ORAL ARGUMENT NOT YET SCHEDULED

No. 12-5314

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BARACK OBAMA, PRESIDENT OF THE UNITED STATES, *et al.*,

Plaintiff-Appellee,

v.

FADHEL HUSSEIN SALEH HENTIF, *et al.*,
Detainee-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF APPELLANT

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April 30, 2013

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in the Brief for Appellant:

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, counsel for the National Association of Criminal Defense Lawyers ("NACDL") states that NACDL is a non-partisan professional bar association that seeks to advance the mission of the nation's criminal defense lawyers to ensure justice and due process for persons accused of crime or other misconduct. NACDL is a non-profit corporation, NACDL has no parent corporations, and no publicly held company has a 10% or greater ownership interest in the NACDL.

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Interest of the Amicus Curiae

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 40,000 affiliate members from all 50 states.[1] Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. NACDL routinely files amicus curiae briefs in the Supreme Court, the U.S. Court of Appeals for the D.C. Circuit, and in other courts throughout the country.

Although the issue before the Court concerns the timing of filing Notices of Appeals in civil actions, prisoners convicted of crimes regularly file petitions for

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[1] Pursuant to Federal Rule of Appellate Procedure ("Rule") 29(a) and Circuit Rule 29(b), the undersigned represents that all parties have consented to the filing of this amicus brief. Pursuant to Rule 29(c)(5), the undersigned certifies that no party's counsel authored the brief in whole or in part; that no party or counsel for a party contributed money that was intended to fund preparation or submission of this brief; and that no person other than the amicus curiae, its members, and its counsel, contributed money that was intended to fund preparation or submission of this brief.

writs of habeas corpus. Such petitions proceed as civil actions. The NACDL thus has an interest in ensuring that prisoners (or, as in this case, detainees) who seek to appeal a denial of their habeas petition do not lose their appeal rights by an unduly narrow reading of the Federal Rules of Appellate Procedure governing what events trigger the time period for filing a notice of appeal.

Relevant Procedural Background

The procedural history of this case is set forth in Appellant's brief. Aspects of the procedural history important to arguments of amicus curiae the NACDL are highlighted below.

Appellant Fadhel Hussein Saleh Hentif, a Yemeni citizen, has been detained by the United States at the naval base detention facility at Guantanamo Bay, Cuba since 2002 pursuant to the Authorization for Use of Military Force, Pub. L. No. 107-40, § 2(a), 115 Stat. 224, 224 (2001). In October 2006, following the Supreme Court's decision in *Rasul v. Bush*, 542 U.S. 466 (2004), that United States courts have jurisdiction to hear habeas applications filed by Guantanamo Bay detainees, Hentif filed a petition for writ of habeas corpus in the United States District Court for the District of Columbia. JA 8; *see also Boumediene v. Bush*, 553 U.S. 723 (2008) (holding that the Military Commissions Act of 2006 did not strip Guantanamo detainees of a constitutionally protected right to habeas corpus review).

The parties filed cross-motions for judgment on the record, and the district court held a four-day hearing on the merits of the petition. JA 11. On August 1, 2011, the district court denied Hentif's habeas petition. *See* JA 9. The district court held that Hentif could be lawfully detained under the Authorization for Use of Military Force if the Respondents (President Obama and other senior U.S. officials) established by a preponderance of the evidence that Hentif "is functionally part of Al Qaeda or the Taliban." JA 12-13 (citing *Barhoumi v. Obama*, 609 F.3d 416, 424 (D.C. Cir. 2010); *Bensayah v. Obama*, 610 F.3d 718, 725 (D.C. Cir. 2010); *Awad v. Obama*, 608 F.3d 1, 11 (D.C. Cir. 2010)). In determining that Respondents met this standard, the district court allowed the admission of hearsay evidence, principally interrogation and intelligence reports, which the district court acknowledged "are not the direct statements of the individuals whose personal knowledge they reflect." JA 14. After reviewing the evidence presented by the parties, the district court concluded that it was "more likely than not that Hentif was a part of Al Qaeda or the Taliban." JA 49.

Court filings in the case were governed by a protective order. In September 2008, the U.S. District Court for the District of Columbia entered a protective order governing treatment of material designated as classified in the Guantanamo Bay detainee litigation. *See In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 145 (D.D.C. 2008) (finding that the detainee litigation "involve[s] national

security information or documents, the storage, handling, and control of which require special security precautions and access to which requires a security clearance and a 'need to know'"). Under the protective order, documents designated as classified must be kept in a secure area and only those counsel who have received the necessary security clearance can access the documents in the secure area. *See id.* at 148-51. Among the many restrictions on the dissemination of information contained in the classified documents was the following: "Petitioners' counsel shall not disclose to a petitioner-detainee classified information not provided by that petitioner-detainee." *Id.* at 150. The protective order was entered in Hentif's case in November 2006. *See* Dkt. No. 5.

Consistent with the protective order, the unredacted version of the district court's memorandum opinion denying Hentif's habeas petition was not docketed. Instead, a "Notice of Filing" of the court's memorandum opinion was docketed on August 1, 2011 as Docket Number 279, with a hyperlink to the Notice. *See* JA 9. A redacted, non-classified version of the memorandum opinion and related judgment was made available to the public on September 15, 2011. *Id.*

Hentif timely filed a motion for reconsideration on August 29, 2011. *See id.* (Docket No. 280). Hentif argued that newly discovered evidence provided a basis for the court to alter or amend its judgment pursuant to Federal Rule of Civil Procedure 59(e). *See* JA 58-60. Although Judge Kennedy had denied Hentif's

habeas petition, following a reassignment, Judge Lamberth decided the motion for reconsideration. On July 26, 2012, he signed a Memorandum and Order denying Hentif's Rule 59(e) motion. *See* JA 61. Because it referenced materials the Government designated as classified, the Memorandum and Order were classified.

The next day, July 27, 2012, the clerk made the following entry:

7/27/2012		NOTICE that the Court on July 26, 2012 issued a classified memorandum and order denying petitioner Fadhel Hussein Saleh Hentif (ISN 259)'s motion for reconsideration. The Court will post an unclassified version to the docket when it becomes available. (lcrcl2) (Entered: 07/27/2012)

JA 9 (D.D.C. docket excerpt). Unlike the Notice of Filing of the district court's memorandum opinion denying Hentif's habeas petition, this Notice was not assigned a docket number, did not include a hyperlink to the Notice, and is not captioned a "Notice of Filing" but instead provides notice that the court "issued a classified memorandum and order" denying the motion for reconsideration.

Consistent with the operative protective order, the classified decision could not be accessed by counsel unless he or she had the necessary security clearance and "need to know." *See In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d at 148-49. Even for those counsel with the necessary clearance, the classified decision could be reviewed only at the federally-run secured facility near Washington, D.C., not at the district court. *See id.* Indeed, the absence of any docket number assigned to the classified decision denying the motion for

reconsideration, indicates the memorandum and order had not been incorporated into the clerk's office's files for the case.

Even cleared counsel able to review the decision at the secured facility could not provide a copy of the decision to Hentif, or even discuss its content with Hentif. *Id.* at 150. Nor could cleared counsel provide a copy of the decision or discuss its contents with un-cleared counsel. *Id.*

A docket number and hyperlink was not assigned to Judge Lamberth's July 26, 2012 decision denying Hentif's motion for reconsideration until August 10, 2012, when the redacted version was entered on the docket, as follows:

8/10/2012	290	REDACTED MEMORANDUM AND ORDER denying petitioner's Motion 280 for Reconsideration. Signed by Chief Judge Royce C. Lamberth on July 26, 2012. (lcrcl4) Modified on 8/10/2012 (jeb,). (Entered: 08/10/2012)

JA 9 (D.D.C. docket excerpt).

Following the docketing of the redacted memorandum and order, a member of Hentif's litigation team received confirmation from this Court's Clerk's office that the time for filing a notice of appeal "runs from the date the actual order or judgment" is placed on the docket rather than the date a notice is issued that a decision has been rendered. *See* JA 74-75 (Decl. of Fermin Figueroa). Hentif filed his Notice of Appeal on October 8, 2012, 59 days after the August 10, 2012 entry of the redacted memorandum and order on the docket. JA 72 (Notice of Appeal).

On November 16, 2012, Respondents-Appellees filed a Notice of Apparent Defect in This Court's Appellate Jurisdiction, and the Court subsequently directed the parties to brief the jurisdictional question, *i.e.*, whether the July 27, 2012 Notice was sufficient to start the timing running for the filing of a Notice of Appeal. JA 76.

Argument

I. Because Federal Rule of Appellate Procedure 4(a)(7) Is Not Jurisdictional, It Must Be Construed in Favor of Preserving a Party's Right to Appeal.

A. Overview of Notice of Appeal Timing Rules.

Federal Rule of Appellate Procedure ("FRAP") 4(a) governs the timing of filing notices of appeal in civil cases. Appeals of denials of habeas petitions are civil appeals. *See Browder v. Director, Dep't of Corr. of Ill.*, 434 U.S. 257, 269 (1978) ("It is well settled that habeas corpus is a civil proceeding."). In a case such as this, where one of the parties is the United States or a United States officer sued in his official capacity, the "notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from." Fed. R. App. P. 4(a)(1)(B). Where, as here, a party timely files a Rule 59 motion in the district court, "the time to file an appeal runs for all parties from the entry of the order disposing of the . . . motion." Fed. R. App. P. 4(a)(4)(A)(v).

Under FRAP 4(a)(7), where Federal Rule of Civil Procedure ("FRCP") 58(a) does not require a separate document, a "judgment or order is entered" for purposes of FRAP 4(a) "when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a)." Fed. R. App. P. 4(a)(7)(A)(i).[2] That rule, in turn, requires that items entered on the docket "must be marked with the file number and entered chronologically in the docket." Fed. R. Civ. P. 79(a)(2). Federal Rule of Civil Procedure 79 further provides that the "Clerk must keep a copy of every final judgment and appealable order." Fed. R. Civ. P. 79(b).

B. Although the Time Period for Filing a Notice of Appeal Is Jurisdictional, the Triggering Event and Tolling Rules Are Not Jurisdictional.

In construing Federal Rule of Appellate Procedure 4(a), this Court has distinguished between timing rules that have a statutory basis and thus are jurisdictional and those that do not have a statutory basis and thus are treated as claim-processing rules. *See Youkelsone v. FDIC*, 660 F.3d 473, 475 (D.C. Cir. 2011) ("only timing rules that have a statutory basis are jurisdictional"); *Obaydullah v. Obama*, 688 F.3d 784, 789 (D.C. Cir. 2012), *petition for cert. filed*, No. 12-8932 (Feb. 26, 2013) ("Lest there be any remaining doubt regarding this

[2] Under FRCP 58(a), a separate document is not required for an order disposing of a motion "for a new trial, or to alter or amend the judgment, under Rule 59." Fed. R. Civ. P. 58(a)(4). Under FRCP 58(c), if a separate document is not required, judgment is entered "when the judgment is entered in the civil docket under Rule 79(a)." Fed. R. Civ. P. 58(c)(1).

circuit's law, however our holding in *Youkelsone* reiterates that key provisions within FRAP 4(a) that are not codified by statute are claim-processing rules.").

28 U.S.C. § 2107(b) requires that a notice of appeal be filed within 60 days after the order appealed from where the Government is a party. Thus, FRAP 4(a)(1)'s 60-day time limit is jurisdictional. *See Bowles v. Russell*, 551 U.S. 205, 209-13 (2007) (holding that notice-of-appeal timing rules based on 28 U.S.C. § 2107 are jurisdictional). In contrast to FRAP 4(a)(1), FRAP 4(a)(4)'s tolling provision for certain timely filed motions and FRAP 4(a)(5)'s provision on motions for extensions are not statutory-based and thus are not jurisdictional. *Obaydullah*, 688 F.3d at 789-91. Accordingly, the Court "can exercise jurisdiction even when an appellant has failed to comply with the deadlines set in FRAP 4(a)(4) and 4(a)(5)." *Id.* at 790. *See also Wilburn v. Robinson*, 480 F.3d 1140, 1146 n.9 (D.C. Cir. 2007) (FRAP 4(a)(4)(A)(vi), which tolls the notice of appeals deadline when a party files a FRCP 60 motion, is a claim-processing rule because "the tolling language . . . has not been made jurisdictional by statute"); *Youkelsone*, 660 F.3d at 475 (FRAP 4(a)(5)'s thirty-day limit on the length of any extension "appears nowhere in the U.S. Code" and thus is not jurisdictional).

Importantly, the fact that non-statutory based provisions of FRAP 4(a) contain timing rules, such as FRAP 4(a)(4)'s requirement that the motion be "timely filed," or FRAP 4(a)(5)(A)(i)'s requirement that a motion for extension be

filed "no later than thirty days after the time prescribed by this Rule 4(a) expires," does not make those provisions jurisdictional. This Court has twice rejected this sort of jurisdictional boot-strapping, holding that the jurisdictional nature of Rule 4(a)'s provisions is to be narrowly defined. *See Wilburn*, 480 F.3d at 1146 n.11 ("It is unlikely that the Supreme Court had such jurisdictional boot-strapping in mind when it so plainly tightened its use of the term 'jurisdictional.'"); *accord Obaydallah*, 688 F.3d at 791.

Just as FRAP 4(a)(4)'s and 4(a)(5)'s tolling and extension provisions are not jurisdictional, FRAP4(a)(7)'s provision on the triggering event for when the period for filing a notice of appeal begins to run also is a claim-processing rule rather than a jurisdictional rule. 28 U.S.C. § 2107 provides that the notice of appeal must be filed "within thirty days after entry of such judgment, order or decree," or within "60 days from such entry" where the Government is a party. 28 U.S.C. § 2107(a), (b). But § 2107 is silent on what constitutes "entry" of the judgment, order or decree. The rule establishing what constitutes "entry" is set forth in FRAP 4(a)(7), a provision whose entire function is to define "entry." Under that rule, which has no counterpart in § 2107, a judgment or order is entered "when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a)." Fed. R. App. P. 4(a)(7)(A)(i).

This Court has been careful to distinguish between the more flexible rules for what constitutes the triggering event and the rigid, jurisdictional rules setting the time period for filing the notice of appeal. As the Court explained in *St. Marks Place Housing Co. v. U.S. Dep't of Housing & Urban Development*, 610 F.3d 75, 81 (D.C. Cir. 2010), "although district courts are generally without authority to extend the time for appeal, they may choose when to decide their cases" so long as they do "not use the latter authority as cover for doing the former." In that case, the district court had entered an order granting the motion to dismiss the complaint and ordering that the case is closed but further ordering that "this Order shall not be deemed a final Order subject to appeal until the Court has issued its Memorandum Opinion." *Id.* at 79. The Court of Appeals held that the time for filing the notice of appeal ran from the date, approximately two months later, when the district court entered its memorandum opinion, not from the date of the order granting the motion to dismiss and closing the case, because the district court entered the earlier order "for reporting purposes only." *Id.* at 81. Interpreting the later memorandum opinion as the "final decision," the Court held it had jurisdiction over the appeal. *Id.*

Here, the district court chose to announce the memorandum and order through a docket notation on July 27 but did not actually enter the memorandum and order on the civil docket until August 10. The August 10 entry on the docket

should therefore be treated as the event triggering the time for filing the notice of appeal. Because FRAP 4(a)(7)'s rules regarding what constitutes "entry" on the civil docket are not statutory-based and thus not jurisdictional, any uncertainty in whether the July 27 docket notation or the August 10 docket entry constituted the triggering event must be resolved in favor of preserving Hentif's right to appeal. The non-jurisdictional provisions of FRAP 4(a) are not intended to operate as a trap for the unwary where something as fundamental as one's appeal rights are at stake.

II. Parties Must Have Clear Notice of What Constitutes the Event That Starts the Clock Running for Filing a Notice of Appeal.

Because the entry of the judgment or order appealed from starts the clock running for the filing of the notice of appeal, special importance has attached to ensuring that parties have certainty about what constitutes the triggering event. FRAP 4(a)(7) ("Entry Defined") and FRCP 58 ("Entering Judgment") are intertwined provisions establishing the triggering event. "Because so much of consequence turns on the entry of the judgment, Rule 58 has been completely rewritten twice to clarify its application." 11 Charles Alan Wright *et al.*, *Federal Practice and Procedure: Civil* § 2781 (2012). Indeed, "[b]oth FRCP 58 and FRAP 4 were amended in 2002 to provide, together with FRCP 79, an integrated system fostering promptness, accuracy, certainty and finality in the entry of judgments by district courts." *Burnley v. City of San Antonio*, 465 F.3d 191, 195 (5th Cir. 2006);

see also Taumoepeau v. Mfrs. & Traders Trust Co. (In re Taumoepeau), 523 F.3d 1213, 1217 (10th Cir. 2008) (FRCP 58 was substantially amended in 2002 "to reduce previously prevailing uncertainty about the appropriate trigger date for the initiation of appellate process").

Prior to its amendment in 2002, ambiguities in FRCP 58's requirement that the judgment be entered as a separate document had led to significant confusion over whether appeals were timely under FRAP 4(a)(7). *See* 11 Charles Alan Wright *et al.*, *Federal Practice and Procedure: Civil* § 2782. "There was particular difficulty if the court had written an opinion or memorandum containing some apparently directive or dispositive words. Was this opinion a direction for entry of judgment or did the judgment come only with some later and more formal document?" *Id.* The Advisory Committee Notes to the 2002 amendments to FRCP 58 also observed: "This simple separate document requirement has been ignored in many cases." Where, prior to the 2002 amendments, issues arose over whether a judgment had been entered, courts interpreted the rules to enable appeals to go forward. *See, e.g., Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 (D.C. Cir. 1990) (concluding that FRCP 58 "'must be applied in such a way as to favor the right to appeal'") (quoting *In re Seiscom Delta, Inc.*, 857 F.2d 279, 283 (5th Cir. 1988)).

Even after the 2002 amendment, this Court has continued to embrace the position that, where the FRCP 58 entry of judgment is the triggering event for purposes of FRAP 4(a)(7), "'[t]he rule should be interpreted to prevent loss of the right of appeal, not to facilitate loss.'" *St. Marks Place Hous. Co.*, 610 F.3d at 81 (quoting *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 386 (1978)).

Just as FRAP 4(a)(7) has been interpreted flexibly to preserve the right to appeal where FRCP 58's separate document requirement applies, the rule also should be interpreted to preserve the right to appeal where FRCP 58 does not impose a separate document requirement. In both instances, the rules regarding what constitutes "entry" should not be interpreted to allow parties to lose their right to appeal as a result of uncertainty as to whether a particular event started the notice-of-appeal period. Appellants who have filed a post-judgment motion tolling the time for filing a notice of appeal are just as entitled to certainty about the triggering event as those appellants who do not pursue such motions. Where the triggering event is the denial of a post-judgment motion, the order must be entered on the civil docket as an "order" with a docket number and hyperlink assigned to that entry.

A. "Entry" of an Order for Purposes of Federal Rule of Appellate Procedure 4(a)(7) Requires More Than the Announcement of the Order.

Under FRAP 4(a)(7), where FRCP 58(a) does not require a separate document, the judgment or order is "entered for purposes of this Rule 4(a) when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a)." Fed. R. App. P. 4(a)(7)(A)(i).

For purposes of FRAP 4(a), the fact that a decision was reached does not trigger the time for filing a notice of appeal. Thus, the date on which the judgment was entered is the date on which the judgment was entered on the docket of the district court, not the date indicated on the order itself. *Freeman v. Rice*, 399 F. App'x 540, 544 n.3 (11th Cir. 2010) (citing *SEC v. Van Waeyenberghe*, 284 F.3d 812, 815 (7th Cir. 2002)); *Adono v. Wellhausen Landscape Co.*, 258 F. App'x 12, 15 (7th Cir. 2007) ("To determine whether an appeal is timely, we look to the date the order was entered on the docket, not the date it was signed."). Similarly, under FRAP 4(a)(2), "[a] notice of appeal filed after the court announces a decision or order – but before the entry of the judgment or order – is treated as filed on the date of and after the entry." This rule makes clear that the actual entry of the order, not simply the district court's announcement of its decision is what constitutes "entry" of the order for purposes of FRAP 4(a).

Before FRAP 4(a)(2) was amended in 1993, notices of appeal filed after the announcement of a decision but before it was entered on the docket were treated as premature because they did not meet FRAP 4(a)'s requirement that the time run from "entry" on the civil docket. *See* Fed. R. App. P. 4 Advisory Committee Notes to 1993 Amendments. This was the case even when the decision was announced or noted on the civil docket. In *Allen v. Horinek*, 827 F.2d 672 (10th Cir. 1987), the Court of Appeals held that the notation on the docket of a ruling from the bench denying the plaintiff's FRCP 59 motion for a new trial did not trigger the time for filing a notice of appeal. The docket entry read: "Hearing on motion for new trial – denied. Order to follow." *Id.* at 673. The Court of Appeals treated the notice of appeal filed after the docket notation but before the actual order was entered on the docket as premature and a nullity.

Under the current rules, the notice of appeal in *Allen* would be treated as having been filed "as on the date of and after entry" of the actual order. Thus, the amendment of FRAP 4(a)(2) after *Allen* did not change the basic rule that the time for filing the notice of appeal runs from the entry of the actual judgment or order, not from a notation on the docket announcing the judgment or order.

Here, the July 27, 2012 notation in the docket stated: "NOTICE that the Court on July 26, 2012 issued a classified memorandum and order denying petitioner Fadhel Hussein Saleh Hentif (ISN 259)'s motion for reconsideration.

The Court will post an unclassified version to the docket when it becomes available." JA 9. As with the docket notation in *Allen*, the docket notation here simply announces that a decision has been made, but does not enter the decision on the docket. (Indeed, even the Notice is not assigned a docket number or hyperlink for electronic access.) Instead, the Notice informs the parties that a non-classified version of the memorandum and order will be entered on the docket at a later date. It was not until August 10, when the "REDACTED MEMORANDUM AND ORDER" was entered on the docket as Docket Entry 290 that the order appealed from was entered on the civil docket for purposes of FRAP 4(a)(7). JA 9.

The caption provided on the docket is not a mere formality. The caption serves to give notice that a FRAP 4(a) triggering event has occurred. *See Hollywood v. Santa Maria*, 886 F.2d 1228, 1232 (9th Cir. 1989) (holding that an entry complied with Rule 79(a) and thus triggered the time for filing a notice of appeal because the order "was entered on the docket *as an order* denying the motion") (emphasis added); *Ellender v. Schweiker*, 781 F.2d 314, 316-17 (2d Cir. 1986) (finding that the requirements of FRAP 4(a) and FRCP 79(a) were met because the entry on the civil docket was "the entry of a 'JUDGMENT' [that] described the substance of the Judgment"). *Cf. United States v. Johnson*, 254 F.3d 279, 286 (D.C. Cir. 2001) (noting that there was no "separate entry for an 'Order' . . . as there would be if the Clerk had understood it to be a separate document").

The provisions in FRCP 79 governing entry of items on the civil docket confirm that the July 27 docket notation was not a FRAP 4(a) triggering event. As noted, FRAP 4(a)(7) provides that, "if Federal Rule of Civil Procedure 58(a) does not require a separate document," a judgment or order is entered for purposes of FRAP 4(a) "when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79." Fed. R. App. P. 4(a)(7)(A)(i). FRCP 79 in turn requires that, inter alia, "appearances, orders, verdicts, and judgments" "must be marked with the file number and entered chronologically in the docket," and further requires that the clerk "keep a copy of every final judgment and appealable order." Fed. R. Civ. P. 79(a)(2)(C), 79(b). Here, the classified memorandum opinion and order was not *entered* on the docket; instead the decision was announced in a docket notation. And, neither the order nor the notice was assigned a docket number. Given the lack of docket number, the absence of a hyperlink indicating there was any document associated with the docket notation, and the classified nature of the memorandum opinion, it also appears that the July 27 docket notation did not reflect an appealable order kept by the Clerk.

B. Any Doubts About Whether a Docket Notation Announcing an Order Should Be Treated as Entry of an Order on the Civil Docket Should Be Resolved in Favor of Treating the Later Filed Order as the Triggering Event.

The July 27 docket notation did not meet FRAP 4(a)(7) requirement that the order appealed from be entered on the civil docket. But, even if there were some

ambiguity on that question, any doubts should be resolved in favor of preserving the right to appeal. Because, as noted above, FRAP 4(a)(7) is not a jurisdictional rule, equitable and policy considerations should come into play in determining whether an ambiguous docket entry should be treated as an event starting the clock running for the notice of appeals period.

The sort of docket notation that was provided to Hentif on July 27, with a reference to a future filing which will be entered on the docket, does not apprise him or his counsel that a Rule 4(a) triggering event has occurred. Indeed, when a member of Hentif's litigation team sought confirmation from this Court's Clerk's office that the July 27 docket notation was not a triggering event, the Clerk's Office confirmed that the time to file a notice of appeal "runs from the date the actual order or judgment" is placed on the docket, which is "distinct from" the date "a 'notice' [] is placed on the docket, even a 'notice' indicating that a decision has been issued." JA 75 (Decl. of Fermin Figueroa). At the very least, the reaction of the Clerk's office to the July 27 docket notation indicates that it did not provide clear notice that a triggering event had occurred.

Because the non-jurisdictional provisions of Rule 4(a), including Rule 4(a)(7) must be interpreted to preserve the right to appeal, the August 10 entry on the docket of Docket Entry 290 ("REDATED MEMORANDUM AND ORDER")

– not the July 27 NOTICE should be treated as the entry of the order on the civil docket.

III. Construing Federal Rule of Appellate Procedure 4(a)(7) as Starting the Time Running for the Filing of a Notice of Appeal Before the Decision Appealed from Is Available to the Appellant Thwarts Appellant's Ability to Consult with His Counsel and to Make an Informed Decision Whether to Take an Appeal.

Treating a docket notation announcing that a decision has been rendered as the triggering event for the notice-of-appeals period rather than the docketing of the actual decision would interfere with habeas petitioners' right to consult with counsel before deciding whether to appeal.

The decision to appeal rests squarely with the client. *See* ABA Standards for Criminal Justice, Standard 4-5.2 ("(a) Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel. The decisions which are to be made by the accused after full consultation with counsel include [] whether to appeal"); *see also Jones v. Barnes*, 463 U.S. 745, 751 (1983) ("the accused has the ultimate authority to make certain fundamental decisions [including whether to] take an appeal"); *Lewis v. Johnson*,

359 F.3d 646, 661 (3d Cir. 2004) ("The ultimate decision to appeal rests with the defendant").[3]

In deciding whether to appeal, a client should have an opportunity to have a "full consultation" with his or her counsel. *See* ABA Standard 4-5.2(a). *See also Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000) ("[b]ecause the decision to appeal rests with the defendant, [] the better practice is for counsel routinely to consult with the defendant regarding the possibility of an appeal") (citing ABA Standards for Criminal Justice, Defense Function § 4-8.2(a) (3d ed. 1993)). The ABA Model Rules of Professional Conduct also encourage consultation between lawyer and client regarding important decisions in the litigation, such as whether to appeal. ABA Model Rules of Prof'l Conduct Rule 1.2(a) ("a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued"); *id.* Rule 1.4 (counsel should "promptly inform the client of any decision[,]" "reasonably consult with the client about the means by which the client's objectives are to be accomplished[,]" and "explain a matter to the extent

[3] This principle arises in the criminal context. While habeas petitions are civil actions, criminal justice standards remain relevant due to the underlying criminal nature of the detentions.

reasonably necessary to permit the client to make informed decisions regarding the representation").

Where a final decision is merely announced but not yet made available, the time to appeal should not start running. Only when the decision is made available can counsel meaningfully consult with the client about whether to appeal. Starting the time upon the mere Notice of a decision – a decision which counsel and client cannot access and discuss – would violate the principles embodied in *Flores-Ortega* and the Rules of Professional Conduct.

Here, the unique situation presented by the Guantanamo Bay litigation greatly inhibits counsel's opportunity to consult with the detainee-client. But the opportunity to consult is not even an option until a non-classified version of the decision appealed from is made available. Unlike the Notice, which appeared on the docket on July 27, 2012, the version of the decision denying the motion for reconsideration docketed on August 10 was accessible through ECF and available at the Clerk's office. And, because it was not classified, it could be disclosed to counsel who lacked security clearance, and to Hentif himself, subject to translation and the constraints imposed by Appellees on Guantanamo detainees accessing legal mail, which include that the documents must undergo further review by Appellees. *In re Guantanamo Bay Detainee Litig.*, 577 F. Supp. 2d 143, 158-60 (D.D.C. 2008). August 10, therefore, must serve as the triggering event starting

the time to file the appeal because it was only after that date that Appellant's counsel even had the opportunity to consult with his client about the merits of the decision and whether to file an appeal.

Conclusion

For the foregoing reasons, the Court should treat the Notice of Appeal as timely filed.

Respectfully submitted,

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Dated: April 30, 2013

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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2013, I electronically filed the foregoing with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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