No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

Adrian Demond Hyman

Petitioner,

v.

United States of America

Respondent.

ON APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S APPLICATION TO EXTEND TIME TO FILE A PETITION FOR A WRIT OF CERTIORARI

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CJA-Appointed Counsel of Record

May 8, 2018

To the Honorable John G. Roberts, Jr., Chief Justice of the United States and Circuit Justice for the United States Court of Appeals for the Fourth Circuit:

Pursuant to 28 U.S.C. § 2101(c) and Supreme Court Rules 13.5, 22, and 30.3, Petitioner Adrian Hyman respectfully requests that the time to file a Petition for a Writ of Certiorari in this matter be extended for forty-five days to and including July 23, 2018. Petitioner is seeking review of the Fourth Circuit's decision in *United States v. Hyman*, 880 F.3d 161 (4th Cir.), *amended on reh'g by* 884 F.3d 496 (4th Cir. 2018). The court issued its opinion on January 22, 2018. App. A. The court granted Hyman's petition for rehearing on March 9, 2018 and issued an amended opinion that same day. App. B–D. Without an extension, the Petition would be due on June 7, 2018. This Application is timely because it is being filed more than ten days before that date. *See* S. Ct. R. 13.5. This Court would have jurisdiction over the judgment under 28 U.S.C. § 1254(1).

1. Hyman has good cause for his application because his attorney is representing him as appointed counsel under the Criminal Justice Act, 18 U.S.C. § 3006A, and must balance her representation with a regular, full-time job as Clinical Professor of Law at Duke Law School. Hyman's appeal ended up taking significantly more time than expected and far more time than is generally budgeted for CJA-appointed attorneys.[1] The appeal has been going on for almost a year and a

[1] The current compensation limit for CJA-appointed attorneys in an appeal is $7,800. Counsel reached that limit over a year ago, after filing an opening brief and then responding to the Government's motion to dismiss. *See* Guide to Judiciary Policy, Ch. 2 § 230.23.20, available at, http://www.uscourts.gov/rules-policies/judiciary-policies/cja-guidelines/chapter-2-ss-230-compensation-and-expenses.

half and the demands of the case have been significant at several points, requiring Counsel to put aside other pressing professional and personal duties in order to meet briefing deadlines.

2. Hyman filed his notice of appeal *pro se* on November 22, 2016 – about three months after the deadline to appeal in a criminal case – seeking to challenge the district court's calculation of his sentencing range under the U.S. Sentencing Guidelines. Counsel was appointed on November 29, 2016 under the Criminal Justice Act and immediately began working to prepare Hyman's case. The opening brief was filed February 13, 2017.

3. Two days before its response on the merits was due, on March 2, 2017, the Government filed a motion to dismiss and suspend briefing, raising the issue of untimeliness for the first time. Addressing the untimeliness issue has involved much greater time and effort than similar motions in the Fourth Circuit.[2] CJA-counsel filed a response to the Government's motion to dismiss on March 28, 2017. Counsel argued, among other things, that the Government had provided no valid justification for its delay resulting in the Government forfeiting its untimeliness defense. The Government declined to file a reply.

4. Three months later, on June 9, 2017, instead of deciding the pending

[2] *See, e.g.*, *United States v. McArthur*, No. 16-4828 (4th Cir. Mar. 21, 2017) (granting 5-page motion to dismiss untimely appeal in just over one month); *United States v. Dimitri Murray*, No. 16-4353 (4th Cir. Jan. 17, 2017) (granting motion to dismiss untimely appeal in under three months); *United States v. Troy Clanton*, No. 16-4357 (4th Cir. Nov. 14, 2016) (granting 4-page motion to dismiss in three months); *United States v. Giovanni Wright*, No. 15-4434 (4th Cir. Dec. 17, 2015) (granting 4-page motion to dismiss in two months); *United States v. Obinna Okpala*, No. 15-4314 (4th Cir. Sept. 11, 2015) (granting 4-page motion to dismiss in two months) *United States v. Steven McCall*, No. 14-4890 (4th Cir. May 19, 2015) (granting three-page motion to dismiss in about one month).

motion to dismiss, the court ordered the Government to file a full response brief on the merits and calendared the case for oral argument. CJA-counsel filed a reply to the Government's brief in late July 2017 and presented oral argument in October 2017.

5. The court granted the Government's motion to dismiss in a published opinion about three months after oral argument, on January 22, 2018. App. A. CJA-counsel filed a petition for rehearing and rehearing *en banc* less than fourteen days later, on February 3, 2018. The court then requested that the Government file a response to Hyman's petition, which the Government filed on February 26, 2018. Two days later, CJA-counsel filed a reply to the Government's response. Finally, almost a year after the Government's motion to dismiss, the court granted Hyman's petition for rehearing on March 9, 2018 but still refused to reach the merits of Hyman's appeal. App. B. That same day it issued an amended opinion but still granted the Government's motion to dismiss the appeal. App. C.

6. All of these filings over the last year and a half have required significant research and time to prepare, leaving CJA-counsel pressed in other responsibilities. The busiest time in the academic year is usually mid-March – late May because CJA-counsel is responsible for assisting students in finalizing extensive final projects, grading the final projects, with grades due by May 4, 2018, and then assigning final grades for the year-long first-year course as well as final grades for an upper-level course. Additional time is warranted to allow counsel to adequately prepare a Petition.

7. CJA-counsel is required to file a petition for a writ of certiorari in a criminal appeal unless she can certify that the petition would be "frivolous." *See* Fourth Circuit CJA Plan, § 5 ¶ 2 (If counsel believes a petition "would be frivolous, counsel may file a motion to withdraw with this court."). CJA-counsel believes that both the merits of Hyman's appeal of his criminal sentence and the arguments raised opposing the Government's motion to dismiss for untimeliness have merit and raise significant issues. And the appellate court itself thought CJA-counsel raised issues with enough merit to warrant full briefing on the merits, oral argument, and a grant of rehearing. By far, motions to dismiss for untimeliness in criminal appeals in the Fourth Circuit have historically been a handful of pages in length and have been overwhelmingly granted in a very short time. *See supra* n.2.

8. CJA-counsel remains convinced that a petition is far from frivolous and thus, she remains under an obligation to file a petition, for two reasons. First, the Fourth Circuit acted without authority when it granted the Government's motion to dismiss based on the erroneous rationale that the court's own local non-jurisdictional claim-processing rule allowing a procedural motion to dismiss "*at any time*," immunized the Government from forfeiture – an argument that was not properly before the court to begin with and was never briefed or developed by the Government.

9. If allowed to stand, the precedential panel decision effectively nullifies *Kontrick v. Ryan*, and this Court's consistent line of cases for over a decade that refuse to allow non-jurisdictional rules to have the "drastic" effects of

jurisdictional rules. Now in the Fourth Circuit, as a matter of law, the Government can delay raising any procedural threshold defense in a motion to dismiss in any appeal as long as it wants and for any reason or no reason at all. It can do so regardless of the prejudice and significant waste of judicial, Criminal Justice Act, and opposing party time and resources, regardless of any other interests at stake that might weigh in favor of hearing the appeal on the merits. The appellate court decision flies in the face of this Court's clear precedents.

10. Second, a petition will not be frivolous because Hyman's sentence is unlawful based on an improperly calculated sentencing range under the U.S. Sentencing Guidelines. This Court has a strong interest in ensuring the proportionality and uniformity of federal sentences across the nation.

11. No meaningful prejudice to Hyman or the Government will arise from granting the extension. Hyman's interests are served by allowing his counsel adequate time to prepare a Petition, while an extension will not affect the Government's interests in retaining him in custody or in having adequate time to respond to the Petition.

WHEREFORE, Petitioner respectfully requests that an order be entered extending the time to file a petition for a writ of certiorari for 45 days to and including July 23, 2018.

Dated: May 8, 2018

Respectfully submitted,

/S/ SARAH M. POWELL
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Counsel for Petitioner Adrian Hyman

No. 18-

IN THE
SUPREME COURT OF THE UNITED STATES

Adrian Demond Hyman

Petitioner,

v.

United States of America

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Rule 29.5 of the Rules of this Court, I certify that on the 8th day of May, 2018, a copy of the Application for an Extension of Time to File Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit was sent by U.S. mail, first-class, postage prepaid, to the following:

Solicitor General of the United States
Room 5616
Department of Justice
950 Pennsylvania Ave. N.W.
Washington, DC 20530-0001

May 8, 2018

/S/ SARAH M. POWELL
SARAH M. POWELL
210 Science Dr.
Durham, NC 27708
(919) 245-1058
CJA-Appointed Counsel of Record

APPENDIX

APPENDIX

EXHIBIT A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4771

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ADRIAN DEMOND HYMAN,

Defendant – Appellant.

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Loretta C. Biggs, District Judge. (1:15-cr-00311-LCB-1)

Argued: October 24, 2017 Decided: January 22, 2018

Before WILKINSON, DUNCAN, and AGEE, Circuit Judges.

Motion to dismiss granted by published opinion. Judge Agee wrote the opinion, in which Judge Wilkinson and Judge Duncan joined.

ARGUED: Sarah Marie Powell, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina, for Appellant. Vijay Shanker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Kenneth A. Blanco, Acting Assistant Attorney General, Trevor N. McFadden, Deputy Assistant Attorney General, Appellate Section, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sandra J. Hairston, Acting United States Attorney, Kyle David Pousson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

AGEE, Circuit Judge:

Adrian Demond Hyman filed his notice of appeal late in violation of the Federal Rules of Appellate Procedure. In response, the Government filed a motion to dismiss the appeal due to his failure to meet the requirement for timely filing. Hyman contends the Government was tardy in filing the motion to dismiss and that delay effectively cures any failure to observe the requirements of the Rules on his part. For the reasons discussed below, we find Hyman's argument to be without merit and grant the Government's motion to dismiss the appeal.

I.

Hyman pleaded guilty in the United States District Court for the Middle District of North Carolina to one count of distribution of cocaine hydrochloride in violation of 21 U.S.C. § 841(a)(1), (b)(1)(C). In a judgment order filed June 27, 2016, the court sentenced Hyman to fifty-seven months' imprisonment with three years of supervised release. On November 22, 2016, Hyman filed a pro se notice of appeal challenging his sentence.[1] This Court appointed counsel and ordered briefing. Hyman filed his opening brief and joint appendix on February 13, 2017.

On March 2, 2017, the Government filed a motion to dismiss the appeal and suspend briefing, and we suspended briefing pending our ruling on the motion to dismiss. In its motion, the Government argued that Hyman had violated Federal Rule of Appellate

[1] The notice of appeal was dated November 2, 2016, and the envelope was postmarked on November 15, 2016.

Procedure 4(b)(1)(A) by failing to file a notice of appeal within fourteen days of the district court's judgment order and that delinquency required dismissal of the appeal. Hyman responded that the Court should allow the untimely appeal because the Government unnecessarily delayed its filing of the motion to dismiss until after he had filed his opening brief. The Government did not reply. We calendared the appeal and motion to dismiss for oral argument and resumed the briefing schedule.

In its response brief on appeal, the Government specifically argued that it was permitted to file a motion to dismiss pursuant to our Local Rule 27(f). Hyman did not respond to this contention in his reply brief. We heard oral argument and now grant the Government's motion to dismiss. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a).

II.

Rule 3(a)(1) of the Federal Rules of Appellate Procedure mandates the timely filing of a notice of appeal in accordance with Rule 4. In turn, Rule 4(b)(1)(A) requires a criminal defendant to file his notice of appeal within fourteen days of the entry of the district court's judgment of conviction.[2] Since Hyman's final order of conviction was entered in the district court on June 27, 2016, he was required to file his notice of appeal no later than July 11, 2016. *See* Fed. R. App. P. 4(b)(1)(A). Consequently, Hyman's

[2] Rule 4(b)(3) extends the time to file to fourteen days from the resolution of certain post-trial motions, and Rule 4(b)(4) also permits the district court—upon motion or sua sponte—to extend the filing period by thirty days "[u]pon a finding of excusable neglect or good cause." Neither rule applies in this case.

notice of appeal filed November 22, 2016, and dated November 2, 2016, was over three months late.

The parties agree that the late filing of a notice of appeal does not deprive the Court of subject matter jurisdiction, but Rule 4 is a mandatory claim-processing rule. *See United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir. 2009) (holding that a violation of Rule 4(b) does not deprive the Court of jurisdiction); *see also Manrique v. United States*, 581 U.S. __, 137 S. Ct. 1266, 1271 (2017) (refusing to determine whether Rule 4 is jurisdictional but stating that "[t]he requirement that a defendant file a timely notice of appeal . . . is at least a mandatory claim-processing rule"). A mandatory claim-processing rule—like Rule 4(b)(1)(A)—is inflexible "but 'can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.'" *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (per curiam) (quoting *Kontrick v. Ryan*, 540 U.S. 443, 456 (2004)).

In addition to the Federal Rules of Appellate Procedure, our Court has promulgated Local Rules that also apply to cases in this Circuit. *See* Fed. R. App. P. 47(a) (permitting each court of appeals to, "after giving appropriate public notice and opportunity for comment, make and amend rules governing its practice"). Local Rule 27(f) states, "Motions to dismiss based upon the ground that the appeal is not within the jurisdiction of the Court or for other procedural grounds may be filed at any time."

Local Rule 27(f) is a broad rule that allows a party to move to dismiss (1) on procedural grounds, *and* (2) at any time. We apply the rule in accordance with its plain language. *See United States v. Shank*, 395 F.3d 466, 469 (4th Cir. 2005) (first rejecting the appellant's arguments due to "the plain language of the rule"). Local Rule 27(f)

clearly and unambiguously allows a party to file a motion to dismiss on procedural grounds *at any time*.

Because we are required to strictly apply claim-processing rules if they are timely raised, and because our Local Rules permit a party to raise the timeliness issue at any time, we grant the Government's motion to dismiss. *Eberhart*, 546 U.S. at 18 (recognizing that "when the Government objected to a filing untimely under [Federal Rule of Criminal Procedure 37, the predecessor to Federal Rule of Appellate Procedure 4(b)], the court's duty to dismiss the appeal was mandatory"). In fact, if we were to deny its motion to dismiss, we would in effect be sanctioning the Government for following our own Rule. Under the Federal Rules of Appellate Procedure, we cannot do so. *See* Fed. R. App. P. 47(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.").

In his response to the Government's motion to dismiss, Hyman cites to our precedent for the proposition that a party must raise the timeliness issue as early as possible. *See Ga. Pac. Consumer Prods., LP v. Von Drehle Corp.*, 710 F.3d 527, 534 (4th Cir. 2013); *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1164 (4th Cir. 1985). These cases, however, address affirmative defenses at trial, not appellate counterarguments. Hyman also relies on cases from the Seventh and D.C. Circuits to argue that the Government should have filed its motion before Hyman filed his opening brief. *See Ramos v. Ashcroft*, 371 F.3d 948, 950 (7th Cir. 2004); *Miss. River*

Transmission Corp. v. FERC, 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992). However, the rules of those circuits regarding motions to dismiss differ from our own and have no application to cases in this Circuit, which are subject to the Local Rules of the Fourth Circuit.[3]

Hyman did not address the application of Local Rule 27(f) in his briefs, even after the Government cited to the Rule in its brief as the basis for granting the motion to dismiss the appeal. When asked at oral argument to articulate a standard for establishing the point at which a motion to dismiss would be untimely and deemed waived, Hyman stated only that the Government was simply too late in this case. Hyman's difficulty in articulating a standard reflects the frailty of attempting to insert a nebulous equity argument in the face of a clear, mandatory claim-processing rule. Moreover, Hyman never identified any prejudice he suffered by virtue of the timing of the Government's motion to dismiss.

Finally, our recent decision in *United States v. Oliver*, __ F.3d __, 2017 WL 6505851 (4th Cir. Dec. 20, 2017), is not inapposite. In that case, the Court determined the conditions necessary to warrant the exercise of its inherent power sua sponte under Local Rule 27(f), which states in pertinent part, "The Court may also sua sponte summarily dispose of any appeal at any time." Within its analysis, the Court addressed when a party

[3] The D.C. Circuit requires a party to file a motion to dismiss within forty-five days of the docketing of the appeal, and that deadline is mentioned in the *Mississippi River Transmission Corp.* case. *See* D.C. Cir. R. 27(g)(1). The Seventh Circuit has no rule regarding motions to dismiss and is therefore free to fashion case-specific rules. By contrast, we are constrained by our Local Rule 27(f).

may file a motion to dismiss, stating, "[I]f the [respondent] fails to object promptly to an appeal's untimeliness in either its merits brief or an earlier motion to dismiss, it generally forfeits the right to do so." *Oliver*, 2017 WL 6505851, at *2. The Court, however, recognized the broad language of Local Rule 27(f) in allowing a party to file a motion to dismiss "at any time" and declined to decide the limits of that part of the Rule, although it did determine that the Government had forfeited its right to move for dismissal because it did not object to the untimely appeal "until well after the merits briefing." *Id.* at *2 & n.2. As in *Oliver*, we decline to determine the boundaries of Local Rule 27(f). Regardless, under whatever limitations may cabin the Rule, the Government here filed its motion to dismiss for untimeliness well within any limits recognized in *Oliver* because the Government raised the dismissal argument before filing its response brief and within that brief. Other than his argument that the Government waived the right to file the motion to dismiss by virtue of the time of its filing, Hyman raises no other arguments as to the motion to dismiss.

For all these reasons, we conclude that the Government's motion to dismiss was timely: "The court of appeals may, in its discretion, overlook defects in a notice of appeal *other than the failure to timely file a notice*." *Manrique*, 137 S. Ct. at 1274 (second emphasis added). Therefore, the Government's motion to dismiss Hyman's untimely appeal is granted. The appeal is dismissed.

DISMISSED

EXHIBIT B

FILED: March 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4771
(1:15-cr-00311-LCB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ADRIAN DEMOND HYMAN

Defendant - Appellant

O R D E R

Upon consideration of appellant's petition for rehearing and rehearing en banc, the court grants panel rehearing and issues an amended opinion on rehearing.

The petition for rehearing en banc is denied, no poll having been requested pursuant to Fed. R. App. P. 35(f).

Entered at the direction of Judge Agee with the concurrence of Judge Wilkinson and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

EXHIBIT C

FILED: March 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4771
(1:15-cr-00311-LCB-1)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ADRIAN DEMOND HYMAN,

Defendant - Appellant.

O R D E R

The Court amends its opinion filed January 22, 2018, as follows:

On page 5, the first sentence of the first full paragraph is amended to read, "Because we are required to strictly apply claim-processing rules if they are timely raised, and because our Local Rules as currently written permit a party to raise the timeliness issue at any time, we grant the Government's motion to dismiss."

For the Court – By Direction

/s/ Patricia S. Connor, Clerk

EXHIBIT D

ON REHEARING

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4771

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

ADRIAN DEMOND HYMAN,

Defendant – Appellant.

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Argued: October 24, 2017 Decided: March 9, 2018

Before WILKINSON, DUNCAN, and AGEE, Circuit Judges.

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ARGUED: Sarah Marie Powell, DUKE UNIVERSITY SCHOOL OF LAW, Durham, North Carolina, for Appellant. Vijay Shanker, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellee. **ON BRIEF:** Kenneth A. Blanco, Acting Assistant Attorney General, Trevor N. McFadden, Deputy Assistant Attorney General, Appellate Section, Criminal Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Sandra J. Hairston, Acting United States Attorney, Kyle David Pousson, Assistant United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Greensboro, North Carolina, for Appellee.

AGEE, Circuit Judge:

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On March 2, 2017, the Government filed a motion to dismiss the appeal and suspend briefing, and we suspended briefing pending our ruling on the motion to dismiss. In its motion, the Government argued that Hyman had violated Federal Rule of Appellate Procedure 4(b)(1)(A) by failing to file a notice of appeal within fourteen days of the

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district court's judgment order and that delinquency required dismissal of the appeal. Hyman responded that the Court should allow the untimely appeal because the Government unnecessarily delayed its filing of the motion to dismiss until after he had filed his opening brief. The Government did not reply. We calendared the appeal and motion to dismiss for oral argument and resumed the briefing schedule.

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II.

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[2] Rule 4(b)(3) extends the time to file to fourteen days from the resolution of certain post-trial motions, and Rule 4(b)(4) also permits the district court—upon motion or sua sponte—to extend the filing period by thirty days "[u]pon a finding of excusable neglect or good cause." Neither rule applies in this case.

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Local Rule 27(f) is a broad rule that allows a party to move to dismiss (1) on procedural grounds, *and* (2) at any time. We apply the rule in accordance with its plain language. *See United States v. Shank*, 395 F.3d 466, 469 (4th Cir. 2005) (first rejecting the appellant's arguments due to "the plain language of the rule"). Local Rule 27(f) clearly and unambiguously allows a party to file a motion to dismiss on procedural grounds *at any time*.

Because we are required to strictly apply claim-processing rules if they are timely raised, and because our Local Rules as currently written permit a party to raise the timeliness issue at any time, we grant the Government's motion to dismiss. *Eberhart*, 546 U.S. at 18 (recognizing that "when the Government objected to a filing untimely under [Federal Rule of Criminal Procedure 37, the predecessor to Federal Rule of Appellate Procedure 4(b)], the court's duty to dismiss the appeal was mandatory"). In fact, if we were to deny its motion to dismiss, we would in effect be sanctioning the Government for following our own Rule. Under the Federal Rules of Appellate Procedure, we cannot do so. *See* Fed. R. App. P. 47(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local circuit rules unless the alleged violator has been furnished in the particular case with actual notice of the requirement.").

In his response to the Government's motion to dismiss, Hyman cites to our precedent for the proposition that a party must raise the timeliness issue as early as possible. *See Ga. Pac. Consumer Prods., LP v. Von Drehle Corp.*, 710 F.3d 527, 534 (4th Cir. 2013); *Peterson v. Air Line Pilots Ass'n, Int'l*, 759 F.2d 1161, 1164 (4th Cir. 1985). These cases, however, address affirmative defenses at trial, not appellate counterarguments. Hyman also relies on cases from the Seventh and D.C. Circuits to argue that the Government should have filed its motion before Hyman filed his opening brief. *See Ramos v. Ashcroft*, 371 F.3d 948, 950 (7th Cir. 2004); *Miss. River Transmission Corp. v. FERC*, 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992). However, the rules of those circuits regarding motions to dismiss differ from our own and have no

application to cases in this Circuit, which are subject to the Local Rules of the Fourth Circuit.[3]

Hyman did not address the application of Local Rule 27(f) in his briefs, even after the Government cited to the Rule in its brief as the basis for granting the motion to dismiss the appeal. When asked at oral argument to articulate a standard for establishing the point at which a motion to dismiss would be untimely and deemed waived, Hyman stated only that the Government was simply too late in this case. Hyman's difficulty in articulating a standard reflects the frailty of attempting to insert a nebulous equity argument in the face of a clear, mandatory claim-processing rule. Moreover, Hyman never identified any prejudice he suffered by virtue of the timing of the Government's motion to dismiss.

Finally, our recent decision in *United States v. Oliver*, __ F.3d __, 2017 WL 6505851 (4th Cir. Dec. 20, 2017), is not inapposite. In that case, the Court determined the conditions necessary to warrant the exercise of its inherent power sua sponte under Local Rule 27(f), which states in pertinent part, "The Court may also sua sponte summarily dispose of any appeal at any time." Within its analysis, the Court addressed when a party may file a motion to dismiss, stating, "[I]f the [respondent] fails to object promptly to an appeal's untimeliness in either its merits brief or an earlier motion to dismiss, it generally forfeits the right to do so." *Oliver*, 2017 WL 6505851, at *2. The Court, however,

[3] The D.C. Circuit requires a party to file a motion to dismiss within forty-five days of the docketing of the appeal, and that deadline is mentioned in the *Mississippi River Transmission Corp.* case. *See* D.C. Cir. R. 27(g)(1). The Seventh Circuit has no rule regarding motions to dismiss and is therefore free to fashion case-specific rules. By contrast, we are constrained by our Local Rule 27(f).

recognized the broad language of Local Rule 27(f) in allowing a party to file a motion to dismiss "at any time" and declined to decide the limits of that part of the Rule, although it did determine that the Government had forfeited its right to move for dismissal because it did not object to the untimely appeal "until well after the merits briefing." *Id.* at *2 & n.2. As in *Oliver*, we decline to determine the boundaries of Local Rule 27(f). Regardless, under whatever limitations may cabin the Rule, the Government here filed its motion to dismiss for untimeliness well within any limits recognized in *Oliver* because the Government raised the dismissal argument before filing its response brief and within that brief. Other than his argument that the Government waived the right to file the motion to dismiss by virtue of the time of its filing, Hyman raises no other arguments as to the motion to dismiss.

For all these reasons, we conclude that the Government's motion to dismiss was timely: "The court of appeals may, in its discretion, overlook defects in a notice of appeal *other than the failure to timely file a notice*." *Manrique*, 137 S. Ct. at 1274 (second emphasis added). Therefore, the Government's motion to dismiss Hyman's untimely appeal is granted. The appeal is dismissed.

DISMISSED

EXHIBIT E

FILED: March 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 16-4771
(1:15-cr-00311-LCB-1)

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ADRIAN DEMOND HYMAN

Defendant - Appellant

J U D G M E N T

In accordance with the decision of this court, this appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK