

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEITH BOWLES, :

4 Petitioner :

5 v. : No. 06-5306

6 HARRY RUSSELL, WARDEN :

7 - - - - - x

8 Washington, D.C.

9 Monday, March 26, 2007

10

11 The above-entitled matter came on for oral

12 argument before the Supreme Court of the United States

13 at 11:06 a.m.

14 APPEARANCES:

15 PAUL MANCINO, JR., ESQ., Cleveland, Ohio; on behalf of

16 Petitioner.

17 WILLIAM P. MARSHALL, ESQ., Special Counsel for the

18 Attorney General of Ohio, Chapel Hill, N.C.; on

19 behalf of Respondent.

20 MALCOLM L. STEWART, ESQ., Assistant to the Solicitor

21 General, Department of Justice, Washington, D.C.; on

22 behalf of the United States, as amicus curiae,

23 supporting Respondent.

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P R O C E E D I N G S

(11:06a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 06-5306, Bowles versus Russell.

Mr. Mancino.

ORAL ARGUMENT OF PAUL MANCINO, JR.

ON BEHALF OF THE PETITIONER

MR. MANCINO: Mr. Chief Justice, and may it please the Court:

Petitioner is before this Court because he followed an order of the district court. He filed his notice of appeal within the time authorized by the district court. It was only when the matter came before the court of appeals was it raised that the district court apparently had no authority to grant a 17-day extension, although it specified a specific date rather than the 14 days in connection with the case.

JUSTICE KENNEDY: Yes, it was authorized by the district court in the sense the district court put it on a piece of paper. It wasn't authorized because the district court had no authority to extend that.

MR. MANCINO: The district court put it on there. When you look at the actual entry itself, it's a handwritten entry. There's no way of telling from the handwritten entry whether that entry was even entered on

1 the docket on the same date because all you have is the
2 handwritten entry, February 10, file your appeal by
3 February 27, which is unusual in a civil case because
4 normally in a civil case you get a judgment; you don't
5 get a directive from the Court that you have 30 days to
6 file a notice of appeal or anything in connection with
7 this. So I don't think it's unreasonable to rely upon a
8 directive from a court.

9 CHIEF JUSTICE ROBERTS: But you knew that 14
10 days was the maximum because the motion asking for it
11 cited and quoted from the rule.

12 MR. MANCINO: Well, that -- we did cite from
13 the rule. That is correct. When the order came out --
14 well, first of all, we were glad to get the order to
15 allow time to appeal; but looking at the order, or just
16 looking at the date, something had to be done. And Of
17 course, we filed on one day before the end date --

18 CHIEF JUSTICE ROBERTS: What if, what if the
19 District Court gave you an extra month? Would your
20 argument still be the same, that that -- because the
21 court set it, that trumps the limitation in the rule?

22 MR. MANCINO: Well, then you get into
23 certain time limits, whether it's reasonable under the
24 circumstances, would a reasonable attorney or litigant
25 rely upon a, you know, expansive period of time that the

1 court gave to it. But here certainly this order is not
2 unreasonable. It's certainly within the confines. And
3 you have a specific end date, do your notice of appeal
4 by this date.

5 JUSTICE GINSBURG: But wouldn't a reasonable
6 lawyer have said see, I referred to the rule, when I
7 made this motion for extension of time. The rule said
8 14 days; this judge obviously made a slip. He
9 miscalculated.

10 Wouldn't a lawyer faced with what the rule
11 clearly says and an inconsistency scribbled on an order,
12 say the judge probably made a mistake? So I better, if
13 I want to protect my client, do what the rule says?

14 MR. MANCINO: Well, looking back, that is
15 probably correct. But looking at the order, and the way
16 it came out, and the fact that you know, the -- the rule
17 allowed for a reopening of the appeal, just looking at
18 the end date of the order, make sure the notice of
19 appeal is filed by that date, it would seem to me that
20 the party who is adversely affected by it may object on
21 that basis, saying Judge, you have no authority to do
22 this, what are you doing in connection with --

23 CHIEF JUSTICE ROBERTS: Why isn't -- this is
24 just a notice of appeal. Why would you -- why not file
25 it the same day? In terms of looking at it from some

1 equitable sense, I don't understand why you wait toward
2 the end of the period assuming you hadn't focused on the
3 difference between the 14 days and the days allowed.

4 What -- why, why would you delay filing the
5 notice of appeal?

6 MR. MANCINO: Well, the only reason for
7 delaying it is obviously workload. And you don't want
8 to get all briefs due within a short period of time,
9 once you get your notice of appeal filed in a particular
10 case, because you have time limits for getting the
11 record, your briefing, and you know, there's a number of
12 appeals going out -- not in this Court, but you know
13 there were a number of appeals going on.

14 And my normal practice is you know, file
15 your notice of appeal near the end of the applicable
16 appeals time.

17 CHIEF JUSTICE ROBERTS: Does it make -- does
18 it a difference that we're dealing with the safety valve
19 provision? In other words, you've got the 30 days to
20 file; and then this rule allows you to -- it's a safety
21 valve, if you didn't get the notice or whatever, you've
22 got a certain procedure that can give you the extra 14
23 days. And now it seems to me that you're asking for a
24 safety valve on top of a safety valve.

25 And I wonder if there's some point where you

1 cut off the -- allowing an out for missing the deadline.

2 MR. MANCINO: Well, I suppose at some point,
3 someone may say well, if the court gave you 180 days to
4 do the act, someone may say well, that appears to be
5 unreasonable in connection with that. I think the safer
6 thing is just to put the order down, say application,
7 reopen the appeal time, granted.

8 And then it would cause someone to go you
9 know, go back, look at the rule, see how much time is
10 allotted under the rule in connection with the case.

11 But I don't think it's unreasonable; in these
12 circumstances we're only talking about three days to do
13 an act. The act was done in two days.

14 CHIEF JUSTICE ROBERTS: Well, but as soon as
15 you start talking about an exception from the provision
16 in the rules, then you're going to get a lot of
17 applications and there are going to be a lot of
18 different reasons for why it wasn't filed on the last
19 day. Once that -- it seems to me, you open it up for an
20 indeterminate ruling.

21 MR. MANCINO: Well, this is an equitable
22 rule in itself. Because it allows something where an
23 appeal time has expired, can you come in and show the
24 circumstances, one, you were not notified, which
25 obviously the court did. The other side's prejudiced --

1 JUSTICE KENNEDY: Well it is an equitable
2 rule conditioned upon compliance with time limits.

3 MR. MANCINO: Well, that's -- that's once
4 it's granted. It's not, the time limit is 180 days or
5 the seven day after you received or became aware actual
6 notice --

7 CHIEF JUSTICE ROBERTS: No, but
8 Justice Kennedy's point I think is critical. In other
9 words, the drafters of the rule obviously wanted to
10 provide a safety valve. But they also appreciated that
11 you can't have it open-ended. So they did impose limits
12 on the -- if you want to call it equitable exception to
13 the 30-day rule. And it seems to me that you sort of
14 restrike the balance the drafters of the rule struck if
15 you allow further equitable departures from their, their
16 rule.

17 MR. MANCINO: Well, I think in past cases
18 the Court has always recognized there are deadlines but
19 there are exceptions to deadlines. And the most
20 compelling exemption is where a court says do the act at
21 this particular time. And you know, it's coming from a
22 judicial officer, it's not coming from someone
23 miscalculating on the calendar, calculating the time
24 when it's 30 days run, when is 14 days run, when it's 10
25 days run in connection with the case. Because in civil

1 litigation you are not given any specific time to do an
2 act. Criminal cases are a little bit different. You
3 are told about an appeal, when an appeal has to be filed
4 in connection with a case. You do not have in civil,
5 when you get your final order -- you know you have 30
6 days to do it.

7 JUSTICE SCALIA: Mr. Mancino, your position
8 here is that this rule is not jurisdictional.

9 Now, what -- what are the consequences of
10 that? I take it that that would mean that the court of
11 appeals has no obligation to inquire on its own whether
12 the matter has been filed too late?

13 MR. MANCINO: Well, I believe --

14 JUSTICE SCALIA: Right? If the parties
15 don't make anything of it, the court of appeals can --
16 can take a late, a late filing?

17 MR. MANCINO: Well, I think when the court
18 of appeals does that, I think in all fairness, they
19 should advise the parties in advance that they we're
20 considering this on our own, that the appeal was out of
21 time, and would you like to --

22 JUSTICE SCALIA: No, no, but I'm asking
23 whether a court of appeals has to even worry about that?
24 If the parties don't make anything of it, the court of
25 appeals can just assume it's okay and go ahead, right?

1 MR. MANCINO: Correct. Because I think
2 they've waived any -- the other side obviously has
3 waived or forfeited any right to object to the -- you
4 know, to the --

5 JUSTICE SCALIA: And you need an objection
6 or else it's, it will be okay?

7 MR. MANCINO: I'm sorry?

8 JUSTICE SCALIA: And you need an objection
9 or else it will be all right?

10 MR. MANCINO: Yes. The objection in this
11 case came -- you know, in the --

12 JUSTICE GINSBURG: That means that a rule --
13 that -- 14 days is really a rule left to the discretion
14 of the district judge. If the district judge feels like
15 giving a little more, this would be no control, unless
16 the opposing side objects; is that right?

17 MR. MANCINO: Well, I -- I believe it does
18 call for a timely objection by somebody to say
19 something, rather than to just sit back and let it
20 expire, knowing that someone did something that they
21 should not do in connection with --

22 JUSTICE SCALIA: Suppose you have problems
23 at home. I don't know, you have an illness at home.
24 And you ask counsel for the other side, you know, I know
25 it's a 14-day limit, but would you give me 20 days?

1 Right? And opposing counsel being as friendly as they
2 are nowadays --

3 (Some laughter.)

4 JUSTICE SCALIA: -- the other, the other
5 side would say sure, take 20 days. Okay? So you
6 prepare a paper for signature by the judge and he signs
7 off on it, gives you 20 days. That's okay then, right?

8 MR. MANCINO: Well I --

9 JUSTICE SCALIA: Because the other side's
10 agreed. He won't object on the court of appeals. And
11 suddenly, suddenly, you've got 20 days even though the
12 rule says 14.

13 MR. MANCINO: Well, there you have somewhat
14 advance knowledge that you're doing something possibly
15 contrary to a rule. But then you have the issue of once
16 you do it, are you forfeiting your right to object and
17 claim a deficiency in the process.

18 Here you're only -- what you're doing --

19 JUSTICE KENNEDY: Well, I mean, that -- that
20 may, that may be true of this stage; but
21 Justice Scalia's question points up the problem of what
22 do we do if we write this case? How do we formulate
23 this rule? And if we say that it's not jurisdictional,
24 not binding, then going forward, it seems to me to allow
25 the hypothetical that he puts to you.

1 MR. MANCINO: Well, I believe you can come
2 up with all sorts of scenarios. What I think is the
3 thing --

4 JUSTICE KENNEDY: That's why we're wondering
5 how to write the opinion.

6 (Laughter.)

7 MR. MANCINO: And where did the litigant
8 reasonably rely upon an order of the court, which
9 apparently the court had authority to issue, regardless
10 of the court making a mistake or doing something
11 intentionally --

12 JUSTICE STEVENS: And the person who did the
13 reliance was you, I guess?

14 MR. MANCINO: Yes, that's correct.

15 JUSTICE STEVENS: And is it correct that --
16 who -- was this litigant represented by counsel during
17 the period when he didn't get the notice of the
18 September 9 order?

19 MR. MANCINO: Yes. I filed the habeas
20 petition. I did anything in connection with the case.

21 JUSTICE STEVENS: So neither the, neither
22 the prisoner nor you received any notice of the first
23 goof up?

24 MR. MANCINO: Well, the first -- well, we
25 received notice of the judgment on the merits. Then we

1 filed a motion to alter judgment or for a new trial. It
2 was not, the order overruling the motion to alter or
3 amend judgment or the motion for a new trial date was
4 not received. And the clerk's docket showed it wasn't
5 mailed out.

6 JUSTICE STEVENS: I see.

7 MR. MANCINO: But in the, in that court,
8 there was a transitioning to this electronic filing,
9 which not everybody was set up at that particular time;
10 so apparently the order may have only gone to -- on the
11 electronic filing system to those who were set up, and
12 we were not set up on that thing. But the court still
13 had the obligation to send it out. The court found that
14 the clerk did not send it out. The clerk found that, or
15 the court found that we did not have notification. And
16 the court found that the other side is not prejudiced by
17 any application.

18 CHIEF JUSTICE ROBERTS: Would your -- would
19 your proposed exception, does it work the other day? I
20 mean, let's say the district court entered this order
21 and set a date certain for you to file the notice of
22 appeal, and only gave you seven days on his count rather
23 than 14, and you filed it on the ninth day, in other
24 words within the 14 days given under the rule.

25 Would you be out of luck because of what the

1 district court set out in its order as what's binding,
2 as opposed to what the resume says? Or could you rely
3 on the fact the rule says you get 14 days?

4 MR. MANCINO: Well I would believe you could
5 then argue that the rule says that, the judge was wrong
6 in -- you know -- in truncating your appeal time to file
7 the appeal.

8 CHIEF JUSTICE ROBERTS: Why wouldn't the
9 same approach work the other way? The rule says 14 and
10 the judge was wrong to give you more?

11 MR. MANCINO: Well, because the exceptions
12 to all of these time deadlines, you have cases from this
13 Court where people untimely file a motion for a new
14 trial. A new trial motion by rule has to be timely
15 filed in order to toll your time. And there have been
16 cases where the motion for new trial has been untimely
17 filed. The other side didn't say anything. And then
18 when the ruling is made, the appeal is filed within the
19 appropriate time.

20 And this Court has sanctioned that procedure
21 in connection. I see no difference here, where a
22 litigant before a court, the court issues an order, you
23 look at the order. And you abide by the order in
24 connection with the case.

25 They do have a reasonable reliance in the

1 case. And in looking back later on, in connection with
2 the -- the issue, in connection with the case.

3 JUSTICE SCALIA: You know sometimes,
4 sometimes district courts take jurisdiction over a case
5 that they -- that they shouldn't have jurisdiction over.

6 MR. MANCINO: Well --

7 JUSTICE SCALIA: And sometimes in reliance
8 on that, you go through a whole trial and it comes up to
9 the court of appeals and we say huh, there was no
10 jurisdiction here; too bad.

11 MR. MANCINO: Well --

12 JUSTICE SCALIA: Even though the court said
13 it and you went through a whole trial in reliance on the
14 district judge. District judges make mistakes.

15 MR. MANCINO: Well, that's a whole -- I
16 believe that's a whole different scenario than presented
17 here. That goes to the subject matter --

18 JUSTICE SCALIA: It's even worse, it seems
19 to me. I mean, you've wasted weeks, you know, in trial
20 and so forth.

21 MR. MANCINO: Right.

22 JUSTICE SCALIA: But if it's jurisdictional,
23 we have to say, you know, too bad. Yes, you were misled
24 by the judge. In reliance on the district judge, you
25 expended a lot of time and money, but there was no

1 jurisdiction. And that's the end of the matter.

2 MR. MANCINO: Well, the rule I always
3 remember from law school is that parties cannot
4 voluntarily confer jurisdiction on a court that does not
5 have it. And the court, at any point, if they do not
6 have subject matter jurisdiction, is free to dismiss the
7 case whether it's at trial level, the appeal level, or
8 whatever.

9 This is not that situation. Obviously, the
10 court by the rule could look into this matter. The
11 court by the rule could grant relief in connection with
12 this matter. It's a question whether the three days --

13 JUSTICE STEVENS: I know I could find this
14 out by looking at a calendar. Do you remember what day
15 of the week February 24th was, or 26th?

16 MR. MANCINO: I believe --

17 JUSTICE STEVENS: We don't have a weekend
18 problem, do we?

19 MR. MANCINO: I believe it was not -- I
20 don't believe it was a weekend, no.

21 JUSTICE KENNEDY: I looked at this. There's
22 a time start. And I think it might be the time stamp
23 when this document was entered on the ultimate appeal.

24 But -- but something you said at the outset
25 prompts this question, that -- Did you think that -- the

1 time runs from 14 days after the date when the district
2 court's order is entered.

3 MR. MANCINO: When it's entered. That's
4 correct.

5 JUSTICE KENNEDY: And was there a submission
6 or an implication in your remarks that you thought that
7 the order was not entered until three days later?

8 MR. MANCINO: No.

9 JUSTICE KENNEDY: Is there an entry -- is
10 there a time entry on the docket -- on court's order?

11 MR. MANCINO: No. It's a handwritten one
12 that doesn't say anything --

13 JUSTICE KENNEDY: I know that it's a
14 handwritten one. But that that -- that shows how long
15 he has to appeal. Is there a date when the order was
16 put on the docket? Does that show on this sheet?

17 MR. MANCINO: No. There's nothing from the
18 clerk indicating -- on the docket there is, but nothing
19 on the document that was sent, because the document only
20 was sent -- it was just handwritten over the -- on top
21 of the motion, so there was no way of telling when it
22 was entered. Because you look back at the history of
23 this case, when the court dismissed the original
24 petition, the court had a date on it. It was only 18
25 days later that it was actually entered by the clerk,

1 and of course that triggered the time for asking for
2 reconsideration.

3 So -- but --

4 JUSTICE BREYER: What about the weekends? I
5 mean, maybe the judge -- I -- it looks from my
6 calendar -- I wondered what day of the week it was. You
7 don't remember. 2/10, February 10, 2004, what day of
8 the week was it?

9 MR. MANCINO: That I cannot answer.

10 JUSTICE BREYER: It looks like it was the
11 middle of the week. So maybe there were one or two
12 weekends. So maybe what the judge's mistake was, he
13 didn't know how to count the weekend rule.

14 MR. MANCINO: Well, what I think was done --

15 JUSTICE BREYER: Which may not be
16 jurisdictional, the weekend rule.

17 MR. MANCINO: What I believe is that this
18 was sent out by mail. So they had, you know, the
19 three-day mail rule, and that's how you came to the 14
20 days in connection with the -- put in the 17-day limit
21 on --

22 JUSTICE SCALIA: Maybe Arabic numerals
23 aren't jurisdictional either.

24 JUSTICE BREYER: They're not. A numeral is
25 not jurisdictional.

1 What's -- what's -- what's the three-day
2 mail rule?

3 MR. MANCINO: Well, normally if you are
4 allowed to do an act by mail, you have three days, you
5 can serve a party and then you have three days to file
6 with the court as part of the Civil Rules. I sort of
7 think that's what the judge -- because this was going
8 out by mail -- he probably didn't get -- I wish I would
9 have saved the envelope, but I don't have the envelope,
10 but it probably didn't get to my office for three days
11 anyway.

12 JUSTICE BREYER: Speaking of the three-day
13 mail rule, maybe the judge's intent when he signed this
14 was that it actually was entered, took effect as of
15 three days later.

16 MR. MANCINO: Well, there's really no --
17 looking at the document, there's no way of telling that.
18 That is correct. There's no way of telling that, and I
19 believe that was probably the reasoning of the court
20 that, you know, it took three days to get mail because
21 you didn't get -- it wasn't sent out last time,
22 obviously you did not get the mail the last time, so he
23 added the three days, and then you have the 14 days to,
24 you know, perfect or file your notice of appeal to get
25 it to the court in this case.

1 So --

2 CHIEF JUSTICE ROBERTS: All of that might
3 have -- all those things might have been going on in the
4 judge's mind, but you don't contest that the 14-day
5 period was not complied with? You don't have an
6 argument that you complied with the 14-day period?

7 MR. MANCINO: No, I do not. We're relying
8 to the exceptions, and there's a number exceptions on
9 deadlines that have come out. We have the equitable
10 tolling, we have the waiver, forfeiture issue. And, you
11 know, in this case, specific assurance by a court which
12 in a past opinion seemed to control the date, where a
13 judge gave you a specific assurance that you could do
14 something in connection with the case.

15 The old Harris Truck case is where the
16 lawyer was on vacation. The judge said well, I'll give
17 you some extra time. Even though they knew of the
18 judgment, they knew the time would run, he said I'll
19 give you extra time to file the appeal because you want
20 to contact the lawyer who was on vacation. The court of
21 appeals then said well, the rule didn't apply because
22 you knew of the order, so -- but that was overlooked
23 even though by time calculation, everybody was out of
24 time.

25 The Eberhart case, they were out of time

1 because the motion for new trial was filed untimely,
2 which under the rule required a timely filing of a
3 motion for a new trial in order to toll your appeal
4 time.

5 So this, obviously the motion to reopen was
6 timely filed, was filed within the 180 days required by
7 the rule. The other side was served. The other side
8 had no objection to it and didn't oppose it. The real
9 issue when you look at an equitable -- sort of an
10 equitable rule like this, is the other side prejudiced,
11 and obviously they are not prejudiced.

12 CHIEF JUSTICE ROBERTS: One of the things I
13 think the drafters of the rule wanted to assure is that
14 there would be a point at which the prevailing party in
15 the district court could know with certainty there
16 wasn't going to be further proceedings in the case, and
17 that's the purpose of the 180-day period and all that.
18 It's not open-ended.

19 Under your rule where the actual time for
20 filing could be at some indefinite point, they'd never
21 really quite have that assurance, would they?

22 MR. MANCINO: Well, unless the court
23 specifically granted to the litigant a specific period
24 of time, and you know, normally litigants and lawyers do
25 not ignore what the court says.

1 At least I think as, you know, anyone -- if
2 this court said that, you have a right to reasonably
3 rely on what the court said. And it certainly wasn't an
4 unreasonable period of time that the court was giving in
5 the case. It wasn't --

6 CHIEF JUSTICE ROBERTS: Well, what would be
7 an unreasonable period of time if the two or three days
8 is not? Would another 10 days?

9 MR. MANCINO: Well, if you go back to the
10 rules, you're going into the six months, 180 days, and
11 then, you know, you would say something. Or if the
12 court, you know, gave you a year or something by
13 mistake, you know, it would -- you know, that something
14 does not sound right here. And then you would look at
15 it. At least if that were the case, you could probably
16 go in and get the court to reconsider, bring it to the
17 attention of the court. Your Honor, we did not have all
18 of this time. Did you make a mistake? You can always
19 correct mistakes. But that was not done here, it was
20 not done by the respondent in this case because they
21 didn't -- the respondent did not object to the
22 application to reopen the appeal, did not say anything
23 --

24 JUSTICE GINSBURG: But the respondent said
25 he had no reason at that time to believe that you

1 wouldn't follow the rule and file within the 14 days.
2 So if they made an objection, the moment the judge put
3 down a date that's 17 days later, the judge might say
4 that's premature.

5 MR. MANCINO: Well then, the judge may have
6 said well, I don't -- look at the rule. I don't have
7 it. I'm going to redraft the order, vacate my order and
8 put a proper order on in connection with the case. It
9 would seem to me that at some point in the appellate
10 process, because when you look at the history that the
11 Sixth Circuit in this case -- at least when the court
12 then granted a certificate of appealability, you would
13 think the respondent would -- what are -- why are you
14 granting a certificate of appealability when you told us
15 we have no jurisdiction over this case, or at least from
16 the two orders anyway, they said they had jurisdiction
17 over the February 10th order that -- on the appeal. And
18 the -- then the certificate of appealability was denied,
19 and normally that would end the case.

20 The court granted the -- my motion for
21 reconsideration, and then granted certain issues that
22 could be briefed on the merits. But once the court
23 granted the certificate of appealability, it seemed to
24 me that the other side, well, what is happening here?

25 JUSTICE SOUTER: Mr. Mancino, I take it that

1 what you are really proposing is sort of a rule that if
2 -- if counsel could reasonably be misled to overlook the
3 mistake by the court, that your reliance upon the
4 court's mistake should -- should, in fact, be respected.
5 It's kind of a rule of reasonably misleading; is that
6 about right?

7 MR. MANCINO: I believe so.

8 JUSTICE SOUTER: I mean, that's how we
9 distinguish your case on your view from the case in
10 which you get 180 days instead of 14?

11 MR. MANCINO: Right. Sort of, you know,
12 reasonably reliant, is it fair.

13 CHIEF JUSTICE ROBERTS: You think we should
14 have a rule of reason rather than a per se rule.

15 (Laughter.)

16 MR. MANCINO: That's the prior case, because
17 they made that.

18 JUSTICE STEVENS: Let me ask this question:
19 Is the order on page 151 of the joint appendix, just
20 those three lines, that's the entire order that the
21 judge entered? It just says granted, and motion --

22 MR. MANCINO: That is what's handwritten on
23 the original documents. That's it.

24 JUSTICE STEVENS: He did not make the
25 findings that the rule requires?

1 MR. MANCINO: No. But presumably you would
2 assume that those findings are subsumed within the rule
3 because the judge found in our favor. The judge denied
4 the motion to vacate part of it but granted the
5 reopening to vacate, and of course on the --

6 JUSTICE STEVENS: Because the motion
7 requires --

8 MR. MANCINO: -- motion to vacate, you have
9 30 days to appeal.

10 JUSTICE STEVENS: The rule requires that he
11 make three specific findings which he did not make.

12 MR. MANCINO: He did not make it, but you
13 assume that the judge did by granting the motion, and
14 nobody else said anything about it anyway.

15 I reserve the time.

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 Mr. Marshall?

18 ORAL ARGUMENT OF WILLIAM P. MARSHALL

19 ON BEHALF OF THE RESPONDENT

20 MR. MARSHALL: Mr. Chief Justice, and may it
21 please the Court:

22 The petitioner's failure to meet the 14-day
23 statutory deadline for filing his notice of appeal is
24 fatal to his case for three reasons.

25 First, the 14-day period is mandatory and

1 jurisdictional, and Federal district courts do not have
2 the power to enlarge this time period.

3 Second, the 14-day rule was not forfeited by
4 the state of Ohio and may be raised by the court sua
5 sponte in any event.

6 Third, even if there could be some sort of
7 limited equitable exception to the 14-day time
8 requirement, the petitioner here falls far short of
9 demonstrating why he is entitled to such extraordinary
10 relief.

11 Let me explain why. The petitioner's claim
12 that notice of appeal time requirements are not
13 jurisdictional contradicts 150 years of practice,
14 countless lower court decisions, settled congressional
15 understanding as to the meaning of its governing --

16 JUSTICE GINSBURG: What type of jurisdiction
17 are you speaking of? It's certainly not Federal
18 jurisdiction in the sense of subject matter
19 jurisdiction, like a specific case arising under Federal
20 law. What kind of jurisdiction do you have in mind?

21 MR. MARSHALL: Your Honor, I think it is its
22 own form of subject matter jurisdiction in the same way
23 that final judgments on appeals are subject matter
24 jurisdiction. And the reason why is that notice of
25 appeals are classically jurisdictional in that sense, in

1 that they transfer the locus of the case from one court
2 to another. In the appellate system, there's actually a
3 changing of the jurisdiction, and the notice of appeal
4 is that triggering mechanism. And in that sense, it is
5 classically jurisdictional and different from the other
6 kinds of time limits that this Court addressed in
7 *Kontrick*, in *versus Eberhart* because those took place
8 within a particular court system, the district court
9 system, where here there was a transfer of jurisdiction
10 triggered by the notice of appeal from one court to the
11 other.

12 JUSTICE ALITO: Isn't that just a word game?
13 It's jurisdictional because it transfers jurisdiction
14 from one court to the other. Why should that be -- why
15 does that make it jurisdictional?

16 MR. MARSHALL: Well, I think, Your Honor,
17 the same way that final judgments are. I mean, final
18 judgments are a jurisdictional prerequisite to transfer
19 from one case to another.

20 The second reason, Your Honor, by the way,
21 is congressional, is the congressional reenactment of
22 the notice of appeal time deadlines, which
23 also indicates that Congress treats these --

24 JUSTICE ALITO: Can you think of anything
25 that's enacted by Congress as jurisdictional?

1 MR. MARSHALL: No, Your Honor, but when
2 there is a background, as there is in this case, of 150
3 years of practice where Congress has enacted against
4 that background, it is presumed to be jurisdictional.
5 And I'd also point out that with respect to this Court's
6 jurisdiction, the Court has treated petitions for
7 certiorari as jurisdictional in civil cases because
8 there is a statutory underpinning, but has not treated
9 them as jurisdictional in criminal cases in part because
10 there is not a statutory underpinning.

11 JUSTICE ALITO: Doesn't the latter suggest
12 that a rule that concerns the transfer of a case from
13 one court to another is not necessarily jurisdictional?

14 MR. MARSHALL: Your Honor, I think the
15 latter recognizes the fact that it doesn't necessarily
16 have to be. That is correct.

17 However, that Congress and this Court can
18 treat such a thing because it is in a -- because it is
19 a -- because it does transfer the case from one to
20 another. I think that the criminal -- that in the
21 certiorari case, with respect to criminal, it might be
22 an indication there that there might be some relation.
23 But I would also suggest that with respect to certiorari
24 practice, you've already -- you're already in the
25 appellate mode and you're not dividing the jurisdiction

1 between trial courts and appellate courts.

2 But the quick answer is yes, Your Honor, I
3 don't think it has to be jurisdictional, but certainly
4 it can be jurisdictional. And for 150 years, this Court
5 and Congress has treated this particular division as
6 jurisdictional.

7 JUSTICE ALITO: Well, it seems to me that's
8 what we're back to, that it's long been treated as
9 jurisdictional. But you just said that it's not
10 sufficient that it's been enacted by Congress and it's
11 not sufficient that it transfers the case from one court
12 to another.

13 So we're back just to history, right?

14 MR. MARSHALL: Well, Your Honor, it's more
15 than just history, because I think Congress reenacting
16 2107 against this background for 150 years, that this
17 issue has been treated as jurisdictional, puts Congress
18 behind this as well. But here it's also, 150 years is
19 not a matter of --

20 JUSTICE GINSBURG: The provision of, is it
21 2107?

22 MR. MARSHALL: Yes, Your Honor.

23 JUSTICE GINSBURG: Where does that appear in
24 the judicial code? Does it appear under the provisions
25 concerning jurisdiction?

1 MR. MARSHALL: No, Your Honor. 2107 does
2 not itself mention jurisdiction. However, that is also
3 true with 2101 in respect to this Court's certiorari
4 jurisdiction in civil cases. The word jurisdiction is
5 not mentioned specifically but it --

6 JUSTICE GINSBURG: But it is under the
7 heading procedure, court procedure, right?

8 MR. MARSHALL: It's time for appeal to
9 court to proceed.

10 JUSTICE GINSBURG: Yes, but that's under a
11 chapter that deals with procedures, as opposed to
12 jurisdiction.

13 MR. MARSHALL: Yes, Your Honor. But this
14 Court in Barnhart suggested that in determining whether
15 something is jurisdictional or not, one looks at the
16 context of the particular location. Here this Rule 21
17 -- excuse me. Here this statute, 2107, has been enacted
18 and reenacted against the background of this Court
19 consistently saying it's jurisdictional and treating
20 this rule as jurisdictional, and that's since cases as
21 far along as Edmondson.

22 JUSTICE GINSBURG: You know there have been
23 a spate of cases that said the word "jurisdiction" has
24 been vastly overused, it's a word of many meanings. And
25 you are telling me that the meaning of these statutes is

1 subject matter jurisdiction, just like it's diversity,
2 is there a federal question?

3 MR. MARSHALL: Yes, Your Honor, in the same
4 way that amount in controversies are also subject
5 matter.

6 JUSTICE GINSBURG: But amount in controversy
7 is in 1332. Congress putting it right there together.
8 It says diversity of citizenship plus amount in
9 controversy, all in 1332. Here the limit appears in a
10 statute, a rule of procedure, not jurisdiction.

11 MR. MARSHALL: Yes, Your Honor. But that
12 statute has been enacted against, as I keep
13 reemphasizing, 150 years of practice, including the
14 Edmondson case in 1869, where the Court on its own
15 motion raised the matter as being jurisdictional and
16 because the time period had not been complied with
17 dismissed the appeal.

18 The question essentially isn't whether we're
19 going to call it jurisdictional or not. The question is
20 the effect of the particular rule. Some of the lower
21 courts call its indications of jurisdiction or a
22 prerequisite to jurisdiction. The question is what the
23 treatment of this particular requirement is and the
24 treatment of this particular requirement consistently
25 for over 150 years has been that it is mandatory,

1 jurisdictional, non-forfeitable, it can be raised by the
2 court sua sponte.

3 JUSTICE SCALIA: What characteristics are
4 you asserting follow from calling it jurisdictional in
5 this case?

6 MR. MARSHALL: Your Honor, the --

7 JUSTICE SCALIA: Number one, it can't be
8 waived, right?

9 MR. MARSHALL: That's correct.

10 JUSTICE SCALIA: Number two --

11 MR. MARSHALL: It's non-forfeitable.

12 JUSTICE SCALIA: The court of appeals has to
13 inquire on its own, right?

14 MR. MARSHALL: Yes, Your Honor.

15 JUSTICE SCALIA: Anything else?

16 MR. MARSHALL: Yes, Your Honor. There's no
17 equitable exception to it. There is no equitable
18 exception to it as well if it's jurisdictional. So all
19 of those three attach to the term "jurisdictional." But
20 I also think they could equally attach to the notion
21 that, even if we don't want to call it jurisdictional,
22 if we don't view it as fitting easily within this
23 category of subject matter jurisdiction.

24 JUSTICE SCALIA: Except at least as to the
25 second, at least as to the second, I don't know of any

1 matter that a court has to inquire into sua sponte which
2 is not jurisdictional. That's the one of the three
3 characteristics that I think we have always attached the
4 word "jurisdictional" to, I think.

5 MR. MARSHALL: Well, Your Honor, in Day
6 versus McDonough in dealing with a habeas, with a habeas
7 statute of limitations, this Court approved the court of
8 appeals raising that issue sua sponte, although they --
9 although in that case the Court --

10 JUSTICE SCALIA: It may.

11 MR. MARSHALL: It may.

12 JUSTICE SCALIA: But not must.

13 MR. MARSHALL: Yes, Your Honor.

14 JUSTICE SCALIA: Not must. And truly with
15 things we have called jurisdictional, you must, right?

16 MR. MARSHALL: Yes, Your Honor. However, if
17 the lower courts wanted to play with the language a
18 little bit and call it necessary for the invocation of
19 jurisdiction or a prerequisite --

20 JUSTICE SCALIA: We could call it
21 "quasi-jurisdictional." You wouldn't object to that?

22 MR. MARSHALL: No, Your Honor. As
23 Shakespeare might say, it's not the name. We are
24 interested in the effect, and the effect here has been
25 traditionally enforced over 150 years of court practice.

1 JUSTICE SCALIA: Well, what do you think is
2 the --

3 JUSTICE GINSBURG: How far do you take it?
4 Suppose this ^ slip is not noticed in the court of
5 appeals, and then there's a petition for cert, and some
6 clever law clerk notices that the notice of appeal was
7 filed in 16 days instead of in 14 days. Would the court
8 then have to dismiss for want of jurisdiction?

9 MR. MARSHALL: Yes, Your Honor. I think it
10 applies in the same way that lack of diversity would
11 apply or lack of a Federal question could apply, as in
12 the Mottley case. Even if it was in front of this
13 Court, if it was recognized in front of this Court, at
14 that time it would -- it must be dismissed.

15 JUSTICE SOUTER: Let's take it a step
16 further. Let's assume it isn't recognized. Assume he
17 gets his habeas relief, and three years later some eager
18 beaver is culling through the records and says, this guy
19 never should have been in court. Do they rearrest him
20 and put him into prison?

21 MR. MARSHALL: Your Honor, collateral
22 attacks for lack of subject matter jurisdiction are not
23 normally sustained, if that's what the -- if I
24 understand your question correctly. So that, for
25 example, in a diversity case, if two years or three

1 years after it proceeds to final judgment somebody
2 realizes that both parties were from the same State, the
3 collateral attack would normally not allow to change
4 that, to change that result. And I would think that the
5 same thing would happen here. If the case had proceeded
6 to final judgment, if there were an error of this type,
7 as with other types of errors in subject matter
8 jurisdiction, there would not be an opening for
9 collateral attack.

10 JUSTICE BREYER: What about something here I
11 hadn't run across, called the unique circumstances
12 doctrine. This Court in Osterneck said this: Where a
13 party has performed a act which if properly done would
14 postpone the deadline for filing his appeal -- and
15 indeed that's what happened here; he postponed the
16 deadline for filing his appeal -- and has received
17 specific assurance by a judicial officer that this act
18 has been properly done -- and here he did receive
19 specific assurance by a judicial officer that the act
20 was properly done -- in those circumstances, you can
21 make a little exception in the interests of justice.

22 MR. MARSHALL: Well, Your Honor, the unique
23 circumstances doctrine doesn't apply here because there
24 wasn't an act which if requested could have been
25 properly done.

1 JUSTICE BREYER: Yes, yes, the act was that
2 he filed a motion to reopen, which motion to reopen
3 postponed the time of appeal. And two things have to
4 happen with that act. One is you have to get the
5 district judge to agree; and second, you have to file
6 the paper.

7 So that's the act which if properly done
8 would, in fact, have led to the appeal.

9 MR. MARSHALL: Your Honor, I think that --

10 JUSTICE BREYER: I agree there were two
11 parts to it or two acts, if you want.

12 MR. MARSHALL: But, Justice Breyer, in this
13 case I think that what would have had to happen is that
14 the Petitioner would have had to move for 17 days in
15 order for the act to be properly done. He moved for 14
16 days.

17 JUSTICE GINSBURG: I thought what we were
18 talking about was that if the order had said 14 days
19 instead of 17, then the act would have been properly
20 done. That is, the only reason that -- the 16 days,
21 according to Mr. Mancino the only reason he took 16 days
22 was the judge authorized that. If the judge hadn't
23 authorized that, the rule wouldn't have been discarded
24 and he would have filed in 14 days.

25 MR. MARSHALL: Well, Your Honor, the judge

1 -- our argument is in part that the judge had no power
2 to authorize it. If I understand your question, with
3 respect to the unique circumstances doctrine, this
4 doesn't fit in because in the unique circumstances
5 doctrine the litigant actually has to seek a particular
6 type of relief and get granted that relief. The
7 Petitioner here did not seek leave to file his motion of
8 appeal within 17 days. The Petitioner here sought,
9 which is the only thing he could do under the rules, is
10 seek to reopen for 14 days.

11 CHIEF JUSTICE ROBERTS: So he hasn't
12 received, just quoting from Osterneck, he hasn't
13 received assurance that the act has been properly done?

14 MR. MARSHALL: That's right.

15 CHIEF JUSTICE ROBERTS: In other words, if
16 he came back and said, was my notice of appeal timely or
17 something, and the judge at that point ruled, then it
18 might come under that provision. But this is just --
19 prospectively, he could have filed this timely even
20 after the judge issued the order. In other words, he
21 could have filed it on the 14th day. He didn't have to
22 wait until the 17th day.

23 MR. MARSHALL: That's correct, Your Honor.

24 JUSTICE BREYER: Why does that matter? I
25 mean, also Osterneck I happened to guess involved a case

1 that took place on Tuesday. This case took place on
2 Thursday. I mean, I grant you the language literally
3 you could say doesn't quite fit it, but so what? The
4 purpose of this Osterneck I take it is to have a very
5 narrow exception where a judge tells you basically what
6 to do, and you follow what the judge said, and then, lo
7 and behold, they hit you with this jurisdictional thing
8 and you didn't get it right.

9 Now, that seems to be its purpose, and the
10 language is very close, so why not follow it?

11 MR. MARSHALL: Your Honor, the purpose of
12 the unique circumstances doctrine is not to give a
13 license to litigants to rely on district court errors.

14 CHIEF JUSTICE ROBERTS: That would be the
15 very narrow circumstances doctrine, not the unique
16 circumstances doctrine.

17 (Laughter.)

18 JUSTICE BREYER: I notice the court applied
19 it twice, so it couldn't quite be the unique
20 circumstances.

21 MR. MARSHALL: That's right, Your Honor.

22 JUSTICE STEVENS: May I ask this question.
23 Supposing there was a dispute as to whether the order
24 had been entered on February 10 or February 12. Say his
25 handwriting was illegible. Would that be a dispute that

1 would remain open throughout the appellate process?

2 MR. MARSHALL: Your Honor, the question is
3 when the clerk of court would have entered for the entry
4 of judgment.

5 JUSTICE STEVENS: If he'd entered this order
6 on February 12 or 13 -- I forget which day it was -- the
7 appeal would have been timely?

8 MR. MARSHALL: That's correct, Your Honor.

9 JUSTICE STEVENS: And I'm just -- and the
10 order was defective because it didn't make findings
11 required by the rule. And I'm just wondering, supposing
12 it was ambiguous as to the date it was actually entered.
13 Would the party then be entitled to rely on the date,
14 February 27th, set in the order, or would he have a duty
15 to investigate and find out exactly when the judge
16 signed the order?

17 MR. MARSHALL: I think the key question,
18 Your Honor, I think is when the -- when the order is
19 entered into the docket, which is done by the clerk of
20 course. I think that is the triggering time.

21 JUSTICE STEVENS: My question is what if
22 that's somewhat ambiguous? A busy court, he handed it
23 to the clerk and the clerk didn't enter it into the
24 docket. You're not sure, there's a fact dispute about
25 that.

1 MR. MARSHALL: Your Honor, that's a
2 different case. The beginning time period is a
3 beginning case, if there was some ambiguity there.

4 JUSTICE STEVENS: I understand. I'm just
5 wondering what your view is, how should courts resolve
6 that kind of dispute? Should that be a dispute that
7 remains open throughout the appellate process/ There's
8 a factual dispute as to when the judge signed order.

9 MR. MARSHALL: Yes, Your Honor. Again, the
10 factual dispute is when the --

11 JUSTICE STEVENS: If he had written here,
12 instead of "2-10," he had written down "2-12," then the
13 prosecutor 3 days later realized he had written down the
14 wrong date, would that have made the appeal untimely?

15 MR. MARSHALL: Your Honor, I think the
16 question at that point is what is the time period
17 entered into the formal docket, and what is the actual
18 judgment.

19 JUSTICE STEVENS: And that's ambiguous, I'm
20 saying. That's ambiguous.

21 MR. MARSHALL: If for some reason the court
22 records are jumbled for some reason or another and
23 nobody can determine when that entry of order is, that's
24 a different case.

25 JUSTICE STEVENS: In that case, you then

1 rely on the February 27 date in the order? Then it must
2 be permissible to rely on appeal to be filed by 2-27?
3 In such a case it would be okay.

4 MR. MARSHALL: Again, Your Honor, the
5 critical thing with the rule period is the time period
6 from the entry of judgment.

7 JUSTICE STEVENS: I know, and I say it's
8 hard to figure out when the order was actually written
9 down in the docket.

10 MR. MARSHALL: I think that the question
11 that would be required then was for whoever was filing
12 the notice of appeal to determine when the entry of the
13 docket is. If that's ambiguous, I think it's obligatory
14 on the litigant to err on the side of caution, Your
15 Honor.

16 JUSTICE STEVENS: And not rely on the 2-27
17 date.

18 MR. MARSHALL: I would certainly suggest
19 that a litigant argue on -- err on the side of caution
20 if at all.

21 JUSTICE GINSBURG: Justice Breyer quoted
22 from the Osterneck case. There was another statement of
23 the rule which goes like this: There is a sharply honed
24 exception covering cases in which the trial judge has
25 misled a party who could have and probably would have

1 taken timely action as a trial judge conveyed correct
2 rather than incorrect information. This case fits right
3 into that description, doesn't it?

4 PLAINIFF'S COUNSEL: No, Your Honor. The
5 case that they're citing to is Thompson, and in Thompson
6 what occurred in that case is that the litigant in that
7 case --

8 JUSTICE GINSBURG: The case that I'm reading
9 from is the concurring opinion in Carlisle against
10 United States. It does cite Thompson.

11 MR. MARSHALL: Thompson is the case,
12 Thompson -- this Court has not relied on the unique
13 circumstances doctrine in 40 years. Buy in Thompson
14 what occurred was the Petitioner requested a new trial
15 untimely, but was told by the court that they had timely
16 requested a new trial. Because they were informed that
17 they were entitled to a new trial, they did not do
18 something else, which was file the notice of appeal. So
19 the court basically sent them down the wrong avenue.
20 Here there was no wrong avenue that the court -- that
21 the litigant was being sent down.

22 JUSTICE GINSBURG: But they would have filed
23 that notice of appeal earlier if the judge had said,
24 your motion for a new trial is untimely. It seems to me
25 the same as in this case. The judge said: Your motion

1 is timely, so you're going to have the trigger so much
2 later. Fine. If the judge had said, your motion is
3 untimely and you know you've got to get your notice of
4 appeal in sooner rather than later. Similarly, here the
5 judge said, well, you've got until 17 days later.

6 If the judge had done right and said the
7 14-day period, then surely Mr. Mancino would have filed
8 within that period.

9 MR. MARSHALL: But, Your Honor, there is
10 nothing that the court did that prevented the litigant
11 here from filing on time. There was nothing that would
12 have prevented the litigation here from filing within
13 the 14-day period.

14 And when --

15 JUSTICE GINSBURG: There was nothing in
16 Thompson that prevented filing the notice of appeal.

17 MR. MARSHALL: Except in Thompson, Your
18 Honor, he was told that he had the right to proceed on a
19 motion for new trial. If he had -- Your Honor, I see
20 that my time is up.

21 CHIEF JUSTICE ROBERTS: You can finish your
22 answer.

23 MR. MARSHALL: In Thompson, Your Honor, the
24 difference is that -- that the litigant was sent down a
25 different road which was inconsistent with his filing a

1 notice of appeal. Here there is nothing inconsistent
2 about filing a notice within 14 days as opposed to 17
3 days.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Marshall.

6 MR. MARSHALL: Thank you, Your Honor.

7 THE COURT: We'll hear from Mr. Stewart.

8 ORAL ARGUMENT OF MALCOLM L. STEWART,
9 ON BEHALF OF UNITED STATES AS AMICUS CURIAE,
10 SUPPORTING RESPONDENT

11 MR. STEWART: Thank you Mr. Chief Justice
12 and may it please the Court.

13 For four basic reasons the deadline for
14 filing a notice of appeal in a civil case should be
15 treated as jurisdictional and therefore as nonwaivable.
16 First, the time limit sent forth in Section 2107
17 directly implicates the concerns that underlie the
18 special treatment of jurisdictional issues. It's a
19 fundamental precept of our legal system that Federal
20 courts should take special care to avoid adjudicating
21 cases where Congress has not authorized them to do so.
22 Or to put it another way, our legal system has
23 presupposed that the unauthorized exercise of
24 jurisdiction is an error different in kind from the
25 misapplication of law in cases that a court is

1 authorized to adjudicate.

2 JUSTICE GINSBURG: Mr. Stewart, do you think
3 this is subject -- that question is subject matter
4 jurisdiction?

5 MR. STEWART: We would -- we would
6 characterize it as a species of appellate jurisdiction.
7 That is, this Court has often said that it's the
8 fundamental duty of this Court when doubt is -- when
9 doubt is apparent, to inquire into its own jurisdiction
10 and that of the court from which the record comes. And
11 that division presupposes that there are cases over
12 which the lower court had subject matter jurisdiction,
13 over which this Court would not have appellate
14 jurisdiction.

15 For example, situations sometimes arise,
16 particularly in cases that are adjudicated by
17 three-judge district courts, in which there is a dispute
18 as to whether a particular district court order is
19 directly appealable to this Court or should go instead
20 to the court of appeals. And if somebody comes to this
21 Court and this Court determines that the appeal should
22 have gone to the court of appeals instead, the error is
23 characterized as one of appellate jurisdiction. This
24 Court lacks jurisdiction to review the ruling even
25 though there's nothing to suggest that the case as a

1 whole fell outside the subject matter jurisdiction of
2 the district court.

3 JUSTICE STEVENS: Mr. Stewart, that's one
4 those interesting examples. We lack jurisdiction of the
5 case but we have power to order it refiled, to vacate
6 the order and have it refiled, don't we?

7 MR. STEWART: That is an anomaly. The Court
8 has said on occasion that because it lacks appellate
9 jurisdiction it has no power to do anything with the
10 case except to vacate the order. And I think that's a
11 court that I'm not going to try to explain.

12 (Laughter.)

13 MR. STEWART: But I think Mr. Marshall has
14 identified the second example, namely the final decision
15 requirement of 28 USC 1291. That is, that's universally
16 conceded to be a jurisdictional rule, even though it has
17 nothing to do with whether the district court had
18 subject matter jurisdiction over the case. It is simply
19 whether this particular decision over -- for which
20 review is sought falls within the appellate jurisdiction
21 of the court of appeals. And our point --

22 JUSTICE SOUTER: Mr. Stewart, should we
23 repudiate the unique circumstances doctrine?

24 MR. STEWART: I don't think you need to -- I
25 think you should repudiate any conception that Federal

1 courts have freewheeling authority to excuse
2 noncompliance with statutory time limits for taking
3 appeals.

4 JUSTICE SOUTER: Well, the unique
5 circumstances doctrine is one circumstance in which
6 courts, say yeah, you can excuse it.

7 MR. STEWART: Well, I -- I think actually
8 both Harris and Thompson are explicable on other
9 grounds. And may even be correct in more limited ways.
10 For example, Harris --

11 JUSTICE SOUTER: But on the grounds for
12 which they have been taken as authority, is it your view
13 that we should repudiate those grounds?

14 MR. STEWART: Yes. With respect to civil
15 cases for which the time for taking an appeal is
16 specified by statute, it's our view to the extent that
17 Harris and Thompson would otherwise support the
18 proposition that district courts may excuse
19 noncompliance with the time limits, those cases should
20 be repudiated.

21 JUSTICE BREYER: Well -- in criminal.

22 MR. STEWART: In criminal cases the time for
23 taking an appeal is not specified by statute. It's
24 imposed by Federal Rule of Appellate Procedure 4(b).
25 But there's no statutory basis for it. There was up

1 until 1988 a provision of Title 18 of the U.S. Code,
2 Section 3772, that specifically authorized this Court to
3 promulgate rules that would establish the time for
4 filing a notice of appeal --

5 JUSTICE BREYER: But in -- though of course,
6 you'd have to confine it very narrowly, I take that
7 doctrine, if there weren't a statute, you read it into
8 the rule. So there is a statute and you read the
9 statute as saying well there could be very some very
10 narrow circumstances that Congress would have been
11 willing to make an exception. For example it is a
12 couple of days and the judge tells you, "do it" or lets
13 you do it. It's roughly the same thing, isn't it?

14 MR. STEWART: Well I think it makes a
15 fundamental difference that there is a statute in place.
16 And certainly with respect to circuit certiorari
17 petitions coming from the court of appeals to this
18 Court, this Court has recognized that distinction to be
19 fundamental.

20 CHIEF JUSTICE ROBERTS: You're sure habeas
21 cases are classified for this purpose as civil rather
22 than criminal?

23 MR. STEWART: Yes, there's no -- no dispute
24 about that. And indeed if the -- if this case were
25 classified as civil for purposes of -- I mean, as

1 criminal for purposes of the time limit for taking an
2 appeal, it would have been far out of time under Federal
3 Rule of Appellate Procedure 4(b). Indeed the authority
4 of the district court to have granted the reopening
5 period 180 days later wouldn't have been present in the
6 criminal context.

7 CHIEF JUSTICE ROBERTS: Looking at the rule,
8 it does require these findings. Has that been
9 interpreted to require that they be written on the
10 record or is that simply something that's supposed to
11 guide the district court?

12 MR. STEWART: I think the courts of appeals
13 have not required that they be written on the record but
14 have required that there be a basis appearing in the
15 record for those findings. So, for instance, if
16 Petitioner's counsel had filed a document asking to
17 reopen in the time, but had not represented that he had
18 not been informed of the judgment, then I think that if
19 the court had granted the reopening, that could be set
20 aside on appeal on the ground that there was no support
21 in the record for such a finding. But I don't believe
22 the courts of appeals have required there be explicit
23 findings as opposed to findings that are implicit in the
24 grant of the reopening.

25 The point I was going to make about the

1 certiorari petitions is that this Court's Rule 13.1
2 imposes a 90-day limit for filing a cert petition in all
3 cases. It is not divided between civil and criminal.
4 But this Court has recognized that the 90-day limit has
5 a very different status in criminal cases than in civil
6 cases. That is Rule 13.2 of the rules of this Court
7 states that when a cert petition is jurisdictionally out
8 of time, the clerk is directed not to file it. And Rule
9 13.2 cites USC 21.01(c).

10 So the clear implication is that the Court
11 recognizes the time limit imposed by statute in civil
12 cases to be a jurisdictional limit. And the crucial
13 point of Rule 13.2 is not simply that it uses the word
14 jurisdictionally. It's that it gives an instruction to
15 the clerk not to file the petition regardless of whether
16 any other party objects. It's the very type of thing
17 that a court will do as to matters of its jurisdiction,
18 as to matters over which it has an obligation to take
19 cognizance, regardless of the other party's objection.

20 In criminal cases by contrast the 90-day
21 rule applies under the rules, but the Court has
22 recognized that it retains the authority to grant
23 petitions that are untimely filed even in cases where
24 the other party objects.

25 The other thing I would say about 2107(a)

1 and it's -- part of it is reprinted at page 16 of the
2 Government's brief. In the last full paragraph of page
3 16, it says, the basic time limit for appeals in similar
4 cases is set by 28 U.S.C 2107(a), which states that --
5 and then the part we haven't reproduced says except as
6 otherwise provided in this section.

7 And then it goes on to say no appeal shall
8 bring any judgment order or decree in an action, suit or
9 proceeding of a civil nature before a court of appeals
10 for review unless notice of appeal is filed within 30
11 days.

12 And the significance of this provision, this
13 language, is it doesn't simply say a notice of appeal
14 must be filed within 30 days. Language like that would
15 conceivably leave open the question of what happens if
16 the notice of appeal is untimely filed. This language
17 actually says if a notice of appeal is not filed within
18 30 days, the appeal will not bring the judgment --

19 JUSTICE STEVENS: But it begins with the
20 exception as provided in subparagraph (c).

21 MR. STEWART: That's correct. So we're not
22 saying that the 30-day limit is absolute --

23 JUSTICE STEVENS: Yeah.

24 MR. STEWART: -- but we're saying that the
25 rule specifies that if the various time restrictions are

1 not complied with, the appeal will not bring -- I'm
2 sorry, the appeal shall not bring the judgment, order,
3 or decree before the court of appeals. This is
4 specifically framed as a limitation on the authority of
5 the reviewing court.

6 JUSTICE BREYER: What do you think, if we
7 did go to Thompson and looked at that, this would be a
8 fortiori from Thompson, as described in Osterneck, was a
9 case in which the judge simply said from the bench look,
10 your -- your -- the new trial motion is timely, though
11 it wasn't; it was out of by two days. While here, we
12 have a formal court order, it is a formal order entered
13 with a -- you know, stamp of the judge, and it says you
14 have till the 27th to file.

15 MR. STEWART: Well, are two things we would
16 say about Thompson. The first is that as this Court
17 explained in its recent decision in Hibbs versus Winn,
18 it's long been recognized that a timely motion for
19 reconsideration will suspend the finality of the
20 judgment and toll the time for taking an appeal. And
21 the Court in Hibbs versus Winn further explained that
22 under certain circumstances, even an untimely motion for
23 reconsideration will have that effect, if the judge
24 appropriately considers it on the merits.

25 And Thompson can be explained as holding

1 simply that where the Government does not object and the
2 district court evinces an intent to treat the motion as
3 timely and consider it on the merits, it will suspend
4 the finality of the judgment I don't think Thompson has
5 to read -- has to be read to stand for a broader
6 equitable principle.

7 The other thing I'd say about Thompson is
8 that for better or for worse, the Government's brief in
9 opposition in Thompson, and the case was decided on the
10 cert papers, didn't cite 28 U.S.C. 2107; it relied
11 exclusively on the time limit that was stated in the
12 Federal Rule of Appellate Procedure. Therefore the
13 Court in Thompson was not required to grapple with
14 congressionally imposed limits.

15 CHIEF JUSTICE ROBERTS: Thank you, Mr.
16 Stewart.

17 Mr. Mancino, you have four minutes
18 remaining.

19 REBUTTAL ARGUMENT OF PAUL MANCINO, JR.,
20 ON BEHALF OF PETITIONER

21 MR. MANCINO: If this were a case where
22 someone just missed the 30-day deadline, I don't think
23 we would be talking. We are talking about a case where
24 a judge properly found, properly ruled that notice was
25 not given and had the authority to reopen the case. And

1 we talk about mandatory and jurisdiction of the case.
2 All that were involved in this case is how is the case
3 moved from one court to another.

4 And the -- was it moved properly in this
5 case? The unique circumstances, I think you cannot find
6 a more compelling case for unique circumstances.

7 Did the party rely upon the court? Here you
8 have a handwritten notation from the court, signed by
9 the judge --

10 JUSTICE STEVENS: Mr. Mancino, does the
11 record tell us how you got notice of that order?

12 MR. MANCINO: No, it doesn't. But I mean, I
13 did get notice of it. It came in the mail, but it
14 doesn't --

15 JUSTICE STEVENS: You, you got that order in
16 the mail?

17 MR. MANCINO: In the mail, correct. And
18 that's why I believe the three days was added, thinking
19 of the mail rule that we have three additional days to
20 do it in connection with the case. And that's how I
21 believe the, how the 17 days came up.

22 JUSTICE KENNEDY: And I asked this once
23 before: Did the document you received show the dates
24 that it was entered on the docket, so you knew when the
25 14 days was running from?

1 MR. MANCINO: No, the only information it
2 had was the printed -- the printed date by the judge.
3 Did not show it was entered that same day.

4 JUSTICE BREYER: Yeah, but in the -- in this
5 thing, it says entered on February 10.

6 MR. MANCINO: Yeah, that's correct. The
7 docket does show that.

8 JUSTICE STEVENS: But how did you find out
9 it had been entered on February 10? Because you did
10 know that at the time you filed your notice of appeal.

11 MR. MANCINO: Well, I just went off what the
12 date on the -- the handwritten date on the pleading we
13 received from the court. It said February 10, so we
14 just put it in there. Didn't go to the actual docket to
15 see if, in fact, it was entered. As you can see, orders
16 were not -- in this case were not entered on date that
17 the judge signified anyway.

18 JUSTICE GINSBURG: This is, this is all at
19 the top of page 151 of the joint appendix, right?
20 That's the that entire thing.

21 MR. MANCINO: That is the -- well, it is
22 printed on that. But I mean, if you look at the
23 original document --

24 JUSTICE GINSBURG: Yes. It was
25 handwritten --

1 MR. MANCINO: It's a handwritten --
2 handwritten by the judge in, in the case. So --

3 JUSTICE KENNEDY: But it says when it was
4 signed by the judge. It doesn't say when it was entered
5 on the docket, when it was entered by the clerk.

6 MR. MANCINO: No. It says when the judge
7 signed it. That's correct.

8 JUSTICE BREYER: But it says it in the
9 index, it says -- it says docket entries. 2-10, it says
10 entered 2-10, on page 11. On page 11.

11 MR. MANCINO: Yeah, that's correct. But
12 that's from the docket --

13 JUSTICE BREYER: Received. So-

14 MR. MANCINO: But the document we received
15 from the Court just has -- you know -- the handwritten
16 notation on it, file your appeal by --

17 JUSTICE ALITO: What would you, what would
18 you have had to have done to find out when it was
19 entered on the docket? Could you have accessed that
20 electronically? Or would you have to go to the court,
21 to --

22 MR. MANCINO: Well, probably I could not
23 have -- at that time, I mean I could do it now, but at
24 that time you'd have to go over to the courthouse, just
25 like we walked on orders of appeal over to the

1 courthouse, had it stamped by the clerk there, and
2 figured that was the end of it and we were on our way to
3 the Sixth Circuit in Cincinnati. Thanks.

4 CHIEF JUSTICE ROBERTS: Thank you,
5 Mr. Mancino. The case is submitted.

6 (Whereupon, the case in the above-titled
7 matter was submitted at 12:07 p.m.)

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