

ADMISSION TO PRACTICE

All counsel, including Criminal Justice Act appointed attorneys, who represent litigants before the Fifth Circuit must be admitted to the bar of the court. Admission requirements are set forth in FED. R. APP. P. and 5TH CIR. R. 46. PLEASE NOTE THAT THE DECEMBER 2009 CHANGE TO OUR RULE REQUIRES ATTORNEYS TO PROVIDE INITIAL CONTACT INFORMATION, AND TO UPDATE THAT INFORMATION WHEN CHANGES OCCUR. In general, an attorney admitted to practice before the Supreme Court of the United States, the highest court of a state, another United States court of appeals or a United States district court, and who is of good moral and professional character is eligible for admission to the bar of this court.

Attorneys must apply for admission on the court's approved form which the clerk furnishes. A member of the bar of this court must move for the applicant's admission, but the applicant does not need to appear before the court to be admitted. You can download our **admission form** from the clerk's office section of the court's internet site <**http://www.ca5.uscourts.gov**> and complete it. If you are not previously admitted and you file an appeal or

enter an appearance in a case, we will not permit further practice until you are admitted to the court.

To apply for admission, you should send to the clerk's office:

> The completed application,
>
> Unless exempt, a certificate of good standing from the state bar/court which qualifies you for admission to the Fifth Circuit,
>
> An accompanying motion for admission signed by a member of this court's bar (the required motion is on the application form),
>
> An application fee of $231.00 payable to "Clerk, U.S. Courts."

The court waives the admission fee for any attorney appointed to represent a party in a criminal or civil appeal, Federal government attorneys, **current** law clerks to Fifth Circuit Judges, and certain military attorneys on initial extended active duty. Motions to proceed pro hac vice are greatly disfavored, and will be denied absent extraordinary circumstances.

5TH CIR. R. 46.1 requires members of this court's bar to apply for readmission every five years. The clerk's office will notify attorneys of their requirement to renew their admission. When notified, attorneys must complete a readmission form and forward a $50.00 renewal fee payable to "Librarian, U.S. Court of Appeals" within 30 days. Failure to respond to the readmission notice may result in the attorney's name being removed from our attorney roll. Thereafter, if an attorney seeks readmission he or she will need to file a new application and oath for admission form and may be required to pay the full admission fee (currently $231.00) before being allowed to practice again in this court.

DISCIPLINARY RULES

All attorneys admitted to the court are subject to disciplinary rules including suspension from practice for misconduct or failure to comply with the FED. R. APP. P. and 5TH CIR. R. 46. Attorneys appearing before the court may not withdraw without the court's consent. Counsel in direct criminal, habeas and other prisoner cases must review 5TH CIR. R. 42.3.1.1 to

understand their obligation to timely prosecute appeals before this court. The rule provides that:

> ... the clerk shall issue a notice to counsel that, upon expiration of 15 days from the date of notice, the appeal may be dismissed for want of prosecution unless prior to that date the default is remedied, and must enter an order directing counsel to show cause why disciplinary action should not be taken against counsel. If the default is remedied within that time, the clerk must not dismiss the appeal and may refer to the court the matter of disciplinary action against the attorney. **If the default is not remedied within that time, the clerk may enter an order dismissing the appeal for want of prosecution or may refer to the court the question of dismissal. The clerk must refer to the court the matter of disciplinary action against the attorney**. (emphasis added)

Requirement to Maintain a Current License to Practice Law. Attorneys must maintain their license to practice issued by competent state or federal licensing entities in order to continue to practice in this court. Thus, if an attorney allows his or her license to practice law to lapse, the attorney may no longer appear in this court.

Standards of Conduct. All members of the bar must comply with the state standards of professional conduct and ethical behavior in the states in which they are admitted to practice. The court imposes disciplinary sanctions for deviations from these standards.

Basis for Disciplinary Action. The court usually takes disciplinary action when:

1) notified that another court has suspended or disbarred an attorney, or
2) an attorney's conduct in this court falls below that required of a member of the bar.

Possible sanctions include reprimand, monetary penalties, forfeiture of payments to appointed counsel, prohibition from receiving Criminal Justice

Act (CJA) appointments, suspension from practicing in the court, and removal from the roll of attorneys permitted to practice before this court.

We refer all disciplinary matters initially to the chief judge. When another court has taken disciplinary action against an attorney, the court orders the attorney to show cause why this court should not impose the same punishment. Another court's decision to impose sanctions is prima facie evidence that the behavior occurred, and relitigation of the alleged acts is not permitted. The only issue is whether the proceedings in the other court comported with due process.

When the court learns an attorney has failed to meet the standards expected of a member of this court's bar, the chief judge may order the attorney to show cause why disciplinary action should not be taken. The order sets out the circumstances giving rise to the court's concern, and specifies the sanctions that can be imposed.

Evidentiary Hearings. Hearings are granted only upon specific written request. The chief judge decides the composition of the hearing, and may delegate fact-finding to a special master. The attorney may be represented by counsel and present evidence relevant to the issue(s) before the court.

COUNSEL'S DUTIES

Continuation of Representation in Criminal and Post Conviction Cases. Counsel appointed to represent a defendant at trial must or in a conditional guilty plea must continue representation of the defendant unless relieved by the court. We consider your signing of a notice of appeal on behalf of a petitioner or moving party in a post-conviction proceeding under 28 U.S.C. § 2254 or 28 U.S.C. § 2255 as an entry of appearance in this court.

Withdrawal and Dismissal. An appointed attorney who has entered an appearance in a case may not withdraw without consent of the court. In most instances, we expect that the motion will be directed to the district court judge. If granted, the district judge should also appoint new counsel to represent the defendant on appeal. An attorney who seeks to withdraw from a criminal appeal or from an appeal involving post-conviction relief must file a motion to withdraw. The motion must set out the reason for withdrawing and must state the client has been advised of the appeal process, including

any deadlines for taking action prescribed by the FED. R. APP. P. and the rules of this court. The motion must also contain:

> A showing new counsel has been retained or appointed; or
>
> A showing appellant is proceeding in forma pauperis or is eligible for appointment of counsel under 18 U.S.C. § 3006A, or that a motion for finding appellant is eligible for appointment of counsel on appeal is filed in the district court; or
>
> A signed statement from the client acknowledging the right to retain new counsel or apply for appointment of counsel, and expressly electing to appear pro se; or
>
> A showing that exceptional circumstances prevent counsel from meeting any of the requirements stated above.

Counsel must furnish proof of service on the client, as well as on all opposing parties.

Appeals without Arguable Merit. If counsel in a direct criminal appeal files a brief characterizing the appeal as without merit and moves to withdraw, *Anders v. California*, 386 U.S. 738 (1967), or responds to a motion to dismiss by stating that any argument in opposition would be frivolous, counsel must advise us of the client's address. We will notify the client of the motion to withdraw and provide him or her notice that a response to the motion is due within 30 days. See the Anders Guidelines posted in the Guides on the website for more information.

Representation after Appeal. The Fifth Circuit's Plan Under the Criminal Justice Act for Representation on Appeal provides that, following an adverse decision on appeal, appointed counsel shall "promptly advise defendant in writing of the right to seek further review by the filing of a petition for writ of certiorari." If the defendant requests counsel to file for certiorari in writing, counsel shall file a petition for the writ timely. As an exception, counsel does not need to file for certiorari if this court relieves counsel of that responsibility upon counsel's motion suggesting the futility of certiorari, or upon this court's sua sponte order.

Counsel must not assume that an adverse decision in this court terminates their duties under the Criminal Justice Act.

Dismissal of an Appeal

Voluntary Dismissal. Civil appeals not involving post-conviction relief may be dismissed by agreement of the parties or on appellant's motion. The terms of dismissal may be agreed upon by the parties or fixed by the court, FED. R. APP. P. 42(b). Pro se appellants voluntarily may dismiss criminal appeals and appeals involving post-conviction relief. However, if counsel files a motion to dismiss voluntarily a criminal appeal or an appeal involving post-conviction relief, counsel must send us a signed statement from the appellant acknowledging his right to appeal and expressly electing to withdraw the appeal. Alternatively, counsel must show exceptional circumstances that prevent sending us such a statement.

Dismissal by the court. On its own motion, the court may dismiss an appeal if a pro se appellant or a retained counsel fails to comply with FED. R. APP. P. or 5TH CIR. R. 42. The dismissal of an appeal does not relieve counsel from possible disciplinary action, 5TH CIR. R. 42.3.

DO I NEED TO TELL THE CLERK WHEN MY ADDRESS CHANGES?

5TH CIR. R. 46.1 requires attorneys to advise us in writing, or by e-mail, of any change of their physical addresses, electronic mail addresses, if any, or telephone numbers. Contact information should be updated through the CM/ECF PACER account. Without your compliance, notices may not be delivered timely, or we may be unable to notify you promptly about any changes in a scheduled oral argument date or location. This delays the orderly and efficient processing of your case.

ELECTRONIC CASE FILING (ECF)

Mandatory attorney electronic case filing is effective March 15, 2010, unless counsel files a motion and is excused for good cause shown. Counsel must register as "filing users" under 5th Cir. R. 25.2.3, comply with the court's ECF rules and the ECF standards, separately posted on our ECF website, http://www.ca5.uscourts.gov/electronic-case-filing/electronic-case-filing/ecf-information-page. Pro se litigants must file a motion in their pending case requesting the right to file ECF and the court must grant that motion for the pro se filer to be eligible for ECF for that individual case.

The court continues to require paper copies of certain pleadings, e.g. briefs, record excerpts, etc. We will notify ECF filers when to submit the paper copies.

Because readers of the Guide may include a few attorneys exempt from the ECF requirements, and pro se litigants not eligible for ECF filing, we continue to refer to documents and forms that these filers will use in paper form. We expect however, that the vast majority of readers will file electronically. We have attempted to make the Guide apply to both ECF and non-ECF filers, but any ECF questions you have should be answered in our Rule 25.2 and our ECF Filing Standards.

GETTING A CASE TO COURT

CASE PROCESSING

WHAT ARE THE MAJOR CASE PROCESSING EVENTS?

Key:

USDC	*United States District Court*	**FED. R. App. P.**	*Federal Rules of Appellate Procedure*
USCA	*United States Court of Appeals*	**5th Cir. R.**	*Fifth Circuit Rules*
USTC	*Tax Court*	**IFP**	*In Forma Pauperis*
USC	*United States Code*		

WHAT	WHO	WHERE/WHEN	REFERENCE
Notice of Appeal	Appellant	Filed in USDC: Criminal Cases: within **14** days after entry of judgment, or **30** days if the U.S. is the appellant	FED. R. APP. P. 4(b)
		Civil Cases: within **30** days after entry of the order of judgment, or **60** days if the U.S. is a party	FED. R. APP. P. 4 (a)
		Filed in USTC: Tax Cases: within **90** days after decision is entered	FED. R. APP. P. 13

WHAT	WHO	WHERE/WHEN	REFERENCE
Petition for Review	Petitioner	Filed in 5th Cir. within time provided by statute	FED. R. APP. P. 15
Filing and Docketing fees	Appellant or Petitioner	Paid to the USDC or USTC when notice is filed, unless appellant is IFP or U.S.: Filing Fee $5.00 Docket Fee $500.00 Paid to the clerk 5th Cir. in cases seeking review of administrative orders or other original proceedings: Docket Fee $500.00	FED. R. APP. P. 3 28 USC § 1913
Transcript Order Form	Appellant	Delivered to court reporter and copies filed in USDC and 5th Cir. within **14** days after notice is filed	FED. R. APP. P. 10(b)
Transcript	Court Reporter	Filed in USDC: <u>Criminal</u> and <u>Civil Cases</u>: Within **60** days after ordered	5th CIR. R. 11.2, Appellate Transcript Management Plan
Record on Appeal	Clerk, USDC	Filed in 5th CIR.: **15** days after filing a notice or filing of transcripts, whichever is later	FED. R. APP. P. 11(b), 5th Cir. R. 11.3

WHAT	WHO	WHERE/WHEN	REFERENCE
Appellant's or Petitioner's Opening Brief	Appellant or Petitioner	Filed in 5th CIR.: within **40** days of the date of briefing notice, (unless expedited or by order of the court)	5th CIR. R. 31.3
Appellee's or Respondent's Answer Brief	Appellee or Respondent	Filed in 5th CIR.: within **33** days after date of appellant's or petitioner's certificate of service.	5th CIR. R. 31.3
Appellant's or Petitioner's Reply Brief	Appellant or Petitioner	Filed in 5th CIR.: within **14** days after service of appellee's or respondent's brief	FED. R. APP. P. 31
Oral Argument Calendars	Clerk, 5th CIR.	Issued **60** days prior to oral argument	Internal Operating Procedure after 5th CIR. R. 34
Oral Argument Appearance	Appellant/Petitioner and Appellee/Respondent	As set forth in calendar notice: Normally, counsel must check in with the clerk at least 30 minutes before the court convenes the session	5th CIR. R. 34.9
Decision	Judges, 5th CIR.	Usually several weeks to several months after submission	[no cite]

WHAT	WHO	WHERE/WHEN	REFERENCE
Petition for Panel Rehearing And Petition for En Banc Rehearing	Parties seeking rehearing	Filed in the 5th CIR.: within **14** days after entry of judgement unless a civil case in which U.S. or agency or officer thereof is a party; then **45** days after entry of the judgment	FED. R. APP. P. 40, see also FED. R. APP. P. 35 and 5th CIR. R. 35
Bill of Costs	Prevailing Party	Filed in the 5th CIR.: within **14** days after the entry of judgment	FED. R. APP. P. 39, see also 5th CIR. R. 39
Mandate	Clerk, 5th CIR.	Issued on the **8**th calendar day after the time for filing petition for rehearing expires, unless petition for rehearing is filed, then issued on the **8**th calendar day after entry of any order denying the petition for rehearing	FED. R. APP. P. 41, and Internal Operating Procedure after 5th CIR. R. 41
Petition for Writ of Certiorari	Parties Seeking Writ	Filed with the clerk, **U.S. Supreme Court**, within **90** days of entry of judgment or denial of timely petition for rehearing	28 USC § 2101(c) Rule 13, Supreme Court Rules

WHAT CASES CAN THIS COURT DECIDE?

Generally speaking, this court can review only final orders of the federal district courts within its territorial jurisdiction, *see* 28 U.S.C. § 1291, final orders of certain federal administrative tribunals involving residents of the circuit, and cases within the court's original jurisdiction. Certain district court orders that are final, only as to some claims or some parties may be appealable under a district court certification order pursuant to FED. R. CIV. P. 54(b). Certain interlocutory orders may be reviewable, *see* 28 U.S.C. § 1292(b). The circuit court has the power to entertain writs of mandamus, prohibition, etc., in the rare cases in which they are appropriate. Likewise, the court can review directly certain bankruptcy appeals provided proper certification is provided and the court elects to hear the matter.

The court has no power to review decisions of state courts except indirectly, in criminal cases, or on appeal of habeas corpus proceedings initiated in federal district court. We review each new case in the clerk's office for jurisdiction. Those cases which appear to be before the court improperly are disposed of by a three judge panel each month without briefing or argument.

HOW DO I APPEAL A DISTRICT COURT JUDGMENT?

You appeal from a final judgment or order of a district court by filing a notice of appeal with the **district court clerk** within the time prescribed in FED. R. APP. P. 3(a) and 4. The notice of appeal must name all of the parties taking the appeal, designate the judgment or order, or part thereof, you are appealing, and identify the court you are appealing to, FED. R. APP. P. 3(c). Form 1 following the FED. R. APP. P. is a suggested notice of appeal. The district court clerk notifies the other parties by mail that a notice of appeal has been filed and sends us a copy of the notice of appeal and the district court docket entries, FED. R. APP. P. 3(d).

WHEN DO I FILE MY NOTICE OF APPEAL?

Civil Cases:

> If the United States is not a party, you must file your notice of appeal within 30 days after entry of the judgment or order appealed from, FED. R. APP. P. 4(a)(1).

If the United States is a party, any party may file the notice of appeal within 60 days after entry of the judgment or order appealed from. (The term "United States" means the United States or one of its officers or agencies thereof. *Id.).*

If a party files a timely notice of appeal, any other party may file a notice of appeal within 14 days thereafter, or within the time otherwise prescribed by FED. R. APP. P. 4(a). If two or more notices of appeal are filed, the 14 days run only from the time the first notice of appeal was filed, FED. R. APP. P. 4(a)(3).

Criminal Cases:

A defendant must file a notice of appeal within 14 days after entry of the judgment or order appealed from, FED. R. APP. P. 4(b).

When the United States is authorized to file a notice of appeal, it must file within 30 days after entry of the judgment or order appealed from, or the defendant's notice of appeal. *Id.*

NOTE - The prescribed times for filing a notice of appeal are jurisdictional and may not be extended by the court of appeals except in the limited circumstances articulated in Rule 4, *see* FED. R. APP. P. 26(b).

WHEN DOES THE TIME TO APPEAL START TO RUN?

Final Judgments. Generally, you may only appeal a final judgment, *See* 9 Moore's Federal Practice §§110.06 - 110.15. However, statutes allow appeals from certain interlocutory orders. The time for appealing such orders is the same as the time prescribed for other civil appeals. Further, FED. R. CIV. P. 54(b) allows a district court to permit an immediate appeal from an otherwise nonappealable interlocutory order by directing that it be entered as a final judgment as to one or more but fewer than all of the claims or parties. In such cases the time for appeal starts from the date that the district court clerk enters the otherwise interlocutory order as final. A notice of appeal filed before the clerk's entry of the final order is premature and the appeal is subject to dismissal by the court of appeals, but may be sufficient to create a valid appeal if the district court enters a final judgment in the case prior to

dismissal of the appeal by this court, *St. Paul Mercury Ins. Co. v. FGC*, 123 F.3d 336, 338 (5th Cir. 1997).

Time for Filing. Your time to file a notice of appeal is governed by FED. R. APP. P. 4(a)(7), and in civil cases depends on whether FED. R. CIV. P. 58(a)(1) requires the district court to enter a separate document on the docket sheet. Counsel are advised to become familiar with the provisions of the federal appellate rule.

Effect of Post-judgment Motions in Civil Cases. If you, or any party, timely files in the district court any of the following motions in a civil case, the time otherwise prescribed for filing a notice of appeal is suspended:

> For judgment under FED. R. CIV. P. 50(b);
>
> To amend or make additional findings of fact under FED. R. CIV. P. 52(b), whether or not granting the motion would alter the judgment;
>
> For attorney fees under Rule 54 if the district court extends the time to appeal under Rule 58;
>
> To alter or amend the judgment under FED. R. CIV. P. 59;
>
> For a new trial under FED. R. CIV. P. 59; or
>
> For relief under FED. R. CIV. P. 60, if filed within 28 days of entry of judgment.

The full time for filing a notice of appeal begins to run again from the entry of the order disposing of any of the above motions, FED. R. APP. P. 4(a)(4).

APPEALS FROM A MAGISTRATE JUDGE'S JUDGMENTS

United States Magistrate Judge judgments entered pursuant to 28 U.S.C. § 636(c)(1) may be appealed to this court in accordance with 28 U.S.C. § 636(c)(3). These appeals are treated the same as appeals from district court judgments, and are governed by all rules of this court.

WHAT DOES IT COST TO APPEAL?

Appellants must pay a $5.00 filing fee and a $500.00 docketing fee to the district court clerk when the notice of appeal is filed. Those excepted from paying are: 1) the United States or an officer or agency thereof; 2) defendants filing a direct criminal appeal who are represented by Criminal Justice Act appointed attorneys; 3) non-incarcerated appellants granted leave to appeal in forma pauperis or seeking to appeal in forma pauperis. Failure to pay timely the required fee may result in dismissal of the appeal. Appellants who abuse the privilege of proceeding in forma pauperis may have restrictions placed upon their filing of further appeals.

Absent approval of in forma pauperis status, prisoners must pay the fees in full except in direct criminal appeals and in post-conviction challenges to convictions. They may pay the fees at or near the time the notice of appeal is filed, or may be able to pay in installments, under the conditions set forth in 28 U.S.C. § 1915(b)(1), the Prison Litigation Reform Act (PLRA) of 1995. Among other requirements, prisoners seeking to proceed in forma pauperis on appeal must:

> File a motion to proceed on appeal in forma pauperis with the district court clerk;
>
> Provide a certified statement of their prison accounts for the six months prior to filing the notice of appeal. Statements must be obtained from every institution in which the prisoner was in custody during the six-month period; and
>
> Sign consent forms allowing the prison officials to access the inmate's account and to withdraw funds, if the prisons require consent forms.

Prisoners must send any consent forms required by the prisons to the district court clerk with the motion to proceed on appeal in forma pauperis and the certified statement of their prison account.

The court will assess an initial partial filing fee (IPFF) if a prisoner applying to proceed on appeal in forma pauperis does not have enough money to pay the full fee. Prisoners **must** pay the IPFF from their inmate accounts and this fee will be taken when funds exist in the account. This means that

if the IPFF is $4.30, and the prisoner only has $1.25 in the inmate account when the prison receives the IPFF for collection, the $1.25 will be withdrawn immediately from the account, or the prison may place a hold on the money to keep the prisoner from spending it. In either event, the prisoner effectively will have a $0.00 account balance. If the prisoner receives $.75 the next month, that money will be collected or held, keeping the balance at $0.00. This process will continue until the full IPFF has been taken from the inmate account.

Once the IPFF is paid, the remaining fees will be collected periodically, but only when the prisoner has more than $10.00 in the account.

The court's Administrative Order on payment of fees under the PLRA discusses our procedures in detail. The order is available on our internet site

<http://www.ca5.uscourts.gov> at the clerk's office section, under "Other

Documents."

Prisoners in civil cases may have to pay costs of the appeal if they lose. Also inmates who have had three actions or appeals dismissed because they were frivolous, malicious or failed to state a claim, are prohibited from proceeding in forma pauperis in a civil action or appeal unless they are under imminent danger of grievous bodily harm. This is the "3-strikes" rule of the Prison Litigation Reform Act. Prisoners with "3-strikes" must pay the full amount of the filing fees before their appeal can be considered.

HOW DO I APPEAL AN INTERLOCUTORY ORDER?

The court may permit an appeal of an otherwise non-appealable interlocutory order of the district court, if that court states the order involves a controlling question of law as to which there is substantial ground for difference of opinion and an immediate appeal might materially advance the ultimate termination of the litigation. This district court statement is a prerequisite to obtaining permission to appeal. An order may be amended at any time to include the prescribed statement, 28 U.S.C. § 1292(b) and FED. R. APP. P. 5(a).

Requesting Permission to Appeal and Length of Petition. An interlocutory appeal is taken by filing an original and three copies of a petition

for permission to appeal with the clerk of this court, with proof of service on all parties to the action in the district court. FED. R. APP. P. 5(c) sets the page limit for a petition and response at 20 pages.

Time for Filing. The petition must be filed within the time limits set by FED. R. APP. P. 5(a)(2) and (3).

Processing the Petition and Answer. The clerk will enter the petition on the miscellaneous docket. Adverse parties may file an answer within 10 days after service of the petition, FED. R. APP. P. 5(b)(2). When the time for filing answers expires, the clerk will submit the petition and answer, if any, to the court. There will be no oral argument on the petition unless ordered by the court, FED. R. APP. P. 5(b).

Granting of Permission. If this court grants permission to appeal, the appellant has 14 days to pay the fees to the district court clerk. If payment is not made, we will dismiss the appeal. If a criminal defendant who has appointed counsel, or if a **non-incarcerated** party is proceeding in forma pauperis, no fee is required, and we will enter the appeal on the docket after we enter the order granting permission to appeal.

HOW DO I GET REVIEW OF A U.S. TAX COURT DECISION?

You appeal a United States Tax Court decision by filing a notice of appeal with the Tax Court clerk in Washington, D.C., within the prescribed time. The clerk notifies all other parties by mail that a notice of appeal has been filed. The content of the notice of appeal is the same as in appeals from district courts, FED. R. APP. P. 13(b) and (c). Form 2 following the FED. R. APP. P. is a suggested form of the notice of appeal.

Time for Filing. A petitioner wishing to appeal from a decision of the Tax Court may file a notice of appeal within 90 days after entry of the decision. If a timely notice of appeal is filed, any other party may take an appeal by filing a notice of appeal within 120 days after entry of the decision of the Tax Court, FED. R. APP. P. 13(a). You may file a notice of appeal by mail, addressed to the clerk. The postmark date is deemed the date of filing, FED. R. APP. P. 13(b) and Internal Revenue Code of 1954, §7502, as amended, and implementing regulations.

Termination of Time for Filing a Notice of Appeal. A timely motion to vacate or revise a decision, made in conjunction with the Rules of Practice of the Tax Court, terminates the running of time for filing a notice of appeal. The full time will begin to run again for all parties from entry of the order disposing of the motion or from entry of the decision, whichever is later, FED. R. APP. P. 13(a).

HOW DO I GET REVIEW OR ENFORCEMENT OF AN AGENCY ORDER?

You can have an agency order reviewed by filing a petition for review with the Fifth Circuit clerk. Form 3 following the FED. R. APP. P. is a suggested petition for review. The respondent is the appropriate agency, board or officer. The United States may also be considered a respondent if allowed by statute. When a statute provides for enforcement of an agency order by a court of appeals, you may apply for enforcement with the Fifth Circuit clerk. We serve the respondents with copies of any petition for review or application for enforcement, but the petitioner must serve a copy on all other parties to the administrative proceedings and file with the clerk a list of those parties served. No response to a petition for review is required. On the other hand, if an application for enforcement is contested, an answer must be served and filed by the respondent within 21 days after the application for enforcement is filed.

Failure to answer will result in judgment by default. A cross-application for enforcement may be filed by a respondent to a petition for review, if the court has jurisdiction to enforce the order. Such cross-application will be filed in the already docketed proceeding and the matters will be briefed and submitted as a single matter, FED. R. APP. P. 15(a), (b) and (c).

Fees. You must pay a $500.00 docketing fee to the Fifth Circuit clerk when a petition for review is filed. If you fail to pay timely, the petition will be dismissed.

Time for Filing Petition or Application. A petition for review or application for enforcement must be filed within the time prescribed by the applicable statute which varies from agency to agency.

Contents and Number of Copies of Petition for Review and Application for Enforcement. A petition for review or application for

enforcement should contain a concise statement describing the proceeding in which the order sought to be reviewed or enforced was entered, any reported citation of the order, the facts upon which venue is based and the relief prayed. 5TH CIR. R. 15.1 requires that when you file a petition for review under FED. R. APP. P. 15, you must pay the filing fee **and attach a copy of the order or orders to be reviewed**. You must file an original and a copy for each respondent with the Fifth Circuit clerk. A respondent must serve and file an answer to an application for enforcement within 21 days. Otherwise, judgment will be awarded as requested. FED. R. APP. P. 15(a), (b) and (c).

HOW DO I FILE AN ORIGINAL PROCEEDING?

You file an application for a writ of mandamus by filing an original and three copies of a petition with the Fifth Circuit clerk's office. This document is an original pleading. It can be mailed in hard copy or Appellate ECF registered filing users may electronically submit documents for filing. The associated fee must be submitted by credit/debit or electronic check through the Pay.gov website. Filers are required to comply with service of the filing in accordance with FRAP 25. You must provide proof of service on all parties to the proceeding in the trial court and provide a copy to the trial court judge. Applications for other extraordinary writs are made by filing a petition with the circuit clerk with proof of service on the respondents. Pro se prisoner petitions are not submitted to the court until the $500.00 docket fee is paid, or the petitioner is granted leave to proceed in forma pauperis, FED. R. APP. P. 21(a). Depending on the nature of the underlying complaint, prisoners may be required to pay a portion of the fee and then the remainder in installments as set forth in the Prison Litigation Reform Act, 28 U.S.C. § 1915 and *In re Stone*, 118 F.3d 1032, 1033-34 (5th Cir. 1997).

Fees. You must pay a $500.00 docket fee to the Fifth Circuit clerk at the time of filing, unless granted permission to proceed in forma pauperis.

Time for Filing a Petition. Extraordinary writs are usually matters of great urgency; no time limit is prescribed. See "Emergency Motions" in the "Motions Processing" section of this guide for the court's procedures for handling emergency matters.

Contents and Length of the Petition. The petition must contain a statement of the issues, the facts necessary to an understanding of the issues, the relief sought, and the reasons why the writ should issue. Copies of an

opinion or an order or necessary parts of a record must also be included. FED. R. APP. P. 21 sets a 30 page limit for petitions.

Further Proceedings. If the court thinks the writ should not be granted, it normally denies the petition without calling for an answer. Otherwise, it issues an order fixing a time for filing an answer. The clerk serves the order on the judge or judges named as respondents and on all parties to the action in the trial court, FED. R. APP. P. 21(b). All parties other than the petitioner are deemed respondents for all purposes. Answers filed by respondents must be served on the petitioner. Ordinarily the court decides the petition on its merits without further briefing or hearing.

WHAT HAPPENS AFTER THE 5TH CIRCUIT GETS MY NOTICE OF APPEAL?

Once we receive your notice of appeal and district court docket entries, or we receive your petition for review or your petition for extraordinary relief, the clerk's office reviews the information and dockets appeals from district courts, petitions for review of agency decisions and original proceedings.

After we docket the case, an attorney in our office conducts an initial jurisdictional review. Cases with obvious jurisdictional deficiencies are sent to a three-judge jurisdictional review panel for review and possible dismissal. This process is discussed on p. 76, infra. Assuming the reviewing attorney notes no obvious jurisdictional issue, some civil cases where both parties are represented by counsel may be identified as possible candidates for the "Appellate Conference Program," and are referred to that office, see discussion starting on p. 41. **We also issue attorneys using the ECF system a notice of docketing activity and enclosures. For those not required to use ECF we send you a docketing packet which includes a docketing letter and a "Notice" which tells you who to call for information.** We will direct you to pay any fees if you have not already done so, to send in an appearance form as required by 5TH CIR. R. 46, and how to obtain access to the Record on Appeal for use in writing your brief. Examples of the briefing information you will receive are shown on the following pages. The "DKT-1" information is sent to attorneys and non-incarcerated pro se litigants. The "DKT-6" information is sent to prisoners. Although every letter is tailored for a particular case, these exemplars should give you an idea what to look for whether you receive them in paper or electronic form. Read the letter immediately after you receive it and comply with the instructions as soon as

possible. Also, this is the time to resolve questions about the case caption or what actions you need to take. If we can address these matters early in the case, we can avoid last minute confrontations when time to fix the problems is short.

SAMPLE DOCKETING LETTER AND ENCLOSURES

Click for sample: DOCKETING LETTER FOR ATTORNEYS AND NON-PRISONER PRO SE LITIGANTS (YOURS MAY DIFFER) (DKT1)

Click for a sample: DOCKETING LETTER

FOR PRISONERS & ENCLOSURE (YOURS MAY DIFFER) (DKT6)

DO I HAVE TO FILE AN APPEARANCE FORM?

In lieu of the "representation form" required by FED. R. APP. P. 12(b), this court requires attorneys to file a "Form for Appearance of Counsel," sometimes referred to as a "notice of appearance form," within 30 days after you file the notice of appeal. You can download the form from the clerk's office section of the court's web site, COMPLETE IT ELECTRONICALLY, SAVE IT, AND UPLOAD THE COMPLETED FORM WHEN YOU DOCKET YOUR APPEARANCE ELECTRONICALLY. FOR NON-ECF FILERS YOU CAN PRINT OUT THE COPY FROM OUR WEBSITE AND MAIL IT IN.

Because there may be delay between when you file an appearance form and when you can actually file a document electronically, we most strongly advise counsel to file an appearance form AS SOON AS THEY KNOW THEY WILL BE PARTICIPATING IN THE CASE, WHETHER JUST ON WRITTEN PLEADINGS, OR FOR ORAL ARGUMENT.

WHAT DO I NEED TO DO ABOUT TRANSCRIPTS?

Necessary Transcripts. If the appellant will urge that a finding or conclusion is unsupported by, or is contrary to, the evidence, he or she must include in the record a transcript of all evidence relevant to such findings or conclusions, FED. R. APP. P. 10(b)(2). Further, if the appeal challenges the trial court's admission or exclusion of evidence, the giving or failure to give a jury instruction, or any other ruling or order, the record must include a transcript of those portions of the proceedings at which the evidence, offer of proof, instruction, ruling and order and any necessary objections are recorded. You must exercise discretion in deciding whether to order transcripts because they significantly increase the time and expense of an appeal.

Ordering Transcripts. To order necessary transcripts, you must:

Complete Part I of the transcript order form (available on our website in the Forms section as well as on the CM/ECF home page) approved by this

court and distributed by the clerk of the district court, see sample

TRANSCRIPT ORDER FORM on p. 31;

Serve copies on the court reporter, the clerk of the district court and all other parties to the appeal, and file a copy with the court of appeals;

Make satisfactory arrangements to pay for the transcript, **at the time you order the transcript**. Your order is not complete until you have made financial arrangements with the court reporter, 28 U.S.C. § 753(f), FED. R. APP. P. 10(b)(4). If the United States is paying under the Criminal Justice Act, your order must say so and you must fill out and submit a CJA-24 form. These are available at the district court clerk's office.

After the court reporter receives your transcript order form, he or she must:

Acknowledge getting it;

Estimate the completion date and the number of pages in the completed transcript; and

Complete Part II of the Transcript Order Form.

The court reporter files one copy of his acknowledgment with us and another with the district court clerk, 5TH CIR. R. 11.1.

ECF FILERS NEED TO FILL OUT THE TRANSCRIPT ORDER FORM

ELECTRONICALLY AND UPLOAD IT WHEN DOCKETING THE EVENT IN CM/ECF

Time for Ordering the Transcripts. The appellant must order necessary transcripts, not already on file, within 14 days after the notice of appeal is filed. Because time required for the production of transcripts is a major cause of delay in appeals, we urge you to order and to pay for necessary transcripts as soon as possible after the notice of appeal is filed. In a criminal appeal where the appellant requests expediting the appeal because his sentence is one year or less, you must order and pay for necessary transcripts when the notice of appeal is filed. The court does not favor motions for extensions of time to file briefs if you did not order the necessary transcripts in a timely manner.

WHAT DOES THE COURT REPORTER HAVE TO DO?

Filing Transcripts. Court reporters must prepare and file transcripts in accordance with FED. R. APP. P. 11 and the 5th Cir. Appellate Transcript Management Plan. When a transcript is completed, the court reporter must file it with the clerk of the district court, who notifies us, FED. R. APP. P. 11(b). The court reporter must also complete Part III of the Transcript Order Form.

Unavailability of Transcripts. If transcripts are unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including recollection, and serve the statement on the appellee, who may serve objections or proposed amendments within 14 days. The **district court** then settles and approves the statement and objections or amendments and the resulting statement is included in the record on appeal, FED. R. APP. P. 10(c).

Extensions of Time to File Transcripts. If a court reporter seeks an extension of time to file the transcript in a case, he or she must comply with the provisions of 5TH CIR. R. 11.2. The court reporters are to notify you if this court grants an extension of time to file the transcript.

WHAT IF I DO NOT NEED A TRANSCRIPT?

If you do not need a transcript to pursue your appeal, e.g., there was no hearing or trial at the district court, you must notify us by filing a transcript order form with an "x" in the box in Part I, A stating "Transcript is unnecessary for appeal purposes" and serve the other parties to the appeal, 5TH CIR. R. 10.1.

If there was no hearing or trial, we request the record on appeal from the district court.

READ INSTRUCTIONS ON BACK OF LAST PAGE BEFORE COMPLETING

TRANSCRIPT ORDER

District Court	District Court Docket Number

Short Case Title _____ Court Reporter _____

Date Notice of Appeal Filed by Clerk of District Court _____ Court of Appeals # _____ (If

PART I. *(To be completed by party ordering transcript. Do not complete this form unless financial arrangements*

A. Complete one of the following:

- ☐ No hearings
- ☐ Transcript is unnecessary for appeal purposes
- ☐ Transcript is already on file in Clerk's office
- ☐ This is to order a transcript of the following proceedings: *(check appropriate box)*

  Voir dire ☐; Opening statement of plaintiff ☐ defendant ☐;
  Closing argument of plaintiff ☐ defendant ☐; Opinion of court ☐;
  Jury instructions ☐; Sentencing ☐; Bail hearing ☐;

HEARING DATE(S)	PROCEEDING	JUI

**FAILURE TO SPECIFY IN ADEQUATE DETAIL THOSE PROCEEDINGS TO BE TRANSCR
OR FAILURE TO MAKE PROMPT SATISFACTORY FINANCIAL ARRANGEMENTS FOR TRANSC
ARE GROUNDS FOR DISMISSAL OF THE APPEAL.**

B. This is to certify that satisfactory financial arrangements have been completed with the court reporter for pay the transcript. The method of payment will be:

- ☐ Private funds; ☐ Criminal Justice Act Funds *(Attach copy of CJA Form 24 to court reporter's copy)*; ☐ Other IFP Funds;
- ☐ Advance Payment waived by reporter; ☐ U.S. Government Funds;
- ☐ Other _____

Signature _____ Date Transcript Ordered _____

Print Name _____ Counsel for _____

Address _____ Telephone _____

**ALLOWANCE BY THE COURT FOR LEAVE TO PROCEED IN FORMA PAUPERIS IN A CIVIL AP
DOES NOT ENTITLE THE LITIGANT TO HAVE TRANSCRIPT AT GOVERNMENT EXPENSE.**

PART II. COURT REPORTER ACKNOWLEDGEMENT *(To be completed by the Court Reporter ar Court of Appeals within 7 days after receipt. Read instructions on reverse side of copy 4*

Date transcript order received	If arrangements are not yet made, date contact made with ordering party re: financial arrangements	Estimated completion date *

- ☐ Satisfactory Arrangements for payment were made on _____
- ☐ Arrangements for payment have not been made. Reason: ☐ Deposit not received ☐ Unab contact ordering party ☐ Other *(Specify)* _____

WHAT HAPPENS AFTER THE TRANSCRIPT IS FILED, OR IF

NO TRANSCRIPT IS NEEDED?

Once the court reporter files the transcript or we request the electronic record from the district court, the district court clerk is responsible for preparing the Electronic Record on Appeal (EROA) and transmitting it to us within 15 days, FED. R. APP. P. 11(b)(2), 5TH CIR. R. 11.3. The new EROA program will paginate the record on appeal for the District Court before they send it to us, 5TH CIR. R. 10.2. We will use the EROA in all decisions on the merits in disposing of cases. APPELLATE CONFERENCE PROGRAM

DOES THE FIFTH CIRCUIT HAVE AN APPELLATE CONFERENCE OR SETTLEMENT PROGRAM?

The Circuit Mediation Program (formerly Fifth Circuit's Appellate Conference Program) began in November 1996. It is governed by a **general order** which can be viewed at our internet site. The program offers a confidential forum in which counsel can discuss their cases with both opposing counsel and the court's conference attorneys. The discussions are "off the record" and are without prejudice to the parties. Your communications with a conference attorney are kept in strict confidence and are not divulged to the judges, court personnel or anyone else.

The office currently is staffed by three attorney-mediators who conduct telephone and in-person conferences with counsel. These conferences are intended primarily to explore the possibilities of settlement, and secondarily to resolve procedural problems. Follow-up conferences directed toward settlement can include the parties themselves as well as counsel.

HOW ARE CASES SELECTED?

The appellate conference program is limited to civil cases in which all parties are represented by counsel. Conferences are not scheduled in criminal, pro se, or habeas corpus appeals. Most of the cases in the

conference program are selected by the conference attorneys after the initial jurisdictional review process. In addition, either party can request that a case be assigned to the program at any time. The court itself occasionally refers specific cases to the program, even after oral argument.

HOW DOES THE PROGRAM WORK?

Most cases assigned to the program are scheduled for an initial conference, usually by telephone. Such conferences ordinarily last less than two hours and generally occur early in the case's history - before a briefing schedule is set. The appellant's counsel is asked to summarize what the case is about, why the appellant should win and what relief will be forthcoming. The appellee's counsel is permitted to respond. This discussion begins the process of focusing on the issues the court may consider controlling, and provides background for possible settlement.

Counsel and the conference attorney then map out steps to be taken to attempt to resolve the case. Any settlement must be voluntary. In some cases, it is apparent that no settlement can occur and conference proceedings do not continue after the initial conference. On the other hand, a substantial percentage of the cases selected for the program are settled.

DOES THE CONFERENCE CHANGE DEADLINES?

Assignment to the mediation program does not affect deadlines already set by the court. However, if settlement discussions are making progress, extensions of briefing schedules can be arranged within the guidelines of 5TH CIR. R. 31.4.

EVEN IF WE DO NOT SETTLE, ARE THERE OTHER BENEFITS?

Yes. Issues on appeal can be identified, explored and refined. Discussing the issues at the outset should make writing briefs easier, and the better briefs that result will aid the court in its consideration of the case.

HOW DO I GET MORE INFORMATION?

Contact the Circuit Mediation Program, U.S. Court of Appeals, 600 Camp Street, New Orleans, LA 70130, or call (504) 310-7799.

WRITING YOUR BRIEF AND

PREPARING RECORD EXCERPTS

WHAT SHOULD I DO WHEN I RECEIVE THE BRIEFING NOTICE?

Whether you are an ECF or non-ECF filer, the **first** thing you should do when you receive the briefing notice is to read it carefully and completely. A sample notice is shown below.

The Briefing Notice. Our briefing notices are tailored to your individual case. We will tell you:

The brief due date;

The court does not favor extensions of time to file briefs;

The court can dismiss your case if you do not timely file your brief;

How to cite to the record on appeal in writing your brief; and

The case caption to use on the cover of your brief. See sample "Case Caption" after the briefing notice.

We may also remind you to send in an appearance form if you have not already done so.

Sample Briefing Notice

Click for sample: BRIEFING NOTICE (BR1)

Sample Caption:

Case No. 60-30033

UNITED STATES OF AMERICA,

Plaintiff Appellee

v.

FERD WASHINGTON,

Defendant - Appellant

HOW DO I MAKE A PORTABLE DOCUMENT FORMAT (PDF)

ELECTRONIC COPY OF MY BRIEF AND RECORD EXCERPTS?

5TH CIR. R. 31.1 requires counsel, who are exempt from ECF filing, and who prepare briefs on a computer to send an electronic copy to the clerk's office on a CD or by other such means as the clerk allows. The brief must be, **in a single Portable Document Format (PDF) file**, not separate files for the Statement of Issues, Statement of Facts, etc. Effective December 1, 2007, 5TH CIR. R. 30.1.2 also requires counsel who are not required to comply with the ECF rules to submit an electronic version of the record excerpts in electronic PDF format. Almost all attorneys will be ECF filers and need to follow 5th Cir. R. 25.2 and ECF Standards in filing their briefs and record excerpts.

www.ca5.uscourts.gov/cmecf/ConvertWordProcessedDocsToPDF.pdf

for information on making a PDF file for ECF, or for a CD, etc., for non ECF filers.

Please read the briefing notice promptly and make a checklist of what you need to do. WE ASK YOU TO REVIEW THE CASE CAPTION IMMEDIATELY. IF YOU THINK IT IS WRONG, LET US KNOW AS SOON AS POSSIBLE.

WHAT SHOULD I DO WITH THE RECORD ON APPEAL?

The court relies on the record to decide your case. You are responsible for insuring that it is complete and that you have ordered all necessary transcripts and documents. Except for those trial exhibits being part of the EROA, trial exhibits are not sent unless you specifically request them. **As with the briefing notice, please act promptly. Within 14 days of receipt, you need to review the electronic record on appeal (EROA) and advise us and the district court of any omissions, or if you need to order additional transcripts, etc. The sooner you get the electronic record corrected the faster you can write your brief, and have your case progress. This court will not be sympathetic to requests for extensions of time to file briefs where you have waited until the last moment to see if the electronic record on appeal is complete, and when it is not, say it is impossible for you to write the brief because the electronic record is deficient. You must accept responsibility for checking the record on appeal early on. This advice applies equally to the appellee.**

CITING TO THE RECORD.

Whether the district court provides you with a paper or electronic copy of the record, you must cite to the page number in the record to support factual assertions, etc. The citation format depends on the type of record you cite.

The Fifth Circuit has now adopted the Electronic Record on Appeal (EROA) as the official record in cases in which the district court created the appellate record. Thus your appeal may contain three types of records on appeal. First, the appeal may have an entire record prepared before the court adopted the Electronic Record on Appeal (EROA) as the official record that uses "USCA5" pagination. Second, your appeal may have a record created under the new EROA format, which includes the case number (for

example, 13-12345). Finally, the appeal may have original and supplemental records and may contain both USCA5 and EROA pagination formats.

You may only use the EROA citation format for EROA records. For EROA appeals, in single record cases, you will utilize the format of "ROA," followed by a period, followed by the page number (e.g., ROA.123). For multiple record EROA cases, you will utilize the format of "ROA," followed by a period, the Fifth Circuit's case number, another period, and then the page number (e.g., ROA.13-12345.123).

You may not use the new citation formats for older USCA5 paginated records. For those records, parties must cite to the record using the USCA5 volume and or page number.

Finally, in cases with both record on appeal pagination formats, you must cite using the citation format corresponding to the type of record cited.

The court recently provided updated guidance for attorneys regarding this matter and other citation related issues. This guidance can be found in the revised Form 7 at the appendix to the Fifth Circuit's Local Rules (page 50-11) at http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/federalrulesofappellateprocedure.pdf.

HOW DO I WRITE MY BRIEF?

Formal Requirements as to Contents for both ECF and non-ECF filers.

Principal Briefs. FED. R. APP. P. and 5TH CIR. R. 28 set out the requirements for briefs filed in appeals. The principal brief must contain the following, in the order indicated, a(n):

Cover meeting the requirements of FED. R. APP. P. 32 and 28.1

(for cross appeals). NOTE: BRIEFS FILED IN ECF MUST HAVE

AN ELECTRONIC COVER PAGE WHICH IS IDENTICAL IN

FORMAT, (BUT NOT COLOR), TO THE PAPER COPY OF THE

BRIEF. THE PAPER COPY MUST HAVE THE CORRECT COLOR COVER;

Certificate of interested persons, 5TH CIR. R. 28.2.1;

Statement regarding oral argument, 5TH CIR. R. 28.2.3;

Table of contents with page references, FED. R. APP. P. 28(a)(2);

Table of authorities, FED. R. APP. P. 28(a)(3);

Brief statement of jurisdiction, FED. R. APP. P. 28(a)(4)(A) through (D); (NOTE: An appellee's brief does not need a jurisdictional statement unless dissatisfied with the appellant's statement,

FED. R. APP. P. 28(b)(1).);

Statement of the issues presented for review, FED. R. APP. P. 28(a)(5). (NOTE: This is not required in an appellee's brief if the appellee is satisfied with appellant's statement; if the appellee does not agree, he or she should correct errors or omissions in appellant's statement.);

Statement of the case, setting out the facts relevant to the issues presented for review, describing the relevant procedural history, and identifying rulings presented for review with appropriate references to the record, FED. R. APP. P. 28(a)(6). (NOTE: The appellee's brief does not need such a statement if the appellee is satisfied with the appellant's statement.);

Summary of the argument, FED. R. APP. P. 28(a)(7);

Argument, FED. R. APP. P. 28(a)(8). This must contain the party's contentions with respect to the issues presented, and the reasons therefor, and must include citations to relevant authorities, statutes, and page numbers in the record on appeal. Although FED. R. APP. P. 28(a)(8)(B) allows discretion on where to place the standard of review in your brief, **this court greatly prefers that your standard of review be "clearly**

identified in a separate heading before discussion of the issues." If the issue is failure to admit or exclude evidence, refusal to give a particular jury instruction, or any other ruling for which a party must record an objection to preserve the right of appeal, your brief should identify where in the record on appeal counsel made proper objection and where it was ruled upon. (NOTE: an appellee does not need to state the standard of review unless he or she disagrees with the appellant's standard);

Short conclusion, setting forth the precise relief sought, FED. R. APP. P. 28(a)(9);

Signature of counsel or a party, FED. R. APP. P. 32(d) and 5TH CIR. R. 25.2.10 for ECF filing;

Proper certificate (proof) of service, FED. R. APP. P. 25. Also note that if you are exempt from ECF and prepare your brief on a computer, your certificate of service must include the fact you served an electronic copy on opposing counsel, see p. 55, infra; Certificate of compliance, if required by FED. R. APP. P. 32(g) and 5TH CIR. R. 32.3. Please note that at least one version of Microsoft Word will not automatically count words in footnotes and will produce an inaccurate word count unless special care is taken. See DeSilva v. DiLeonardi, 185 F.3d 815, 816 (7th Cir. 1999). Be aware of the attributes of your word processing software to ensure that all of the words in your brief are reflected in your certificate of compliance.

References to record on appeal must follow the form prescribed by the Clerk of Court - see 5th Cir. R. 28.2 and Fifth Circuit Court of Appeals Form 1 of the **Federal Rules of Appellate Procedure with Fifth Circuit Rules and Interal Operating Procedures**.

Supplemental Briefs. The only additional brief that may be filed without express leave of court is the reply brief, if the appellant chooses to

respond to the appellee's brief, or if a cross-appellant responds to the answer brief filed by the cross-appellee.

NOTE - The court prefers that FED. R. APP. P. 28(j) letters generally be used only to cite cases decided after a brief has been filed. The letter must not contain more than 350 words.

Cross-Appeals. Rule 28.1(b) determines which party is an appellant and which a cross-appellant. The party who files a notice of appeal first is the appellant for purposes of FED. R. APP. P. 28.1, 30, and 34. If notices are filed the same day, the plaintiff below is the appellant. The appellee must file a principal brief in the cross-appeal **and** respond to the principal brief in the appeal. The appellant then must respond to the principal brief in the crossappeal and may, in the same brief, reply to the response in the appeal.

Designation of Parties. Designations as "appellant" and "appellee" should be used as little as possible. In the interest of clarity, the briefs should, as much as possible, use the designations used in the court or agency below, the actual names of the parties, or terms descriptive of the parties.

Joint Briefing. Joint briefing is encouraged, but not required, in criminal appeals involving more than one appellant or appellee. The United States is encouraged to file a consolidated brief whenever possible. On motion, leave to file a consolidated brief may be granted by the court even if the appeals are not consolidated. Every effort is made to set co-defendants' appeals before the same panel.

WHAT MUST MY PAPER COPY BRIEF LOOK LIKE?

Presently, the court requires paper copies of briefs for both ECF and non-ECF attorney filers. FED. R. APP. P. 32 sets the standards for briefs. You must use opaque unglazed paper and print on only one side of the paper. As a quick reference, our briefing checklist is at Appendix E. WE WILL NOTIFY ECF ATTORNEY FILERS WHEN TO SEND IN THE PAPER COPIES OF THEIR BRIEFS. Normally we will review the electronic version first and if there are no deficiencies, we will then advise you to send in the paper copy.

Cover. Except for filings by unrepresented parties, paper copies of briefs must have a durable cover and be in the colors prescribed by the federal rules. You may wish to review our "Checklist of Rule Requirements for Briefs and Record Excerpts. Your cover must have the:

> Case number at the top of the cover;
>
> Name of the court;
>
> Title of the case. (Use the title we sent you with the briefing notice, unless you and this office have agreed that a different title is correct);
>
> Nature of the proceeding and the name of the court, agency or board below;
>
> Title of the brief, identifying the party or parties on whose behalf the brief is filed, e.g., "Appellant's Brief" or "Brief of Appellant";
>
> Name, office address, and telephone number of counsel representing the party filing the brief.

The brief must be bound securely and the binding may not obscure the text, and must allow the brief to lie reasonably flat when open. **The court strongly prefers spiral binding.**

Paper Size, Line Spacing and Margins. The brief must be on 8½ x 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides.

Typeface. You may use either monospaced or proportionally spaced typeface. Text written in proportionally spaced typeface must include serifs, and the typeface must be at least 14 points. Monospaced typeface may not have more than 10½ characters per inch. As an exception to the federal rule, footnotes may be in 12 point or larger proportional typeface.

HOW LONG CAN MY BRIEF BE?

The court requires **typed** briefs, however, the court does accept handwritten briefs from incarcerated pro se litigants. Briefs from **non-incarcerated pro se litigants** must conform to FRAP 32.

Page Limits. Principal briefs which have 30 or fewer pages, and reply briefs with 15 or fewer pages, automatically meet the length standards of FED. R. APP. P. 32(a)(7)(A). Principal briefs can be longer than 30 pages and reply briefs more than 15 pages if you comply with the "type-volume" limits (see below) and provide a certificate of compliance.

Type-volume Limits. A principal brief may have up to 13,000 words in either proportional or monospaced typeface. Alternatively, if your software application cannot count words, or if your brief is typed on a typewriter which has monospaced typeface, the brief may have up to 1,300 lines of text. A reply brief may not contain more than one-half the type-volume limits for a principal brief.

In counting pages, words, or text lines, you do not count the certificate of interested persons, any corporate disclosure statement, the tables of contents and citations, statement regarding oral argument, addendum containing statutes, rules or regulations, and any certificates of counsel.

The type-volume limits are designed to measure "mechanically" and objectively. As a matter of court policy, **use the word count feature of your word processor or computer software to count the "words" in your briefs**. Do not "manually count" the words. There are at least two reasons for this. First, because word processing software versions count "words" differently, there is no objective standard for you to use if you count words manually. Second, a manual count is inaccurate and we cannot readily verify the count. If you are preparing a brief on a monospaced typeface typewriter, which cannot count text lines, use the "text line convention." There are 26 lines on a page that is double-spaced, is 8½ x 11 inches in size, has one-inch margins and uses type that has no more than 10½ characters per inch, i.e., standard typewriter size paper. Then take the number of pages and multiply by 26. This will give you the number of text lines, and you do not have to count them manually.

Because the type-volume limits are designed to work only in a "mechanical" fashion, we do not permit handwritten briefs to use the typevolume limits to measure length. We cannot count handwritten words, or lines of text easily. Further, because handwriting size and spacing are inconsistent, the text line convention of 26 lines per page is not reliable. Thus, handwritten principal briefs are limited to 30 pages, and reply briefs are limited to 15 pages, exclusive of the statements regarding oral argument or interested persons, and tables of contents and authorities, etc.

WHAT DO I NEED TO KNOW ABOUT A CERTIFICATE OF COMPLIANCE?

You MUST complete a certificate of compliance and place it as the last document in your brief and other papers in accordance with FED. R. APP. P. 32(g)(1).

> **(g)** ***Certificate of Compliance.***
>
> (1) ***Briefs and Papers That Require a Certificate.*** A brief submitted under Rules 28.1(e)(2), 29(b)(4), or 32(a)(7)(B) – and a paper submitted under Rules 5(c)(1), 21(d)(1), 27(d)(2)(A), 27(d)(2)(C), 35(b)(2)(A), or 40(b)(1) – must include a certificate by the attorney, or an unrepresented party, that the document complies with the type-volume limitation. The person preparing the certificate may rely on the word or the line count of the word-processing system used to prepare the document. The certificate must state the number of words – or the number of lines monospaced type – in the document.

FED. R. APP. P. 32(g)(2) provides a "Form 6" Certificate of Compliance which counsel should use. Note that to meet the requirements of FED. R. APP. P. 32(g), the certificate must state the number of words in the document. A statement that the document has "fewer than 13,000" words is not sufficient. Further, to assist us in checking the accuracy of your certificate, we ask you to identify the name and version of the word-processing software you used, e.g., Microsoft Office Professional Word 13.

FORM 6. CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT

Certificate of Compliance with Type-Volume Limit,
Typeface Requirements, and Type-Style Requirements

1. This document complies with [the type-volume limit of FED. R. APP. P. [*insert Rule Citation; e.g. 32(a)(7)(B)*]] [the word limit of FED. R. APP. P. [*insert Rule citation; e.g., 5(c)(1)*]] because, excluding the parts of the document exempted by FED. R. APP. P. 32(f) [and [*insert applicable Rule citation, if any*]]:

☐ this document contains [*state the number of*] words, **or**

☐ this brief uses a monospaced typeface and contains [*state the number of*] lines of text.

2. This document complies with the typeface requirements of FED. R. APP. P. 32(a)(5) and the type-style requirements of FED. R. APP. P. 32(a)(6) because:

☐ this document has been prepared in a proportionally spaced typeface using [*state name and version of word-processing program*] in [*state font size and name of type style*], **or**

☐ this document has been prepared in a monospaced typeface using [*state name and version of word-processing program*] with [*state number of characters per inch and name of type style*].

(s)

Attorney for

Dated:

13,000 WORDS ARE NOT ENOUGH. HOW DO I GET MORE?

The court "looks ... with great disfavor" on motions to exceed the typevolume limits, 5TH CIR. R. 32.(a)(7). Any motion to exceed the limits **must** be filed at least 10 days before the brief is due, **and** you must submit a draft copy of the proposed brief.

WHY DO I HAVE TO SIGN MY BRIEF?

FED. R. APP. P. 32(d) requires a signature because this constitutes a certificate that you have read the brief and that it complies with the rules. We look at this as a personal professional responsibility and a means to help ensure that counsel is involved fully in the preparation of the briefs which this court will read.

WHAT DOES AN APPELLEE HAVE TO DO?

An appellee's brief must be written under the standards of FED. R. APP. P. and 5TH CIR. R. 28 and 32. Note that under FED. R. APP. P. 28(b) an appellee's brief does not need to contain any of the following unless the appellee is dissatisfied with the appellant's statement:

Jurisdictional statement;

Statement of the issues;

Statement of the case; and

Statement of the standard of review.

However, an appellee's brief **must** contain a certificate of interested persons and a statement regarding oral argument, **must** be signed, (see 5TH CIR. R.25.2.10 for ECF filing),and if prepared on a computer, **must** be served on the appellant's counsel as specified for ECF filers, or on a CD or other authorized format for ECF exempt attorneys, in addition to paper copies.

HOW DO I FILE A REPLY BRIEF?

The rules allow for an appellant to file a reply brief to address arguments raised in the appellee's brief, FED. R. APP. P. 28(c); however, just because it is allowed does not mean that every appellant has to file one. If your reply brief merely reiterates what is already in your opening brief, it serves little purpose and only delays consideration of your appeal. Reply briefs should be filed only if necessary to rebut an important argument in the appellee's brief. If you do file a reply brief, it must contain a table of contents with page references and a table of authorities - cases, statutes and other authorities with page references, FED. R. APP. P. 28(c). Reply briefs are due within 14 days after service of the appellee's brief, FED. R. APP. P. 31(a)(1). Because the court tries to speed the processing of cases, direct criminal appeals are forwarded to the court immediately after filing of the appellee's brief. Extensions of time to file reply briefs are greatly disfavored, 5TH CIR. R. 31.4.4. If the appellant in a civil case is not going to file a reply brief, we ask you to notify us immediately so we can forward the case for decision.

Length. A reply brief cannot exceed 15 pages, 6,500 words or 650 text lines, FED. R. APP. P. 32(a)(7).

WHAT HAPPENS IF THERE IS SOMETHING WRONG WITH MY BRIEF?

We check briefs using the checklist at Appendix E to insure that: you have sent the proper number of copies; the case caption is right; the cover color is correct; there is a certificate of service; there is a certificate of compliance, if required; and the brief is signed, etc. If there are errors - over 30% of the briefs filed have deficiencies - we will NOTIFY ECF FILERS THROUGH A "NOTICE OF DOCKET ACTIVITY," or if you are a non-ECF filer, call or write you and explain what action you have to take to correct the problem(s), and when to send a corrected brief to us. Under FED. R. APP. P. 25 we must file your brief even if there are format errors and notify you of the deficiencies. If you do not correct the errors on time, we can send your brief to the court for review, possible striking and, if you are the appellant, dismissing your appeal, 5TH CIR. R. 32.5. In the interests of time, postage savings and benefit to your clients, follow the instructions we give you, carefully check your briefs before you file them, and if there is a problem,

promptly correct the errors and return the briefs to us. A sample deficiency letter follows.

SAMPLE BRIEF DEFICIENCY LETTER

Click for sample: BRIEF DEFICIENCY LETTER (BR 5)

HOW DO I WRITE AN AMICUS BRIEF?

Amicus briefs may be filed only with the consent of all parties and such consent must be noted in the brief, FED. R. APP. P. 29(a), or by leave of court granted on motion. The United States, its agencies or officers, or a State, Territory, Commonwealth or the District of Columbia, do not need consent of the parties or leave of court to file an amicus brief, Id. However, if the United States, a State, or any other person or entity wishes to file an amicus brief in support of a petition for en banc hearing or rehearing submitted by another party, they must file a motion.

If you need a motion for leave to file an amicus brief, your motion must accompany your brief and state your interest and the reason an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case, FED. R. APP. P. 29(a)(3).

Amicus briefs **must** comply with FED. R. APP. P. 29 and **must** be filed **no later than 7 days after the principal brief of the party being supported is filed.** Our court interprets this to mean the amicus brief must be delivered or placed in the mail no later than 7 days after the principal brief is filed.

Amicus briefs must include a certificate of interested parties, if necessary to fully disclose all those with an interest in the amicus brief, 5TH

CIR. R. 29.2. The brief is limited to one half the maximum length allowed by the rules for a party's principal brief, FED. R. APP. P. 29(a)(5).

DO YOU HAVE OTHER SUGGESTIONS HOW TO WRITE MY BRIEF?

Form of Citation. The court strongly recommends that the parties cite statutes, cases and other materials according to a uniform system, such as that set out in the *Bluebook: A Uniform System of Citation*. References in briefs must be made to the page numbers in the record on appeal, e.g. "R. 134."

The court is duty-bound to do substantial justice in deciding the appeals before it. Judges, however, must necessarily rely upon the advocates to point out the facts of record, the applicable rules of law, and the equities of the particular case that compel a just decision. You will have greater success persuading the court to decide in your favor if you have an effective and carefully prepared brief. In writing the brief, remember that briefs are the first step in persuasion, and that our judges read briefs in advance of oral argument. However, because fewer than 25% of briefed cases overall are given oral argument, the brief may be your only chance to argue your position. Briefs should be written so that you get your important contentions before the court.

We offer the following additional suggestions:

Make your statement of the nature of the case, how the case got to the court, the basis of the court's jurisdiction, and what the court below did, succinct. This is also a good place to orient the court to the justice of the party's position by a concise indication of what was wrong below or why the lower court was right.

Spend time in drafting the statement of the issues or questions presented for review. Stress the main issue and make an effort to present only a few questions. The questions you select should be stated clearly and simply. A brief that assigns a dozen errors and treats each as being of equal importance when some are clear losers, may suggest that none are very good. As Justice Frankfurter once said, "a bad argument is like the clock striking thirteen, it puts in doubt the others."

The statement of facts should set forth a brief and objective account of the pertinent facts, with references to the record to support and verify each important statement. Use a narrative chronological summary, rather than a digest of what each witness said. Do not omit relevant unfavorable facts. If you marshal the facts well and state them clearly, the relevant points of law often develop naturally. An effective statement summarizes the facts and persuades the reader that both justice and precedent require a decision for your client. While the rules provide that appellees need not make any statement of the case, they should give their own statement if they believe the relevant facts have not been fairly presented by the appellants; however, they should **not** make needless repetition of the appellant's statement.

Factual statements should be suitably divided by appropriate headings. Little is more discouraging to the judicial eye than a great expanse of print with no guideposts and little paragraphing. Short paragraphs with topic sentences and frequent headings and subheadings help the court follow and understand the points you are making.

Break your argument into main points with appropriate headings. The arguments should contain reasons supporting your position, including an argumentative analysis of the evidence, if called for, and discussion of the authorities. If the case turns on the facts, the brief should make clear factual arguments bolstered by record references. If the important record reference is short enough, quote the record, but not for pages and pages. Record citations also help the court find the important facts in a voluminous record.

When possible the emphasis should be on reason, not merely on precedent, unless a particular decision is controlling. A few good cases in point, with sufficient discussion to show that they are relevant, are preferred over string citations. Quotations should be used sparingly. If a case is worth citing, it usually has a quote which will drive the point home, and one or two good cases are ordinarily sufficient. If the cited case lacks a good quote, a terse summary will establish it as a case the court should read. A long discussion of the facts of the cited cases is usually unnecessary.

If an opponent cites cases that obviously do not apply, your brief need not distinguish the opponent's cases. Lawyers should ask themselves whether the judge could reasonably think the opponent's cited case was important. If not, do not waste space on the case. Address only those which could trouble the court.

While the brief should be written with attention to style and interest, clarity and simplicity are the paramount considerations. Italics and footnotes should be used sparingly. Above all, accuracy is imperative in statements, references to the record, citations, and quotations. Counsel should carefully proofread briefs for errors in spelling, quotations, or citations. The neater the briefs appear, the better written, the more succinct, the more to the point they are, the better the impression the briefs make on the judges.

Finally, put yourselves in the judges' position - what will they see as critical? Write the briefs almost as your client would like to see the opinion written. The appellate courts have constraints under the law: for instance, they cannot substitute their opinion when there are credibility questions. Think about what the judges must do to affirm or reverse, and structure the briefs accordingly.

HOW DO I FILE AND SERVE MY BRIEF?

Number of Copies Required. 5TH CIR. R. 31.1 requires all counsel to file 7 paper copies of your briefs. **We will notify ECF attorney filers when to send in the paper copies. For non-ECF attorney filers, send the paper copies on the due date and if you prepare the brief on a computer you must also send us one copy of the brief in electronic form in a single Portable Document Format (PDF) file on a CD or other authorized format and send another electronic copy to each party separately represented by counsel.** We use your electronic copy to check the word count and to provide the staff attorney's office and our judges with a text searchable means of finding relevant parts of your brief. The CD you send can contain nothing except the brief and you must label it. The label must include the case name, docket number, identify the brief, e. g., appellant's brief, and specify the word processing software and version used to prepare the brief, e.g., WordPerfect 8.0. Your electronic copy of the brief must contain a "cover" sheet with the case number, caption, description of the brief, e.g., "Appellant's Brief," etc., the same as the paper copies.

If you are the appellant, you must send or deliver your brief to this court no later than 40 days after the date of the briefing notice sent to you. The appellee has 33 days from the date on your certificate (proof) of service to place the appellee's brief in the mail or give it to a third party commercial carrier for delivery within three days. **Appellees may not combine the**

time given in 5TH CIR. R. 31.3 with the provisions of FED. R. APP. P. 26(c) to receive 36 days to file a brief.

Proof of Service. FED. R. APP. P. 25(d) was amended in 1994 to require that the proof of service or "certificate" of service certify:

> The date and manner of service;
>
> The names of the persons served;
>
> **Mailing addresses or the addresses of the place of delivery.**

ECF FILERS MUST AGREE TO RECEIVE SERVICE ELECTRONICALLY AND FILERS WILL DESIGNATE THE MANNER OF SERVICE WHEN FILING THE BRIEF ELECTRONICALLY. IF THE OPPOSING PARTY IS NOT AN ECF FILER, YOU WILL HAVE TO MAKE SERVICE IN ACCORDANCE WITH THE FEDERAL RULE. Please remember that when you identify an address you must give a full address. Give the person's name, an address, e. g., 600 South Maestri Place, or post office box number, and the city, state and zip code.

HOW DO I GET MORE TIME TO FILE A BRIEF?

5TH CIR. R. 31.4 governs requests for extensions of time to file briefs. As a general rule, the court expects briefs to be filed timely and without extensions. Please remember that no extension, even if unopposed, is automatic. Extensions are discouraged and should only be requested when absolutely necessary, and not just when convenient. Unopposed requests for extension for less than 30 days normally should be made by via CM/ECF, 5TH CIR. R. 31.4.3.1, and must include a letter advising why the extensions is needed. The clerk should receive all motions requesting an extension at **least 7 days before the due date**. 5TH CIR. R. 31.4.1. and the Internal Operating Procedures following 5TH CIR. R. 27 and 31 express the court's sense that absent extraordinary circumstances, the MAXIMUM extension in criminal cases is 30 days, and 40 days in civil cases.

WHAT ARE RECORD EXCERPTS?

The Fifth Circuit uses the original record in deciding every case on the merits, and the district court provides the record to the court. Records are

available on-line to attorneys who have filed a form for appearance of counsel in the case, see: Accessing District Court EROA from the Guides section of the website. Pro se parties must contact the district court to obtain a copy of the record. 5TH CIR. R. 30 requires parties to file record excerpts in appeals from decisions of district courts, the U.S. Tax Court, and in Agency cases, except for Immigration and Naturalization Service proceedings, and Federal Energy Regulatory Commission cases which are covered by 5TH CIR. R. 15.3.

Record Excerpts are intended to give our judges a readily available and brief document which they can read along with the briefs in deciding whether a case needs oral argument. Our judges also refer to the record excerpts in preparing for oral argument. When preparing record excerpts you should remember the purpose and include **only** those portions of the record on appeal required by our rule, or which will assist the judges when you compile the "optional" contents.

Who Must File? Appellants represented by counsel and non-incarcerated pro se litigants must prepare and file record excerpts. ECF filers will initially file their record excerpts in the ECF system and then provide paper copies when we request them. Non-ECF filing attorneys will file record excerpts in paper and provide an electronic copy on a CD or other authorized means in PDF format. If an appellee believes that essential material has not been included, he or she may file separate record excerpts with the brief. Prisoners not represented by counsel do not need to file record excerpts, 5TH CIR. R. 30.1.3

Number of Copies. You must file **4 copies** of excerpts from the district court record with this court, 5TH CIR. R. 30.1.4 and .5. The appellant must also serve a copy of the record excerpts on counsel for each party separately represented by counsel and on any party proceeding pro se.

Mandatory Contents. Record excerpts **must** include copies of the following portions of the district court record. **We ask that you take particular care in binding the record excerpts to ensure that the binding does not obscure the documents in the excerpts, particularly the docket entries**:

The docket sheet;

The notice of appeal;

The indictment in criminal cases;

Any jury verdict;

The judgment or interlocutory order appealed;

Any other orders or rulings being reviewed;

Any relevant magistrate judge's report and recommendation;

Supporting opinion or findings of fact and conclusions of law filed, or transcript pages of orally delivered opinions or findings of fact;

A certificate of service complying with FED. R. APP. P. 25.

In agency cases, except for Federal Energy Regulatory Commission actions, the petitioner must file 4 copies of any order being reviewed and any supporting opinion, findings of fact or conclusions of law, 5TH CIR. R. 30.2(b). These copies must be filed at the same time as the petitioner's brief.

Optional Contents. Your record excerpts may include those parts of the record referred to in the briefs, including:

Essential pleadings or portions thereof;

Relevant parts of a FED. R. CIV. P. 16(e) pretrial order relevant to an issue on appeal;

Jury instructions given or refused that present an issue on appeal, together with any objection and the court's ruling, and any other relevant part of the jury charge;

The administrative law judge's findings and conclusions, if the appeal seeks review of a court order reviewing an administrative agency determination;

Relevant transcript pages challenging admission or exclusion of evidence, or other interlocutory ruling or order;

Relevant parts of written exhibits presenting an issue on appeal.

Length. **Optional contents are limited to 40 pages.**

Form. Record excerpts must:

> Have a numbered table of contents, with citation to the record, starting with the lower court docket sheet;
>
> Be on 8½ x 11-inch light paper with clear black images;
>
> Be tabbed to correspond to the numbers in the table of contents;
>
> Be securely bound (spiral binding is preferred) in a way that allows the excerpts to lie reasonably flat when opened;
>
> Have a durable white cover conforming to FED. R. APP. P. 32(a)(2), except titled "RECORD EXCERPTS."

Nonconforming Record Excerpts. As with briefs, we must file nonconforming excerpts. However, if deficiencies are not corrected within the time we allow, the excerpts may be stricken by the court, sanctions may be imposed, and the appeal may be dismissed for failure to prosecute.

MOTIONS PROCESSING

WHAT DO I NEED TO KNOW ABOUT MOTIONS?

Applications for an order or other relief from operation of the rules must be made by filing a motion unless the FED. R. APP. P. prescribe another form, FED. R. APP. P. 27(a)(1).

5TH CIR. R. 27.1 and 27.2 set forth in detail the motions which the clerk and single judges can decide. If you are dissatisfied with a ruling by the clerk or a single judge, you may file a motion for reconsideration with the clerk. Reconsideration of a clerk's order is by a single judge; review of a single judge order is by a three judge panel. There is no right to en banc review of a three judge order on a procedural motion. 5TH CIR. R. 27 gives the clerk's office authority to act on opposed and unopposed procedural motions. Centralizing the authority to act on motions for extension of time and for permission to file "extra-length" briefs, etc. gives greater consistency to the court's actions.

Contents of Motions. Motions must state the particular grounds for the motion, the relief sought and any legal argument necessary to support the motion. The motion also must contain and be accompanied by the documents required by FED. R. APP. P. 27(a)(2)(B) and 5TH CIR. R. 27.4 which requires a certificate of interested persons, except for purely procedural motions, e.g., motion to extend the time to file a brief, or to pay fees, etc. If motions are supported by memoranda, affidavits, or other papers, they must be served and filed with the motions, FED. R. APP. P. 27. **All motions must indicate whether they are opposed or not.** See also 5TH CIR. R. 27.4. All motions must contain a Certificate of Compliance, in accordance with FED. R. APP. P. 32(g).

Responses. Any party may file a response in opposition to a motion within 10 days after service of the motion unless the court shortens or extends the time. The court may act on motions authorized by FED. R. APP. P. 8, 9, 18, and 41, in fewer than 10 days by giving reasonable notice before ruling. Further, the court may decide **procedural** motions at any time, **without waiting for a response**. Any party adversely affected by such action may request reconsideration, vacation or modification of the action by filing a motion, FED. R. APP. P. 27(a) and (b).

Reply to Responses. Although FED. R. APP. P. 27(a)(4) permits a reply to a response within 7 days after service of the response, the court looks upon replies with great disfavor. Further, as a general rule, the court does not grant extensions of time to file a reply to a response.

Computing Time. The December 1, 2009 amendments to the FED. R. APP. P. changed the way times are calculated. Now all deadlines are calculated using the "days are days," or calendar days method. FED. R. APP. P. 26 gives explicit instructions how to count deadlines expressed in days and hours, etc.

Form. Motions and other papers must be produced by a process that creates a clear black image on opaque, unglazed 8½ x 11-inch light colored paper, preferably white. A motion or response does not need a cover, but must contain a caption setting forth the name of the court, the title of the case, the file case number, and a brief descriptive title indicating its purpose. Text must be double spaced, except for quotations more than two lines long.

There must be one inch margins on all sides. The December 2005 change to FED. R. APP. P. 27(d)(1)(E) makes clear that motions should be in 14 point proportional typeface, (or not more than 10½ characters per inch in monospaced typeface), and use a plain roman typeface, see generally the requirements of FED. R. APP. P. 32(a)(5) and (6).

Binding. The document must be bound securely, not obscure the text and lie reasonably flat when open, FED. R. APP. P. 27(d) and 32(a)(3). No cover is required.

Number of Copies. ECF filers need to send us paper copies of motions as indicated below BUT only when we request them. Non-ECF filers must provide paper copies as follows. Where the motion can be acted on by the clerk or a single judge, (see 5th Cir. R. 27.1 and 27.2) you need only file an original and one copy. Motions which require panel action, e.g., to dismiss an appeal, require an original and three copies.

Service. You must serve copies of all motions and responses on all other parties and must file proof of service with the court, FED. R. APP. P. 25(b), (c) and (d).

Disposition. 5TH CIR. R. 27.1 and 27.2 delegate authority from the court to the clerk and single judges to rule on a variety of procedural motions. Matters not covered in these rules may be referred to a three judge panel for decision.

HOW ARE MOTIONS PROCESSED?

Once we receive a motion, we make an entry in our docketing system and then determine where the motion must go for a decision.

Motions decided by the clerk pursuant to 5th Cir. Rule 27.1 normally will be ruled on within 5 days after we receive an unopposed motion, or within 5 days after the expiration of time for filing an opposition. In prisoner cases, where the federal government or state moves for an extension of time to file a brief, the clerk's office can grant a 15-day extension without knowing if the prisoner objects. If the prisoner does object after the motion has been granted, we then note that any further governmental extension requests are considered opposed.

Where a motion needs a single judge's action, we select the judge from a standing log and assign it to the next judge in rotation. At the beginning of the court year in July, we set these administrative motions logs and follow them throughout the year. The judge who rules on your motion is selected randomly.

Most non-emergency motions requiring initial decision by a three-judge panel are sent to the staff attorney's office for review and recommendation. A motion for permission to file a successive habeas corpus application in the district court is sent to the staff attorney's office as soon as possible because, by statute, a three judge panel only has 30 days to decide the matter, 28 U.S.C. § 2244(b)(3)(D).

Emergency Motions. See 5TH CIR. R. 27.3 to see what constitutes an emergency motion, and the requirements you must meet for the court to consider the motion on an expedited basis. If your motion is a true emergency, we immediately assign the motion to the next initiating judge in rotation on our administrative log and simultaneously send copies of the motion to the other panel members. Unless directed by the clerk, all communications are to the clerk's office. You should be aware that the court may take action on a motion before a response is received. Potential respondents should notify the clerk immediately if they intend to respond and should file a response as soon as possible.

Fax or Electronic Filing. 5TH CIR. R. 25 permits fax filing only in emergency situations and only after the clerk specifically allows a party to send documents by fax. ECF filers will file motions electronically. Non-ECF filers may send an electronic motion, e.g. an attachment to an e-mail, only when the clerk's office grants permission to do so.

Reconsideration. A reconsideration of action on a motion must be filed within 14 days unless the United States is a party in a civil case, see 5TH CIR. R. 27.1. Reconsideration requests are limited to 20 pages.

CASE SCREENING

HOW DO CASES GET TO THE COURT?

A discussion of the court's screening practices and procedures is found in the Internal Operating Procedures (IOP) following 5TH CIR. R. 34.

Cases with obvious jurisdictional deficiencies are not briefed, and we do not request the full record on appeal from the district court. Instead, after review by an attorney in the clerk's office, the cases are prepared for decision by our monthly jurisdictional review panel, discussed infra.

Cases which are briefed are either "screened" through the staff attorney's office or sent directly to an "initiating" screening judge. When we receive the briefs and the original record on appeal, we send the case on for screening. All direct criminal cases and prisoner cases - the majority of our docket - are sent to the staff attorney for review, preparation of a legal analysis of the appeal, and a recommendation whether the case merits oral argument, or should be decided on the "summary" calendar. We send direct criminal appeals as soon as we have the record on appeal and the appellant's and appellee's briefs, without waiting for a reply brief. If a reply brief is filed later, we send it to the staff attorney immediately. In civil cases, we wait until a reply brief is filed, or the time to file has expired and then send the case to the staff attorney.

A small number of cases are screened directly to an initiating judge,

e.g., NLRB, private civil diversity, tax, bankruptcy, etc.

Staff Attorney Screening. The staff attorney reviews the cases we send and generally designates them as "Class I" through "Class IV":

> Class I cases are so lacking in merit they are deemed frivolous and subject to affirmance or dismissal under FED. R. APP. P. 34(a)(2)(A) and 5TH CIR. R. 42.2 and 47.6;
>
> Class II cases constitute the court's summary calendar. This class of cases includes cases where counsel has waived argument. In general, Class II cases have a limited number of issues and the dispositive issue(s) recently have been decided, or the facts and legal arguments are presented adequately in the briefs and the record on appeal. Many Class II cases are decided at the Conference Calendar, see pp. 70-71.
>
> Classes III and IV cases represent the court's oral argument calendars and present difficult or new issues for the court to decide. Class III cases are given 20 minutes per side for argument;

Class IV cases receive 30 minutes per side and represent the most complex cases involving major legal questions.

Once the staff attorney completes review on the case, he sends to the clerk the briefs, record on appeal, and recommendations on the merits of the case, and any pending motions. The staff attorney may also select cases with two or three issues, easy facts and a limited record, for decision on the "conference calendar," discussed in the Decision and Opinions Section, infra, without further screening. When we receive cases requiring submission to the court from the staff attorney, we send them in rotation to the next "screening panel" selected from our log. Screening panel assignments are made effective July 1st of each year and the three judges assigned to that panel sit together for one year. Within each panel, we rotate "initiating" judge assignments, so each judge has an equal opportunity to act as the first, second and third reviewer on the case.

When the initiating judge receives the appeal, his or her first task is to determine whether the case is properly classified. If the initiating judge agrees with a Class I or Class II recommendation, the case will be decided on the "summary calendar" without argument. The judge then normally has 45 days in civil cases and 31 days in criminal cases to draft an opinion and to send it on to the second judge on the panel. That judge can agree both with the proposed disposition and with the opinion, or can send the case to the oral argument calendar. If the second judge agrees that a Class I or II disposition is proper, he or she then sends the case on to the third panel member. That judge can agree with the disposition, or can send the case to the oral argument calendar. The important thing to remember is that it takes all three judges' agreement to decide the case on the summary calendar.

Cases which the staff attorney classifies as Class III or Class IV and recommends for oral argument are sent to an initiating judge on a screening panel for approval of the recommendation, except for direct criminal cases which are sent to the oral argument calendar on the staff attorney's recommendation alone. If the judge concurs argument is needed, the case is returned to the clerk's office for assignment of the case to the next available oral argument calendar. If the initiating judge disagrees with the recommendation for oral argument, the judge's screening panel will decide the case without oral argument if all three panel members agree.

Judge Screening. Cases sent directly to the judges' chambers for screening are classified and handled in a similar manner to cases sent via the staff attorney.

ORAL ARGUMENT

WHAT ARE THE CHANCES I WILL GET ORAL ARGUMENT?

Overall fewer than 20% of the cases briefed actually receive oral argument, (some cases initially selected for argument are later removed from the calendar shortly before the scheduled argument date). Criminal cases have the least, and private civil cases the greatest probability for argument. A more extensive statistical breakdown is at Appendix I.

HOW CAN I FIND OUT ABOUT ORAL ARGUMENT CALENDARS?

About 30 days before the beginning of oral argument sessions, we post the case names and numbers, and the locations of the arguments on our internet site. The week before argument we post the names of the judges who will hear the cases. You may also call our calendaring section for information about a particular case.

HOW LONG DOES IT TAKE TO GET ARGUMENT?

The length of time between filing of briefs and oral argument varies depending upon the type of case and the court's backlog. Criminal and other special cases receive priority. The court presently has little backlog of cases for oral argument. Thus, once designated for argument a case should be heard within about 3 months depending on the number of oral argument sessions.

PANEL ARGUMENTS AND PANEL COMPOSITION

The court hears oral argument normally during the first week of each month. Generally, each panel hears five cases per day, Monday through Thursday. Additional sessions are scheduled at any time to handle such matters as death penalty appeals, cases requiring emergency relief, etc. Except for *en banc* cases, the panel consists of three judges. Cases are

assigned to oral argument panels randomly. We send the briefs and record excerpts to the panel members soon after the cases are selected for argument. The judges read the briefs and record excerpts before argument, although they usually will not have examined the complete record on appeal.

HOW AND WHEN CAN I FIND OUT WHO IS ON MY PANEL?

The court does not release the identity of the panel members until seven days before the beginning of the oral argument session. We make this information available on our 5th Circuit internet home page, seven days before the oral argument session begins.

EN BANC ARGUMENTS

If a majority of the judges in regular active service agree, the en banc court can hear an appeal initially or rehear it after panel decision, FED. R. APP. P. 35(a). The procedures for petitioning for rehearing or rehearing en banc are summarized on pp. 73-75, infra. If the court votes to take the case en banc, the parties must file 20 copies of all previously filed and any supplemental briefs. All non-recused active judges participate in en banc oral arguments. Generally, each side is allowed thirty minutes for argument. The court will not ask questions during the first half of the allotted time for opening argument, unless counsel waives this privilege. The court normally holds en banc sessions three times a year, in January, May, and September.

WHERE ARE THE COURTROOMS LOCATED?

There are three courtrooms in New Orleans on the second floor of the John Minor Wisdom U.S. Court of Appeals Building at 600 Camp Street. If more than three oral argument panels are scheduled in New Orleans, some calendars will start at 9:00 a.m. and others at 1:00 p.m. Periodically, the court hears oral argument outside of New Orleans. At least 30 days before oral argument, we will notify you where and when the oral argument session will be held. Once oral argument begins, the cases are heard without interruption, except for change of counsel between cases, until the entire calendar is heard.

CHECKING IN WITH THE CLERK'S OFFICE

On the day of the argument, the attorneys who will argue must check in with the clerk. In New Orleans, go to the John Minor Wisdom U.S. Court of Appeals Building, 600 Camp Street and proceed to Room 102. Counsel arguing cases must check-in 30 minutes before court convenes, 5TH CIR. R. 34.9. Counsel in the fourth and fifth cases on the docket may check-in by telephone, except on the last day of argument. The number to call is at the end of "Note 3" to the oral argument calendar we send you. If you check-in by phone you still must physically check-in at the courtroom no later than one hour after the court session convenes.

In New Orleans, counsel in the second case normally sit in the courtrooms during the first argument so that they can move to counsel's table immediately after the first case is argued. Counsel in the third and later cases may wait in the attorney's lounges which are adjacent to our three courtrooms. Inside each of these lounges is a system which indicates which case is being argued. When the case before yours is being heard you should be present in the courtroom so there is minimal delay in proceeding when the preceding argument concludes.

You should become familiar with the court by listening to other earlier scheduled arguments, and you should know the names of the judges on the panel. We ask you to identify yourselves to the court, even though your names appear on the court's daily minute sheet. This allows the judges to know who is arguing so they can address counsel by name.

WHAT DO I HAVE TO DO TO GET READY?

Time for Argument. Each side receives 20 minutes in the normal case; a few cases permit 30 minutes per side. If more than one counsel is going to argue, or if an amicus is permitted to argue, counsel must agree among themselves how to allocate their 20 or 30-minute time allowance.

Generally, not more than two counsel will be heard for each party, 5TH CIR. R. 34.4. Most appellants reserve 5 minutes of their 20 or 30 minutes for rebuttal. The court disfavors requests to extend the time for argument and normally denies requests for more time. The time permitted for oral argument has no relationship to the attention the court gives a particular case. The court time limits represent the estimate of the time needed to

present the issues, and answer the court's questions. Counsel should be prepared to answer the judges' questions.

Cases consolidated for briefing are treated as one case for oral argument unless the court orders otherwise. Counsel may divide the argument time as they agree, although some limitations are built in by the short time allowed for oral argument.

Attendance of Counsel. Counsel for each party must be present for oral argument unless excused by the court for good cause, 5TH CIR. R. 34.2. Parties desiring to waive oral argument and to submit the case on the briefs, must file a motion to waive argument at least **7 days** before the date set for hearing, 5TH CIR. R. 34.3. Please note however, that when a case is placed on the oral argument calendar, a judge has determined argument will be helpful in resolving the case. Requests by the parties to waive argument are "not looked upon with favor," 5TH CIR. R. 34.10.

Continuance of Hearing. After a hearing date has been set, only the court may delay argument for good cause, 5TH CIR. R. 34.6. The court ordinarily does not consider engagement of counsel in other proceedings as good cause.

Preparation for Argument. Counsel should thoroughly prepare to argue their case. You should have read the record on appeal while writing your brief, and should reread the record excerpts. Be certain what is in them and where it is. Do not rely on your memory of what you think was there when you prepared your brief. Also, review all the briefs. Be aware of discrepancies between your statement of facts and your opponent's. Make sure you are fully conversant on the legal arguments at issue in the case. Finally, throughout your reviewing process imagine yourselves in the court's position and think what the judges will want to know and how they will want to hear it.

The appellant's oral argument must capture the judges' interest and persuade them that error occurred which this court can correct under governing statutes and established precedents. The appellee, on the other hand, must convince the judges that the issues have been correctly and fairly decided by the trial court or that, in any event, the ultimate determination requires no alteration.

Although your oral argument and brief complement each other, each serves a different purpose. The oral argument should emphasize the critical points to convince the judges that fair play and precedent support your position. In contrast, the strength of the brief lies in its lucid, precise, and documented statement of the facts, with fully explained reasoning and law supporting your position. The brief should detail how the court can arrive at the decision you advocate as the correct one.

Presenting Oral Argument. Below are some suggestions for how to present your case:

The Opening Statement. The panel has read the briefs before argument and is familiar with the case. Individual judges, however, will have prepared to hear twenty or more cases during oral argument week. Thus, counsel should say enough about the facts and posture of the case to bring the particular case into focus. Beyond that, an effective presentation can take many forms. Obviously, counsel must catch and hold the judges' attention in the first few minutes. The appellant in particular should identify the critical issues on appeal immediately, and then should move quickly to a lucid, concise and persuasive argument.

The Statement of Facts. Attune yourselves to the court's level of comprehension. If the facts are relatively simple, do not spend much time on them. A common mistake lawyers make before this court is to spend half of their oral argument talking about background facts, not the key ones on which the decision turns. If the case is complex factually however, even though the court has read the briefs, counsel may need to give a clear version of the facts–indeed, a clear factual exposition may be the most appropriate appellate argument an attorney can make.

The Argument. You should rely principally upon the briefs for the full discussion of the law which supports the appeal. In oral argument, avoid a minute dissection of case law except when one or a few cases clearly should control the outcome or when cases must be distinguished in order for you to prevail. Avoid quotations and generally do not give the citations of cases cited in your brief during oral argument. Just say, for example, "Your Honor, Johnson v. Jones, from this Circuit, cited in the brief, is controlling. In essence it says, if you refer to cases not cited in the brief, refer to the cases by name and court, and provide the citations in writing to the court and counsel before argument.

Visual Aids. Visual aids are a two-edged sword. Many judges do not find them particularly helpful in any form. More importantly, some judges will not allow you to make visual aids of anything that is not already in the record on appeal. Further, when counsel refer to a chart or diagram, they may walk toward the aid or, at a minimum, turn away from the microphone. Sound systems do not pick up your voice well when you are not speaking directly into the microphone. Thus, the judges have difficulty hearing your argument. Nonetheless, if counsel believe visual aids are necessary, they are advised that in lieu of large poster sized aids, it is invariably more helpful to furnish four small size (approximately 8 x 14 inches or less) copies of charts, diagrams, etc., to the courtroom deputy. For en banc cases, counsel should provide 20 copies. The deputy will give a copy to each judge. If counsel must use large aids, they should also furnish the smaller sized copies.

Emphasis. You do not have a lot of time to argue, particularly if the court asks you many questions. Emphasize the important points in oral argument (but not to the point of giving the panel the impression that the others are pure throwaways). By the time the case gets to this court, you should know what is critical and have an instinct for the case's strongest point and the opponent's weaknesses. Stress those in oral argument.

Try Not to Read the Argument. An advocate cannot hold the audience long without looking it in the face. You need to know the argument so well that you can watch the court, respond to its uncertainties, ascertain the direction of its concern, and answer its questions. Answer questions as directly as possible, adding when necessary any qualifications or references to matters better developed later in the argument. Answer questions when asked; do not postpone an answer until later in the argument. You may get sidetracked and never answer the question which a judge feels is the key to the case. Listen to the judge and respond in a way which disabuses the panel of any misapprehension of your position. One great advocate says to rejoice when the court asks questions. It allows you to penetrate the mind of the court and understand what the judges are concerned about. Yet, of course, try not to let the court keep you from reaching the major points that you must make.

Try to Relax, Speak Clearly and Slowly. Talk directly into the microphone and be sure the judges can hear you.

Talk Policy Sense. Counsel should prepare by asking themselves policy questions about the case. Perhaps there is no room for policy in the case, but if there is, counsel should be able to tell the court why his or her client should prevail and what social ends a favorable decision would promote.

One benefit of oral argument may be the opportunity to address the breadth of the issue before the court. A party may want to win as big, or lose as small, as possible. For example, it is sometimes critical to a regulated industry that a decision be a narrow one confined to the special facts of the case rather than one announcing a broad new rule. Or, if a conviction might be set aside, the prosecutor hopes to create as little precedent as possible. A good advocate looking to the future may try to persuade the court to resist expressing dicta or, conversely, may actively seek the enunciation of a broad rule.

Avoid Personalities. Although counsel may, of course, criticize the reasoning of opposing counsel or the court below, **you should be careful not to make personal attacks**. Disparaging words only detract from your argument.

The Special Position of Appellee's Counsel. Appellee's counsel has the advantage of listening to appellant's argument. Appellee's counsel should correct appellant's counsel's important misstatements of the facts. Appellee's counsel probably should give fresh answers to questions which were posed to appellant's lawyer. This can be done by simply noting the question and saying the appellee would like to respond also. Appellee's counsel can then develop other points, and note concessions by the opponent. Appellee's counsel should often be able to ascertain from the court's questions the factors upon which the case will turn. Of course, having won below is a great advantage, especially if the issues turn on disputed facts involving credibility determinations.

Rebuttal. Most appellants' counsel reserve a few minutes of their time for rebuttal. The last word may be important. However, statements on rebuttal seldom make points that the judges do not already have in mind. Rebuttal often can be bypassed if you have nothing fresh to say. Remember too that rebuttal is not used to raise new arguments. If you try to make a new argument on rebuttal, the court almost surely will deny consideration or

give appellee a chance at surrebuttal. Make your rebuttal short, and use it to correct important errors and mischaracterizations by appellee's counsel.

Be Succinct. The court too often sees lawyers who make all possible points, then note that all argument time has not been used up, so they go over the points again. The court is grateful when counsel make their arguments and then stop. That a certain amount of time has been allocated for oral argument does not constitute a contract to fill each minute. Also, be aware of the court's reaction to your argument. If you have an obvious winner of a case, do not prolong your argument just to use up your time. As one of our judges noted: "Often the mark of a good appellate advocate is knowing when to sit down."

DECISION AND OPINIONS

HOW ARE CASES DECIDED?

At the beginning of each court year, the clerk's office sets various panels of judges to decide cases. We establish "screening panels" to review cases to determine whether oral argument is needed to resolve the appeal. We also set panels for hearing oral argument during the course of each year. From the oral argument panels, we select three judges each month to sit on a "jurisdictional review panel," and we also select three judge "conference calendar" panels which convene six times per year.

Jurisdictional Review Panel. Cases with obvious jurisdictional deficiencies, some successive habeas corpus applications and prisoner pro se mandamus petitions are presented to this panel each month. The cases are not briefed and there is generally a limited record available. However, materials necessary to decide the case are sent to the panel members in advance of the session. Staff attorneys present the cases and a proposed disposition to the panel. If the panel concurs, the case is decided and they issue an opinion or order dismissing the appeal for lack of jurisdiction, rule on the mandamus petition, or act on the successive habeas application. If the judges disagree on the disposition of the case, it is normally reassigned to a screening panel. If briefing is necessary to decide the case, the clerk's office will advise the parties to brief the case, including any special issues the court wishes argued.

Conference Calendar Panel. The conference calendar convenes every other month. These cases have simple facts, a short record and only a very few issues. The panel members receive materials needed to decide the case in advance of the session, and the record on appeal is available for the court's review before the panel convenes. Each judge is designated as the initiating judge for one-third of the cases each day, and he or she leads the questioning. Lawyers from the staff attorney's office present the cases to the judges and offer a proposed opinion for the panel's consideration. If the panel concurs, the opinion is entered. If there is disagreement in the result or in the language of the opinion, the case is removed from the calendar and is reassigned, normally to a screening panel.

Summary Calendar Panels. Cases classified as Class I and II, which are not decided on the conference calendar are submitted to the court along with all briefs, record excerpts and the record on appeal. The panel then decides the cases. If any party has requested oral argument in their briefs, all judges must concur in the result and in the opinion; there can be no special concurrences or dissents. Once agreement is reached on the decision, the panel transmits the opinion to the clerk electronically.

Oral Argument Panels. Court week is generally the first week of each month. Most sessions are held in New Orleans, but each year we often hold sessions in other cities and occasionally at law schools within the circuit. Thus, counsel can expect argument in a variety of locations when notified that your case has been calendared for oral argument.

Before argument each panel member receives a copy of the briefs and the record excerpts. The record on appeal is available for the court's review prior to argument, and is sent to the writing judge after argument.

WHEN ARE DECISIONS MADE?

Jurisdictional Review and Conference Calendar Panels. The

decisions of these panels issue the day of, or the day after, the panels convene.

Summary Calendar Panels. The median time for all cases from submission of the case to the judges until a decision is a bit less than one month.

When the last judge on the screening panel agrees the case does not need oral argument and agrees with the opinion, the decision is transmitted electronically to the clerk's office for issuance. Along with the decision, we receive instructions on assessment of costs and instructions whether the case is to be published in the Federal Reporter or issued as unpublished.

Oral Argument Panels. The median time from the time of oral argument until decision for all cases is about 2 months.

The court does not issue decisions from the bench. The judges confer promptly after completion of a day's calendar of oral arguments. Although the panel may reach a tentative decision at this conference, additional exchanges among the judges are often necessary. The presiding judge of the panel assigns the case to a panel member to prepare an opinion. The clerk's office receives instructions to send the record on appeal to the judge designated the "writing judge" to assist in preparing the opinion. The writing judge circulates a copy of the proposed disposition to the other members of the panel. By court policy, the court does not pre-circulate opinions to the entire court except in the very rare instance where the panel opinion results in a split of authority among the circuits. After panel members have concurred or had an opportunity to prepare separate opinions, the disposition is sent electronically to the clerk with instructions as to how to assess costs and how to release the opinion.

The court does not need to write an extensive disposition in every appeal but may, in its discretion, use a terse judgment such as "affirmed," 5TH CIR. R. 47.6. Also, the judges do not have to sign the opinion, as district court judges do.

HOW OPINIONS ARE ISSUED?

All opinions are issued in typewritten or "manuscript" form. A copy is sent to the trial court or agency and the parties on the day the opinion issues – that is on the day the court enters the decision on the docket sheet, FED. R. APP. P. 36. Generally, we do not fax copies of the opinion to the parties, but we will call to let you know an opinion has issued, if you request this service in advance. All opinions also are posted on our website the day issued.

HOW DO I KNOW WHEN THE OPINION IS ISSUED?

ECF filers will receive a notice of docket activity when the opinion issues. Otherwise, opinions are mailed or e-mailed to the trial court or agency, and the parties on the day the opinion issues. In addition, published and unpublished opinions are placed on our internet site the day they are issued. As a service to the public, you can subscribe to our opinions service and receive the opinions via automatic e-mail communications. These opinions are in typewritten format and do not contain a case syllabus or headnotes.

The Fifth Circuit library also keeps a reference copy of the unpublished opinions by date of issuance. If you know the name of the case and its number, you may purchase a copy from the clerk's office for $3.00. Please send a check or money order made payable to "U.S. Courts" to U.S. Court of Appeals for the 5th Circuit, ATTN: Mail Remittance, 600 South Maestri Place, New Orleans, LA 70130.

DO UNPUBLISHED OPINIONS HAVE VALUE AS PRECEDENT?

Unpublished opinions issued on or after January 1, 1996, have no precedential value and do not bind other panels of the court, except under the doctrine of res judicata, etc., 5TH CIR. R. 47.5.4. However, they may be cited if they have persuasive value with respect to a material issue that has not been addressed in a published opinion and the unpublished disposition would assist the court.

Unpublished opinions issued before January 1, 1996, are precedent and binding on the court.

If you cite to any unpublished opinion, you must attach a copy of the opinion to any document you file with the court, if the opinion is not in a publicly available electronic database.

HOW DO I KNOW IF AN OPINION IS UNPUBLISHED?

All unpublished opinions contain a legend on the first page which states generally that pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published.

HOW DOES THE COURT DECIDE WHEN TO PUBLISH AN OPINION?

5TH CIR. R. 47.5 sets out the criteria for publishing an opinion. Opinions are published unless each panel member decides the case does not meet the criteria for publication. If any judge of the court or a party requests that a panel reconsider its publication decision, all panel members must agree to publish the opinion.

POST DECISION MATTERS

REHEARINGS AND RECONSIDERATIONS

Initially, remember that filing a petition for panel or en banc rehearing is not a prerequisite to filing a petition for writ of certiorari in the Supreme Court. Also remember that you should only ask for rehearing when truly warranted.

Second, petitions for panel or en banc rehearing should never assume an adversarial posture with the panel. Challenging the position of an opponent in an argumentative way is an effective adversarial tool, but is counter-productive when applied to the panel opinion. Even though the court has ruled against a particular party, the panel has not become an adversary, and counsel should not treat it as such in the petition for rehearing.

WHAT ARE MY CHANCES FOR SUCCESS ON REHEARING?

Although the numbers may vary from year to year, the historical average of successful petitions for panel rehearing is less than 5%. Even fewer petitions for en banc rehearing are granted, generally less than 3%.

WHEN DO I HAVE TO FILE MY PETITION?

Both panel and en banc rehearings must be filed within 14 days after entry of judgment, except in civil cases where the United States is a party. In this instance any party has 45 days to file for rehearing, FED. R. APP. P. 35(c) and 40(a)(1).

Petition for Panel Rehearing. A petition for panel rehearing must state with particularity each point of law or fact that the petitioner believes

the court has overlooked or misapprehended, FED. R. APP. P. 40(a)(2), 5TH CIR. R. 40.2. Generally, the court does not request an answer to the petition.

Number of Copies. You must file four paper copies of a petition for panel rehearing and attach an unmarked copy of the opinion or order you want reviewed, 5TH CIR. R. 40.1. We will tell ECF filers when to submit the paper copies. Please attach a copy of the file stamped opinion we sent you rather than one you printed out from the internet.

Time for Filing. We must **receive** the petition for panel rehearing within the time set in FED. R. APP. P. 40(a)(1), 5TH CIR. R. 40.4.

Petition for Rehearing En Banc. A petition for rehearing en banc is to be used only for cases involving questions of exceptional importance or to secure or maintain uniformity of the court's decisions, FED. R. APP. P. 35(a). Our Internal Operating Procedure following the federal rule expands this notion. A petition for rehearing en banc is an extraordinary procedure intended to bring to the entire court's attention an error of exceptional public importance or an opinion which directly conflicts with prior Supreme Court, Fifth Circuit or state law precedent. Rehearing en banc petitions take an inordinate amount of the judges' scarce resources. Because of the extraordinary nature of en banc rehearings, the court is fully justified **in imposing sanctions on its own initiative** for petitions which have little merit, 5TH CIR. R. 35.1.

Number of Copies. You must file 20 copies of the petition for rehearing en banc. We will tell ECF filers when to send in the paper copies. The petition must not be incorporated in a petition for panel rehearing, if one is filed. Further, the petition for en banc rehearing may not adopt by reference any matter from the petition for panel rehearing or from any other brief or motions in the case, 5TH CIR. R. 35.2. You must attach unmarked copies of the panel opinion or order as an appendix to the petition, 5TH CIR. R. 35.2.10. Please attach a copy of the file stamped opinion we sent you rather than one you printed out from the internet.

Time for Filing. Like a petition for panel rehearing, we must **receive** the petition for en banc rehearing within the time set forth in FED. R. APP. P. 40(a)(1).

Effect of Granting a Petition for En Banc Rehearing. If the court grants a petition for en banc rehearing, the panel opinion is vacated and the mandate is stayed, 5TH CIR. R. 41.3.

LENGTH AND FORM OF REHEARING PETITIONS

Panel Rehearings. The petition must not exceed 15 pages. The form is prescribed by FED. R. APP. P. 32 and the petition must be served as FED. R. APP. P. 31 requires.

En Banc Rehearings. The petition must not exceed 15 pages, and must comply with the format requirements of FED. R. APP. P. 32. Any petition must also include a statement of interested parties, 5TH CIR. R. 35.2.1, and if the party is represented by counsel, there must be a statement by counsel which complies with FED. R. APP. P. 35(b)(1) and (2). No response is necessary to the petition unless the court orders one.

Attachments. Except by permission of the court, petitions for panel and en banc rehearing should have no attachments other than a copy of the panel opinion.

I WANT TO FILE BOTH A PETITION FOR PANEL AND EN BANC REHEARING. WHEN ARE THEY DUE?

If you are filing both a petition for panel and en banc rehearing, **both** petitions must be filed within the time limits in FED. R. APP. P. 40(a)(1). You do not get to file a petition for panel rehearing and when that is denied, then get another 14 or 45 days to file a petition for en banc rehearing. Pro se litigants often make this mistake.

RECONSIDERATIONS

When the clerk or a single judge rules on an administrative motion, technically there is no "rehearing" of that decision. Instead, the court uses the term "reconsideration." 5TH CIR. R. 27.1 and .2 lay out the types of motions that the clerk and single judges may rule on. Any request for review of their decisions should be made by a "motion for reconsideration." You must file the motion within 14 days after the date the order you want reviewed is filed. As an exception, if the United States is a party in a civil

case, any party has 45 days to file the motion for reconsideration. Requests for reconsideration may not exceed 15 pages.

Reconsideration of denials of relief in administrative motions is by a three-judge panel **only.** Procedural and interim matters, such as stay orders, injunctions pending appeal, appointment of counsel, leave to appeal in forma pauperis, denial of permission for an abusive litigant to file pleadings, denials of more time to file briefs, etc., are not matters subject to en banc consideration.

Further, 28 U.S.C. § 2244(b)(3)(E) is clear that the denial of permission to file a successive habeas corpus petition is not appealable. There is no right of "reconsideration," or "rehearing," and no right to file a writ of certiorari to the Supreme Court.

THE MANDATE

WHAT IS THE MANDATE?

Unless the court directs that a formal mandate issue, the mandate consists of a certified copy of the court's judgment, a copy of the opinion, and direction as to costs. A copy of a "judgment" is shown below.

Click for sample: JUDGMENT

Issuance. The court's judgment takes effect when the mandate issues. We issue the mandate on the eighth calendar day after the time for filing a petition for rehearing has passed, unless a timely petition for rehearing is filed, or an explicit court order shortens or lengthens the time. If a petition for rehearing is denied, we issue the mandate on the eighth calendar day after the order denying rehearing is filed, unless the court shortens or extends the time. On occasion, the court will issue the mandate forthwith, in which case the mandate is issued at the same time as the judgment is entered, e.g., in expedited appeals of criminal sentences and actions denying mandamus relief, 5TH CIR. R. 41.4. When we issue the mandate, we send a certified copy of the final judgment, the opinion of the court, and directions as to costs, if any, and the record on appeal to the district court. We notify the

parties of the issuance of the mandate, but we **do not send another copy of the opinion or a copy of the judgment to the parties.**

STAYS OF THE MANDATE

Stay Pending Application for Certiorari. You may file a motion to stay issuance of the mandate pending application to the Supreme Court for a writ of certiorari, with reasonable notice to all parties. Fed. R. App. P. 41(d)(2). The stay must not exceed 90 days unless extended by the court for good cause shown. To prevent a stay from being used for purposes of delay, we will not grant a stay pending certiorari in criminal cases unless we conclude there is a substantial question for the Supreme Court, 5TH CIR. R.

41.1. The fact we have issued the mandate does not affect your right to apply for a writ of certiorari nor does it affect the power of the Supreme Court to grant the writ.

Petition for Writ of Certiorari. You have 90 days from the date of entry of judgment, or the date of the denial of a timely petition for rehearing to file a petition for writ of certiorari in the United States Supreme Court. We have no authority to enlarge the time. Requests for additional time must be filed by motion with the clerk of the U.S. Supreme Court.

Petition for Rehearing. The timely filing of a petition for panel or en banc rehearing, or motion for stay of the mandate, stays the mandate until the petition or motion is ruled upon, unless the court directs otherwise, FED. R. APP. P. 41(d)(1).

COSTS

The prevailing party in an appeal can request payment of the costs set out in FED. R. APP. P. and 5TH CIR. R. 39. A party seeking to recover costs must file an itemized and verified bill of costs, along with proof of service on opposing counsel, within 14 days after entry of the judgment. A sample is shown on the following pages. You must file any objection within 14 days of service on the party against whom the costs are taxed, unless the time is extended by the court. Objections to the bill of costs are usually filed when unreasonable charges or improper items are listed. We permit copying costs for up to 15 copies of briefs and 10 copies of record excerpts. 5TH CIR. R. 39.1 limits copying costs to the lesser of actual cost or $0.15 per page. We do

not permit recovery of mailing fees or commercial delivery fees for transmitting briefs, 5TH CIR. R. 39.1 and .2.

Click for sample: BILL OF COSTS

Although "taxable" in the court of appeals, the money involved as "costs" never physically changes hands at the court of appeals level. We prepare an itemized statement of costs for insertion in the mandate. The costs can then be recovered in the district court after the mandate issues. In some instances we may send a supplemental statement of costs to the district court for inclusion in the mandate after the mandate has issued. No time limit is specified for the court of appeals to send the statement of costs, and district courts are not authorized to impose such a time limit.

MISCELLANEOUS

STAY OR INJUNCTION PENDING APPEAL

The mere filing of a notice of appeal does not stay the district court's judgment. If you want to stay a district court judgment or if you seek an injunction pending appeal, you must follow FED. R. APP. P. 8, and generally make application in the district court. In a motion for stay of judgment or for injunction made to this court, you must show the district court has denied the relief you requested, with the reasons given therefor, or must show that application to the district court would not be practicable, FED. R. APP. P. 8(a)(2). Stays in death penalty cases are governed by the separate requirements of 5TH CIR. R. 8.

An application for stay of a decision or order of an agency pending review is made in a similar manner to an application for stay of a district court judgment, FED. R. APP. P. 18.

Jurisdiction. A motion for stay or injunction does not transfer jurisdiction to the court of appeals. In order for the court to consider such a motion, there must be a pending appeal from a district court judgment, a pending petition for review of a decision or order of an agency, or a pending application for a writ.

Fees. No separate fee is required to file a motion for stay or injunction, but all required fees must have been paid in the underlying action, or leave to proceed in forma pauperis must have been granted, before the court will act on the motion.

Content of Motion and Supporting Papers. In addition to showing prior application to the district court or agency, where practicable, and the action of the district court or agency, with reasons given for such action, you must show the reason for the relief requested and the facts relied upon. Disputed facts should be supported by affidavits or other sworn statements or copies thereof. The motion should be accompanied by copies of the relevant parts of the record, FED. R. APP. P. 8(a)(2), and 18(a)(2)(B).

Filing and Service. You must file an original and three copies of the motion and supporting papers, together with a certificate of service on all parties to the appeal or proceeding. You must also give reasonable notice of every application for stay or injunction to all parties, including when, where and to whom the application is to be presented.

Responses. Although the court may grant temporary relief ex parte in appropriate cases, the court may grant a stay or injunction pending appeal without first giving opposing parties time to respond to the motion. If you intend to respond you should notify the clerk's office immediately. All responses received by the clerk before action on the motion are presented to the court for consideration.

RELEASE IN CRIMINAL CASES

This court may review district court orders respecting release, entered before or after a judgment of conviction. A review of the district court order entered before judgment or conviction must be by appeal, 18 U.S.C. § 3145(c), and should be initiated like any other criminal appeal. After reasonable notice to the appellee, the appeal must be heard upon such papers, affidavits, and portions of the record as the parties may present or the court requires, FED. R. APP. P. 9(a). A government requested review of a district court order respecting release pending a defendant's direct criminal appeal must also be by appeal. 18 U.S.C. §§ 3145(c) and 3731. A defendant may seek review of a district court order respecting release pending appeal by initiating a separate appeal, 18 U.S.C. § 3145(c), or by filing a new motion for release, FED. R. APP. P. 9(b).

Fifth Circuit Requirements. Our requirements for filing an application for release after judgment of conviction are set forth in detail in **5TH CIR. R. 9.2**. The documents required for release before and after judgment of conviction are set forth in **5TH CIR. R. 9.3**.

HABEAS CORPUS PROCEEDINGS

ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT. In April 1996, the habeas corpus provisions were extensively amended. There is a one-year statute of limitations on filing a petition for writ of habeas corpus, 28 U.S.C. §§ 2244(d)(1) and 2255. As a general rule, a prisoner may only file one federal habeas corpus application. A second or successive application may not be filed unless a three judge panel of this court grants permission to file another, 28 U.S.C. § 2244(b)(3).

There are also limits on the standards of review that the federal courts may apply.

Prisoners convicted by state courts need to exhaust available state court remedies before filing a federal habeas corpus application, 28 U.S.C. § 2254(b)(1)(A). After exhaustion of those remedies, state prisoners may file an application for federal habeas corpus relief in the federal district court which has jurisdiction over the location of their prison or over the court where they were convicted. Prisoners convicted in a federal district court may file an application for a writ of habeas corpus to the federal district court where they were convicted. Applications for habeas relief improperly sent to this court are transferred to the appropriate district court, FED. R. APP. P. 22(a). If the district court denies habeas corpus relief, the prisoner may appeal, but only if granted a "certificate of appealability" by a district or circuit court judge, FED. R. APP. P. 22(b).

CERTIFICATE OF APPEALABILITY. A habeas petitioner who is unsuccessful in the district court must apply first to the district judge for a certificate of appealability. If the district judge denies a certificate of appealability, the notice of appeal from denial of a writ of habeas corpus constitutes a request to this court for a certificate of appealability, FED. R. APP. P. 22(b). However, this court generally requires the prisoner to file: 1) a motion for a certificate of appealability; and, 2) a separate brief in support of

the motion. If the prisoner fails to file these documents within the prescribed time, we will dismiss the appeal.

If the district judge grants a certificate of appealability on only some of the issues in the case, the petitioner must expressly ask for an expanded certificate on additional issues from this court.

FORM AND NUMBER OF COPIES. Applications for certificates of appealability must meet the format and length requirements of FED. R. APP. P. 32(a), and 5TH CIR. R. 32, as applicable.

SUCCESSIVE HABEAS CORPUS APPLICATIONS. Applications for second or successive habeas corpus petitions are limited to 30 pages for a handwritten application, or 13,000 words or 1,300 text lines for typed and computer generated applications. As a general rule any application for a second or successive petition should include the following:

> A second or successive § 2254 petition must make a prima facie showing that you satisfy either of the two conditions found in 28 U.S.C. § 2244(b):
>
> > (a) that your claim relies on a new rule of constitutional law, made retro-active by the Supreme Court, that was previously unavailable; **or**,
> > (b) the factual predicate for your claim could not have been discovered previously through the exercise of due diligence, **and** the facts underlying your claim, if proven by clear and convincing evidence, would be sufficient to establish that a reasonable trier of fact would not have found you guilty of the underlying offense.
>
> You must attach the following documentation to your § 2254 motion to this court:
>
> > (1) a copy of the proposed § 2254 petition you are requesting permission to file in the district court;
> > (2) copies of all previous § 2254 petitions challenging the judgment or sentence received in any conviction for which you are currently incarcerated; all previous § 2241 petitions challenging the terms and conditions of your imprisonment.

(3) any complaint, regardless of title, that was subsequently treated by the district court as a § 2254 motion or § 2241 petition;
(4) all court opinions and orders disposing of the claims advanced in (2) above; and
(5) all magistrate judge's reports and recommendations issued in connection with the claims advanced in (2), above.

If, after due diligence and through no fault of your own, you cannot obtain the documents described above, you should submit an affidavit describing the steps you took to obtain them and explaining why you were unsuccessful. If possible, you should also identify by court, case name and case number any proceeding for which you cannot obtain the documents in (2) and (3) above.

SPECIAL PROCEDURES IN DEATH PENALTY CASES.

Because of the extraordinary nature of the interests in cases involving the death penalty and because appeals in cases in which an execution date is set may require an expedited decision or a stay of execution to prevent the appeal from becoming moot, the court has adopted special procedures governing appeals in such cases. These procedures are set out in detail in 5TH CIR. R. 8.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 06, 2014

Mr. John Doe
600 Main Street
Any Town, USA

No. 60-30033 USA v. F. Washington
USDC No. 96-CR-15

Dear Mr. Doe,

We have docketed the appeal as shown above, and ask you to use the case number above in future inquiries.

Filings in this court are governed strictly by the Federal Rules of **Appellate** Procedure. We cannot accept motions submitted under the Federal Rules of **Civil** Procedure. We can address only those documents the court directs you to file, or proper motions filed in support of the appeal. See FED R. APP. P. and 5TH CIR. R. 27 for guidance. Documents not authorized by these rules will not be acknowledged or acted upon.

To receive the record for preparing your brief, counsel, including CJA attorneys, must provide the appropriate district court with a United Parcel Service, or similar commercial delivery service, account number. If you wish to receive exhibits, you must specifically request them. The district court will charge your account for shipping you the record on appeal. In the alternative, you may contact a local courier or attorney support services firm to pick up the record and ship it to you. CJA counsel may add these shipping fees to their vouchers.

You must pay to the **district court clerk** the $505.00 court of appeals filing and docketing fee and notify us of the payment within 15 days from the date of this letter. Failure to pay the fee within 15 days will result in the dismissal of your appeal, see 5TH CIR. R. 42.3.

All counsel who desire to appear in this case must electronically file a "Form for Appearance of Counsel" naming all parties represented within 14 days from this date, see FED R. APP. P. 12(b) and 5TH CIR. R. 12. This form is available on our website www.ca5.uscourts.gov. Failure to electronically file this form will result in removing your name from our docket. Pro se parties are not required to file appearance forms.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Deputy Clerk

cc:

DKT 1

United States Court of Appeals

DK6

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

June 06, 2014

Mr. John Doe
600 Main Street
Any Town, USA

No. 60-30033 USA v. F. Washington
USDC No. 96-CR-15

Dear Mr. Doe,

We have docketed your appeal. You should use the number listed above on all future correspondence.

You should carefully read the following sections

Filings in this court are governed strictly by the Federal Rules of Appellate Procedure, **NOT** the Federal Rules of Civil Procedure. We cannot accept motions submitted under the Federal Rules of Civil Procedure. We can address only those documents the court directs you to file, or motion filed under the FED R. APP. P. in support of the appeal. See FED R. APP. P. and 5TH CIR. R. 27 for guidance. Documents not authorized by these rules will not be acknowledged or acted upon.

Appellant's Brief Required by FED R. APP. P. and 5TH CIR. R. 28

The court usually does not appoint counsel to represent pro se parties in this type of case, although it may do so when there are exceptional circumstances. If the court thinks you are entitled to an appointed lawyer, it will appoint one. You do not need to file a separate motion asking for appointment of counsel. If you want the court to order any other relief, you should include a motion with the brief that you file in this Court.

The court knows you are not a lawyer and does not hold you to the same standards it requires of attorneys in stating your case. The court reviews the case on the record of the district court proceedings and on the briefs filed by the parties. Therefore, your brief should explain as briefly and plainly as possible the facts of the case, the issues of law that you think entitle you to relief, and the relief you are asking. To assist you in writing your brief please see below.

A. FORMAT AND NUMBER OF COPIES:

1. Use 8 1/2 x 11 inch light colored paper, preferably white;

2. Make a 1 inch margin on the top, bottom and both sides of the pages;

3. Securely fasten the brief so pages do not fall out, and so the pages can be read when the brief is opened;

4. Send us **4 copies of your brief.**

B. CONTENTS:

Your brief should have the following:

1. a STATEMENT OF THE LEGAL ISSUES you think the court should decide;

2. a STATEMENT OF THE CASE explaining what happened in the district court and when, and how the district court ruled;

3. a STATEMENT OF FACTS starting at the beginning and telling in order what happened according to the evidence;

4. an ARGUMENT telling why the court should decide for you. Give legal authority which supports your side of the case. For each legal issue, try to include the "standard of review" this court should use in deciding your case. The "standard of review" may be included either under a separate heading before the discussion of each issue or in the discussion of the issue;

5. a CONCLUSION giving a brief statement of the relief you want and why.

6. a CERTIFICATE OF COMPLIANCE for typewritten or computer prepared briefs if the brief is more than 30 pages long (not counting any statement regarding oral argument, and the certificates of service and compliance). Use the computer's word count feature to count the words. **Do not count the words yourself.** You may use the "text line" method for typewritten briefs to show you meet the type-volume limits. Typewritten briefs with proper margins, (described above), typeface with at least 10 1/2 characters per inch, and double spacing should have no more than 26 lines of text per page.

C. CERTIFICATE OF SERVICE.

Your brief MUST CONTAIN a certificate of service showing the date you mailed a copy of your brief to the other parties in the case, and giving the name and complete mailing address (street number or post office box number, city and state) of the person you sent your brief to.

D. PENALTIES.

If you do not mail 4 copies of your brief to us within 40 days of the date shown on this letter, or properly request an extension of time, we will dismiss your case without

further notice, see 5TH CIR. R. 42.3. Note, 5TH CIR. R. 31 and the Internal Operating Procedures following rules 27 and 31 provides the general sense of the court on the disposition of a variety of matters, which includes that except in the most extraordinary circumstances, the maximum extension for filing briefs is 30 days in criminal cases and 40 days in civil cases.

Appellee's Brief

The appellee is allowed 30 days from the date of service of your brief to file a response. The appellee's brief may be in letter or memorandum form but must provide a statement of relevant facts, address the issues you raised and provide record and legal authority citations. 4 copies are required. If a defendant or respondent did not make an appearance previously, an appellee's brief is not required unless we notify the appellee to file a brief. We will send a copy of the notice to you. If the district court denied **In Forma Pauperis** status and certified that the appeal is not taken in good faith, the appellee does not need to file a brief, unless the court notifies the appellee to do so. We will send you a copy of the notice.

Important notice regarding citations to the record on appeal to comply with the recent amendment to 5TH CIR. R. 28.2.2.

Parties are directed to use the new ROA citation format in 5TH CIR. R. 28.2.2 **only** for electronic records on appeal with pagination that includes the case number followed by a page number, in the format "YY-NNNNN.###". In single record cases, the party will use the shorthand "ROA.###" to identify the page of the record referenced. For multi-record cases, the parties will have to identify which record is cited by using the entire format (for example, ROA.YY-NNNNN.###).

Parties may not use the new citation formats for USCA5 paginated records. For those records, parties must cite to the record using the USCA5 volume and or page number.

In cases with both pagination formats, parties must use the citation format corresponding to the type of record cited.

Explanation: In 2013, the court adopted the Electronic Record on Appeal (EROA) as the official record on appeal for all cases in which the district court created the record on appeal on or after 4 August 2013. Records on appeal created on or after that date are paginated using the format YY-NNNNN.###. The records on appeal in some cases contain both new and old pagination formats, requiring us to adopt the procedures above until fully transitioned to the EROA.

The recent amendment to 5TH CIR. R. 28.2.2 was adopted to permit a court developed computer program to automatically insert hyperlinks into briefs and other documents citing new EROA records using the new pagination format. This program provides judges a ready link to pages in the EROA cited by parties. The court intended the new citation format for use **only** with records

using the new EROA pagination format, but the Clerk's Office failed to explain this limitation in earlier announcements.

Reply Brief

You have 14 days from the date the appellee's brief is filed to file a reply brief. However, you are not required to file a reply brief.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Deputy Clerk

cc:

DKT 6

Case No. 60-30033

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FERD WASHINGTON,

Defendant - Appellant

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

December 15, 2016

No. 60-30033 USA v. Washington
USDC No. 96-CR-15

Dear

We have docketed the appeal as shown above, and ask you to use the case number for future inquires. You can obtain a copy of our briefing checklist on the Fifth Circuit's website "http://www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/rules/brchecklist".

Briefing Notice. The record is complete for purposes of the appeal, see FED R. APP. P. 12. Appellant's brief and record excerpts are due within 40 days of the date shown above, see FED R. APP. P. & 5TH CIR. R. 28, 30, and 31. See also 5TH CIR. R. 30.1.2 and 5TH CIR. R. 31.1 to determine if you have to file electronic copies of the brief and record excerpts. [If required, **electronic copies MUST be in Portable Document Format (PDF).**]

Policy on Extensions. The court grants extensions sparingly and under the criteria of 5TH CIR. R. 31.4. If you request an extension, you must contact opposing counsel and tell us if the extension is opposed or not. 5TH CIR. R. 31.4 and the Internal Operating Procedures following rules 27 and 31 state that except in the most extraordinary circumstances, the maximum extension for filing briefs is 30 days in criminal cases and 40 days in civil cases.

Reply Brief. We do not send cases to the court until all briefs are filed, except in criminal appeals. Reply briefs must be filed within the 14 day period of FED R. APP. P. 31(a)(1). See 5TH CIR. R. 31.1 to determine if you have to file electronic copies of the brief, and the format.

Brief Covers. THE CASE CAPTION(S) ON BRIEF COVERS MUST BE EXACTLY THE SAME AS THE CASE CAPTION(S) ON THE ENCLOSED TITLE CAPTION SHEET(S). **YOU WILL HAVE TO CORRECT ANY MODIFICATIONS YOU MAKE TO THE CAPTION(S) BEFORE WE SUBMIT YOUR BRIEF TO THE COURT.**

Dismissal of Appeals. The clerk may dismiss appeals **without notice** if you do not file a brief on time, or otherwise fail to comply with the rules.

Appearance Form. If you have not electronically filed a "Form for Appearance of Counsel," you must do so within 14 days of this date.

You must name each party you represent, See FED R. APP. P. and 5TH CIR. R. 12. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov.

You may elect to pursue summary affirmance/disposition if all issues in the case are foreclosed by 5th Circuit precedent. If you elect this procedure, you must file a motion for summary affirmance contemporaneously with an informal letter brief in support of the motion, not exceeding 10 pages. The U.S. Attorney may join in the motion, if unopposed, or file a response letter not exceeding 10 pages. Record excerpts are not required.

Attention Attorneys: Direct access to the electronic record on appeal (EROA) for pending appeals will be enabled by the U S District Court on a per case basis. Counsel can expect to receive notice once access to the EROA is available. Counsel must be approved for electronic filing and must be listed in the case as attorney of record before access will be authorized. Instructions for accessing and downloading the EROA can be found on our website at www.ca5.uscourts.gov/attorneys/attorney-forms/eroa_downloads. Additionally, a link to the instructions will be included in the notice you receive from the district court.

Sealed documents, except for the presentence investigation report in criminal appeals, will not be included in the EROA. Access to sealed documents will continue to be provided by the district court only upon the filing and granting of a motion to view same in this court.

New Guidance Regarding Citations in Pleadings.

The court has approved an amendment to 5TH CIR. R. 28.2.2 granting the Clerk the authority to create a standard format for citation to the electronic record on appeal. You must use the new citation format when citing to the electronic record on appeal.

A. In single record cases, use the short citation form, "ROA" followed by a period, followed by the page number. For example, "ROA.123."

B. For multiple record cases, cite "ROA" followed by a period, followed by the Fifth Circuit appellate case number of the record referenced, followed by a period, followed by the page of the record. For example, "ROA.13-12345.123."

Important notice regarding citations to the record on appeal to comply with the recent amendment to 5TH CIR. R. 28.2.2.

Parties are directed to use the new ROA citation format in 5TH CIR. R. 28.2.2 **only** for electronic records on appeal with pagination that includes the case number followed by a page number, in the format "YY-NNNNN.###". In single record cases, the party will use the shorthand "ROA.###" to identify the page of the record referenced. For multi-record cases, the parties will have to identify which record is cited by using the entire format (for example, ROA.YY-NNNNN.###).

Parties may not use the new citation formats for USCA5 paginated records. For those records, parties must cite to the record using the USCA5 volume and or page number.

In cases with both pagination formats, parties must use the citation format corresponding to the type of record cited.

Explanation: In 2013, the court adopted the Electronic Record on Appeal (EROA) as the official record on appeal for all cases in which the district court created the record on appeal on or after 4 August 2013. Records on appeal created on or after that date are paginated using the format YY-NNNNN.###. The records on appeal in some cases contain both new and old pagination formats, requiring us to adopt the procedures above until fully transitioned to the EROA.

The recent amendment to 5TH CIR. R. 28.2.2 was adopted to permit a court developed computer program to automatically insert hyperlinks into briefs and other documents citing new EROA records using the new pagination format. This program provides judges a ready link to pages in the EROA cited by parties.

Important notice: 5TH CIR. R. 30.1.7(c) provides that the electronic PDF version of the record excerpts should contain pages representing the "tabs" identified in the index of the document. However, we remind attorneys that the actual paper copies of record excerpts filed with the court must contain actual physical tabs that extend beyond the edge of the document, to facilitate easy identification and review of tabbed documents.

You will find the electronic record on appeal (EROA) under your individual case number, but please use case number **15-98007,** captioned **In Re: MDL 2179 Deepwater Horizon,** to view the agreed designated parts of the record.

Briefs in Anders Cases. If you are planning on filing an Anders motion and supporting brief, please refer to the following checklist on the Fifth Circuit's website: "www.ca5.uscourts.gov/clerk/AndersChecklist.pdf". **IMPORTANT: ALSO, refer to the Anders Guidelines on the Fifth Circuit's website: "www.ca5.uscourts.gov/docs/default-source/forms-and-documents---clerks-office/forms-and-samples/andersguidelines.pdf", regarding the recently updated minimum communication verification requirement.**

Pro se litigants may request the record from the district court to prepare their brief. Those proceeding in forma pauperis may receive the record without payment of shipping costs. If you wish to receive exhibits, you must specifically request them.

Once you obtain the record, you should check it within 14 days of receipt for any missing or incomplete items. If you need to request a supplemental record or order transcripts, do so promptly. The court will not grant extensions of time to file your brief because you did not timely check the record.

Pro se prisoners may request the record from the district court to prepare their briefs. If requested, the record will be sent to the warden.

If your appeal is from the denial of a motion pursuant to either 28 U.S.C. § 2254 or § 2255 in which the district court granted you a certificate of appealability (COA) as to some but not all of the issues presented and you intend to apply to this court for an expanded COA as to the issues denied, you must submit such a motion by the time you file your principal brief.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
, Deputy Clerk
504-310-

Enclosure(s)

cc w/encl:

P.S. When filing briefs or record excerpts under seal, you must also file a motion for leave to seal briefs/excerpts, before or at the time of filing your brief/excerpts.

P.S. The notice originally issued on is being reissued due to .

P.S. As a prisoner filing a pro se brief in a direct criminal appeal, your brief should have the proper colored covers (blue for appellant; red for appellee, etc.) whenever possible. If you cannot obtain colored covers, you should send us a motion to file your brief in present form AT THE SAME TIME you send in your brief.

P.S. The appellant's record excerpts must contain a copy of the notice of appeal and cross appeal(s) on file.

P.S. In addition to the briefing notice enclosed, the court directs the parties to brief the following:

Case No. 60-30033

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

FERD WASHINGTON,

Defendant - Appellant

United States Court of Appeals

BR5

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

December 15, 2016

No. 60-30033 USA v. Washington
USDC No. 96-CR-15

Dear

The following pertains to your brief electronically filed on 12/15/16.

The following pertains to the paper copies of your brief filed on 12/15/16.

The following pertains to your brief filed in paper form on 12/15/16.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Failure to timely provide the appropriate number of copies may result in the dismissal of your appeal pursuant to 5TH CIR. R. 42.3.

You must provide proof of service within the next 14 days. See FED R. APP. P. 25(d) and 5TH CIR. R. 31.1.

Your proof of service must include the names of the persons served; the mail or electronic addresses, facsimile numbers, or physical delivery addresses, as appropriate for the method of service; and the date and manner of service. Please prepare a new proof of service - do not just re-date your earlier proof of service. Attach a cover letter showing service of the corrections. You must make the changes within the next 14 days.

We filed your brief but you must make the following correction(s) within the next 14 days. Opposing counsel's briefing time continues to run.

You must file electronically the Record Excerpts as required by FED R. APP. P. 30, 5TH CIR. R. 30.1 and FED R. APP. P. 25(a)(2)(D).

We filed your brief. However, you must make the following corrections within the next 14 days. You may:

1. Send someone to this office to correct the briefs;

2. Send someone to pick up the briefs, correct and return them;

3. Send a self-addressed stamped envelope and we will return your briefs, (we will tell you the postage cost on request). You must then mail the corrected briefs to this office;

4. Send corrected briefs and we will recycle those on file.

Opposing counsel's briefing time continues to run.

You need to correct or add:

The paper copies of your brief require the following corrections within the next 5 days. You may:

1. Send someone to this office to correct the briefs;

2. Send someone to pick up the briefs, correct and return them;

3. Send a self-addressed stamped envelope and we will return your briefs, (we will tell you the postage cost on request). You must then mail the corrected briefs to this office;

4. Send corrected briefs and we will recycle those on file.

Opposing counsel's briefing time continues to run.

You need to correct or add:

Your brief has the wrong color cover. The color should be red, see FED R. APP. P. 32(a)(2).

Certificate of interested persons, see 5TH CIR. R. 28.2.1.

Statement regarding oral argument, see 5TH CIR. R. 28.2.3.

Table of contents is required, see FED R. APP. P. 28(a)(2).

Table of authorities, see FED R. APP. P. 28(a)(3).

Statement of jurisdiction, see FED R. APP. P. 28(a)(4).

Statement of the issues, see FED R. APP. P. 28(a)(5).

A concise statement of the case setting out the facts relevant to the issues submitted for review, see FED R. APP. P. 28(a)(6). The facts should be incorporated within, or as a subsection of, the 'Statement of the Case.' A separate 'Statement of Facts' is not acceptable.

Argument, see FED R. APP. P. 28(a)(8) and 5TH CIR. R. (28.3)(i).

Short conclusion, see FED R. APP. P. 28(a)(9).

Signature, see FED R. APP. P. 32(d).

Certificate of compliance if required by FED R. APP. P. 32(g)(1) and 5TH CIR. R. 32.3. (See FED R. APP. P. 28(a)(10)).

An electronic copy of the brief in Portable Document Format (PDF) file as required by 5TH CIR. R. 31.1.

Summary of argument, see FED R. APP. P. 28(a)(7).

Standard of review, see FED R. APP. P. 28(a)(8)(B).

Sufficient number of paper copies to meet the seven (7) copy requirement, and, if applicable, a 3.5 inch diskette with an electronic copy of the brief, see 5TH CIR. R. R. 31.1. You must provide 5 additional copies.

Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). (See attachment)

We have not received 4 copies of the Record Excerpts required by 5TH CIR. R. 30.1.2.

An electronic copy of the Record Excerpts in Portable Document Format (PDF) file as required by 5TH CIR. R. 30.1.2.

Your brief's binding does not conform with FED R. APP. P. 32(a)(3). Briefs must be bound to permit them to lie reasonably flat when opened.

Durable covers are required.

You must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED R. APP. P. 12(b) and 5TH CIR. R. 12 & 46.3. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, the brief will be stricken and returned unfiled.

Your brief omits the name of John Doe. We assume they are no longer involved in the case, and we have removed the name from the docket. Upon request we will reinstate it.

Record References: Every assertion in briefs regarding matter in the record must be supported by a reference to the page number of the original record, whether in paper or electronic form, where the matter is found, using the record citation form as directed by the Clerk of Court. Although your brief contains citations to the record, they are not in proper form. (See 5TH CIR. R. 28.2.2)

The certificate of service is insufficient because it lacks a statement confirming a reasonable attempt to communicate, in a manner and language understood by the defendant: (i) that you fully examined the record and reviewed relevant law, and there are no meritorious issues for appeal; (ii) that you have moved to withdraw, (iii) if granted, the motion will result in the dismissal of the appeal; but (iv) the defendant has the right to file a response opposing your motion within 30 days, in English. (See the Anders Checklist and Practitioner's Guide available on our website). **The Certificate of Service must appear in the exact format referenced above.**

Once you have prepared your sufficient brief, you must select from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary.

Important notice regarding citations to the record on appeal to comply with the recent amendment to 5TH CIR. R. 28.2.2.

Parties are directed to use the new ROA citation format in 5TH CIR. R. 28.2.2 **only** for electronic records on appeal with pagination that includes the case number followed by a page number, in the format "YY-NNNNN.###". In single record cases, the party will use the shorthand "ROA.###" to identify the page of the record referenced. For multi-record cases, the parties will have to identify which record is cited by using the entire format (for example, ROA.YY-NNNNN.###).

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LYLE W. CAYCE, Clerk

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504-310-

cc: