No. ____

IN THE
SUPREME COURT OF THE UNITED STATES

Adrian Hyman,
Petitioner,

v.

United States of America,
Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has recognized at least two distinct categories of time limits in our system of justice: those with jurisdictional consequences, and the more ordinary non-jurisdictional claim-processing deadlines, adopted for "the orderly transaction" of a court's business. *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004). Each has different consequences if a party misses it and each limits the authority of a federal appellate court in distinct ways.

Jurisdictional deadlines fundamentally alter "the normal operation of our adversarial system" because they require courts to dismiss any case filed after the deadline, regardless of the waste of resources and time or of any other interests weighing in favor of hearing the merits of a case. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 434 (2011). Because of these harsh consequences, in recent years this Court has tried to limit the situations in which federal courts may consider a rule to have jurisdictional consequences. *Id.* at 435. The questions presented are:

1. Whether an appellate court acts without authority when it enforces the non-jurisdictional deadline for a direct criminal appeal under Fed. R. App. P. 4(b) with the harsh consequences this Court has only allowed jurisdictional rules, particularly in the context of the interests at stake in a challenge to an unlawful criminal sentence, authorized by 18 U.S.C. § 3742.

2. Whether non-jurisdictional rules, such as Fed. R. App. P. 4(b), are subject to equitable exceptions and whether equitable considerations should excuse the missed deadline of an indigent defendant, unrepresented by counsel, in this case.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Adrian Hyman respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is published at 880 F.3d 161. The amended opinion after rehearing is published at 884 F.3d 496.

JURISDICTION

The opinion and judgment of the Fourth Circuit were entered on January 22, 2018. Hyman's petition for rehearing was granted on March 9, 2018, and an amended opinion and judgment were entered that same day. On May 18, 2018, Chief Justice of the United States John G. Roberts extended the time to file this petition through July 23, 2018. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND RULES PROVISIONS INVOLVED

Relevant portions of 18 U.S.C. § 3742, Fed. R. App. P. 4(b), Fourth Circuit Local Rule 27(f), and related local rules from other circuits, are reproduced in App. D.

STATEMENT OF THE CASE

1. District Court Proceedings. On December 9, 2015, Mr. Hyman, represented by an assistant federal public defender, pleaded guilty to a single count of distribution of an unspecified amount of cocaine hydrochloride under 18 U.S.C. §§ 841(a)(1) and (b)(1)(C), arising from three drug sales with a criminal informant in March, 2015. After a hearing on June 13, 2016, Hyman was sentenced to 57 months in prison, three years of supervised release, and a special assessment of $100. Judgment was entered June 27, 2016. Hyman's prison sentence was more than double what he would have reasonably expected from any evidence the Government had proffered in the case when he pleaded guilty. *See*

DE-13, Hyman Br.

2. Fourth Circuit Appeal. On November 22, 2016, and unrepresented by counsel, Hyman filed his notice of appeal in the district court, challenging his criminal sentence. *See* App. E, Docket. The court of appeals had jurisdiction under 28 U.S.C. § 1291 and 18 U.S.C. § 3742(a). Hyman stated in the notice: "This appeal is base [sic] on the Supreme Court's recent decision in United States v. Molina-Martinez (No. 14-8913) . . . . The defendant seeks plain error review under Federal Rules of Criminal Procedure 52(b). According to the ruling in Molina-Martinez, the defendant believes this appeal is not time barred." DE-14, J.A. at 114. The next day the appeal was docketed in the court of appeals.

On November 29, the court appointed counsel for Hyman under the Criminal Justice Act, 18 U.S.C. § 3006A. On December 5, 2016, counsel filed the docketing statement, which showed that Hyman's notice of appeal was filed after the 14-day period allowed by Fed. R. App. P. 4(b). The Government entered its appearance that same day. It has not denied it was aware at least by this point that Hyman's notice of appeal was untimely. The Government had a duty to timely review the docketing statement and file any corrections within 10 days. *See* 4th Cir. L.R. 3(b). Upon receiving the docketing statement, the Government did not move to dismiss the appeal.

Meanwhile, after filing the docketing statement and receiving no motion to dismiss the appeal, CJA-counsel proceeded to work on Hyman's appeal. The court issued a briefing schedule on January 9, 2017, and a month later, on February 8, 2017, when the deadline to file the opening brief and Joint Appendix was approaching, counsel e-mailed the Government to coordinate the Appendix contents. Again, the Government did not move to dismiss.

On February 13, 2017, Hyman filed his opening brief, arguing, *inter alia*, that the district court improperly calculated his U.S. Sentencing Guidelines range. On March 2, 2017, two business days before its response brief was due, the Government moved to suspend briefing and to dismiss the appeal as untimely. The Government offered no reason for its delay in raising untimeliness. The motion's substantive argument for dismissal was just this: "The untimely notice of appeal under Rule 4(b) does not deprive this Court of subject matter jurisdiction. *United States v. Urutyan*, 564 F.3d 679, 683–86 (4th Cir. 2009). Nonetheless, the United States moves to dismiss the instant appeal – entered nearly four months beyond the deadline – as untimely." DE-20, Gov't Mot. at 2.

Hyman's response, filed March 28, 2017, made arguments in favor of excusing the missed deadline, including that the Government forfeited its untimeliness defense by its own undue delay. Hyman demonstrated by affidavit the significant time and resources that had been spent in the case from the Government's delay. DE-28, Hyman Resp. to Mot., Exh. B. In addition, Hyman provided an exhibit compiling research suggesting a Government practice in the Fourth Circuit of waiting to assert untimeliness until after it gauges the merits of an appeal.[1] *Id.* at Exh. A. The Government declined to reply to Hyman's response, although it was entitled to do so under Fed. R. App. P. 27(a)(4).

The court suspended the briefing schedule but did not rule on the motion to dismiss. Months later, on June 8, 2017, the court tentatively calendared oral argument and then ordered the Government to file a response addressing Hyman's opening brief on the merits. DE-29; DE-30. So briefing resumed, and the Government filed a 35-page brief on July 18, 2017. In the barely two pages of that brief dedicated to timeliness

[1] Overwhelmingly the Government waives untimeliness in cases involving an *Anders* brief or in the rarer case of a waiver of the right to appeal in a plea agreement.

arguments, the Government did not to respond to Hyman's forfeiture arguments or even mention forfeiture. DE-38, Gov't Resp. Br. at 7–8. Rather, the Government summarily asserted that when it "properly objects" to untimeliness, Rule 4(b)'s deadline is mandatory and inflexible. *Id.* at 7. The Government concluded:

> The Government has raised the untimeliness of Hyman's notice of appeal by moving to dismiss the appeal. *See* 4th Cir. L.R. 27(f) ("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."). Accordingly, this Court should dismiss the appeal.

Id. at 8.

On October 24, 2017, a Fourth Circuit panel heard oral argument.[2] Refusing to hear any arguments on the merits, the panel raised on its own an argument for dismissal based on the scope of Local Rule 27(f). Oral Arg. at 3:28–4:10, 7:37, 13:00. Specifically, the panel asked whether the local rule allowing motions to dismiss on procedural grounds to be filed at any time, *required* the panel to dismiss the appeal. Comments from the bench seized on the rule's language, suggesting the rule's permission to file a motion "at any time" negates the possibility of forfeiture from undue delay. *Id.*

The Government focused its short oral presentation on precedents governing non-jurisdictional claim-processing rules of this Court, the Fourth Circuit, and other appellate courts.[3] *Id.* at 21:00-25:28. When a judge asked Government counsel if he thought it necessary to "get beyond" the local rule at all, counsel replied, "We don't, your honor. I don't think so." *Id.* at 21:31. That was the Government's only reference at oral argument to the panel's local rule rationale.

On January 22, 2018, the panel issued a precedential decision granting the

[2] *Hyman* Oral Arg., available at: http://coop.ca4.uscourts.gov/OAarchive/mp3/16-4771-20171024.mp3. Last accessed June 4, 2018.
[3] The Government's entire argument lasted four-and-a-half minutes.

Government's motion to dismiss based on the rationale raised by the bench at oral argument:

> 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. 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.

United States v. Hyman, 880 F.3d 161, 163 (4th Cir. 2018) (emphases in panel decision).

Hyman timely petitioned for rehearing and rehearing *en banc* on February 3, 2018. DE-50. The court then requested the Government respond to Hyman's petition. In response, the Government admitted it did not raise its untimeliness defense at the earliest reasonable opportunity: "Although the government certainly could have moved to dismiss Hyman's appeal before he filed his opening brief, nothing compelled the government to do so . . . ." DE-57, Gov't Resp. to Pet. at 8–9.

On March 9, 2018, the panel granted Hyman's petition for rehearing, but merely for the purpose of adding three words (underlined below) to the panel's decision: "Because we are required to strictly apply claim-processing rules if they are timely raised, and because our Local Rules <u>as currently written</u> permit a party to raise the timeliness issue at any time, we grant the Government's motion to dismiss." *United States v. Hyman*, 884 F.3d 496, 499 (4th Cir. 2018).

REASONS FOR GRANTING THE WRIT

The proceeding below was a direct criminal appeal, and so the deadline to file the notice of appeal is not jurisdictional but instead governed by a non-jurisdictional claim-processing rule. *See Kontrick v. Ryan*, 540 U.S. 443, 453–54 (2004); Fed. R. App. P. 4(b)(1)(A). This Court has long recognized that such rules afford the opposing party an

untimeliness defense, similar to an affirmative defense, which may waived or "forfeited" if the party waits "too long" to assert it. *Eberhart v. United States*, 546 U.S. 12, 15 (2005) (per curiam); *see Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 16 (2017) (stating that claim-processing deadlines are "subject to forfeiture if not properly raised by the appellee"); *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 133 (2008) (most statutes of limitations "seek primarily to protect" the opposing party and thus, "the law typically treats a limitations defense as an affirmative defense").

In Hyman's case, *every* relevant consideration weighed in favor of forfeiture and of hearing the appeal on the merits. Yet the Fourth Circuit's precedential decision erroneously reasoned that because its local rule generally allows procedural motions in any appeal to be "filed at any time," the court had no authority to entertain forfeiture arguments or to consider other interests at stake in deciding whether to reach the merits of an indigent defendant's challenge to his criminal sentence, regardless of principles set forth in *Kontrick* or any other precedent to the contrary. The decision renders the criminal appeal deadline non-jurisdictional in name only. In addition, the Fourth Circuit is out of step with a majority of other circuits that recognize either by local rule or case law that undue delay burdens courts and parties. *See infra* Section I.A.3.

Additionally, by devising and then relying on its own arguments in the Government's behalf and brushing past other procedural bars designed to ensure a fair criminal process, the court erroneously gave the criminal appeal deadline jurisdictional force and consequences. Departing from the principle of party presentation in this manner to avoid hearing the merits of an indigent defendant's challenge to his criminal sentence violates the Sixth Amendment's guarantee of an adversarial criminal process, which requires *both* courts and counsel to ensure that every defendant receives a "full

appellate review." *See Anders v. California*, 386 U.S. 738, 742 (1967); *United States v. Cronic*, 466 U.S. 648, 655–57 (1984).

Finally, this Court has reserved the question whether non-jurisdictional claim-processing rules are "subject to equitable exceptions." *Hamer*, 138 S. Ct. at 18 n.3. The deadline to appeal a criminal case of Fed. R. App. P. 4(b) – especially in a challenge to an unlawful sentence authorized by 18 U.S.C. § 3742 – should be subject to equitable exceptions because of the interests at stake in all criminal cases, in which the Government may take a person's property, freedom, or life. *Hyman* is the proper vehicle to decide this issue. First, all equitable considerations weigh in favor of excusing the filing deadline in this case: the Government chose without explanation to delay moving to dismiss until Hyman had prepared and presented his entire appeal and it failed to make any serious response to Hyman's arguments in favor of hearing the merits. The court then granted the motion when doing so no longer served any Government interest protected by untimeliness defenses *and* rendered pointless the immense time and resources expended in this appeal by the court, Hyman, Hyman's CJA-appointed counsel, as well as the Government.

Second, the decision conflicts with and undermines this Court's precedents including *Kontrick*, *Wood v. Milyard*, 566 U.S. 463 (2012), *Anders*, and others. This Court should vacate the decision because it creates "the potential for significant discord" in the Fourth Circuit as well as other circuits that might adopt its reasoning. *See Virginia v. LeBlanc*, 137 S. Ct. 1726, 1729–30 (2017) (per curiam) ("Reversing the Court of Appeals' decision in this case—rather than waiting until a more substantial split of authority develops—spares Virginia courts from having to confront this legal quagmire."); *District of Columbia v. Wesby*, 138 S. Ct. 577, 589 (2018) (exercising discretion to correct appellate

court error even though it was not required to resolve the case "because the D.C. Circuit's analysis, if followed elsewhere, would 'undermine the values qualified immunity seeks to promote'"); *Stutson v. United States*, 516 U.S. 193, 194–95 (1996) (per curiam) (vacating court of appeals summary affirmance that failed to consider "pertinent matters").

I. The Court of Appeals Acted Without Authority and Out of Step with a Majority of Circuits by Enforcing the Non-Jurisdictional Deadline to File a Criminal Appeal as Though It Were Jurisdictional.

This Court has recognized at least two distinct categories of deadlines, each of which has distinct consequences when a deadline is missed and each limits the authority of federal appellate courts to act in distinct ways: jurisdictional limits and non-jurisdictional claim-processing rules. *See Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 393 (1982) (holding that the deadline to file charge of discrimination with EEOC is not jurisdictional and thus, "subject to waiver, estoppel, and equitable tolling"). The decision below muddles this Court's precedents concerning the distinct kinds of rules by erroneously enforcing its own local claim-processing rule and the criminal appeal deadline as if they were jurisdictional.

"Characterizing a rule as jurisdictional renders it unique in our adversarial system." *Sebelius v. Auburn Reg'l Med. Ctr.*, 133 S. Ct. 817, 824 (2013). And so, courts must not give non-jurisdictional rules "'jurisdictional' consequences." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011); *see also Granberry v. Greer*, 481 U.S. 129, 136 (1987) (vacating the judgment because the appellate court treated the nonexhaustion defense as effectively jurisdictional by holding that the defense "could not be waived" and by refusing to consider "whether the interests of justice would be better served by addressing the merits"). Jurisdictional time limits are inflexible and have "harsh consequences" because they require dismissal of any case filed after the deadline,

"even if equitable considerations would support extending the prescribed time period." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1631, 1632 (2015). For example, a court must raise untimeliness *sua sponte* regardless of any other interests at stake and even if the benefiting party has waived or forfeited the issue. *Id.* at 1632. "Branding a rule as going to a court's subject-matter jurisdiction alters the normal operation of our adversarial system." *Henderson*, 562 U.S. at 434. A "valid [jurisdictional] objection may lead a court *midway through briefing* to dismiss a complaint in its entirety. '[M]any months of work on the part of the attorneys and the court may be wasted.'" *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012).

If a deadline is jurisdictional, "waiver becomes impossible, meritorious excuse irrelevant . . . and *sua sponte* consideration in the courts of appeals mandatory." *Bowles v. Russell*, 551 U.S. 205, 216–17 (2007) (Souter, J., dissenting). Because of these harsh consequences, "in recent years" this Court has limited the kinds of rules treated as jurisdictional. *Sebelius*, 133 S. Ct. at 824 ("With these untoward consequences in mind, 'we have tried in recent cases to bring some discipline to the use' of the term 'jurisdiction.'"). In contrast, non-jurisdictional rules are distinctively "less stern" even when phrased in mandatory language. *Hamer*, 138 S. Ct. at 17. Non-jurisdictional rules can be "relaxed" when judicial efficiency or "the ends of justice so require." *Schacht v. United States*, 398 U.S. 58, 64 (1970).

Here, the court erroneously relied on the very mandatory-language rationale this Court has already dismissed as insufficient to "imbue[] a procedural bar with jurisdictional consequences."[4] *See Kwai Fun Wong*, 135 S. Ct. at 1632. "Time and again,

[4] *See Hyman*, 884 F.3d at 498–99.

we have described filing deadlines as 'quintessential claim-processing rules,'. . . . That is so . . . even when the time limit is important (most are) and even when it is framed in mandatory terms (again, most are); indeed, that is so 'however emphatic[ally]' expressed those terms may be.'" *Id.*; *see Musacchio v. United States*, 136 S. Ct. 709, 717 (2016) (even though 18 U.S.C. § 3282(a), the general federal criminal statute of limitations, "uses mandatory language," it is non-jurisdictional and thus subject to forfeiture).

The panel's decision cannot be squared with this Court's precedents. Only Congress has the power to cabin an appellate court's authority by imposing jurisdictional consequences on a deadline. When even the most mandatory language cannot transform a non-jurisdictional rule into a rule with jurisdictional consequences, an appellate court's own local procedural rule certainly has no special power to shield the criminal appeal deadline from forfeiture and other considerations that apply to non-jurisdictional rules. If the court's decision stands, this Court's careful distinctions between jurisdictional and non-jurisdictional rules are meaningless because lower courts are free, by decision or local rule, to give jurisdictional consequences to *any* kind of rule.

A. The Court of Appeals Erroneously Concluded Its Own Local Claim-Processing Rule Prohibited the Court from Considering Forfeiture of a Defense Arising from a Non-Jurisdictional Deadline, Set Forth by this Court in *Kontrick v. Ryan*.

The decision below faulted Hyman for failing "to articulate a standard for establishing the point at which a motion to dismiss would be untimely." *Hyman*, 884 F.3d at 499. But to require a bright line rule giving a party in every case a specific number of days before it forfeits a defense is to fundamentally misunderstand the principles of forfeiture applicable to non-jurisdictional deadlines under *Kontrick* and related cases. Forfeiture "is the failure to make the timely assertion of a right," in contrast to waiver,

which is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Any right "'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Id.* at 731.

The forfeiture doctrine is grounded in longstanding equitable principles.[5] "The principle that the passage of time can preclude relief has deep roots in our law, and this Court has recognized this prescription in various guises." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 217 (2005); *see Sanborn v. United States*, 135 U.S. 271, 281 (1890) (the lower court erred in allowing interest for any time before the lawsuit began because the Government "has long delayed an assertion of its rights, without showing some reason or excuse for the delay"). "Forfeiture is 'not a mere technicality and is essential to the orderly administration of justice.'" *Freytag v. Comm'r*, 501 U.S. 868, 894–95 (1991) (Scalia, J., concurring in part and concurring in the judgment).

Like other equitable principles, forfeiture is a context-driven doctrine that requires careful consideration of all the circumstances of a case. *NAACP v. New York*, 413 U.S. 345, 365–66 (1973) (timeliness of motion to intervene); James W. Moore, 3B *Moore's Federal Practice* § 24.13 (timeliness is not merely a function of when the motion was filed relative to the filing of the action); *cf. Wesby*, 138 S. Ct. at 588. Whether a defense has been properly invoked comes down to when the party learned of its defense, why the party delayed raising it, whether the delay prejudiced the other party, and whether other

[5] Related equitable doctrines include abuse of the writ, laches, estoppel, stale demand, acquiescence, and forfeiture (often called "waiver" in earlier cases). *Cf. Phillips v. Negley*, 117 U.S. 665, 677 (1886) (recognizing equitable principles require a court to "consider all the facts and circumstances of the case, and require that the party making the application shall appear to have acted in good faith and with ordinary diligence," and thus relief "will not be granted when he has knowingly acquiesced in the judgment complained of, or has been guilty of laches and unreasonable delay in seeking his remedy").

interests at stake nonetheless weigh in favor of reaching the merits.

1. The court erroneously refused to consider when the Government first learned of untimeliness or its reason for delay.

Equitable principles require a party to assert an objection or defense at the earliest reasonable opportunity after the party learns of the circumstances giving rise to the objection or defense, or risk losing it. The "early assertion of rights" by a party is "essential" and so an "objection should be taken at the earliest opportunity." *Brown, Bonnell & Co. v. Lake Superior Iron Co.*, 134 U.S. 530, 535–36 (1890) (timeliness in objecting to equity jurisdiction); *see Arizona v. California*, 530 U.S. 392, 413 (2000) (party cannot assert preclusion defense when the party failed to raise it "earlier in the litigation, despite ample opportunity and cause to do so"); *Nguyen v. United States*, 539 U.S. 69, 86–87 (2003) (Rehnquist, J., dissenting) (noting that a party did not forfeit its defense because "it availed itself of the earliest opportunity to object to this error").

This prompt-assertion principle is common throughout our legal system, found in constitutional law, the common law, statutes, and federal rules of procedure.[6] Courts look carefully at whether a party asserted a defense promptly and sometimes refuse to forgive a delay of even days when circumstances show the party has not acted diligently. For example, in *NAACP v. New York*, this Court held that a motion to intervene was untimely in part because it was filed four months after the case began and two months after the Court noted that the proposed intervenors should have reasonably learned of the case. 413 U.S. at 366–67. Indeed, the Court concluded that the motion was untimely

[6] *See, e.g.*, *Barker v. Wingo*, 407 U.S. 514 (1972) (Sixth Amendment right to speedy trial); *Frech v. Lewis*, 218 Pa. 141, 67 A. 45 (1907) ("even at common law a cash seller's right to reclaim . . . could be lost as the result of an unreasonable delay in exercising that right"); 18 U.S.C. § 983(d), (e) (timeliness required in civil forfeiture proceedings); Fed. R. Civ. P. 24 (motion to intervene must be "timely").

under the circumstances even if the Court accepted the intervenors' claim that they waited to file only *seventeen days* after they were "first informed" of the case. *Id.* at 367. Faithfully applying this principle to untimely criminal appeals would mean the Government must assert its defense at the first reasonable opportunity after it learns of the defense, just like any other party. *Cf. Scarborough v. Principi*, 541 U.S. 401, 421 (2004) (recognizing that "limitations principles should generally apply to the Government 'in the same way that' they apply to private parties'").

In addition to a majority of circuits, the Government has also recognized that prompt assertion of a defense in an appeal generally means asserting it before the appellant's opening brief. In its brief in *Manrique v. United States*, 137 S. Ct. 1266 (2017), involving a challenge to the validity of the defendant's notice of appeal, the Government thought it important to provide this Court with a valid explanation for its delay in raising an objection for the first time in its response brief, filed after defendant-appellant's opening brief. Brief for United States in *Manrique v. United States*, No. 15–7250, 2016 WL 4578838 at *31 (Sept. 1, 2016). "In this case, the government unquestionably timely invoked the notice of appeal requirement. In the court of appeals, *petitioner's opening brief signaled for the first time* his intention to challenge the amount of restitution." *Id.* (emphasis added)

Also relevant in a forfeiture inquiry is the *reason* for delay. *See Barker*, 407 U.S. at 531 (applying traditional principles to the right to a speedy trial, "[c]losely related to length of delay is the reason the government assigns to justify the delay"); *Dolan v. United States*, 560 U.S. 605, 617 (2010) (discussing traditional principles of timeliness including reason for delay for "time-related directives"). Not all reasons for delay are equally valid. *Barker*, 407 U.S. at 531 ("[D]ifferent weights should be assigned to

different reasons."). For example, delay simply for the Government's own convenience is not a "valid reason," *see Dickey v. Florida*, 398 U.S. 30, 38 (1970), nor is delay to hamper the defense, *see Barker*, 407 U.S. at 531.

Here, the Government failed to diligently assert a defense it reasonably knew about within days of the docketing of the appeal and refused to provide any reason at all for its delay. Indeed, contradicting its own understanding of diligence shown in its brief in *Manrique*, the Government admitted that it could have filed its motion to dismiss earlier, but that it chose not to because "nothing compelled the government to do so." DE-57, 12–13. *Cf. United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 275 (2010) (procedural rule does not give party license to unduly delay asserting a defense). At the latest, the Government knew of the untimeliness by mid-December 2016, because the Government was required to review the docketing statement filed on December 5, 2016 within ten days, *see* 4th Cir. L.R. 3(b), and the docketing statement established the untimeliness of the appeal. The docketing statement did not escape the Government's attention: counsel for the Government entered his appearance in the Fourth Circuit the same day it was filed, less than an hour after Hyman filed the docketing statement. *See* App. E. Thus, the Government could have easily filed its bare three-page motion to dismiss in mid-December 2016. But instead, the Government inexcusably waited until March 2017—100 days after Hyman filed his notice of appeal, 87 days after his counsel filed the docketing statement showing untimeliness, 52 days after the Fourth Circuit issued the briefing schedule, and weeks after Hyman filed his opening brief.

Finally, continuing its treatment of the deadline as jurisdictional in practical effect, the court of appeals refused to consider the reason – or lack thereof – for the Government's delay, at all, even though Hyman presented evidence indicating a routine

pattern of deliberate delay in the Fourth Circuit that is both unnecessarily wasteful and unjust. *See* DE-28, Hyman Resp. to Mot. at Exh. A. That data indicate that, at least in recent years, the Government has waited to assert untimeliness for the apparent purpose of gauging the merits of the appeal. The Government invariably waives its defense for the least meritorious appeals: primarily cases involving an *Anders* brief, in which counsel certifies that there are no meritorious issues for appeal, while raising the defense in all other untimely appeals. Such a strategy, while perhaps convenient for the Government, forces the court and opposing counsel, often appointed under the Criminal Justice Act and thus paid by federal funds,[7] to waste the most time and resources on the least meritorious appeals, while also perversely ensuring that the most meritorious untimely appeals will not be heard.

Deliberate delay that appears to be a "wait-and-see" tactic, resulting in dismissal of untimely criminal appeals with the most merit, should be frowned upon as improper gamesmanship. *Cf. Nguyen*, 539 U.S. at 81 n.12 (recognizing that concerns for gamesmanship "animate the requirement for contemporaneous objection"). Waiting to assert a defense until it is convenient, or after viewing the merits of a defendant's entire case-in-chief, long after a party first learns of the facts giving rise to the defense, is contrary to any understanding of timeliness.

2. The court erroneously refused to consider prejudice or any interests weighing in favor of hearing the merits of the criminal appeal.

Forfeiture and related doctrines require consideration of the extent to which the delay has harmed the other party and imposed costs on courts. Harm includes the time,

[7] The Criminal Justice Act provides disbursement of federal funds to pay appointed counsel and reimburse for expenses. 18 U.S.C. § 3006A (d).

resources, and expense the opposing party has spent. *See Bolivarian Republic of Venez. v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1323 (2017) (noting that delay imposes "burdens of time and expense" on a party); *Jones v. SEC*, 298 U.S. 1, 20 (1936) (the Government was not prejudiced by motion to dismiss because the Government had not "given any time or expense to the preparation and filing of a cross-bill or of the evidence to sustain it. It had not taken any action in respect to the cause which entitled it to say that it would be prejudiced by a dismissal"); *cf. Commercial Cas. Ins. Co. v. Consol. Stone Co.*, 278 U.S. 177, 180 (1929) (rejecting argument that a party may object to venue "after the suit has reached the stage for dealing with the merits" as causing "harmful delay and confusion").

The time, resources, and expense required to prepare a criminal case on appeal involving errors in calculating the Sentencing Guidelines range are not *de minimis*. In fact, an opening brief, which is most similar to a plaintiff's entire case-in-chief at trial, is the bulk of the expense and effort required in a typical appeal. This Court has *required* federal courts to consider prejudice as well as other interests before dismissing a criminal defendant's case in directly analogous circumstances. *See, e.g.*, *Wood*, 566 U.S. at 473 (holding that in state prisoner's federal habeas petition, an appellate court has authority to raise a forfeited or waived statute of limitations defense *sua sponte* only in "exceptional cases"); *Day v. McDonough*, 547 U.S. 198, 210–11 (2006).

Incorrectly stating that Hyman had identified no prejudice, the court refused to respond to arguments Hyman made throughout the appeal that concretely documented harm.[8] Significant time, resources, and effort were spent because of the Government's

[8] *See, e.g.*, DE-28, Hyman Resp. to Mot. to Dismiss 8, 12, 13–14, 32–33; DE-40, Hyman Reply to Gov't Resp. 2–3; DE-50, Hyman Pet. for Reh'g 14–15.

delay. Indeed, not only has this case required more time than the vast majority of untimely criminal appeals in the Fourth Circuit,[9] it has taken more time than the majority of all criminal appeals on the merits. The median resolution time for a criminal appeal in the Fourth Circuit is *eight* months after the notice of appeal is filed and the median for all circuits is eleven months.[10] When the court finally issued its amended opinion after granting Hyman's petition for rehearing, it was more than *fifteen months* after the notice of appeal was filed. In total, CJA-counsel billed over 350 hours on the case from being appointed in November 2016 through rehearing in March 2018. *See* DE-51, Pet. for Reh'g, Sealed Exh. 1. While Hyman did not personally pay the attorney's fees, the waste of federal CJA funds and time is nonetheless a harm relevant to forfeiture and interests at stake, especially the conservation of judicial resources. *Cf. Vermont v. Brillon*, 556 U.S. 81, 91 (2009) (an attorney's "duties and obligations are the same whether the lawyer is privately retained, appointed, or serving in a legal aid or defender program"). If Hyman had paid a private attorney for this appeal, the expense would be staggering.

After *Hyman*, it is difficult to imagine when the Fourth Circuit would ever hold that a party has been prejudiced sufficiently to warrant reaching the merits of an untimely appeal. Additionally, the panel's error was compounded by its failure to consider the extent to which the delay had also imposed costs on the Fourth Circuit itself. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 50 n.8 (1987) (after trial and appellate review,

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[9] By far, Government motions to dismiss untimely criminal appeals are resolved shortly after the motion has been briefed. *See, e.g.*, *United States v. Clanton*, No. 16-4357 (4th Cir. Nov. 14, 2016) (granting motion in three months); *United States v. Wright*, No. 15-4434 (4th Cir. Dec. 17, 2015) (granting motion in two months).

[10] *See* Admin. Office of the U.S. Courts, *U.S. Courts of Appeals-Median Time Intervals in Months for Civil and Criminal Appeals Terminated on the Merits, by Circuit, During the 12-Month Period Ending Sept. 30, 2017*, Table B-4A (2017).

"[t]he interests of judicial economy and the avoidance of delay, rather than being hindered, would be best served by resolving the issue"). *Cf. Cox Broadcasting Corp. v. Cohn,* 420 U.S. 469, 477–478 (1975) (exceptions to finality doctrine are justified in part by need to avoid "the mischief of economic waste and of delayed justice").

Forfeiture also requires courts to consider what interests the untimeliness defense is meant to protect and whether there are any other interests served by reaching the merits. This is especially true for criminal cases. *See Greenlaw v. United States*, 554 U.S. 237, 243–44 (2008). Limitations defenses primarily protect the interests of the party asserting the defense in avoiding the time and expense of litigation. *Hamer*, 138 S. Ct. at 17 (time limits "promote the orderly progress of litigation"); *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) ("Statutes of limitations are primarily designed to assure fairness to defendants."). Thus, the Government's interests in having an untimely appeal dismissed all but disappear after the Government has been required to fully prepare and present the merits of a case. Furthermore, "promoting judicial efficiency" is also a legitimate interest. *John R. Sand*, 552 U.S. at 133; *Granberry*, 481 U.S. at 136. Declining to reach the merits after the appeal had been fully briefed and the court itself had issued several procedural orders was clearly an inefficient use of judicial resources.

Regardless of the mandatory language of the Fourth Circuit's local rule, this Court's cases such as *Granberry, Day, Wood,* and *Greenlaw*, *require* federal courts to consider various interests at stake before raising untimeliness *sua sponte* to dismiss a criminal defendant's habeas petition, including the interests of justice and judicial efficiency. If a federal appellate court must consider the interests in favor of reaching the merits in the analogous situation of a forfeited untimeliness defense in a habeas petition, it makes no sense that a federal court would presume that it could summarily dismiss a

direct criminal appeal, which implicates many of the same interests, "at any time," without considering prejudice or any interests at stake at all.

The court of appeals erroneously applied its local procedural rule and Fed. R. App. P. 4(b) as if the untimely appeal of an indigent, *pro se* prisoner challenging his criminal sentence under § 3742 were just like any other case – whether civil, criminal, bankruptcy, or any other – to come before the court. *Cf. Stutson*, 516 U.S. at 197 (rejecting the argument "that more stringent rules as to filing deadlines apply to prisoners than to creditors filing claims in a bankruptcy proceeding"); *Dolan*, 560 U.S. at 626 (Roberts, C.J., dissenting) (noting the significant difference between statutes involving "the rights of criminal defendants (for whom procedural protections are of heightened importance)" and statutes that do not implicate the same concerns).

But the right to appeal in a criminal case, and the statutory right to appeal an unlawful criminal sentence in particular, are not like a civil appeal. *See* discussion *infra* Section II. For example, unlike parties in civil cases, the Government has no individual interest in having a case dismissed without reaching the merits, especially after it has spent time and effort preparing an appeal: the Government shares Congress's and a defendant's interest in the lawfulness of a criminal sentence. *See Brady v. Maryland*, 373 U.S. 83, 94 & n.2 (1963) (recounting statement of former Solicitor General, "'The Solicitor General is not a neutral, he is an advocate; but an advocate for a client whose business is not merely to prevail in the instant case. My client's chief business is not to achieve victory but to establish justice.'").

> [I]t is not insignificant that this is a criminal case. When a litigant is subject to the continuing coercive power of the Government in the form of imprisonment, our legal traditions reflect a certain solicitude for his rights, to which the important public interests in judicial efficiency and finality must occasionally be accommodated. We have previously refused to allow

> technicalities that caused no prejudice to the prosecution to preclude a remand under 28 U.S.C. § 2106 (1988 ed.) 'in the interests of justice.' And procedural accommodations to prisoners are a familiar aspect of our jurisprudence.

Stutson, 516 U.S. at 196.

Equitable principles give a federal court with jurisdiction "the power – and if the ends of justice demand – the duty" to reach the merits. *See Sanders v. United States*, 373 U.S. 1, 18–19 (1963). Only jurisdictional rules require an appellate court to ignore these considerations. But here, the court gave no attention to any of these interests and gave the criminal appeal deadline and its own local rule the most severe jurisdictional consequences. The court was spared *no* time or effort in dismissing the untimely appeal. The Government itself was spared *no* time or effort after it was required to prepare the entire case on the merits, present oral argument, and respond to the petition for rehearing. In fact, the Government's own evaluation of its interests and calculation of what the court would likely want to focus on at oral argument is evident from the fact that the Government spent less than two pages of its 35-page response brief dedicated to untimeliness after the court resumed briefing and ordered the Government to submit a response to Hyman's opening brief. CJA-counsel spent more time, resources, and effort than the vast majority of all appeals require and Hyman has been extraordinarily delayed in pursuing collateral review of his sentence. No other interests were served and in fact, the interests discussed above were harmed. The court of appeals had *no* justification for refusing to hear the merits of Hyman's appeal and dismissal served *no* legitimate purpose.

3. The court's approach to Government delay in raising a dispositive defense in criminal appeals conflicts with that taken by most other circuits

The decision below also conflicts with the approach of a majority of other circuits

that recognize the harm caused by an appellee waiting until after an opening brief to raise an untimeliness defense.[11] The Fifth Circuit is the only other circuit to come close to the panel's grant to the Government of virtual immunity from forfeiture or default. *See United States v. Hernandez-Gomez*, 795 F.3d 510, 511 (5th Cir. 2015) (Government can raise untimeliness any time before or with its first substantive filing). The Federal, District of Columbia, First, Third, Sixth, Seventh, Eighth, and Tenth Circuits have clearly recognized the harm that undue delay causes by requiring similar dispositive motions to be filed more expeditiously. *See* App D.

For example, the Tenth Circuit requires similar dispositive motions to be filed within 14 days after the notice of appeal is filed, *id.* at 24a–25a; the Eighth Circuit requires these motions to be filed within 14 days that an appeal is docketed, *id.* at 24a; the Third Circuit requires such motions before the appellant's opening brief, *id.*; the D.C. Circuit requires any dispositive motion to be filed within 45 days of the docketing of the appeal, *id.* at 25a; and the Federal Circuit requires such motions to be filed "as soon after docketing as the grounds for the motion are known," *id.* at 26a. While allowing motions for lack of jurisdiction at any time, the First Circuit nevertheless requires them to "be promptly filed when the occasion appears," and the rule does not include other procedural grounds for dismissal at all. *Id.* at 23a. The Sixth Circuit generally only allows motions to dismiss for lack of jurisdiction. *Id.* The Seventh Circuit, through decisional law, requires the Government to file dispositive motions as soon as possible after the circumstances are known, and well before the opening brief is filed. *See United States v.*

[11] Relatedly, the Second Circuit also discourages unnecessary delay in appeals by requiring any motion to extend time to file a brief to be filed "as soon as practicable after the extraordinary circumstance arises." *See* App D at 23a; *RLI Ins. Co. v. JDJ Marine, Inc.*, 716 F.3d 41, 44 (2d Cir. 2013) (denying motion to reinstate appeal because appellant waited until "the last minute" to file extension motion and relied on grounds the party knew of long before the motion was filed).

Fortner, 455 F.3d 752, 754 (7th Cir. 2006).

These circuits agree that waiting to file a dispositive motion is not merely "some procedural peccadillo." *See Miss. River Transmission Corp. v. F.E.R.C.*, 969 F.2d 1215, 1217 n.2 (D.C. Cir. 1992). Dispositive motions should be resolved "before the parties have sunk time, effort and expense into preparing their briefs and before the court has reviewed and analyzed the case." *Id.* As the Seventh Circuit reasoned in *Ramos v. Ashcroft*, the Government's motion in that case "should have come well before [petitioner] filed his own brief," and indeed "within a month (two at the outside) of the petition's filing date," because "[t]he Department of Justice has no warrant to put its adversary to that cost and inconvenience." 371 F.3d 948, 950 (7th Cir. 2004).

B. The Court of Appeals Accorded Jurisdictional Consequences to the Criminal Appeal Deadline by Setting Aside the Party Presentation Principle, and in Doing So, Violated the Sixth Amendment's Guarantee of an Adversarial System of Justice.

In addition to refusing to consider forfeiture or any interests weighing in favor of hearing the merits of the appeal, the court gave drastic jurisdictional consequences to the criminal appeal deadline in second, distinct way. The court erroneously allowed the non-jurisdictional deadline to displace the party presentation principle and thus alter our adversarial system of justice. In doing so, the court denied Hyman the adversarial criminal process guaranteed under the Sixth Amendment and violated the principles of *Anders* that afford criminal defendants full and fair appellate review. At times the court acted more as an advocate for the Government than a neutral tribunal and it flew past a number of procedural barriers that should have counseled judicial restraint. Only jurisdictional rules have the power to alter our adversarial system so drastically.

The Sixth Amendment guarantees that all defendants are prosecuted through an

adversarial process before neutral courts. *Cronic*, 466 U.S. at 656; U.S. Const. Amend. VI ("In all criminal prosecutions" the accused has the right to a "public trial, by an impartial jury" and "to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."). "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." *Evitts v. Lucey*, 469 U.S. 387, 394 (1985). "It is that 'very premise' that underlies and gives meaning to the Sixth Amendment. It 'is meant to assure fairness in the adversary criminal process.'" *Cronic*, 466 U.S. at 655–56. The Amendment *requires* courts to adhere to the adversarial system. "But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." *Id.* at 657. The constitutional requirement of an adversarial criminal process does not end the moment the trial concludes. *See Greenlaw*, 554 U.S. at 243–44.

The Sixth Amendment's guarantee of an adversarial system of justice is ensured in large measure by principles of party presentation and judicial impartiality. "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present." *Greenlaw*, 554 U.S. at 243. "We wait for cases to come to us, and when they do we normally decide only questions presented by the parties." *Id.* at 244. "To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights." *Id.* at 243–44.

These principles strictly limit an appellate court's authority to reach arguments not properly before a court. *Carducci v. Regan,* 714 F.2d 171, 177 (D.C. Cir. 1983) (Scalia,

Cir. J.) ("The premise of our adversarial system is that appellate courts do not sit as self-directed boards of legal inquiry and research, but essentially as arbiters of legal questions presented and argued by the parties before them."). A "federal court does not have *carte blanche* to depart from the principle of party presentation basic to our adversary system." *Wood v. Milyard*, 566 U.S. 463, 472 (2012); *Henderson*, 562 U.S. at 434 (under our adversarial system, "courts are generally limited to addressing the claims and arguments advanced by the parties"). Generally, therefore, appellate courts will not address issues that were not properly raised by the parties and thoroughly briefed. "Federal courts of appeals refuse to take cognizance of arguments that are made in passing without proper development." *Johnson v. Williams*, 568 U.S. 289, 299 (2013).[12] Nor do federal courts generally consider an issue that was procedurally defaulted, such as those first raised in an appellant's reply brief. *Cone*, 556 U.S. at 484 (Alito, J., concurring in part and dissenting in part) (noting that it is the "standard practice" not to "entertain[] an issue that was not mentioned at all in the appellant's main brief and was mentioned only in passing and without any development in the reply brief").[13]

Procedural default rules "generally take on greater importance in an adversary system" and ensure that all parties are treated the same under the law. *See Sanchez-Llamas v. Oregon*, 548 U.S. 331, 357 (2006). "Procedural default rules are designed to encourage parties to raise their claims promptly . . . . The consequence of failing to raise

[12] *See also Kwai Fun Wong*, 135 S. Ct. at 1631 n.2 (refusing to address Government argument in part because it "contends in passing" and "makes no independent arguments in support of that position"); *Dolan*, 560 U.S. at 619 (refusing to address argument in part because "the issue has not been adequately briefed"); *Alabama v. North Carolina*, 560 U.S. 330, 342 (2010) (party abandoned forfeiture because it "merely noted that North Carolina refused to participate at the sanctions hearing, and have cited no law in support of the proposition that this was a forfeit"); *Sims v. Apfel*, 530 U.S. 103, 110 (2000) (parties in adversarial proceedings "are expected to develop the issues").

[13] *See also* Fed. R. App. P. 28(a)(8)(A); Fed. R. Crim. P. 51, 52(b); *Olano*, 507 U.S. at 731 (authority of appeals court under Fed. R. Crim. P. 52(b) to correct unpreserved errors is "circumscribed").

a claim for adjudication at the proper time is generally forfeiture of that claim." *Id.* at 356–57 (citation omitted). "What makes a system adversarial rather than inquisitorial is . . . the presence of a judge who does not (as an inquisitor does) conduct the factual and legal investigation himself, but instead decides on the basis of facts and arguments pro and con adduced by the parties." *Id.* at 357.

For the same reasons, the authority of appellate courts to raise issues and arguments *sua sponte* is limited to "exceptional cases." *Wood*, 566 U.S. at 471–74.[14] "Courts do not usually raise claims or arguments on their own," especially arguments in favor of one party. *Henderson*, 562 U.S. at 434. One such circumstance allowing courts to act however, is to avoid "unnecessary judicial waste." *Arizona*, 530 U.S. at 412. "Where no judicial resources have been spent on the resolution of a question, trial courts must be cautious about raising a preclusion bar *sua sponte,* thereby eroding the principle of party presentation so basic to our system of adjudication." *Id.* at 412–13. In a similar context, before raising a forfeited limitations defense *sua sponte* to dismiss an untimely habeas petition, a federal appellate court is *required* to "assure itself that the petitioner is not significantly prejudiced by the delayed focus on the limitation issue, and 'determine whether the interests of justice would be better served' by addressing the merits or by dismissing the petition as time barred." *Day*, 547 U.S. at 210, 211 (reasoning that the defendant had not been significantly prejudiced and justice did not require reaching the merits in part because "[n]o court proceedings or action occurred in the interim," thus, no significant judicial resources had been spent).

[14] *See also Arizona*, 530 U.S. at 412 (raising preclusion defense *sua sponte* is appropriate only in "special circumstances"); *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 837–38 (1989) (authority should be "exercised sparingly" and "[i]n each case, the appellate court should carefully consider whether the dismissal of a nondiverse party will prejudice any of the parties in the litigation").

These principles of restraint are not mere trivialities. Like the right to counsel, they ensure a fair, adversarial process that depends on having zealous advocates and "detached" judges. *See Greenlaw*, 554 U.S. at 244 n.3. A fair, adversarial process honors "the public interest in truth and fairness." *Polk Co. v. Dodson*, 454 U.S. 312, 318 (1981). These principles additionally prevent unfair surprise to opposing parties and thus, inadequate briefing of issues. *See NASA v. Nelson*, 562 U.S. 134, 148 n.10 (2011) (refusing to address arguments petitioner did not ask it to address, because respondents "understandably refrained from addressing that issue in detail"). Only jurisdictional rules – "unique" in our system – have the power to alter our entire system of justice by authorizing courts to ignore these principles. *Sebelius*, 133 S. Ct. at 824. This Court has drawn a clear picture of how the lower federal courts should apply the party presentation principle in criminal appeals. "To the extent courts have approved departures from the party presentation principle in criminal cases, the justification has usually been to protect a *pro se* litigant's rights." *Greenlaw*, 554 U.S. at 243–44.

The precedential decision in *Hyman* ran rough shod over all of these fundamental principles that guarantee our adversarial system. Indeed, the court at times acted more as a zealous advocate for the Government than did the Government itself. Throughout the appeal, the Government never presented the novel and overbroad argument that the local rule somehow gave the criminal appeal deadline jurisdictional armor. And even if the Government could have adequately presented a rationale based on the plain language of the local rule by merely citing and quoting the rule's text, it undoubtedly procedurally defaulted that argument by failing to raise it when the motion to dismiss was being briefed. The Government did not cite the rule in its motion on March 2, 2017, and it also declined to file any reply brief to answer Hyman's arguments in response to the motion,

including forfeiture. *See* Fed. R. App. P. 27(a)(4) ("Any reply to a response must be filed within 7 days after service of the response."). Over four months later, in late July 2017, after the court resumed briefing, calendared the case for oral argument, and ordered the Government to file its response brief on the merits, the Government merely cited the local rule and quoted its text, without any elaboration. At no point – in its response on the merits or at oral argument – did the Government *argue* the local rule rationale on which the panel grounded its decision. Out of the 7,756-word response brief, the Government spent just 348 words on untimeliness arguments, which cannot be adequate to develop any novel rationale. In fact, the court failed to even notice that the Government had offered no rebuttal to the suggestion that its delay was pursuant to a litigation strategy or any other arguments Hyman presented on forfeiture or other interests at stake. In any other typical adversarial setting, offering no rebuttal would result in a court deeming those arguments unchallenged.

Nevertheless, the panel erroneously enforced its local rule as though that rule was in fact jurisdictional, and thus required the court to set aside principles of party presentation such as procedural default *and* required the court to raise the issue of its own local rule *sua sponte* even if the Government had defaulted it. Procedural default rules even apply to "claimed violations of our Constitution," but apparently not to the Government or the Fourth Circuit panel in Hyman's case. *See Sanchez-Llamas*, 548 U.S. at 356. Such a harsh, literal interpretation of the circuit's own non-jurisdictional local rule "sweeps too broadly." *See id.* at 357.

In resting its decision to grant the Government's motion to dismiss on arguments the court itself raised the first time at oral argument and on a novel (and erroneous) rationale that was never briefed or adopted by the Government, the Fourth Circuit

disregarded this Court's principles of restraint. The court's unauthorized behavior calls into question the "fairness, integrity, or public reputation" of the Fourth Circuit's proceedings. *See Olano*, 507 U.S. at 732 (holding in an analogous context that federal appellate courts have authority under Fed. R. Crim. P. 52(b) to correct a plain error that was not timely preserved in the district court). Far from *protecting* a *pro se* litigant's rights as *Greenlaw* teaches, the panel left party presentation principles in the dust in *avoiding* the merits of an indigent defendant's criminal appeal. And raising arguments on its own to dismiss Hyman's case served neither the policies underlying the right to appeal a criminal sentence nor avoidance of judicial waste as this Court counseled in *Greenlaw*.

In addition to setting aside the party presentation principle, the court erroneously refused to consider colorable arguments Hyman presented in favor of hearing the merits of the appeal, which violated the principles of *Anders*. Every criminal defendant has a right to be heard by an impartial tribunal at trial, *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963), and to "full appellate review" by an equally impartial court, *Anders*, 386 U.S. at 742. In *Anders*, this Court condemned the "discrimination against the indigent defendant on his first appeal," 386 U.S. at 741, that occurs when appointed counsel reviews the record, decides an appeal is meritless, and seeks to withdraw as counsel with only a cursory letter asserting that "bare conclusion." *Id.* at 742. It is the responsibility of counsel *and* of the appellate court to ensure that a criminal defendant's case is reviewed fairly, and cursory review of a case by the court is not "fair procedure" required by the Constitution. *Id.* at 741.

Principles of "fair procedure" require counsel to do more than give bare conclusions and they require it of courts as well. *See id.*; *see also id.* at 743 (holding that the court

erred in dismissing the habeas application in part because it "gave no reason at all for its decision"). For example, appointed counsel may seek to withdraw from an appeal only after "a conscientious examination" of the record and filing a brief containing any issue that "might arguably support the appeal." *Id.* at 744. After counsel's brief, "the court—not counsel—then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous." *Id.* Criminal defendants must be given "full consideration." *Id.* at 743.

"Notice, the right to be heard, and the right to counsel" are fundamental guarantees. *Griffin v. Illinois*, 351 U.S. 12, 17 (1956). While a primary concern in *Anders* was the disadvantage that money creates, the Court's decision rested on the underlying conviction that the court has an equal obligation to fully engage in a review of the record. The teachings of *Anders* are as relevant to a court of appeals as they are to a defendant's own attorney. The Constitution is not satisfied by a court purporting to examine the record and then cursorily stating that the appeal has no merit with no other explanation. *See Douglas v. California*, 372 U.S. 353, 354–55 (1963). The Constitution requires substance, not mere form, and the right to be heard must include the right to be heard by a court that actually considers a criminal defendant's colorable arguments – whether on the merits of a criminal appeal, or on the Government's forfeiture of its defense from unjustified delay. While courts are not required to waste time and resources responding to frivolous arguments, colorable arguments deserve something more than a summary rejection. In *Anders*, "[t]he no-merit letter and the procedure it triggers do not reach that dignity." 386 U.S. at 744. Neither did the procedure of the Fourth Circuit panel in this case. The panel's decision to ignore Hyman's colorable arguments against dismissal in no way amounted to the full consideration required by this Court's decisions.

The path Hyman's appeal followed shows that the Fourth Circuit itself recognized that Hyman at least raised colorable arguments that merited consideration. After the Government's motion to dismiss was fully briefed, the court resumed the briefing schedule,[15] ordered the Government to respond on the merits, heard oral argument, and eventually granted Hyman's petition for rehearing. The court's own actions thus show that at a minimum Hyman raised colorable arguments against the Government's motion and that the court's cursory statement that Hyman's arguments had no merit is erroneous.

If an appellate court is required to independently review the entire record when an *Anders* brief is filed, in order to assure itself that there are no possible meritorious issues, these same principles certainly must apply to the kind of review the appellate court must give to a criminal defendant's non-frivolous arguments to excuse the missed appeal deadline and hear the merits. But the court never came close to acknowledging most of the arguments Hyman raised, much less providing a meaningful response. Even when the court granted Hyman's petition for rehearing it still refused to respond to any arguments Hyman made throughout the appeal and in the petition for rehearing. Instead, it added three puzzling words to its original opinion, with no explanation on how they were relevant. *See supra* at 5; *Hyman*, 884 F.3d at 499. Hyman was entitled to reasoned analysis of *some kind* from the court in response to those arguments, and in refusing to consider them, the court violated principles of *Anders*. Hyman's voice was not heard by the appellate court and he did not receive full appellate review of any sort.

[15] By far, the majority of untimely criminal appeals in the Fourth Circuit are decided on the motion documents alone and dismissed shortly after the Government's motion to dismiss. *See supra* note 9.

II. *Hyman* is an Ideal Vehicle to Address Whether Equitable Exceptions Apply to Non-Jurisdictional Claim-Processing Rules such as the Criminal Appeal Deadline.

This Court has reserved the question of whether "mandatory claim-processing rules may be subject to equitable exceptions." *Hamer*, 138 S. Ct. at 18 n.3; *Kontrick*, 540 U.S. at 457. This case presents the Court with an opportunity to finally resolve this long-standing and far-reaching issue. Equitable considerations should apply to excuse a missed deadline to file a criminal appeal under Fed. R. App. P. 4(b) in appropriate circumstances, and in this case in particular, for the following reasons.

First, this Court should recognize a general presumption that mandatory claim-processing rules are subject to equitable exceptions. Equitable exceptions serve important interests, such as the conservation of judicial resources and the avoidance of gamesmanship. *See Stutson*, 516 U.S. at 197 ("dry formalism should not sterilize procedural resources which Congress has made available to the federal courts"). Allowing these exceptions for non-jurisdictional rules underscores the difference between jurisdictional and non-jurisdictional deadlines that this Court has worked to clarify in recent years. Federal courts have no authority to act to protect such interests if a rule is jurisdictional, and recognizing such a presumption for non-jurisdictional rules will further this Court's concern to avoid the harsh consequences jurisdictional rules demand when possible. By adopting a presumption that equitable exceptions may apply, the Court will provide important guidance for lower courts. Adopting such a general presumption also aligns with this Court's precedents that have routinely recognized equitable exceptions for various non-jurisdictional rules. *See, e.g.*, *Holland v. Florida*, 560 U.S. 631, 645–46 (2010) ("a nonjurisdictional federal statute of limitations is normally subject to a 'rebuttable presumption' in *favor* 'of equitable tolling.'"); *Irwin v.*

Dep't of Veterans Affairs, 498 U.S. 89, 95–96 (1990).

Second, equitable exceptions should apply to criminal appeals, where individuals risk losing property, freedom, and even their life, thus implicating serious concerns that call for allowing equitable considerations to play a role. *See* discussion *supra* at 19; *Evitts*, 469 U.S. at 399–400 ("A system of appeal as of right is established precisely to assure that only those who are validly convicted have their freedom drastically curtailed."). And the argument for equitable exceptions is especially weighty when a defendant seeks to challenge on appeal an unlawful criminal sentence under 18 U.S.C. § 3742. This statutory right to appeal is unique and serves interests greater than the regulation of a court's docket or the Government's legitimate interest of conserving resources. It differs in nature and origin from the right to appeal in other criminal cases as well as civil cases, granted by 28 U.S.C. § 1291, which gives federal appellate courts jurisdiction over any final judgment of a district court.

Congress enacted § 3742 along with the processes for creating the Sentencing Guidelines in order to eliminate errors and disparities in sentences through the appellate review process. The federal courts have a duty to promote Congress's primary purpose in the Sentencing Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 1987 (codified as amended in scattered sections of 18 and 28 U.S.C.): the uniformity and proportionality of all federal criminal sentences across the nation. *Rita v. United States*, 551 U.S. 338, 348–49 (2007); *see Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1908 (2018) (recognizing interests in having correct Guidelines calculations beyond a defendant's personal interests). Congress's purpose is frustrated when a court of appeals declines to reach the merits of a nonfrivolous appeal in circumstances like *Hyman*.

A close examination of the language of § 3742 confirms Congress's intent. *See* App.

D at 21a–22a. The process is begun by the defendant filing a notice of appeal. § 3742(a) ("A defendant may file a notice of appeal . . . of an otherwise final sentence"). Once that happens, the statute mandates the course of action an appellate court must take, without reference to any time limit. By its express language, § 3742 requires the appellate court to review the relevant record *on its own* instead of relying only on arguments presented by the parties, a requirement similar to the full appellate review required in *Anders*. *See* § 3742(d), (e), and (f) ((d) "If a notice of appeal is filed . . . . the clerk shall certify" the part of the record designated by either party as relevant, *in addition to*, the presentence report and information submitted during the sentencing proceeding). The appellate court's ultimate decision on the lawfulness of the criminal sentence must rest on its own review of the record, not simply on arguments defendant's counsel has presented. *See* § 3742(e) ("Upon review of the record, the court of appeals shall determine whether the sentence" is unlawful; (f) "If the court of appeals determines" that the sentence is unlawful, it "shall remand the case"). In short, § 3742 imposes a duty of review on the court of appeals but places no express times limits to when a defendant can challenge an unlawful sentence. Thus, if a defendant chooses to appeal, a sentence is final in law only when the § 3742 process has been completed.

Congress clearly intended the goal of uniform and proportionate sentences to take precedence over other objectives served by the criminal appeal deadline, such as finality of judgments. S. Rep. No. 98-223, at 151 (1983) ("The Committee intends that a sentence be subject to modification through the appellate process, although it is final for other purposes."). To accomplish this purpose, Congress established "a limited practice of appellate review of sentences in the Federal criminal justice system." *Id.* at 146. These "specialized provisions," *id.* at 151, are "essential to assure that the guidelines

are applied properly and to provide case law development of the appropriate reasons for sentencing outside the guidelines." *Id.* at 148. This suggests that the interests at stake in deciding whether to excuse the missed deadline under Fed. R. App. P. 4(b) are important for appellate courts to consider when deciding whether to hear a criminal appeal of an unlawful sentence on the merits.

Additionally, reaching the merits of Hyman's appeal would promote Congress's purpose of ensuring uniform and proportionate criminal sentences. The errors the district court made in calculating the sentencing range are serious and if not corrected, will lead to unwarranted disparities in federal sentences. *See* DE-13, Hyman Br. As a result of the errors, the Guidelines range the court calculated imposed a prison sentence that was more than double what any evidence put forward by the Government would have supported when he pleaded guilty. This is not a matter involving the unlimited discretion a district court has when considering the factors under 18 U.S.C. § 3553(a) in order to *impose* a sentence *within* the proper sentencing range, or deciding a deviation from the proper range is required. But the district court's calculation of the Guidelines range used methods that seem more like creative storytelling than rigorous mathematics.

The errors in Hyman's case are exactly those Congress was concerned with in passing the Sentencing Reform Act. The Guidelines provide a straightforward framework "under which a set of inputs specific to a given case (the particular characteristics of the offense and offender)" yields "a predetermined output (a range of months within which the defendant [can] be sentenced)." *Peugh v. United States*, 133 S. Ct. 2072, 2079 (2013). That is transparent. That is fair. Such rigor is crucial because appellate courts can presume that a sentence imposed within a properly calculated Guidelines range is reasonable. *Rita*, 551 U.S. at 341.

Third, allowing equitable considerations to excuse a missed deadline in appropriate circumstances also "further[s] the purposes of litigative efficiency and economy." *See Cal. Pub. Emps. Ret. Sys. v. ANZ Sec., Inc.*, 137 S. Ct. 2042, 2051 (2017). Hyman's appeal has lasted over fifteen months and the merits of his appeal have already been extensively briefed by the parties. Hyman has been significantly delayed in his ability to challenge his sentence on collateral review. And to discard that work and require Hyman to spend the time and effort in a petition to vacate his sentence under 28 U.S.C. § 2255 is a waste of resources and time. Hyman would also have no guarantee of having another attorney appointed to represent him in a habeas action. Additional litigation would similarly burden the Government, the district court, and possibly the Fourth Circuit with further litigation if Hyman did not prevail in the district court action. This waste is inexcusable, especially when the Fourth Circuit had most of the issues involved in a habeas petition fully briefed on direct appeal and could have dealt with them there.

The Government's delay has consumed virtually *all* of the time, resources, and effort of the court, CJA-counsel, and Hyman himself, that an appeal decided on the merits could ever require. *See* discussion *supra* at 17. It has been over a year since the Government's motion to dismiss. But CJA-counsel raised issues with enough merit to persuade the Fourth Circuit to order full briefing on the merits, hear oral argument, and also grant rehearing, only to disregard those same issues and treat a non-jurisdictional filing deadline as if it were jurisdictional in all respects. Hyman should not be further penalized for raising meritorious arguments in favor of hearing the merits.

Fourth, other considerations strongly support applying equitable exceptions to this case in particular. Hyman's direct appeal of his criminal sentence has merit. *See* DE-13, Hyman Br. The panel's refusal to consider Hyman's arguments for an equitable

exception served none of the interests that the non-jurisdictional filing deadline exists to protect and it puts the Fourth Circuit out of step with a majority of other circuits, as discussed above. Additionally, Hyman did not sleep on his rights and his untimeliness of less than four months is excusable. Acting without counsel, it is not surprising that Hyman only identified errors in the district court's calculation of his Guidelines range after the 14-days allowed to timely appeal. *See Molina-Martinez v. United States*, 136 S. Ct. 1338, 1342–43 (2016). In an analogous context this Court has recognized the difficulty and delay that the extraordinarily complex web of highly technical rules making up the Guidelines may cause a *pro se* defendant. *See Rosales-Mireles*, 138 S. Ct. at 1904; *Molina-Martinez*, 136 S. Ct. at 1342–43. This complexity can certainly also prevent an indigent defendant, unrepresented by counsel, from unraveling the errors in the sentencing range before the fourteen days allowed by Rule 4(b).

Finally, while this Court has declined to address the issue in other cases because the issue was not properly raised below, *see, e.g.*, *Hamer*, 138 S. Ct. at 22, in this case, CJA-counsel repeatedly pressed arguments on the equitable considerations that weighed in favor of hearing the merits in the appellate court.[16] *See United States v. Williams*, 504 U.S. 36, 41 (1992) ("Our traditional rule . . . precludes a grant of certiorari only when 'the question presented was not pressed or passed upon below.'"). The appellate court necessarily passed upon the issues when it determined its local rule shielded Fed. R. App. P. 4(b) entirely from any equitable considerations. This case thus combines an unexplained Government delay in moving to dismiss the defendant's appeal *with* the appeals court's recognition that CJA-counsel had raised issues on the merits that

[16] *See, e.g.*, DE-28, 13–18, 20–21; DE-40, 8–9; DE-50, 12–20.

warranted full briefing on the merits and oral argument, *and* arguments about untimeliness that demanded a grant of rehearing after the Government was asked to respond. Hyman's case is therefore the appropriate vehicle to address this important issue. Considering all of the circumstances of this case, equitable considerations justify excusing Rule 4(b)'s deadline to appeal.

CONCLUSION

More than 15 months after the notice of appeal was filed the panel finally issued its amended decision and judgment. In that time it has become clear that Mr. Hyman presented arguments that the Fourth Circuit treated as serious. There can be no argument that there are any interests served by refusing to decide the appeal on its merits. Mr. Hyman deserves his voice to be heard. The court of appeals took a different course, in direct contradiction of this Court's precedents and the Sixth Amendment's guarantee of an adversarial system of justice for every person facing criminal charges, especially those who are indigent and filing *pro se*: the court ignored meritorious arguments Hyman raised, hurdled over multiple procedural bars, gave no weight to Congress's purposes in enacting § 3742 or any other interests in favor of reaching the merits, brushed aside decades of consistent precedents of this Court, relied entirely on a rationale and arguments of the court's own invention, refused to apply straightforward and longstanding principles of timeliness to a non-jurisdictional procedural deadline, and refused to follow and apply clear law. This disregard for our adversarial system is only authorized for rules with jurisdictional consequences. The Fourth Circuit's decision "has so far departed from the accepted and usual course of judicial proceedings" that this Court should exercise its supervisory authority. *See* Sup. Ct. R. 10(a).

For the foregoing reasons this Court should grant a writ of certiorari and review the decision of the Fourth Circuit or, in the alternative, grant the writ, vacate the panel decision and remand the case with appropriate instructions to the court.

Date: July 23, 2018

Respectfully submitted,

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