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WHEN REASONABLE JURISTS COULD DISAGREE: THE FIFTH CIRCUIT'S MISAPPLICATION OF THE FRIVOLOUSNESS STANDARD

Brent E. Newton*

I. INTRODUCTION

With increasing frequency during the past decade, the United States Court of Appeals for the Fifth Circuit has dismissed criminal defendants' direct appeals as "frivolous" under Fifth Circuit Local Rule 42.2.¹ Likewise, in federal habeas corpus cases, the Fifth Circuit increasingly has denied prisoners a certificate of probable cause ("CPC") (recently renamed a "certificate of appealability" ("COA")),² a ruling that is tantamount to a finding that a habeas appeal is frivolous or borders on frivolousness.³

In cases where the Fifth Circuit deems a criminal law issue to be frivolous, the initial effect of such a finding is that the

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1. See e.g. *U.S. v. Vasquez-Bernal*, No. 98-40553 (5th Cir. Aug. 5, 1999); *U.S. v. Salazar-Olivares*, 179 F.3d 228 (5th Cir. 1999); *U.S. v. Morales-Ortiz*, No. 98-50179 (5th Cir. Oct. 21, 1998); *U.S. v. Arizmende-Matias*, No. 98-50126 (5th Cir. Aug. 18, 1998); *U.S. v. Hoffman*, 96-20836 (5th Cir. June 17, 1997); *U.S. v. Platero-Umanzor*, No. 96-10563 (5th Cir. Oct. 23, 1996); *U.S. v. Burlison*, 22 F.3d 93 (5th Cir. 1994).

2. See 28 U.S.C. § 2253 (1994); see e.g. *Lamb v. Johnson*, 179 F.3d 352 (5th Cir. 1999); *Crane v. Johnson*, 178 F.3d 309 (5th Cir. 1999); *Green v. Johnson*, 116 F.3d 1115 (5th Cir. 1997).

3. See *Barefoot v. Estelle*, 463 U.S. 880, 892-94 (1983), a federal habeas corpus case, in which the Supreme Court stated that "[t]he primary means of separating meritorious from frivolous appeals should be the decision to grant or withhold a certificate of probable cause" and that "the issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous." *But see id.* at 892-93 (noting the view "that 'probable cause' requires something more than the absence of frivolity") (citation omitted).

prisoner's appeal is summarily dismissed without oral argument and without the more careful judicial consideration received by an appeal on the Fifth Circuit's oral argument calendar. The systematic impact of this trend is a chilling effect on appellate advocacy in criminal cases that results from increased threats of sanctions by the court,⁴ and, in at least one recent case, the actual imposition of monetary sanctions on court-appointed appellate counsel.⁵

What is most disturbing about the Fifth Circuit's increasing willingness to label direct and habeas appeals by prisoners as frivolous is the court's chronic misapplication of the well-established standard for determining what is "frivolous." Simply put, the Fifth Circuit has repeatedly deemed an issue frivolous when conflicting decisions of other courts have deemed the very same issue not only nonfrivolous but actually meritorious. As discussed below, under the Supreme Court's frivolousness standard, an issue is necessarily nonfrivolous when decisions of other courts directly support a defendant's claim.

II. THE FRIVOLOUSNESS STANDARD AS DEFINED BY THE SUPREME COURT

In numerous criminal and civil cases during the last four decades, the United States Supreme Court has addressed the issue of when an appeal is "frivolous."⁶ In a series of decisions in the late 1950s and early 1960s, the Court held that a criminal defendant was permitted to pursue an appeal—and, if found indigent, to receive the assistance of appointed counsel and to proceed in forma pauperis—so long as his case presented at least one issue that was "not frivolous."⁷ In these cases, the Court did not offer any standard governing the determination of whether

4. See e.g. *Salazar-Olivares*, 179 F.3d at 230 (threatening appellant's counsel that future appeals deemed frivolous could result in sanctions imposed by the court); *Burleson*, 22 F.3d at 95 (same).

5. See *U.S. v. Gaitan*, 171 F.3d 222, 224 (5th Cir. 1999).

6. In *Neitzke v. Williams*, 490 U.S. 319, 325 (1989), the Court held that the term "frivolous" has the same meaning in civil and criminal contexts.

7. See e.g. *Johnson v. U.S.*, 352 U.S. 565, 566 (1957) (per curiam); *Farley v. U.S.*, 354 U.S. 521, 522-23 (1957) (per curiam); *Ellis v. U.S.*, 356 U.S. 674, 675 (1958) (per curiam); *Coppedge v. U.S.*, 369 U.S. 438, 446-47 (1962).

an issue is “frivolous.”

In *Anders v. California*,⁸ the Court set forth the procedures governing direct criminal appeals when counsel for the defendant determines that an appeal is frivolous and, thus, wishes to withdraw. During the course of setting forth the proper procedure in such a case, the Court stated that a criminal defendant’s appeal is frivolous if its “legal points [are not] arguable on their merits.”⁹ The Court did not otherwise define the term “frivolous.”

In *Barefoot v. Estelle*,¹⁰ a federal habeas corpus appeal, the Court did offer such a definition. It held that a claim for relief is “legally frivolous” only if it “is squarely foreclosed by statute, rule, or authoritative court decision, or is lacking any factual basis in the record of the case.”¹¹ The Court further stated that an issue is nonfrivolous if that issue is “debatable among jurists of reason” or, put another way, if “a court *could* resolve the issue[] [in a different manner].”¹² The *Barefoot* Court’s use of the term “authoritative court decision” obviously did not refer to a circuit court’s negative resolution of a particular issue in a prior case, but, instead, referred to a prior, adverse decision of the Supreme Court itself.

In two subsequent cases, a civil rights appeal and a habeas corpus appeal, the Supreme Court expressly held that an issue raised by an appellant on appeal to a circuit court is, by definition, nonfrivolous if it finds direct support in decisions of other lower courts and the issue has not yet been addressed by the Supreme Court, even if circuit precedent squarely forecloses the particular claim. In the habeas case, *Lozada v. Deeds*,¹³ the Court reversed the Ninth Circuit’s summary decision to deny a certificate of probable cause. The Supreme Court found that, at the time that the Ninth Circuit had denied CPC, the issue raised by the petitioner found direct support in an earlier, contrary decision of another circuit, and, therefore, the issue was

8. 386 U.S. 738 (1967).

9. *Id.* at 744.

10. 463 U.S. 880 (1983).

11. *Id.* at 894.

12. *Id.* at 893 n. 4 (brackets and italics in original; citation omitted).

13. 498 U.S. 430, 432 (1991) (per curiam).

“debatable among jurists of reason.”¹⁴ Clearly, in holding that a CPC should have been granted, the Supreme Court deemed the issue nonfrivolous in view of the split among the lower courts on the issue raised by *Lozada*.¹⁵

In *McKnight v. General Motors Corp.*,¹⁶ the Court unanimously disagreed with the Seventh Circuit’s conclusion that a civil rights litigant’s contention in 1992 that section 101 of the Civil Rights Act of 1991 applied retroactively was “frivolous.” The appellee in that case had moved to dismiss the appeal as frivolous in light of prior Seventh Circuit precedent that held that the 1991 Act was not retroactive. The Court’s reasoning in reversing the Seventh Circuit was as follows:

The Court of Appeals correctly rejected petitioner’s argument that [the 1991 Act] applies retroactively. [citing *Landgraf v. USI Film Products*, 511 U.S. 244 (1994), which was decided after McKnight’s litigation in the courts below]. However, if the only basis for the order [dismissing the appeal as frivolous] was that his retroactivity argument was foreclosed by Circuit precedent, the order was not proper. As petitioner noted in his memorandum opposing dismissal and sanctions, this Court had not yet ruled on the application of [the 1991 Act] to pending cases [and did not do so until 1994]. Filing an appeal was the only way petitioner could preserve the issue [for review by the Supreme Court]. Although, as of September 30, 1992 [i.e., the time of the appeal to the Seventh Circuit] there was no circuit conflict on the retroactivity question, that question had divided the District Courts and its answer was not so clear as to make petitioner’s position frivolous.¹⁷

Thus, a line of Supreme Court cases culminating in *McKnight* firmly stands for the proposition that an appeal is not frivolous if the appellant raises an issue that finds direct support in a decision of another court. In such a case, the issue is nonfrivolous because it could be (indeed, it was) decided differently by another court.¹⁸ Put another way, if the lower

14. See *id.* at 432 (quoting *Barefoot*, 463 U.S. at 893 n. 4).

15. See *Barefoot*, 463 U.S. at 894 (“[T]he issuance of a certificate of probable cause generally should indicate that an appeal is not legally frivolous.”).

16. 511 U.S. 659, 659-60 (1994) (per curiam).

17. *Id.*

18. See *Barefoot*, 463 U.S. at 893 n. 4. The Supreme Court’s frivolousness standard is

courts are divided on a particular issue, it can never be characterized as an “indisputably meritless legal theory.”¹⁹

III. THE FIFTH CIRCUIT’S REPEATED MISAPPLICATION OF THE SUPREME COURT’S FRIVOLOUSNESS STANDARD

In recent years, the Fifth Circuit has repeatedly failed to recognize that a claim raised by a prisoner is automatically nonfrivolous on direct appeal or automatically worthy of a CPC or COA on habeas corpus review if the claim finds direct support in a decision of another court.

For instance, in *United States v. Platero-Umanzor*,²⁰ a defendant convicted of illegal reentry into the United States after a deportation²¹ contended that his prior “aggravated felony” conviction was an element of the offense that must be alleged in the indictment rather than a mere sentencing enhancement.²² The court found the defendant’s claim to be “frivolous” and summarily dismissed it under Fifth Circuit Rule 42.2.²³ In characterizing the issue as frivolous, the court cited a prior Fifth Circuit decision that had rejected an identical claim on the

in accord with the well-established standard in civil cases governing whether a litigant is subject to sanctions under Federal Rule of Appellate Procedure 38 or Federal Rule of Civil Procedure 11 for making a frivolous or patently unreasonable legal argument. In such cases, the Fifth Circuit has held that a party or party’s attorney is not subject to sanctions unless a claim or defense asserted is not “arguably supported by existing law, or any reasonably based suggestion for its extension, modification, or reversal.” *Coghlan v. Starkey*, 852 F.2d 806, 810-11 (5th Cir. 1988) (citation and internal question omitted); *Smith Intl., Inc. v. Texas Com. Bank*, 844 F.2d 1193, 1199-1200 (5th Cir. 1988). Thus, if a litigant relies on a decision of a court other than the Fifth Circuit in seeking to extend, modify, or even reverse existing Fifth Circuit precedent, the litigant is not subject to sanctions under rules 11 or 38.

19. *Neitzke v. Williams*, 490 U.S. 319, 327 (1989) (characterizing a “frivolous” claim as relying on an “indisputably meritless legal theory”). This is not to say that the only way for a defendant to establish that an issue is nonfrivolous is to rely on a case exactly on point from some other court. Case law offering analogous support to the defendant’s issue could also be sufficient to make the issue “arguable on [its] merits,” *Anders v. California*, 386 U.S. 738, 744 (1967), “debatable among jurists of reason,” or show that another court “could decide the issue in a different manner.” *Barefoot*, 463 U.S. at 893 n. 4.

20. No. 96-10563 (5th Cir. Oct. 23, 1996).

21. See 8 U.S.C. § 1326(2) (1994).

22. See 8 U.S.C. § 1326(b) (1994) (defendant with a prior aggravated felony conviction subject to enhanced penalties).

23. See *U.S. v. Platero-Umanzor*, No. 96-10563, slip op. at 1-2 (5th Cir. Oct. 23, 1996).

merits.²⁴ However, in that prior case, Judge Carolyn Dineen King dissented and contended that a defendant's prior aggravated felony conviction was an element of the offense.²⁵ Judge King's dissent in *Vasquez-Olvera* noted that decisions by other courts, including the Ninth Circuit, had held that a defendant's prior aggravated felony conviction was an element of the offense and not simply a sentencing enhancement.²⁶

Clearly, at the time the Fifth Circuit decided *Platero-Umanzor*, the split among the lower courts and the absence of an authoritative decision by the Supreme Court rendered the issue nonfrivolous.²⁷ Indeed, a year later the Supreme Court granted certiorari in another Fifth Circuit case raising the same issue.²⁸ Unquestionably, the Court would not have granted certiorari if the issue were frivolous. Although the Court ultimately held that a defendant's prior aggravated felony conviction was a sentencing enhancement,²⁹ four Justices dissented and contended that it was an element of the offense.³⁰ Such an issue, which sharply divided jurists in both the lower court and the Supreme Court itself, was clearly nonfrivolous.

In *United States v. Hoffman*,³¹ the Fifth Circuit dismissed the defendant's appeal as frivolous based on a waiver of the defendant's right to appeal contained in a plea agreement.³² However, prior to the dismissal, the defendant had explained that there were two reasons why the waiver was unenforceable and provided decisions from other courts directly supporting her specific contentions.³³ First, the defendant, who was challenging the voluntariness of her guilty plea on appeal, noted that other courts had held that a claim that a guilty plea was involuntary

24. See *id.* (citing *U.S. v. Vasquez-Olvera*, 999 F.2d 943, 945-47 (5th Cir. 1993)).

25. See *U.S. v. Vasquez-Olvera*, 999 F.2d 943, 947 (5th Cir. 1993) (King, J., dissenting).

26. *Id.* at 946 (citing *U.S. v. Gonzalez-Medina*, 976 F.2d 570, 572 (9th Cir. 1992)).

27. *Platero-Umanzor*, No. 96-10563 (5th Cir. Oct. 23, 1996).

28. See *Almendarez-Torres v. U.S.*, 520 U.S. 1154 (1998).

29. See *Almendarez-Torres v. U.S.*, 523 U.S. 224 (1998).

30. See *id.* at 1223 (Scalia, J., dissenting, joined by Stevens, Souter & Ginsburg, JJ.).

31. No. 96-20836 (5th Cir. June 17, 1997).

32. See *id.* at 1-2.

33. See Reply Brief for Appellant at 2-4, *U.S. v. Hoffman*, No. 96-20836 (5th Cir. June 17, 1997).

cannot be waived in a plea agreement.³⁴ Second, the defendant noted that the district court had informed her at sentencing that she had a right to appeal and the prosecution stood silent in response to the court's assurance. She cited decisions by other courts that held that a district court's statement at sentencing that an appeal was permitted, without any objection from the prosecution, rendered an appeal waiver void.³⁵ Although these decisions by other circuits were cited and discussed in Hoffman's pleadings on appeal, the Fifth Circuit made no reference to the contrary decisions of other courts and summarily dismissed the appeal as frivolous based on the waiver provision in the plea agreement.³⁶

In a myriad of illegal reentry cases in which a defendant has contended that his prior conviction for drug possession does not constitute an "aggravated felony" under 8 U.S.C. § 1101(a)(43) and U.S.S.G. § 2L1.2(b)(1) (which adopts the statutory definition from 8 U.S.C. § 1101(a)(43)), the Fifth Circuit has rejected the claim as frivolous after citing a prior Fifth Circuit case³⁷ that rejected the claim on the merits.³⁸ However, the claim, which is based on statutory interpretation, finds direct support in a unanimous decision of the en banc

34. See e.g. *U.S. v. Padilla-Gonzales*, 100 F.3d 965 (table), 1996 WL 622937, at *1 n.1 (9th Cir. 1996) ("Contrary to the government's assertions, Padilla-Gonzalez's waiver of appellate rights does not preclude us from reviewing the issue of whether the guilty plea was knowing and voluntary."); *Bello v. People*, 886 F. Supp. 1048, 1054 (W.D.N.Y. 1995) (same); cf. *U.S. v. Michlin*, 34 F.3d 896, 898-99 (9th Cir. 1994) (in the process of determining whether defendant's waiver of right to appeal in plea agreement was enforceable, the court addressed the threshold issue of whether the guilty plea itself was voluntary).

35. See *U.S. v. Buchanan*, 59 F.3d 914, 918 (9th Cir. 1995), in which the court held:

Litigants need to be able to trust the oral pronouncements of district court judges. Given the district court judge's clear statements at sentencing [that the defendant had a right to appeal], the defendant's assertion of understanding, and the prosecution's failure to object [based on the waiver-of-appeal provision in the plea agreement], we hold that in these circumstances, the district court's oral pronouncement controls and the plea agreement waiver is not enforceable.

See also *Everard v. U.S.*, 102 F.3d 763, 766 (6th Cir. 1996) (citing *Buchanan*, 59 F.3d at 918).

36. See *U.S. v. Hoffman*, No. 96-20836, slip op. at 1-2 (5th Cir. June 17, 1997); see also *U.S. v. Hoffman*, No. 96-20836, Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc (5th Cir. July 24, 1997).

37. See *U.S. v. Hinojosa-Lopez*, 130 F.3d 691, 693-94 (5th Cir. 1997).

38. See e.g. *U.S. v. Morales-Ortiz*, No. 98-50179 (5th Cir. Oct. 21, 1998); *U.S. v. Arizmende-Matias*, No. 98-50126 (5th Cir. Aug. 18, 1998).

Board of Immigration Appeals in *In re L-G*.³⁹ In *In re L-G*,⁴⁰ the BIA, which hears appeals from rulings of immigration judges in civil immigration cases, interpreted 8 U.S.C. § 1101(a)(43) to exclude a conviction for drug possession as an “aggravated felony.” Although the BIA consists of reasonable jurists,⁴¹ the Fifth Circuit inexplicably has deemed the unanimous en banc BIA’s interpretation of 8 U.S.C. § 1101(a)(43) to be frivolous.

In *United States v. Vasquez-Bernal*,⁴² the defendant contended that the district court violated the plain language of Federal Rule of Criminal Procedure 11(c)(1) by accepting the defendant’s guilty plea without warning him of the statutory maximum sentence he faced upon conviction. The Fifth Circuit acknowledged in an unpublished opinion that the district court violated Rule 11(c)(1) but held that the issue was frivolous because the error was deemed harmless by the court, even though the prosecution conceded that the record did not reveal that the defendant was actually aware of the statutory range of punishment at the time he entered a guilty plea.⁴³ The court reasoned that the error was harmless because there was no evidence that the defendant would have pleaded not guilty and gone to trial if he had been informed of the statutory maximum punishment before pleading.⁴⁴

The Fifth Circuit’s finding of frivolousness in *Vasquez-Bernal* was in direct conflict with prior decisions of the Ninth Circuit applying Rule 11, which have held that a district court’s failure to advise a defendant of the maximum punishment that he faces is not harmless error if the record does not show that the defendant was actually aware of the statutory range of punishment at the time that he pleaded guilty.⁴⁵ More

39. 1995 WL 582051 (BIA 1995) (en banc).

40. *Id.*

41. *Cf. Kin Sang Chow v. INS*, 12 F.3d 34, 37 (5th Cir. 1993) (affording “considerable weight and deference” to BIA’s interpretation of another immigration statute).

42. No. 98-40553 (5th Cir. Aug. 5, 1999).

43. *Id.* at 3-5.

44. *Id.* at 3-5.

45. *See U.S. v. Jaramillo-Suarez*, 857 F.2d 1368, 1372-73 (9th Cir. 1988); *accord U.S. v. Campos*, 48 F.3d 1229 (table), 1995 WL 74763, at *1 (9th Cir. 1995). Furthermore, in a prior Fifth Circuit case, which was later overruled by the en banc Fifth Circuit, the court had held that a district court’s failure to advise a defendant of the statutory range of

significantly, the Fifth Circuit's finding of frivolousness in *Vasquez-Bernal* was also in direct conflict with prior Fifth Circuit cases holding that a defendant's ignorance of the statutory maximum punishment renders his guilty plea involuntary and, thus, unconstitutional under the Due Process Clause.⁴⁶ It is well established that an involuntary guilty plea is reversible error even if the record on appeal supports the conclusion that the defendant "would have pleaded guilty anyway," i.e., notwithstanding the involuntary nature of his guilty plea.⁴⁷

The Fifth Circuit's holding in *Vasquez-Bernal* that the defendant's challenge to his guilty plea was frivolous flies in the face of such well-established binding authority. On rehearing, the court modified its opinion by deleting its finding of frivolousness. Instead, the court simply affirmed the judgment of the trial court and ordered the opinion published.⁴⁸

The Fifth Circuit has similarly erred in federal habeas corpus appeals. For instance, in *United States v. Magallon*,⁴⁹ a certificate for appealability was summarily denied in a case in which the petitioner alleged that he did not adequately waive his constitutional right to testify by merely silently acquiescing in his trial counsel's decision to rest his case without calling any witnesses. Although the petitioner had cited majority decisions of two state supreme courts and a dissenting opinion of a federal circuit judge that held that due process requires a defendant's waiver of his right to testify to be expressly on the record during a colloquy with the trial court,⁵⁰ the Fifth Circuit nevertheless denied a COA.⁵¹

punishment at a guilty plea proceeding was not amenable to harmless-error analysis and, thus, was subject to automatic reversal on appeal. See *U.S. v. Pierce*, 893 F.2d 669, 679 (5th Cir. 1990), overruled by *U.S. v. Johnson*, 1 F.3d 296 (5th Cir. 1993) (en banc).

46. See e.g. *Lewellyn v. Wainwright*, 593 F.2d 15, 17 (5th Cir. 1979).

47. See e.g. *Henderson v. Morgan*, 426 U.S. 637, 644-45 & n.12 (1976).

48. *U.S. v. Vasquez-Bernal*, 197 F.3d 169 (5th Cir. 1999).

49. No. 98-20830 (5th Cir. Mar. 23, 1999).

50. See *People v. Curtis*, 681 P.2d 504, 514 (Colo. 1984); *State v. Neuman*, 371 S.E.2d 77, 81-82 (W. Va. 1988); see also *U.S. v. Martinez*, 883 F.2d 750, 764-65 & n. 11 (9th Cir. 1989) (Reinhardt, J., dissenting), vacated on other grounds, 928 F.2d 1470 (9th Cir. 1991).

51. See *U.S. v. Magallon*, No. 98-20830, slip op. at 2 (5th Cir. Mar. 23, 1999).

In *Penry v. Johnson*,⁵² the majority of a Fifth Circuit panel denied a COA with respect to the death row inmate's argument that the jury instructions submitted in his case violated the Eighth Amendment by failing to give an adequate vehicle for jurors to consider his mitigating evidence of mental retardation and child abuse. One judge on the panel, Judge Dennis, issued a dissenting opinion that contended that the jury instructions were constitutionally invalid.⁵³ How such a divided panel of judges could deny a COA under the *Barefoot* standard defies logic.⁵⁴ In November of 2000, the Supreme Court stayed Penry's death sentence⁵⁵ and granted certiorari in his case and reversed⁵⁶—a clear indication that the issues presented in his case were not frivolous.⁵⁷

In *Turner v. Johnson*,⁵⁸ the habeas petitioner argued that the Constitution requires the prosecution's allegations of unadjudicated 'extraneous offenses offered during the capital sentencing phase to be proved beyond a reasonable doubt. The Fifth Circuit deemed this claim unworthy of a CPC—describing it as “not contain[ing] any indicia of merit”⁵⁹—notwithstanding the court's recognition in a prior case that “numerous lower courts” in other jurisdictions had taken a contrary position on that particular issue.⁶⁰

In *White v. Johnson*,⁶¹ the habeas petitioner contended that his death sentence was unconstitutional because it would

52. 215 F.3d 504 (5th Cir. 2000).

53. *Id.* at 513-14 (Dennis, J., dissenting).

54. The same bizarre result occurred in a prior Fifth Circuit capital habeas case. Over the vigorous dissent of one judge—who contended that one of the capital defendant's claims warranted habeas corpus relief—an earlier panel of the Fifth Circuit denied a death row inmate a CPC in *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987).

55. 121 S. Ct. 510 (2000).

56. *Penry v. Johnson*, 121 S. Ct. 1910 (2001).

57. In numerous other habeas corpus cases, the Fifth Circuit has denied CPC only to have the Supreme Court grant certiorari on the issue. See e.g. *Graham v. Lynaugh*, 854 F.2d 715, 716 (5th Cir. 1988), *cert. granted*, 492 U.S. 915 (1989); *Selvage v. Lynaugh*, 842 F.2d 89, 95 (5th Cir.), *cert. granted*, 493 U.S. 888 (1989); *Lowenfield v. Phelps*, 817 F.2d 285, 298 (5th Cir.) (denying CPC by a vote of 2-1), *cert. granted*, 482 U.S. 932 (1987). Unquestionably, the Supreme Court's decision to grant certiorari and address the merits of an issue necessarily means that it is anything but frivolous.

58. 106 F.3d 1178, 1188-89 (5th Cir. 1997).

59. *Id.* at 1190.

60. See *U.S. v. Mergerson*, 4 F.3d 337, 344-45 & n. 4 (5th Cir. 1993).

61. 79 F.3d 432, 437 (5th Cir. 1996).

constitute cruel and unusual punishment to execute him after he had spent nearly two decades on death row. The Fifth Circuit denied CPC on this claim even though the Supreme Court in another case recently had entered a stay of execution so that the lower courts could consider the same issue.⁶² According to the Supreme Court's well-established standard governing stays of execution, the Court would not have entered a stay of execution on the issue unless it presented "substantial grounds upon which relief might be granted" and, furthermore, that there was a "reasonable probability" that certiorari would be granted and a "significant possibility" that the issue would prove meritorious.⁶³ Nevertheless, despite this recent action by the Supreme Court on the very same issue in another case, the Fifth Circuit in *White* did not even view the issue to be worthy of a CPC.⁶⁴

In *McFarland v. Collins*,⁶⁵ the Fifth Circuit denied a CPC to an indigent habeas petitioner who had unsuccessfully contended that he had both the right to appointed counsel on habeas corpus review and the concomitant right to a temporary stay of execution in order to permit an appointed lawyer to file a meaningful habeas petition. The Fifth Circuit denied CPC on this issue even though the petitioner had cited a prior decision of the Ninth Circuit that directly supported his argument that he was entitled to appointed habeas counsel and a stay of execution.⁶⁶ The Supreme Court made it clear that the Fifth Circuit had erred in *McFarland*. Not only did the Court grant certiorari on this issue in *McFarland*'s case, the Court ultimately reversed the Fifth Circuit.

Like the numerous Fifth Circuit direct appeals discussed above, which deemed criminal defendants' appeals to be frivolous notwithstanding contrary decisions of other courts that directly supported the defendants' positions, the foregoing

62. See *Lackey v. Scott*, 514 U.S. 1093 (1995), reversing denial of stay of execution in *Lackey v. Scott*, 52 F.3d 98 (5th Cir. 1995). Two Supreme Court Justices also had described the issue as an "important[,] undecided one" that warranted a "careful study" by the lower courts. *Lackey v. Texas*, 514 U.S. 1045 (1995) (opinions of Stevens & Breyer, JJ., respecting the denial of certiorari).

63. See *Barefoot v. Estelle*, 463 U.S. 880, 895 (1983).

64. *White*, 79 F.3d at 437-40.

65. 7 F.3d 47, 48-49 (5th Cir. 1993).

66. See *Brown v. Vasquez*, 952 F.2d 1164 (9th Cir. 1991).

habeas corpus appeals demonstrate that the Fifth Circuit has repeatedly failed to comply with well-established Supreme Court authority.

IV. CONCLUSION

Without a doubt, indigent prisoners' direct appeals and habeas corpus appeals have burgeoned, occupying an increasingly larger share of the Fifth Circuit's docket.⁶⁷ However, the Supreme Court has held that the application of the frivolousness standard in defendants' "appeals from criminal convictions cannot be used as a convenient valve for reducing the pressures of work on the courts."⁶⁸

The Supreme Court has directed defense counsel to "resolve all doubts and ambiguous legal questions in favor of his or her client" in determining whether an appeal is frivolous and requires counsel to seek to withdraw under *Anders*.⁶⁹ An appellate court likewise should resolve all doubts and ambiguous legal questions in favor of a defendant in deciding whether an issue is legally frivolous. When an issue presented on appeal finds direct support in a decision of one or more other lower courts and the issue has not yet been resolved by an authoritative decision of the Supreme Court, the issue is obviously "ambiguous" and, by definition, nonfrivolous.

67. See Statement of the Honorable Carolyn Dineen King, Circuit Judge, United States Court of Appeals for the Fifth Circuit, before the Commission on Structural Alternatives for the Federal Courts of Appeals <<http://app.comm.uscourts.gov/hearings/dallas/king.htm>> (last updated Mar. 31, 1998).

68. See *Coppedge v. U.S.*, 369 U.S. 438, 450 (1962).

69. *Anders v. California*, 386 U.S. 738 (1967). See *McCoy v. Ct. App. Wis.*, 486 U.S. 429, 444 (1988).