No. 06-5306

IN THE

Supreme Court of the United States

Keith Bowles,

Petitioner,

v.

Harry Russell,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether an appellate court may sua sponte dismiss an appeal which has been filed within the time limitations authorized by a district court after granting a motion to reopen the appeal time under Rule 4(a)(6) of the Federal Rules of Appellate Procedure.

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INTEREST OF *AMICUS CURIAE*

National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia nonprofit corporation with a membership of more than 10,000 attorneys nationwide, along with eighty state and local affiliate organizations numbering 28,000 members in fifty states. NACDL was founded in 1958 to promote study and research in the field of criminal law and procedure, to disseminate and advance knowledge of the law in the area of criminal justice and practice, and to encourage the integrity, independence and expertise of defense lawyers in criminal cases in the state and federal courts. Among NACDL's objectives are to ensure that appropriate measures are taken to safeguard the rights of all persons involved in the criminal justice system and to promote the proper administration of justice.[1]

STATEMENT

The Federal Rules of Appellate Procedure permit a district court to reopen the time for a party to file an appeal for a period up to fourteen days in certain specified circumstances. In this case, it is undisputed that the district court properly reopened the time for taking an appeal and that petitioner filed a notice of appeal within the time permitted by the district court's order. It is further uncontested that the Government never objected in the district court to the amount of time the court gave petitioner to file his appeal, even though the order gave petitioner three more days than is permitted by the rule. The question in this case is whether the court of appeals was correct in holding that it lacked jurisdiction to consider petitioner's appeal because although

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[1] Pursuant to Rule 37.6, *amicus curiae* states that no counsel for a party authored any part of this brief, and no person or entity, other than the *amicus curiae*, its members, and its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record for both parties have consented to the filing of this brief.

petitioner's notice of appeal was filed in compliance with the district court's order, the district court's order was not in compliance with the Rules.

1. Federal Rule of Appellate Procedure 4 governs the time limits for filing notices of appeal. Subsection (a)(1)(A) of that rule provides that in "a civil case…the notice of appeal…must be filed with the district clerk within 30 days after the judgment or order appealed from is entered." That time limit is subject to exception under two provisions of the Rule. Subsection (a)(5) permits a party to seek from the district court an extension of time to file the notice of appeal, so long as the motion is filed no later than 30 days after the notice of appeal was due and the party shows excusable neglect or good cause. Fed. R. App. P. 4(a)(5)(A). Rule 4(a)(6) provides an additional exception:

> The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:
>
> (A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;
>
> (B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and
>
> (C) the court finds that no party would be prejudiced.

All of these provisions are codified at 28 U.S.C. § 2107.

2. Petitioner Keith Bowles was convicted in Ohio of felony-murder and sentenced to fifteen years to life in prison. *Bowles v. Russell*, 432 F.3d 668, 669 (2005). After exhausting his state appeals, petitioner filed for a writ of habeas corpus. Acting upon the recommendation of a

magistrate judge, the district court dismissed the petition and denied a certificate of appealability. *Id.* at 670. Bowles then moved for a new trial or to amend the judgment, which tolled the time for filing a notice of appeal until the motion was denied on September 9, 2003. *See id.*; Fed. R. App. P. 4(a)(4)(A). At that time, under Rule 4(a)(1), petitioner was required to file a notice of appeal by October 9, 2003. It is undisputed, however, that petitioner's counsel did not receive notice of the judgment. *Id.* Counsel finally became aware of the judgment when he checked a docket sheet on December 3, 2003. *Id.* In accordance with Rule 4(a)(6), counsel filed a timely motion to reopen the time for appeal. The motion did not request an extension of time of any particular length or specify a date upon which the notice of appeal should be due if the motion were granted. *See* Motion to Vacate and Reopen Time to Appeal.

On February 10, 2004, the district court granted petitioner's motion. 432 F.3d at 670. Under the Rule, the district court was authorized to reopen the time to appeal for up to fourteen days from the entry of the order granting the motion, which would have been February 24, 2004. However, for reasons undisclosed in the record, the court extended the deadline for an additional three days as well, ordering that petitioner was entitled to file his notice of appeal by February 27, 2004.[2]

Although the order exceeded the district court's authority under the Rule, and although all parties were served with the order, the Government did not object to the order or otherwise inform petitioner or the district court of the error. *See id.* at 671 n.1. Petitioner's counsel subsequently filed a notice of appeal on behalf of his client on February 26, 2004, within

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[2] *Cf.* Fed. R. App. P. 26(c) ("When a party is required or permitted to act within a prescribed period after a paper is served on that party, 3 calendar days are added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service.").

the time permitted by the court's order, but two days beyond the maximum extension permitted by the rules.

3. After docketing the appeal, the Sixth Circuit issued an order to show cause why the appeal should not be dismissed as untimely. *Id.* at 671. After receiving petitioner's response, a motions panel found that "[t]he appeal was timely filed as it applies to the February 10, 2004 ruling" which reopened the time for appeal. *Id.* (alteration in original). A subsequent panel then denied the certificate of appealability, a decision reversed by a different panel upon petitioner's motion for reconsideration. *Id*.

The merits panel then dismissed the appeal as untimely. The court first concluded that the failure to file a notice of appeal within the time permitted by the rules deprives a court of appeals of subject-matter jurisdiction. *Id.* at 673. Accordingly, the court held that it lacked authority to proceed with the appeal even if the notice of appeal was filed in reliance upon an order of the district court. *Id*. The court acknowledged that several decisions of this Court might "counsel a contrary" result. *Id*. The court thus recognized that in *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), this Court unanimously reversed the dismissal of an untimely appeal where the appellant filed his notice of appeal within the time permitted by a district court's erroneous order extending the appeal deadline. *See* 432 F.3d at 673-75. The Sixth Circuit likewise acknowledged that in *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam), the Court ordered that the circuit court hear an appeal filed outside the time permitted by the Rules where the trial court erroneously assured the appellant that a post-trial motion was timely filed and would thus toll the time to file the appeal. 432 F.3d at 674-75.

The court of appeals nonetheless held that the "unique circumstances" doctrine established by these decisions did not apply to this case. *Id.* at 675. The court noted that in *Thompson*, the appellant had been misled regarding the effect of a motion which, if timely filed, would *postpone* the time

for filing an appeal, whereas in this case, petitioner had been misled regarding the length of a *reopened* appeal period. *Id*. The court further distinguished the cases on the ground that the untimely filing in *Thompson* arose originally from the *party's* error, which the court later ratified, whereas the untimely filing in this case arose originally from the *court's* error. *Id.* The court concluded from this fact that the "unique circumstances" doctrine "operates to excuse neglect on the part of the litigant, not on the part of the court." *Id*. The court accordingly dismissed the appeal for lack of jurisdiction.

This Court granted certiorari on December 11, 2006.

SUMMARY OF ARGUMENT

The Sixth Circuit's decision in this case is wrong on two accounts. First, it erroneously construed the time limits for filing a notice of appeal as affecting the court's subject-matter jurisdiction to adjudicate petitioner's appeal. That error led to the second: dismissing the appeal even though it was filed within the time limits authorized by the trial judge in an order to which the Government made no objection in the district court. Both errors should be corrected by this Court and petitioner's appeal should be reinstated.

Federal Rule of Appellate Procedure 4(a), and the corresponding statutory provision 28 U.S.C. § 2107, properly understood, are not jurisdictional provisions but instead merely mandatory claim-processing rules the violation of which may be overlooked in certain circumstances. The subject-matter jurisdiction of the court of appeals is defined by 28 U.S.C. §§ 1291-1292, which establish the class of cases falling within the circuit courts' adjudicatory authority in terms of the finality of a district court's judgment and without reference to the time limits for filing a notice of appeal. Those time limitations are, instead, separately codified in 28 U.S.C. § 2107 and Federal Rule of Appellate Procedure 4(a), neither of which purport to limit the courts' jurisdiction. While the deadlines in those provisions are mandatory and

strictly enforced, they are not conditions on the jurisdiction of the courts of appeals.

Even if this Court considered the basic filing deadlines of Rule 4(a) – *e.g.*, the thirty-day limit for filing a notice of appeal or the 180-day limit for filing a motion to reopen the time for filing an appeal – to be jurisdictional, there is no reason to conclude that the separate provisions limiting the authority of the district court to grant extensions of time are also matters of jurisdictional significance. This Court has never held, for example, that the circuit courts have on obligation to review sua sponte whether the district court correctly determined that the predicate for an extension of time (*e.g.*, excusable neglect or reasonable cause) exists in every case in which an extension is granted, even if the opposing party never objected to the extension in the trial court or conceded the issue on appeal. The fourteen-day limit in Rule 4(a)(6) likewise is a nonjurisdictional restriction on the authority of the court to extend the time for filing an appeal, not a limitation on the subject-matter jurisdiction of the court of appeals.

Because the time limits of Rule 4(a) in general, and the fourteen-day limit in Rule 4(a)(6) in particular, are not jurisdictional, they are subject to excuse and forfeiture in appropriate circumstances. Although the district court clearly erred in permitting petitioner to file a notice of appeal more than fourteen days after the court issued its order, that error should not result in the dismissal of petitioner's appeal, for two related reasons.

First, this Court has recognized that dismissal is appropriate in the "unique circumstances" that arise when a party submits an untimely notice of appeal in reliance upon erroneous assurances or orders from a district court indicating that the appeal would be timely when filed. *See, e.g.*, *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam); *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962). While parties obviously have a duty to inform themselves of the requirements of the rules, it is not

unreasonable for a litigant to assume that the court will conform its orders to the requirements of the law and that taking an action permitted by court order will not result in the forfeiture of important rights, including the right of appeal. Such reliance is particularly understandable in the context of habeas litigation, where the rules are complex and the vast majority of petitioners proceed pro se. The "unique circumstances" doctrine plays an important role in balancing the judicial system's competing interests in compliance with procedural rules and ensuring the vindication of important constitutional rights.

Second, this Court has recognized that even strict claim-processing rules, like the time limits in Rule 4(a), are subject to forfeiture when a party fails to invoke them in a timely manner. *See, e.g.*, *Eberhart v. United States*, 126 S. Ct. 403, 406 (2005). In this case, the Government had notice that the time permitted by the district court's order exceeded that permitted by the rules. It nonetheless failed to object to the order in the district court, even though doing so would have permitted the trial court to remedy the error, provided petitioner notice of the defect and a chance to file a timely appeal, and avoided the difficulties with which the court of appeals ultimately was forced to struggle in this case.

In these circumstances – where the appellant relies on a deadline set in a court order to which the appellee offered no objection in the district court – the timeliness objection is forfeited and dismissal is inappropriate.

Finally, even if this Court were to decide that the Sixth Circuit was required to dismiss petitioner's appeal for lack of jurisdiction, it should nonetheless make clear that the district court retains a limited authority to issue another Rule 4(a)(6) order reopening the time to file an appeal. Nothing in the rules precludes a district court from issuing a second order reopening the time to appeal in appropriate circumstances, a practice commonly permitted when appellants fail to perfect an interlocutory appeal under the procedures established in 28 U.S.C. § 1292(b). While such orders surely should be rare,

and their issuance subject to careful review by the courts of appeals, allowing a second reopening would be entirely appropriate in the unique circumstances of cases such as this.

ARGUMENT

I. The Time Limits Established By Federal Rule Of Appellate Procedure 4(a) And 28 U.S.C. § 2107, While Stringent, Are Not Jurisdictional.

The Sixth Circuit ruled that it lacked jurisdiction to hear petitioner's appeal because although petitioner filed his notice of appeal within the time permitted by the district court's order reopening the time for appeal under Fed. R. App. P. 4(a)(6), the district court exceeded its authority under that rule. The court of appeals' conclusion was incorrect, based in part on the misconception that the time limits in Rule 4(a) restrict the subject-matter jurisdiction of the circuit courts.

A. The Time Limits For Filing A Notice Of Appeal Do Not Affect The Court Of Appeals' Subject-Matter Jurisdiction.

1. From the beginning of the American judicial system, the subject-matter jurisdiction of the federal courts has been defined in terms of the types of cases a court may hear, rather than by reference to time limitations like those imposed in Fed. R. App. P. 4(a).

Nineteenth- and early-twentieth-century treatises explained that the first "essential" of subject-matter jurisdiction was "cognizance of the *class of cases* to which the one to be adjudged belongs." George W. Rightmire, CASES AND READINGS ON THE JURISDICTION AND PROCEDURE OF FEDERAL COURTS 1 (1917) (citation omitted) (emphasis added); John Downey Works, COURTS AND THEIR JURISDICTION: A TREATISE ON THE JURISDICTION OF THE COURTS OF THE PRESENT DAY, HOW SUCH JURISDICTION IS CONFERRED, AND THE MEANS OF ACQUIRING AND LOSING IT 20 (1894) (same). Or, as put by another treatise writer, "the abstract question of jurisdiction is whether the cause belongs

to the class named." Timothy Brown, COMMENTARIES ON THE JURISDICTION OF COURTS 6 (1891). This definition of subject-matter jurisdiction found its roots in the historical division of jurisdiction among the various courts of England. The early English judicial system was characterized by a proliferation of courts, each with distinct boundaries of authority. *See generally* Edward Coke, THE FOURTH PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; CONCERNING THE JURISDICTION OF COURTS (1648, ed. 1817). Those boundaries were drawn according to the nature of the claim and the subject of the litigation – quite literally, the "subject-matter" of the suit. For example, the Court of the Admiralty had jurisdiction over causes of action arising on the open seas, *id.* at 134, cases involving the misuse of heraldic arms were brought in the Court of Chivalry, *id.* at 123-29, and the Ecclesiastical Courts governed cases involving spiritual matters, *id.* at 321.

The tradition of defining courts' jurisdiction in terms of the classes of cases they were empowered to hear continued in the American courts, as illustrated by the division of law and equity courts in many early states, and by Article III of the federal constitution, which defined the judicial power of the United States by reference to the subject-matter of the litigation (*e.g.*, federal question or maritime jurisdiction) or the identity of the parties (*e.g.*, diversity jurisdiction). *See* U.S. Const. Art. III, § 2.

Following this pattern, Congress has long defined the subject-matter jurisdiction of the district court in terms of the subject-matter of the litigation or the identity of the parties. *See* 28 U.S.C. § 1331 (providing that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"); *id.* § 1332 (establishing diversity jurisdiction). If the case is of the type described in Section 1331 or 1332, the district court has jurisdiction over the matter even if the plaintiff fails, for example, to bring the suit within the time limits established in

a statute of limitations. *See Day v. McDonough*, 126 S. Ct. 1675, 1681 (2006).

In the same way, the subject-matter jurisdiction of the federal circuit courts has always been defined by statute through reference to the class of cases to be reviewed – specifically, final judgments of the district courts and certain interlocutory orders – and not in terms of the timeliness of the notice of appeal. Thus, the statute creating the federal appellate courts in 1891 explicitly provided that "the circuit courts of appeals established by this act shall exercise *appellate jurisdiction* to review by appeal or by writ of error *final decision* in the district court…in all cases other than those provided [direct review in the Supreme Court]." Act of Mar. 3, 1891, ch. 517, § 6, 26 Stat. 826, 828 (emphasis added). That basic definition of appellate jurisdiction has changed little since that time. In its present form, 28 U.S.C. § 1291 continues to provide that "[t]he courts of appeals...*shall have jurisdiction* of appeals from all *final decisions* of the district courts of the United States" (emphasis added).[3]

The rules for processing appeals falling within the defined jurisdiction of the courts of appeals have always been separately codified without any reference to jurisdiction. Thus, in the original 1891 Act, the time for taking an appeal was defined in Section 11, which made no mention of jurisdiction (which was expressly defined in Section 6). *See* § 11, 26 Stat. at 829. Likewise today, the time for filing a notice of appeal is set forth in 28 U.S.C. § 2107 and reflected in Fed. R. App. P. 4(a), neither of which mentions jurisdiction or refers to the expressly jurisdictional provisions of 28 U.S.C. §§ 1291-1292.

2. Nonetheless, in recent times, the word "jurisdiction" has become "a word of many, too many, meanings." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 90 (1998) (citation omitted). As a result, "courts, including this

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[3] 28 U.S.C. § 1292 extends that jurisdiction to certain interlocutory orders as well.

Court…have been less than meticulous" in their usage of the term and have "more than occasionally used the term 'jurisdictional' to describe emphatic time prescriptions in rules of court," *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), including the thirty-day time limit in Rule 4(a)(1). *See, e.g.*, *Browder v. Director, Dep't of Corrs. of Ill.*, 434 U.S. 257, 264 (1978) (referring to time limit "as "mandatory and jurisdictional").

The Court has, however, recently undertaken to reduce the confusion and to restore the proper conception of subject-matter jurisdiction in the federal courts. Just last Term, the Court admonished that "[c]larity would be facilitated…if courts and litigants used the label 'jurisdictional' not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court's adjudicatory authority." *Eberhart v. United States*, 126 S. Ct. 403, 405 (2005) (per curiam) (quoting *Kontrick*, 540 U.S. at 455). Claim-processing rules, the Court has been clear, may be "emphatic" but that does not make them jurisdictional. *Id.* at 406. *See, e.g.*, *Arbaugh v. Y & H Corp.*, 126 S. Ct. 1235, 1242 (2006) ("[T]ime prescriptions, however emphatic, are not properly typed 'jurisdictional.'" (internal quotation marks omitted) (quoting *Scarborough v. Principi*, 541 U.S. 401, 414 (2004))); *Carlisle v. United States*, 517 U.S. 416, 434 (1996) (Ginsburg, J., concurring) ("It is anomalous to classify time prescriptions, even rigid ones, under the heading 'subject-matter jurisdiction.'").

This Court has illustrated the distinction in recent cases rejecting claims that failure to comply with various deadlines in the federal rules were jurisdictional errors that could be raised at any point in the litigation. For example, in *Kontrick v. Ryan*, 540 U.S. 443 (2004), the Court held that a debtor forfeited any objection to the untimeliness of a creditor's complaint objecting to the discharge of a debt because the debtor failed to raise that objection before the complaint was

adjudicated on the merits.[4] This Court began by observing that the jurisdiction of the bankruptcy courts to hear objections to a discharge was expressly set forth in 28 U.S.C. § 157(b)(2)(J), which "contains no timeliness condition." 540 U.S. at 453. The time limits for filing objections, the Court explained, was instead typical of the kinds of "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate." *Id.* at 454. For that reason, the untimeliness of the creditor's objection did not disturb the court's jurisdiction to consider the claim and the objection was subject to forfeiture. *Id.*

A year later, this Court reaffirmed its definition of jurisdictional rules in *Eberhart*, a case involving an untimely motion for a new trial under the Federal Rules of Criminal Procedure. As relevant to the case, the Rules required that the defendant file his motion "within 7 days after the verdict or finding of guilty." Fed. R. Crim P. 33(b)(2). The defendant filed a timely motion, but later attempted to supplement it outside the time permitted by the rule. The Government failed to object to the untimeliness of the amendment in the district court, but raised the issue on appeal after the trial court granted the motion. The court of appeals held that the district court lacked jurisdiction to rule on the merits of the untimely motion, but this Court unanimously reversed. Like the bankruptcy rules in *Kontrick*, the Court explained, the time limit for filing a motion for new trial is simply an "emphatic time prescription[]," 126 S. Ct. at 406, not a rule delineating the classes of cases the court may hear. As such, the time limit warranted neither the jurisdictional label nor its consequences. And because the Government failed to timely object to the lateness of the motion for a new trial in the district court, it could not raise that objection on appeal. *Id.* at 407.

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[4] Under the Bankruptcy Rules, the creditor was required to file the objection "no later than 60 days following the first date set for the meeting of creditors." Fed. R. Bankr. P. 4004(a).

3. In light of this Court's recent cases, it is impossible to escape the conclusion that the time limits of Rule 4(a) are nonjurisdictional. As in *Kontrick* and *Eberhart*, the time requirements in Rule 4(a) are not "prescriptions delineating the class of cases…falling within the court's adjudicatory authority," but rather a "claim-processing rule" the violation of which may be subject to forfeiture if not timely raised. *Eberhart*, 126 S. Ct. at 405.

That the time limits in Rule 4(a) govern the filing of a notice of appeal, rather than a bankruptcy complaint or a motion for new trial, is of no significance. As discussed above, the time limits for filing a notice of appeal have never been referred to as jurisdictional in the rules or statutes that established them, and the jurisdiction of the courts of appeals has always been expressly defined in separate provisions that mark the boundaries of that jurisdiction in relation to the finality of the district court's judgment, not the timing of the notice of appeal.

Indeed, this Court has already rejected the view that rules affecting the timeliness of a notice of appeal are jurisdictional. In *Eberhart*, the Court held that the time for filing a motion for a new trial in a criminal case is nonjurisdictional, even though the timely filing of such a motion will toll the time for filing a notice of appeal. *See* 126 S. Ct. at 407 (Fed. R. Crim. P. 33 not jurisdictional); Fed. R. App. P. 4(b)(3)(A)(ii) (Rule 33 motion tolls time for filing appeal). *Eberhart* also made clear that this Court's decision in *United States v. Robinson*, 361 U.S. 220 (1960) – which held that a district court lacked the authority to enlarge the time for filing a notice of appeal outside of the circumstances permitted in the rules – did not rest on a conclusion that the rules governing the timely filing of a notice of appeal affected a court's subject-matter jurisdiction. "*Robinson* is correct," the Court explained, "not because the District Court lacked *subject-matter jurisdiction*, but because district courts must observe the clear limits of the Rules of Criminal Procedure when they are properly invoked." 126 S. Ct. at 406 (emphasis

in original). So, too, in this case, while the district court's authority to reopen the time for filing a notice of appeal is strictly limited by Rule 4(a)(6), that restriction is not jurisdictional.

Nor does it make a difference that the time limits at issue here are codified in a statute, as well as the Federal Rules of Appellate Procedure. While Congress plainly has the authority to make time limits a condition of subject-matter jurisdiction through legislation, there is no basis for believing that it intended to do so in passing 28 U.S.C. § 2107. As noted above, nothing in that statutory provision states that the limitation is jurisdictional and, in fact, Congress has expressly defined the jurisdiction of the courts of appeals in separate provisions, 28 U.S.C. §§ 1291-92, that make no reference to time limits for filing a notice of appeal. Given the longstanding Anglo-American legal tradition of defining jurisdiction in terms of subject matter and parties, rather than filing deadlines, there is every reason to believe that if Congress intended to make the limits in Section 2107 jurisdictional, it would have done so expressly.

B. At The Very Least, Limits Imposed On A District Court's Authority To Reopen The Time For Appeal Are Not Jurisdictional.

While it appears clear that none of the time limits in Rule 4(a) satisfy the criteria for subject-matter jurisdiction restrictions under this Court's recent cases, the Court ultimately need not so hold to resolve this case; even if a timely notice of appeal is a prerequisite for appellate jurisdiction, the district court's compliance with the fourteen-day restriction in Rule 4(a)(6) is not. So long as the appellant files a notice of appeal within the time designated in an order reopening the time for appeal, the court of appeals' jurisdiction is established even if the order exceeds the trial courts authority under the rules.

Although this Court has sometimes said that the "30-day time limit [of Fed. R. App. P. 4(a)(1)] is mandatory and jurisdictional," *Browder*, 434 U.S. at 264, it has never

suggested that every requirement in Rule 4(a) affects the subject-matter jurisdiction of the circuit courts. The fourteen-day limit in Rule 4(a)(6) is but one of several provisions of the Rule that cabin a trial court's authority to extend the time for appeal. Rule 4(a)(5), for example, permits a district court to extend the time for filing a notice of appeal, but only upon a showing of "excusable neglect or good cause." Fed. R. App. P. 4(a)(5)(A)(ii). And Rule 4(a)(6) itself permits reopening the time to file an appeal only if the court finds that no party would be prejudiced. But this Court has never suggested that any of these limitations are jurisdictional, such that a court of appeals would be obligated to review a district court's determination of good cause under Rule 4(a)(5) sua sponte, or that the parties may never stipulate to the absence of prejudice under Rule 4(a)(6).

Indeed, any such suggestion could not be squared with this Court's decision in *Thompson*, and its explication of *Robinson* in *Eberhart*. In *Thompson*, the Court held that a party's reliance on a district court's determination that good cause justified an extension precluded the court of appeals from second-guessing that determination on appeal. *See* 375 U.S. at 386-87. Likewise, in *Eberhart*, the Court made clear that while a district court must observe the limits on its authority to extend the time for taking an appeal or granting a new trial "when properly invoked," this did not mean that such limits "are not forfeitable when they are *not* properly invoked." 126 S. Ct. at 406 (emphasis in original).

There are sound reasons to conclude that restrictions on a court's authority to grant an extension should be considered nonjurisdictional, even if a party's compliance with the deadline for filing an appeal is not. A party wishing to disturb the lower court's judgment must make that intention known within a certain time by filing a notice of appeal, Fed. R. App. P. 4(a)(1)(A)-(B), a motion to extend the time for filing such a notice, Fed. R. App. P. 4(a)(5)(A)(i), or a motion to reopen the time to file an appeal, Fed. R. App. P. 4(a)(6)(B). The time limits for taking such actions provide

the prevailing party a measure of security in the finality of the district court's judgment in his favor if action is not taken by his opponent within the time prescribed. *See, e.g.*, *Browder*, 434 U.S. at 264. The fourteen-day limitation in Rule 4(a)(6), however, serves no such interest. Once a timely motion under Rule 4(a)(6) is filed, the prevailing party is on notice that he can no longer assume the finality of the judgment. And if the motion is granted, the prevailing party is immediately informed, on the face of the order, of the date after which finality will be restored if no notice of appeal is filed. On the rare occasion when the district court errs in setting that date, the prevailing party always has an opportunity to bring the error to the attention of the court and his opponent. But he can hardly complain that his legitimate interest in finality and repose has been impinged if he either does not notice the error in the order, or notices and decides not to inform the trial court of the mistake.

II. An Appeal Filed In Compliance With A Deadline Established By A Court Order Should Not Be Dismissed, Particularly Absent A Timely Objection To The Order In The District Court.

Because 28 U.S.C. § 2107 is not a statute that restricts subject-matter jurisdiction, the Sixth Circuit had jurisdiction to hear the appeal. But that does not necessarily mean that the court erred in dismissing the appeal as untimely. Even nonjurisdictional rules are binding on parties and courts and noncompliance may support dismissal of an action or an appeal in appropriate circumstances.

In determining whether dismissal was appropriate in this case, it should be understood at the outset that responsibility for the late filing of petitioner's appeal is shared by both parties as well as the district court. The court obviously is required to comply with the restrictions on its authority set forth in the Rules. *See Eberhart*, 126 S. Ct. at 406. And although the court's error was wholly uninvited – petitioner did not ask the court to extend the deadline by three days or propose a particular date – petitioner's counsel obviously

could have avoided the problem by checking the court's calculations and filing the notice of appeal two days earlier than he did. At the same time, the Government could have objected to the order in the district court, thereby allowing the trial court to correct the error before it had any potential of misleading petitioner into filing an untimely notice of appeal.

In such circumstances – when the appellant relies on a filing deadline established in a court order without objection from the appellee – dismissal is improper under this Court's established cases.

A. An Appeal Is Not Subject To Dismissal As Untimely When The Appellant Files A Notice Of Appeal In Reliance On A Deadline Established In A Court Order.

This Court has long held that an untimely appeal should not be dismissed when the appellant was misled by the district court into filing his notice of appeal outside the time provided in the rules.

In *Harris Truck Lines, Inc. v. Cherry Meat Packers, Inc.*, 371 U.S. 215 (1962) (per curiam), a district court granted an extension of time to file an appeal after counsel for the petitioner represented that he could not obtain authorization to file an appeal because his client's general counsel was on vacation in Mexico. The Seventh Circuit dismissed the appeal. The rule permitted an extension only if the party showed "excusable neglect *based on a failure of [the] party to learn of the entry of the judgment*."[5] However, Harris' counsel did not claim that he had not learned of the entry of the judgment, but rather that he was having difficulty communicating with his client. The court of appeals dismissed the appeal as untimely because under such circumstances, the district court lacked authority to grant the motion. This Court reversed in light of the "unique

[5] *Id*. at 216 (emphasis added) (quoting Fed. R. Civ. P. 73(a) (1961)) (internal quotation marks omitted). Fed. R. Civ. P. 73(a) is the predecessor to Fed. R. App. P. 4(a).

circumstances" of the case. *Id*. at 217. Although the Court reaffirmed that an extension was available only upon showing excusable neglect in failing to learn of the entry of the judgment, and even though the Court did not question that the petitioner's need for an extension had nothing to do with lack of notice, this Court nonetheless held that dismissal of the appeal was unwarranted. *Id.* "In view of the obvious great hardship to a party who relies upon the trial judge's findings of 'excusable neglect' prior to the expiration of the 30-day period and then suffers reversal of the finding," the Court concluded, "the Court of Appeals ought not to have disturbed the motion judge's ruling." *Id*.

The Court applied this "unique circumstances" doctrine again in *Thompson v. INS*, 375 U.S. 384 (1964) (per curiam). The petitioner in that case had moved for a new trial in the district court. Had the motion been timely filed, it would tolled the time for filing a notice of appeal. *Id*. at 385-86. However, the motion was not timely. Nonetheless, the "the trial court specifically declared that the 'motion for a new trial' was made 'in ample time.'" *Id*. at 385. As a result, the petitioner waited until the trial court had disposed of the untimely motion before appealing. That delay rendered the appeal untimely. *Id.* at 385-86. Nevertheless, this Court held that the appeal should be heard as a result of the "unique circumstances": if the judge had not misinformed the party, the party "could have, and presumably would have, filed the appeal within 60 days of the entry of the original judgment…." *Id.* at 386.

This case falls squarely within the principle established by *Harris* and *Thompson.* Had the district court complied with the restriction on its authority to extend the time for appeal, there is no reasonable dispute that petitioner could have, and surely would have, filed a timely notice of appeal. To be sure, petitioner's counsel could have avoided a late filing by reviewing the rules and determining that the district court was mistaken. But the same was true in both *Harris* and *Thompson.* If anything, the circumstances of this case

support even greater solicitude for petitioner. In *Harris*, the error was invited by the appellant who requested an extension to which it was not entitled under the rules. In this case, the district court's error was of its own making, uninvited by petitioner's entirely proper motion. Moreover, in *Thompson*, the court simply stated that the petitioner's motion was timely after the petitioner had submitted an untimely motion entirely as a result of his own negligence. In this case, the district court issued an order affirmatively authorizing an appeal by a particular date.

2. The Sixth Circuit nonetheless held that the "unique circumstances" doctrine was inapplicable because, in its view, (a) this Court "severely limited" the unique circumstances doctrine in *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989); (b) this case is factually distinguishable from this Court's prior precedents; and (c) the 1991 Amendments to the Rules of Appellate Procedure "undermine[d] any argument for [a] liberal application" of the "unique circumstances" doctrine. *See* 432 F.3d at 675-76. None of the reasons is sound.

First, nothing in *Osterneck* "severely limited" or otherwise drew into question the continuing vitality of the "unique circumstances" doctrine. To the contrary, the Court in *Osterneck* simply held that the doctrine did not apply to the case before it because the court of appeals had properly found that "at no time has the district court or this court ever affirmatively represented to the Osternecks that their appeal was timely filed, nor did the Osternecks ever seek such assurance from either court." 489 U.S. at 178-79 (citation omitted) (internal quotation marks omitted). This Court has since reaffirmed that when a party *does* reasonably rely on a district court's order purporting to authorize an otherwise untimely appeal, the unique circumstances doctrine continues to apply. *See Carlisle v. United States*, 517 U.S. 416, 428 (1996) (confirming that *Thompson* "relied upon the 'unique circumstances' that the cause of the failure to meet the Rule's deadline was an…assurance by the District Court itself"); *id.*

at 435 (Ginsburg, J., concurring with two other members of the Court) (noting that the Court "has recognized one sharply honed exception" to seemingly inalterable time limits: "That exception covers cases in which the trial judge has misled a party who could have – and probably would have – taken timely action had the trial judge conveyed correct, rather than incorrect information.").

Second, the Sixth Circuit's attempts to distinguish this case from *Thompson* and *Harris* do not withstand scrutiny. The court of appeals held, on the authority of *Osterneck*, that *Thompson* applies only when the district court ratifies an erroneous action of a party, and that it has no application here, where the party relied on an uninvited error by the district court. Just why this Court would show more solicitude to a party who initiates an error, than one who is simply the victim of a court's mistake, the Sixth Circuit did not attempt to explain. But in any event, it is plain that nothing in *Osterneck* requires that nonsensical position. The relevant point was simply that some form of reliance on the district court was required, a reliance that was missing in *Osterneck* and is amply demonstrated in this case.[6]

Third, nothing in the 1991 Amendments to the Rules overruled any of this Court's prior cases construing or applying the "unique circumstances" doctrine. The addition of Rule 4(a)(6) was undoubtedly intended to regularize the process for reopening the time for filing appeals when a party had not been given notice of the judgment. It may be taken from that fact that the time limits in the rule were intended to be strictly enforced. But the same was undoubtedly true of the time limits in *Harris* (time for taking an appeal) and *Thompson* (time for motion for a new trial, having the effect of tolling the time for taking an appeal). This Court

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[6] The Sixth Circuit also noted that petitioner received no assurance from the district court that his appeal was timely. 432 F.3d at 675. But neither did the appellant in *Harris*, who, much like petitioner, was simply given an unauthorized extension of time in which to file his appeal. *See* 371 U.S. at 216.

nonetheless held that strictness of those rules did not require the dismissal of an appeal when the district court misled a party to miss the appeal deadline. By 1991, that precedent had been established and undisturbed for more than twenty-five years. And during that time, the Rules had been subject to repeated revisions without any indication that the Rules Committee or Congress intended to overrule that established precedent.

3. The "unique circumstances" doctrine appropriately accommodates the judicial system's sometimes competing interests in promoting enforcement of important procedural rules while also maintaining fair access to appellate review. As Justice Scalia has observed, "[t]he injustice caused by letting the litigant's own mistake lie is regrettable, but incomparably less than the injustice of *producing* prejudice through the court's intervention." *Castro v. United States*, 540 U.S. 375, 386-87 (2003) (Scalia, J., concurring in part and concurring in judgment). While litigants and their lawyers have a responsibility to ensure compliance with the rules, it is both expected and understandable that they will generally assume the correctness of orders issued by experienced federal judges. In recognition of this inevitable reliance, this Court has held in other contexts that reliance on incorrect advice from a trial court may be cause to excuse the misinformed forfeiture of important rights. *See, e.g.*, *Marvel v. United States*, 380 U.S. 262 (1965) (per curiam) (vacating a judgment and remanding for a hearing as to whether the petitioner was misled by the trial judge as to the length of the sentence prior to pleading guilty).

The unique circumstances doctrine is particularly appropriate in the habeas context, where important liberty interests are at stake and where procedural rules are often complex. Moreover, in the vast majority of cases, habeas petitioners proceed pro se in the district courts. *See* Roger A. Hanson & Henry W.K. Daley, U.S. Dep't of Justice, FEDERAL HABEAS CORPUS REVIEW: CHALLENGING STATE COURT CRIMINAL CONVICTIONS 17 (1995) (ninety-three percent of

habeas petitions are filed pro se). Pro se litigants necessarily rely heavily on the trial court's direction on what measures are necessary to comply with mandatory procedural requirements and to preserve a right to appellate review. Punishing pro se defendants for relying on that direction is incompatible with the long tradition of requiring courts to provide special assistance to pro se litigants in federal court. *See, e.g.*, *Castro*, 540 U.S. at 377 (majority opinion) (court must warn pro se litigant of consequences of recharacterizing motion for new trial as first habeas petition); *Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (liberal construction of pro se pleadings required).

B. The Government's Failure To Object To The Order Reopening The Time To File An Appeal Precludes Reliance On That Objection Now.

Even if the "unique circumstances" doctrine did not apply, dismissal would nonetheless be unwarranted because the Government could have, but did not, object in the district court to the unauthorized extension of the appeal period beyond the fourteen days permitted by the rule.

This Court has been clear that even claim-processing deadlines that are strict and "unalterable on a party's application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point." *Kontrick*, 540 U.S. at 456; *see also Eberhart*, 126 S. Ct. at 406 (emphasis omitted) (claim-processing rules are "forfeitable when they are not properly invoked").[7] Of course, ordinarily, the first occasion to object to an untimely notice of appeal is in the circuit court, at which point the objection would not provide any opportunity to avoid the timeliness problem (since the

[7] *See further, e.g., Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (statutory time limit to file EEOC complaint is nonjurisdictional and thus subject to forfeiture); *cf. Arbaugh v. Y&H Corp.*, 126 S. Ct. 1235, 1245 (2006) (objection that claim does not satisfy nonjurisdictional statutory restriction is forfeited after trial on the merits).

time to appeal will already have passed). In such circumstances, it may be appropriate to allow dismissal of an untimely appeal even if not immediately objected to by the appellant, or to allow the defect to be noticed by the court sua sponte.

When, however, the error arises from the improper extension of the time to appeal by the trial judge, a party ordinarily will have an opportunity to object to an improper extension in the district court and should forfeit the right to object on appeal if it fails to inform the district court of the error in time for the mistake to be corrected. Most often, an objection can be made in response to the opponent's motion for an extension of time or to reopen the time for appeal. For example, the party may object that the applicant has not shown "excusable neglect or good cause" to support an extension under Rule 4(a)(5), or that the reopening of the time to appeal would cause prejudice under Rule 4(a)(6). The failure to make such an objection should preclude any argument in the circuit court that the appeal was untimely because the extension was wrongly granted. *Cf. Harris*, 371 U.S. at 216-17.

In the unusual circumstance where the error is uninvited – as in this case, where the Government could not have objected to the length of the extension when the motion was made because no particular time period was requested – an opposing party ordinarily will nonetheless have an opportunity to bring the error to the district court's attention through a subsequent objection or motion to reconsider. The failure to make such an objection until it is too late for the district court to correct its mistake and the appellant has acted in irreversible reliance on the order, should result in the forfeiture of the timeliness objection on appeal.

* * * * *

Under this Court's precedents, when a party files a notice of appeal within the time permitted by an erroneous order extending or reopening the time to file an appeal, and the opposing party fails to raise a timely objection to the error in

the district court, a court of appeals may not dismiss the subsequent appeal as untimely. The effect of this rule is to "admonish the Government that failure to object...entails forfeiture of the objection, and to admonish defendants that timeliness is of the essence, since the Government is unlikely to miss timeliness defects very often." *Eberhart*, 126 S. Ct. at 406-07.

In this case, because the Government made no objection to the district court's erroneous order, and because petitioner acted in reliance upon that order in filing his notice of appeal, the Sixth Circuit erred in dismissing the appeal. For that reason, the decision below should be reversed.

III. Even If Petitioner's Appeal Were Properly Dismissed For Lack Of Jurisdiction, The District Court Retains A Limited Authority To Issue Another Order Reopening The Time To File An Appeal.

Even if this Court determined that the district court's erroneous extension of time beyond the fourteen-day period authorized in the Rules created a jurisdictional defect that required dismissal of the appeal, the Court should nonetheless make clear that in limited circumstances, a district court retains the authority to reopen the appeal period a second time to permit a new and timely appeal.

As a general matter, dismissal of an appeal for lack of jurisdiction does not preclude a subsequent appeal when the conditions for jurisdiction have been satisfied. *See* 18A Charles Alan Wright et al., FEDERAL PRACTICE AND PROCEDURE § 4436 ("Dismissal of an appeal for want of appeal jurisdiction … has no preclusion consequences when a later and proper appeal is taken."). For example, an unsuccessful attempt to appeal an interlocutory order does not preclude an appeal from final judgment.

In this case, the jurisdictional defect precluding review of petitioner's appeal could be remedied by the district court's once again reopening the time to file an appeal for fourteen days to permit petitioner to file a new and timely notice of

appeal. While the circumstances supporting such an order may be rare, there is nothing to preclude the district court from issuing a second Rule 4(a)(6) order when the criteria in the Rule have been met and the unique circumstances justify the action.

In particular, nothing in the text of Rule 4(a)(6) prevents a second reopening should the district court, in its discretion, consider it proper. Under the Rule, the court must find that (1) the moving party did not receive the required notice of the entry of the judgment within twenty-one days after entry; (2) the party filed a motion to reopen within 180 days of entry of the judgment or seven days of receiving proper notice; and (3) no party would be prejudiced by the reopening. *See* Fed. R. App. P. 4(a)(6)(A)-(C). Here, it is undisputed that petitioner did not received the required notice of judgment and that he filed a motion to reopen within 180 days of the judgment and seven days after learning of its entry. *See* 432 F.3d at 670.[8] The district court would, of course, be required to determine whether reopening the judgment for a second time at this late date would prejudice the Government.[9] And even if the court found that the prerequisites for reopening were met, it would still be allowed, in its discretion, to deny the motion. *See* Fed. R. App. P. 4(a)(6) ("The district court *may* reopen the time to file an appeal....") (emphasis added). But once the three prerequisites for reopening are satisfied, nothing in the Rule precludes a second reopening simply because a prior order

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[8] Because the district court may reopen the appeal period in response to the original motion, there would be no need for a second motion (which would be untimely under the rule if filed more than 180 days after the entry of judgment).

[9] A second reopening would not be prejudicial within the meaning of the rule simply because it allowed petitioner to take an appeal that the Government could otherwise avoid. Advisory Committee Notes, Fed. R. App. P. 4 ("[b]y 'prejudice' the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal").

was previously issued, and an appeal unsuccessfully attempted.

While this suggestion may seem novel, a similar practice has been established under 28 U.S.C. § 1292. That provision authorizes a district court to issue an order permitting a party to take an interlocutory appeal from a qualifying order. The statute "permit[s] an appeal to be taken from such order…if application is made to [the court of appeals] within ten days after the entry of the order." *Id.*; *see also* Fed. R. App. P. 5(a) (same). Over the years circuit courts have regularly confronted the situation in which a district court has issued an order certifying an interlocutory appeal under Section 1292(b), but the party failed to perfect the appeal by making the required application to the circuit court within ten days as required by statute. In such circumstances, the courts regularly permit the district court to recertify the order permitting interlocutory appeal in response to the original motion. *See, e.g.*, *Marisol v. Giuliani*, 104 F.3d 524, 528 (2d Cir. 1996) (allowing recertification of order if it would enhance efficiency); *In re Benny*, 812 F.2d 1133, 1137 (9th Cir. 1987) (same); *Nuclear Engineering Co. v. Scott*, 660 F.2d 241, 247 (7th Cir. 1981) (same); *Aparicio v. Swan Lake*, 643 F.2d 1109, 1112-13 (5th Cir. 1981) (allowing recertification freely).[10]

Permitting a second reopening of the time to appeal accords with the purpose behind the Rule to provide an

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[10] This Court implicitly approved the recertification practice in *Baldwin County Welcome Center v. Brown*, 466 U.S. 147 (1984), when it reviewed a case on recertified interlocutory appeal. Justice Stevens, dissenting on the merits, noted the Court was required to examine, *sua sponte*, the propriety of the recertification process, as the time limits for perfecting a certified appeal are expressly made conditions of the circuit court's subject-matter jurisdiction over interlocutory orders. *Id*. at 160-61 (citing 28 U.S.C. § 1292(b)). Although the majority did not discuss the question, the dissent "concur[red] in the majority's holding that there is jurisdiction." *Id*. at 162.

avenue for appeal when a petitioner has good excuse for missing a prior opportunity. "Rule 4(a)(6) was adopted to soften the harsh penalty of losing one's right to appeal due to the government's malfeasance in failing to notify a party of a judgment...." *Arai v. American Bryce Ranches Inc.*, 316 F.3d 1066, 1070 (9th Cir. 2003). There is no reason why the rule should not also be available to prevent a party from losing his right to appeal due to the district court's error in ordering the reopening of an appeal.

To be sure, a second reopening under the Rule would only be possible in rare and limited circumstances. As previously noted, the district court would be prohibited by the terms of Rule 4(a)(6) from granting a second reopening if there would be prejudice to any party. Moreover, the court's exercise of discretion to allow a second reopening would be subject to appellate review and, with good reason, subject to careful scrutiny. It is safe to say that the court's discretion would be abused if the failure to perfect an appeal upon the first reopening was solely due to the neglect of the party. *Cf. Braden v. University of Pittsburgh*, 552 F.2d 948, 955 (3d Cir. 1977) (allowing recertification of interlocutory appeal orders only in cases where parties did not have notice of order due to the district court's dereliction). But under the circumstances present in this case – where the initial deadline is missed in reliance upon an erroneous order to which the opposing party failed to make a timely objection – permitting a second reopening would be entirely appropriate.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

Respectfully submitted,

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