IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

United States Court of Appeals
Fifth Circuit
FILED
September 10, 2018
Lyle W. Cayce
Clerk

No. 17-10942

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOEL DARNELL PATTON,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 6:16-CV-49

Before DENNIS, CLEMENT, and ENGELHARDT, Circuit Judges.

PER CURIAM:*

Joel Darnell Patton appeals the district court's denial of his successive habeas petition pursuant to 28 U.S.C. § 2255[1] and his post-judgment motion for relief under Federal Rules of Civil Procedure 52(b) and 59(a), (e). Because we conclude that Patton's notice of appeal was untimely, we DISMISS the appeal for lack of jurisdiction.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

[1] 28 U.S.C. § 2255, as well as the other Title 28 provisions referenced herein, fall within the Antiterrorism and Effective Death Penalty Act of 1996, also known as "AEDPA."

I

Petitioner Patton pleaded guilty in 2001 to one count of possession of a firearm by a convicted felon under 18 U.S.C. § 922(g). He had five prior Texas felony convictions—one for aggravated assault and four for robbery under Texas Penal Code § 29.02. The district court enhanced Patton's sentence under § 924(e) of the Armed Career Criminal Act ("ACCA"), accepting the presentence report's finding that Patton had "at least three prior convictions for a 'violent felony' or 'serious drug offenses,' or both." Patton was sentenced to 210 months of imprisonment followed by three years of supervised release. His conviction and sentence were affirmed on direct appeal. *See United States v. Patton*, 263 F.3d 166 (Table), 2001 WL 804479 (5th Cir. June 15, 2001), *cert. denied*, 534 U.S. 1007 (2001).

In 2015, the Supreme Court held in *Johnson v. United States* that the residual clause (the latter half of § 924(e)(2)(B)(ii)) in ACCA's definition of a violent felony was unconstitutionally vague. 135 S.Ct. 2551, 2562–63 (2015). In *Welch v. United States*, the Court held that *Johnson* applied retroactively to cases on collateral review. 136 S.Ct. 1257, 1268 (2016). This court has held that a conviction for robbery under Texas Penal Code § 29.02 qualifies as a violent felony under ACCA's residual clause. *See United States v. Davis*, 487 F.3d 282, 287 (5th Cir. 2007). It did not directly foreclose the possibility that robbery may support an enhancement under ACCA's force clause. *See id.*[2]

The district court appointed a Federal Public Defender to assist with Patton's case in light of *Johnson*. Patton then sought authorization to file a successive petition pursuant to 28 U.S.C. § 2255, which this court granted in August 2016. The court noted that the "grant of authorization is tentative in

[2] This court recently held, in *United States v. Burris*, 17-10478, that Texas robbery does not support an enhancement under ACCA's force clause. The mandate in *Burris* has been held, and a petition for rehearing en banc is pending.

that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Patton has failed to make the showing required to file such a motion."

The district court denied Patton's successive § 2255 petition and a certificate of appeal ("COA") on February 9, 2017, holding that Patton had failed to demonstrate that he was sentenced under the residual clause of ACCA. It also stated, in the alternative, that Patton's robbery offenses continued to qualify as violent felonies under the force clause of ACCA; thus, he continued to have at least three qualifying convictions. Patton filed a motion under Federal Rules of Civil Procedure 52(b) and 59(a), (e) on February 22, requesting that the district court reopen the judgment, amend its findings and conclusions of law, and reconsider its denial of a COA in light of an intervening case, *United States v. Rico-Mejia*, 853 F.3d 731 (5th Cir. 2017), *withdrawn and superseded on panel reh'g*, 859 F.3d 318 (5th Cir. 2017).[3] The district court denied the motion on August 8, 2017.

On August 23, Patton filed a notice of appeal of the district court's denial of his successive § 2255 petition and its denial of his post-judgment motion. This court granted Patton a COA on three issues: 1) whether Patton's post-judgment motion under Rules 52(b) and 59(a), (e) was an unauthorized, successive § 2255 motion; if so, 2) whether an unauthorized, successive § 2255 motion extends the period for filing a timely notice of appeal; and 3) whether Patton's convictions for Texas robbery qualify as violent felonies under the "force clause" of ACCA. The first two issues go to this court's jurisdiction over the appeal, and they were raised by the court sua sponte. Because Patton filed his notice of appeal more than six months after the court denied his authorized,

[3] This court in *Rico-Mejia* held that the defendant's prior conviction for "terroristic threatening" was not a "crime of violence" within the meaning of the Sentencing Guidelines because it lacked physical force as an element. *See Rico-Mejia*, 859 F.3d at 322–23.

successive § 2255 petition, his appeal of that order is only timely if his post-judgment motion extended the filing deadline.

II

This court determines de novo whether a post-judgment motion for relief from judgment should be construed as an unauthorized, successive § 2255 petition. *See United States v. Brown*, 547 F. App'x 637, 640–41 (5th Cir. 2013); *see also United States v. Nkuku*, 602 F. App'x 183, 185 (5th Cir. 2015).

III

The Supreme Court has held that, in a proceeding under 28 U.S.C. § 2254, a post-judgment motion under Federal Rule of Civil Procedure 60(b) should be construed as a successive habeas petition if it raises new claims for relief, presents new evidence in support of a claim that has already been litigated, contends that a subsequent change in decisional law justifies relief from the judgment,[4] or otherwise challenges the district court's resolution of the underlying claim on the merits. *See Gonzalez v. Crosby*, 545 U.S. 524, 530–32 (2005). Acknowledging that AEDPA's jurisdictional restrictions, by their terms, apply only when a court is evaluating a petitioner's "application" for a writ of habeas corpus, the Court stated that "it is clear that for the purposes of § 2244(b) an 'application' for habeas relief is a filing that contains one or more 'claims.'" *Id.* at 530. "A habeas petitioner's filing that seeks vindication of such a claim is, if not in substance a habeas corpus application, at least similar enough that failing to subject it to the same requirements would be inconsistent with the statute." *Id.* at 531 (internal quotations omitted). After all, "alleging that the court erred in denying habeas relief on the merits is

[4] A successive petition may rely on an intervening change in decisional law only if the new law is "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Gonzalez v. Crosby*, 545 U.S. 524, 531–32 (2005) (citing 28 U.S.C. §2244(b)(2)(A)).

effectively indistinguishable from alleging that the movant is, under the substantive provisions of the statutes, entitled to habeas relief." *Id.* at 532.

Thus, challenges to a district court's resolution of claims on the merits or attempts to raise new claims for relief are construed as unauthorized, successive habeas petitions—even when the application is self-styled as a Rule 60(b) motion. *Id.* at 530–32. If, however, a post-judgment motion "attacks, not the substance of the federal court's resolution of a claim on the merits, but some defect in the integrity of the federal habeas proceedings," courts should not construe the motion as a successive petition. *Id.* at 532. A petitioner does not improperly attack a district court's merits determination when "he merely asserts that a previous ruling which *precluded* a merits determination was in error—for example, a denial for such reasons as failure to exhaust, procedural default, or statute-of-limitations bar." *Id.* at 532 n.4 (emphasis added).

Courts have extended the logic of *Gonzalez* beyond its specific procedural posture. Relevantly, for example, *Gonzalez*'s rationale applies equally to proceedings under § 2255. *See United States v. Hernandes*, 708 F.3d 680, 681 (5th Cir. 2013); *Brown*, 547 F. App'x at 641; *see also Williams v. Thaler*, 602 F.3d 291, 303 (5th Cir. 2010) (noting with approval that "[n]early every circuit has applied the *Gonzalez* rationale to federal prisoners seeking habeas relief under § 2255" and collecting cases). This circuit has also applied the *Gonzalez* framework to post-judgment motions under Rule 59(e), noting that while differences exist between Rule 59(e) and Rule 60(b), both Rules "permit the same relief—a change in judgment." *Williams*, 602 F.3d at 303 (quoting *Harcon Barge Co., Inc. v. D & G Boat Rentals, Inc.*, 784 F.2d 665, 669 (5th Cir. 1986)).

These extended applications of *Gonzalez* are entirely logical. The general concern identified in *Gonzalez*—that petitioners may use post-judgment motions to make an end-run around AEDPA's exacting procedural requirements—is not exclusive to the Rule 60(b) (or the Rule 59(e)) context. *Id.*

Indeed, while this circuit has never squarely addressed *Gonzalez*'s successive petition analysis in the context of a post-judgment motion under Rule 52(b) or 59(a) specifically, the court has stated that "[a]ny motion that draws into question the correctness of a judgment is functionally a motion under Civil Rule 59(e), whatever its label," and should be treated as such. *Harcon Barge*, 784 F.2d at 669–70 (internal quotations omitted). Accordingly, the answer to the successive petition inquiry turns on the actual substance of Patton's post-judgment motion—not the motion's technical title. *See id.* If Patton's motion attacks the merits of the district court's ruling on his § 2255 petition, it is an unauthorized, successive habeas petition, regardless of the fact that it was self-styled as a Rules 52(b) and 59(a), (e) motion.

First, the court must examine the district court's ruling on Patton's § 2255 petition to determine the basis of its dismissal. Noting that the appeals court had directed it to dismiss Patton's petition without reaching the merits if it determined that he had failed to make the required showing, the district court stated that Patton had not sufficiently demonstrated that his sentence was enhanced under the unconstitutional residual clause. This finding, as the government seems to concede, was a procedural, threshold determination—not a ruling on the merits. *See generally* 28 U.S.C. § 2244(b)(4). However, the district court went on to hold, in the alternative, that Patton's robbery convictions continued to qualify as violent felonies under the force clause of ACCA. This is a resolution of the force clause argument Patton raised in his motion for authorization and implicated in his § 2255 petition *on the merits*.

Patton's post-judgment motion focuses entirely on the district court's latter, merits-based ruling. He makes two primary arguments: (1) Texas robbery does not satisfy the force clause of ACCA; and (2) this court's opinion in *Rico-Mejia* is an intervening change in law that confirms the district court clearly erred in interpreting ACCA's force clause to encompass Patton's

robbery convictions. Patton's post-judgment motion does not directly challenge the district court's threshold, "pre-merits" ruling—that Patton had failed to demonstrate that he was sentenced under the residual clause.

Patton maintains that his post-judgment motion was merely challenging the district court's *refusal* to reach the merits of his underlying claim. A close look at the substance of the motion belies this characterization. Again, the motion never once mentions the district court's finding regarding Patton's failure to demonstrate his sentence was enhanced under the residual clause. This is a critical omission: the district court's determination with respect to Patton's threshold burden is the only type of finding that would have *precluded* a merits determination. Accordingly, the ruling on Patton's burden is the only proper subject of a motion seeking a change in the judgment. *See Gonzalez*, 545 U.S. at 532 n.4. Instead, Patton quarrels only with the district court's alternative merits holding.

Additionally, Patton asserts that an intervening change in law justifies an amendment of the district court's judgment. *Gonzalez* makes clear that, under AEDPA, an intervening change in law is only a proper basis for relief if the case announces "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." *Gonzalez*, 545 U.S. at 531–32 (citing 28 U.S.C. §2244(b)(2)(A)). Patton does not argue—nor can he—that *Rico-Mejia* announced a new constitutional rule. And, more fundamentally, *Rico-Mejia* is neither itself a Supreme Court case, nor does it espouse a constitutional principle blessed by the Supreme Court and explicitly made retroactive. Accordingly, Patton's argument runs afoul of *Gonzalez*'s limitations on post-judgment motions that rely on an intervening change in law as a basis for relief. *See id*. at 532.

Because Patton's post-judgment motion attacks the district court's merits determination that Patton's robbery convictions satisfy ACCA's force

clause[5]—irrespective of whether that conclusion was in fact erroneous—and relies on an intervening change in law that is not a new constitutional rule made retroactive to cases on collateral review, it is an unauthorized, successive § 2255 petition under *Gonzalez* and its progeny.

IV

Generally, a petitioner has 60 days from the denial of his § 2255 petition to file a notice of appeal. 28 U.S.C. § 2107(b); FED. R. APP. P. 4(a)(1)(b). Because the filing deadline is prescribed by statute, the limitation is jurisdictional and a petitioner's failure to timely file requires dismissal of the underlying action. *See Bowles v. Russell*, 551 U.S. 205, 210–13 (2007). The district court denied Patton's § 2255 petition on February 9, 2017. Patton filed his notice of appeal on August 23, 2017, more than six months after the district court's denial.

Again, however, Patton did file a timely motion for relief pursuant to Rules 52(b) and 59(a), (e). That motion was filed within 28 days of the denial of Patton's § 2255 petition, as required by the Federal Rules. Post-judgment motions will ordinarily toll the filing period, and the deadline for filing a notice of appeal will be 60 days from the entry of an order disposing of the motions.

[5] Patton argues in his brief on appeal that his original motion for authorization to file a successive petition that was submitted to this court was not docketed for consideration by the district court as directed in the authorization order. He contends that this was a "defect in the integrity of the post-conviction proceeding"—a proper basis for a post-judgment motion. This argument is unavailing. To begin with, Patton cites absolutely no authority for the proposition that this type of filing error was the type of challengeable "defect" contemplated by *Gonzalez*. Moreover, Patton's post-judgment motion mentioned the potential filing mishap in a footnote stating only that "[i]f the [district court] did not have the benefit of the arguments raised in the motion for authorization," it would provide "an independent reason to reopen the case and consider those arguments." This court has stated that "[a] single conclusory sentence in a footnote is insufficient to raise an issue for review." *United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006) (citing *Beazley v. Johnson*, 242 F.3d 248, 270 (5th Cir. 2001)). Again, Patton's contention that his post-judgment motion was permissibly focused on defects in the integrity of the post-conviction proceeding is simply disingenuous. The entire body of the motion is focused on the alleged error in the district court's conclusion that Patton's robbery convictions qualified as violent felonies under the force clause—a merits determination.

FED. R. APP. P. 4(a)(4)(A)(ii), (iv). If, however, a post-judgment motion is in fact an unauthorized, successive § 2255 petition, the filing period is not tolled. *See Uranga v. Davis*, 893 F.3d 282, 284 (5th Cir. 2018) (citing *Williams*, 602 F.3d at 303–04); *Brown*, 547 F. App'x at 640–41.[6]

It is undisputed that Patton did not file his notice of appeal within 60 days of the district court's disposition of his successive § 2255 petition. Because his post-judgment motion is properly characterized as an unauthorized, successive petition, it did not toll the filing deadline. Accordingly, because Patton's notice of appeal was untimely, this court lacks jurisdiction to hear the appeal.

V

For the foregoing reasons, Patton's appeal of the district court's denial of his successive § 2255 petition and post-judgment motion for relief is DISMISSED for lack of jurisdiction.

[6] Patton cites *Castro v. United States*, 540 U.S. 375, 386 (2003) to support the proposition that "the court should not re-write the motion over the appellant's objection, particularly where the effect of that revision would be to deprive the Court of jurisdiction to consider his otherwise timely appeal." *Castro*, however, dealt with the recharacterization of a post-judgment motion to the detriment of a *pro se* litigant. *See Castro*, 540 U.S. at 382. The equitable considerations underlying the Supreme Court's reasoning in *Castro* are inapplicable where the petitioner is represented by competent legal counsel.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10942

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JOEL DARNELL PATTON,

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

Before DENNIS, CLEMENT, and ENGELHARDT, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

Edith Brown Clement

UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-10782

In re: JOEL DARNELL PATTON,

Movant

A True Copy
Certified order issued Aug 01, 2016

Clerk, U.S. Court of Appeals, Fifth Circuit

Motion for an order authorizing
the United States District Court for the
Northern District of Texas, Lubbock to consider
a successive 28 U.S.C. § 2255 motion

Before JONES, SMITH, and DENNIS, Circuit Judges.

PER CURIAM:

Joel Darnell Patton, federal prisoner # 34351-077, seeks authorization to file a successive 28 U.S.C. § 2255 motion based on the Supreme Court's recent decisions in *Johnson v. United States*, 135 S. Ct. 2551 (2015), which held that the residual clause of the Armed Career Criminal Act (ACCA) is unconstitutionally vague and *Welch v. United States*, 136 S. Ct. 1257, 1265, 1268 (2016), which determined that *Johnson* is retroactively applicable to cases on collateral review. If granted authorization, Patton would challenge the district court's enhancement of his sentence under the ACCA based on his prior Texas robbery and aggravated assault convictions.

This court will not grant authorization to file a successive § 2255 motion absent a prisoner's prima facie showing that his claim relies on either (1) "newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing

evidence that no reasonable factfinder would have found [him] guilty of the offense" or (2) "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." § 2255(h); *see* 28 U.S.C. § 2244(b)(3)(C); *Reyes-Requena v. United States*, 243 F.3d 893, 897-99 (5th Cir. 2001). Patton has made "a sufficient showing of possible merit to warrant a fuller exploration by the district court." *Reyes-Requena*, 243 F.3d at 899 (internal quotation marks and citation omitted).

Accordingly, IT IS ORDERED that the motion for authorization to file a successive § 2255 motion is GRANTED. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Patton has failed to make the showing required to file such a motion. *See* § 2244(b)(4); *Reyes-Requena*, 243 F.3d at 899. We express no opinion as to what decisions the district court should make. The Clerk is DIRECTED to transfer the motion for authorization and related pleadings to the district court for filing as a § 2255 motion. *See Dornbusch v. Comm'r*, 860 F.2d 611, 612-15 (5th Cir. 1988). The filing date shall be, at the latest, the date the motion for authorization was received in this court, unless the district court determines that an earlier filing date should apply.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

JOEL DARNELL PATTON,	)	
	)	
Movant,	)	CIVIL ACTION NO.
	)	6:16-CV-049-C
V.	)	CRIMINAL NO.
	)	6:00-CR-029-01-C
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

Movant was convicted for being a felon in possession of a firearm and sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). Following an appeal challenging his conviction, which was affirmed, he filed his first motion pursuant to 28 U.S.C. § 2255. That motion was dismissed with prejudice on September 22, 2009. On August 1, 2016, the United States Court of Appeals for the Fifth Circuit tentatively granted Movant's request for an order authorizing this Court to consider a successive motion filed under 28 U.S.C. § 2255. The appellate court directed this Court to "dismiss the § 2255 motion without reaching the merits if [this Court] determines that Patton has failed to make the showing required to file such a motion."

The Government responded to Movant's motion on September 27, 2016, and argued that Patton has failed to make the showing required to file his successive motion. As argued by the Government, Movant has the burden of showing that the district court enhanced his sentence under the ACCA by viewing his robbery convictions as violent felonies under the ACCA's

residual clause. Yet, as also aptly argued by the Government, Movant fails to demonstrate that this Court regarded his robberies as violent felonies under the residual clause of the ACCA. Moreover, because Movant's robbery convictions continue to qualify as violent felonies under the force clause of the ACCA, Movant continues to have at least three qualifying convictions.

Thus, Movant has failed to meet his burden. For the reasons argued in the Government's Response, the Court finds that Movant's Motion should be **DENIED** AND **DISMISSED**.

All relief not expressly granted is denied.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability is denied. For the reasons set forth herein, Defendant has failed to show that a reasonable jurist would find (1) this Court's "assessment of the constitutional claims debatable or wrong" or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

SO ORDERED.

Dated this 9th day of February, 2017.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

ACCA,APPEAL,CLOSED

U.S. District Court
Northern District of Texas (San Angelo)
CIVIL DOCKET FOR CASE #: 6:16-cv-00049-C

Patton v USA
Assigned to: Senior Judge Sam R Cummings
Related Cases: 6:00-cr-00029-C-BL-1
6:09-cv-00077-C
6:14-cv-00033-C
Case in other court: USCA Fifth Circuit, 17-10942
Cause: 28:2255 Motion to Vacate / Correct Illegal Sentence

Date Filed: 06/16/2016
Date Terminated: 02/09/2017
Jury Demand: None
Nature of Suit: 510 Prisoner Pet: Motions to Vacate Sentence
Jurisdiction: U.S. Government Defendant

Petitioner

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V.

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Date Filed	#	Docket Text
06/16/2016	1 (p.5)	MOTION to Vacate (Successive) under 28 U.S.C. 2255 (Criminal Case Number 6:00-CR-029) Unless exempted, attorneys who are not admitted to practice in the Northern District of Texas must seek admission promptly. Forms, instructions, and exemption information may be found at www.txnd.uscourts.gov, or by clicking here: Attorney Information - Bar Membership. If admission requirements are not satisfied within 21 days, the clerk will notify the presiding judge. (dsr) Modified date of filing on 8/1/2016 (dsr). (Main Document 1 replaced on 8/2/2016) (dss). (Entered: 08/01/2016)
08/01/2016	2 (p.151)	NOTICE- Order from USCA: Accordingly, IT IS ORDERED that the motion for authorization to file a successive § 2255 motion is GRANTED. Our grant of authorization is tentative in that the district court must dismiss the § 2255 motion without reaching the merits if it determines that Patton has failed to make the showing required to file such a motion. See § 2244(b)(4); Reyes-Requena, 243 F.3d at 899. We express no opinion as to what decisions the district court should make. The Clerk is DIRECTED to transfer the motion for authorization and related pleadings to the district court for filing as a § 2255 motion. See Dornbusch v. Commr, 860 F.2d 611, 612-15 (5th Cir. 1988). The filing date shall be, at the latest, the date the motion for authorization was received in this court, unless the district court determines that an earlier filing date should apply. (Attachments: # 1 (p.5) USCA clerk ltr) (dsr) (Main Document 2 replaced on 8/2/2016) (dsr). (Additional attachment(s) added on 2/15/2017 per USCA request: # 2 (p.151) additional pages) (dsr). Modified on 2/15/2017 (dsr). (Entered: 08/01/2016)
08/02/2016	3 (p.174)	Order to Show Cause, Notice, and Instructions to Parties. The clerk has served this order and will regenerate notice of the motion and supporting documents to the

		designated Assistant US Attorney. Wes Hendrix-DOJ for United States of America added. (Ordered by Senior Judge Sam R Cummings on 8/2/2016) (dsr) (Entered: 08/02/2016)
08/02/2016		New Case Notes: A filing fee is not due for this case. (dsr) (Entered: 08/02/2016)
09/26/2016	4 (p.176)	NOTICE of Attorney Appearance by John Eric Nickols-DOJ on behalf of United States of America. (Filer confirms contact info in ECF is current.) (Nickols-DOJ, John) (Entered: 09/26/2016)
09/27/2016	5 (p.178)	RESPONSE filed by United States of America re: 1 (p.5) Motion to Vacate under 28 U.S.C. 2255. (Nickols-DOJ, John) (Entered: 09/27/2016)
09/27/2016	6 (p.195)	Appendix in Support filed by United States of America re 5 (p.178) Response/Objection *to motion under 28 U.S.C. § 2255* (Nickols-DOJ, John) (Entered: 09/27/2016)
02/06/2017	7 (p.217)	NOTICE - Correspondence requesting order for release from federal custody - re: 1 (p.5) Motion to Vacate under 28 U.S.C. 2255, filed by Joel Darnell Patton. (dss) (Entered: 02/06/2017)
02/09/2017	8 (p.220)	ORDER: Movant's motion Denied and Dismissed. All relief not expressly granted is denied. Certificate of Appealability is denied. (Ordered by Senior Judge Sam R Cummings on 2/9/2017) (dsr) (Entered: 02/09/2017)
02/09/2017	9 (p.222)	JUDGMENT: Civil action is Denied and Dismissed. (Ordered by Senior Judge Sam R Cummings on 2/9/2017) (dsr) (Entered: 02/09/2017)
02/15/2017	10 (p.223)	Notice of Substitution of Counsel by AFPD. James Matthew Wright-FPD added as AFPD. (Wright-FPD, James) (Entered: 02/15/2017)
02/22/2017	11 (p.224)	MOTION to Reopen Case, MOTION to Alter Judgment, MOTION for New Trial, MOTION for Reconsideration re 8 (p.220) Order, 9 (p.222) Judgment, MOTION for Certificate of Appealability on appeal () filed by Joel Darnell Patton with Brief/Memorandum in Support. (Attachments: # 1 (p.5) Fennell - First Opinion, # 2 (p.151) Fennell - Denying Reconsideration) (Wright-FPD, James) (Entered: 02/22/2017)
08/08/2017	12 (p.252)	ORDER denying 11 (p.224) Motion to Reopen Case; denying 11 (p.224) Motion to Alter Judgment; denying 11 (p.224) Motion for Reconsideration ; denying 11 (p.224) Motion for Certificate of Appealability. All relief not expressly granted is denied. Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 USC § 2253(c), this Court finds that a certificate of appealability is denied. (Ordered by Senior Judge Sam R Cummings on 8/8/2017) (dss) (Entered: 08/08/2017)
08/18/2017	13 (p.255)	MOTION Leave to Proceed IFP on appeal filed by Joel Darnell Patton (Wright-FPD, James) (Entered: 08/18/2017)
08/23/2017	14 (p.258)	ORDER granting 13 (p.255) Motion Proceed In Forma Pauperis on appeal. (Ordered by Senior Judge Sam R Cummings on 8/23/2017) (dsr) (Entered: 08/23/2017)
08/23/2017	15 (p.259)	NOTICE OF APPEAL as to 8 (p.220) Order, 9 (p.222) Judgment, 12 (p.252) Order on Motion to Reopen Case, Order on Motion to Alter Judgment, Order on Motion for Reconsideration, Order on Motion for Certificate of Appealability, to the Fifth Circuit by Joel Darnell Patton. T.O. form to appellant electronically at Transcript Order Form or US Mail as appropriate. Copy of NOA to be sent US Mail to parties not electronically noticed. IMPORTANT ACTION REQUIRED: Provide an electronic

		copy of any exhibit you offered during a hearing or trial that was admitted into evidence to the clerk of the district court within 14 days of the date of this notice. Copies must be transmitted as PDF attachments through ECF by all ECF Users or delivered to the clerk on a CD by all non-ECF Users. See detailed instructions here. (Exception: This requirement does not apply to a pro se prisoner litigant.) Please note that if original exhibits are in your possession, you must maintain them through final disposition of the case. (Wright-FPD, James) (Entered: 08/23/2017)
08/28/2017	16 (p.260)	NOTICE of Docketing Record on Appeal from USCA (copy of letter to FPD) re 15 (p.259) Notice of Appeal, filed by Joel Darnell Patton. USCA Case Number 17-10942. (dss) (Entered: 08/28/2017)

In the United States District Court
For the Northern District of Texas
San Angelo Division

Joel Darnell Patton, Petitioner,	§ §	
v.	§ § §	Case No. 6:16-CV-49-C Related to: 6:00-CR-29-C
United States of America, Respondent.	§ § §	

Petitioner's Motion to Reopen the Judgment, Reconsider Denial Of Certificate of Appealability

Petitioner Joel Darnell Patton respectfully asks this Court to amend its findings, re-open the judgment, amend its conclusions of law or make new ones, and alter or amend the judgment. This motion is made pursuant to Federal Rules of Civil Procedure 52(b) and 59(a) & (e), and in light of intervening Fifth Circuit authority: *United States v. Rico-Mejia*, __ F.3d __, No. 16-50022 (5th Cir. Feb. 10, 2017).

Procedural History

Mr. Patton raised a post-conviction challenge to his Armed Career Criminal Act sentence in light of *Johnson v. United States*, 135 S. Ct. 2551 (2015), and *Welch v. United States*, 136 S. Ct. 1257 (2016). This Court entered written judgment in the criminal case on January 12, 2001, (Crim. Doc. 29), ordering Mr. Patton to serve 210 months in prison. (Crim. Doc. 29 at 2). The Fifth Circuit affirmed the judgment on July 11, 2001. (Crim. Doc. 34). Mr. Patton's prior attempts to challenge the judgment were unsuccessful.

On May 23, 2016, this Court appointed the Federal Public Defender to represent Petitioner in any claim for relief under *Johnson*. (Crim. Docs. 60 & 63). In June of 2016, Petitioner asked the

Fifth Circuit for authorization to file a successive motion to vacate under 28 U.S.C. § 2255. *See In re Patton*, No. 16-1087 (5th Cir. docketed June 16, 2016). The full motion for authorization appears at ECF Doc. 2-2.[1]

In his motion for authorization, Petitioner argued that he no longer qualified as an Armed Career Criminal after *Johnson* struck down ACCA's residual clause. He specifically argued that his prior convictions for robbery did not satisfy the "elements clause" (also called the "force clause"), under the authority of *United States v. Vargas-Duran*, 356 F.3d 598, 606 (5th Cir. 2004) (en banc), *United States v. Cruz-Rodriguez*, 625 F.3d 274 (5th Cir. 2010), and *United States v. Ortiz-Gomez*, 562 F.3d 683 (5th Cir. 2009). The Fifth Circuit granted authorization on August 1, 2016, and transferred all pleadings to this Court for filing as a successive § 2255 motion. (Civ. Doc. 2.)

On September 27, 2016, the Government filed its response to Mr. Patton's authorized successive petition. (Civ. Doc. 5.) The Government agreed that—prior to *Johnson*—robbery was considered a violent felony under the now-defunct residual clause. (Doc. 5 at 5) (discussing *United States v. Davis*, 487 F.3d 282 (5th Cir. 2007)). But the Government opposed relief, arguing that robbery could also be considered a violent felony under the *elements* clause. *Id.* at 5–12. The Government specifically acknowledged the line of Fifth Circuit precedent relied upon by Mr. Patton, but argued those cases had been cast into doubt by "the Supreme Court's analysis in *United States v. Castleman*, 134 S. Ct. 1405 (2014)" (Doc. 5 at 10).

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[1] Undersigned counsel assumes that the motion for authorization and all "related pleadings" were transferred to this Court "for filing as a § 2255 motion," as ordered by the Fifth Circuit. *See* Fifth Circuit Order at 2, *In re Patton*, No. 16-10782 (5th Cir. Aug. 1, 2016), *reprinted at* Civ. Doc. 2 at 2. It appears that the Motion for Authorization itself was not added to this Court's ECF system until February 17, 2017. If the Court did not have the benefit of the arguments raised in the motion for authorization when it issued its original decision in this case, that provides an independent reason to reopen the case and consider those arguments.

This Court ultimately agreed with the Government. On February 9, 2017, the Court entered an order denying and dismissing Mr. Patton's motion to vacate. (Doc. 8.) The court specifically found that Mr. Patton's convictions for simple robbery "continue to qualify as violent felonies under the force clause of the ACCA." (Doc. 8 at 2.) The Court also concluded that no reasonable jurist would find its resolution of the motion debatable, so it denied a certificate of appealability.

Legal Standard

This Court has authority to grant this motion under Rules 52 and 59 of the Federal Rules of Civil Procedure. Rule 52(b) provides, in relevant part:

> (b) Amended or Additional Findings. On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings—or make additional findings—and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

Fed. R. Civ. P. 52(b). Rule 52(b) provides authority to modify the judgment in accordance with the amended findings. This motion "may accompany a motion for a new trial under Rule 59." Fed. R. Civ. P. 52(b).

Under Rule 59, the Court has authority to amend the judgment, "open the judgment," "amend findings of fact and conclusions of law or make new ones, or direct the entry of a new judgment." Fed. R. Civ. P. 59(a)(2). The Court may also grant a "new trial" under Rule 59(a). Rules 52(b) and 59 apply in § 2255 proceedings. *See* Rule 12 of the Rules Governing Section 2255 Cases in the U.S. Dist. Courts. The motion is timely because it is filed within 28 days of the entry of judgment. Fed. R. Civ. P. 52(b) & 59(e).

"Relief under Rule 59(e) is . . . appropriate when there has been an intervening change in the controlling law." *Schiller v. Physicians Res. Group Inc.*, 342 F.3d 563, 567–568 (5th Cir. 2003) (citing *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir.2002)); *accord Naquin v. Elevating*

Boats, L.L.C., 817 F.3d 235, 240 n.4 (5th Cir. 2016). It is also appropriate whenever there has been a manifest error in law. Because this Court's disposition of this action conflicts with the intervening decision in *United States v. Rico-Mejia*, __ F.3d __, No. 16-50022 (5th Cir. Feb. 10, 2017), that case either represents an intervening change, or reveals clear error.

Discussion

The Government argued that Texas simple robbery was a violent felony because it had, "as an element," the use, attempted use, or threatened use of physical force against the person of another. The argument assumed that Fifth Circuit precedent limiting the reach of the "elements clause" had been overruled by Supreme Court cases such as *Castleman*. (Doc. 5 at 10.) This Court apparently agreed.

Just one day after the Court issued its judgment in this case, the Fifth Circuit issued its opinion in *Rico-Mejia*. The opinion was later re-issued as published precedent. It is now clear that the government's argument is wrong, and that cases such as *Vargas-Duran* continue to govern the "element clause" analysis. *See also United States v. Villegas-Hernandez*, 468 F.3d 874, 879 (5th Cir. 2006) ("There is . . . a difference between a defendant's causation of injury and the . . . use of force."). Since (1) *Castleman* did not unequivocally overrule *Vargas-Duran* (and similar cases), and (2) simple robbery does not satisfy the elements clause under those cases, the Court should reissue the judgment in Mr. Patton's favor.

I. *CASTLEMAN* DID NOT OVERRULE *VARGAS-DURAN*.

A. Under *Vargas-Duran*, the element of *causing bodily injury* is not equivalent to *use of physical force*.

Vargas-Duran is the seminal case in the Fifth Circuit interpreting an identically worded elements clause. The *en banc* Court recognized that "[t]here is . . . a difference between a defendant's

causation of an injury and the defendant's use of force." *Vargas-Duran*, 356 F.3d at 606. Following that line of reasoning, the Fifth Circuit has repeatedly held that Texas crimes defined in terms of *causing injury* did not necessarily require proof of "use of physical force." *See, e.g.*, *Villegas-Hernandez*, 468 F.3d at 879 (assault of a peace officer does not have "use of physical force" as an element); *United States v. Gracia-Cantu*, 302 F.3d 308 (5th Cir. 2002) (injury to a child does not have "use of physical force" as an element); *United States v. Andino-Ortega*, 608 F.3d 305, 311 (5th Cir. 2010) (same).

To assist in applying this jurisprudence, *Villegas-Hernandez* identified several ways a defendant could cause bodily injury "without use of 'destructive or violent force": those examples include "making available to the victim a poisoned drink while reassuring him the drink is safe, or telling the victim he can safely back his car out while knowing an approaching car driven by an independently acting third party will hit the victim." 468 F.3d at 879. "To convict a defendant under any of these scenarios, the government would not need to show the defendant used physical force against the person or property of another." *Id.*

These hypothetical examples are often cited in Fifth Circuit decisions to illustrate the difference between causing injury and using force. *See, e.g.*, *United States v. Herrera-Alvarez*, 753 F.3d 132, 139 (5th Cir. 2014) ("Under the reasoning of *Villegas-Hernandez*, the harmful effect of the poison itself is not sufficient to furnish the destructive or violent physical force that the 'use of force' prong of § 2L1.2 demands."); *United States v. Johnson*, 286 F. App'x 155, 157 (5th Cir. 2008) (unpub.) (citing poison and traffic); *United States v. De La Rosa*, 264 F. App'x 446, 447–449 (5th Cir. 2008) (unpub.) (same).

B. Under that same logic, *threatening to cause injury* is not the same as *threatening to use physical force*.

Just as "[t]here is . . . a difference between the use of force and the causation of injury," *Vargas-Duran*, 356 F.3d at 606, there is also a difference between threatened harm and threatened use of force. Thus, the Fifth Circuit held that the California offense of "criminal threat" and the Pennsylvania crime of terroristic threatening do not have "threatened use of force" as an element, even though both statutes require proof that the defendant threatened to harm the victim. *See United States v. Cruz-Rodriguez*, 625 F.3d 274, 276–277 (5th Cir. 2010), and *United States v. Ortiz-Gomez*, 562 F.3d 683, 687 (5th Cir. 2009); *see also United States v. White*, 258 F.3d 374, 384 (5th Cir. 2001) (Texas offense of terroristic threatening does not have use or attempted use of physical force as an element). By the same logic, placing a victim "in fear" that the victim will suffer harm is not the same thing as actually threatening to use force.

This argument was advanced in Mr. Patton's successful motion for authorization. (ECF Doc. 2-2 at 6–7).

C. Contrary to the Government's Argument, *Castleman* did not overrule this precedent.

The Government acknowledged this unfavorable precedent in its response to Mr. Patton's motion to vacate. (ECF Doc. 5 at 9–10). Yet it argued that the Fifth Circuit had not "squared" its precedent "with more recent Supreme Court precedent," including the Supreme Court's decision in *Johnson v. United States*, 559 U.S. 133 (2010), and *Castleman*. *Id.* at 10. While that might have been true at the time the Government filed its response, the Fifth Circuit subsequently reaffirmed its precedent and held that a very similar statute did not satisfy the elements clause.

In *Rico-Mejia*, the Fifth Circuit considered the Arkansas crime of first-degree terroristic threatening. "Arkansas law decrees that a person is guilty of first-degree terroristic threatening if:

(A) With the purpose of terrorizing another person, the person threatens to cause death or serious physical injury or substantial property damage to another person." *Rico-Mejia*, __ F.3d __, slip op. at 5 (quoting Ark. Code Ann. § 5-13-301(a)(1)(A)). In that case, the Government argued that a threat to *kill* another person was necessarily a threat to use physical force, and that *Castleman* had overruled contrary Fifth Circuit precedent. The Fifth Circuit rejected that argument:

> The Government's contention regarding *Castleman* must be rejected. By its express terms, *Castleman*'s analysis is applicable only to crimes categorized as domestic violence, which import the broader common law meaning of physical force. *Castleman* is not applicable to the physical force requirement for a crime of violence, which "suggests a category of violent, active crimes" that have as an element a heightened form of physical force that is narrower in scope than that applicable in the domestic violence context. 134 S. Ct. 1411 n.4. Accordingly, *Castleman* does not disturb this court's precedent regarding the characterization of crimes of violence, and § 5-13-301(a)(1)(A) cannot constitute a crime of violence under § 2L1.2(b)(1)(A)(ii) because it lacks physical force as an element.

Rico-Mejia, __ F.3d at __, slip op. at 6–7. In other words, *Castleman* interpreted the definition of *domestic violence*, and its analysis was limited to that context. Further, the term "domestic violence" invites a significantly broader definition of "force." The Fifth Circuit and the Supreme Court did not overrule or retreat from precedent interpreting the definition of *violent felony* or *crime of violence*, which involve a more narrow definition of "force." The Fifth Circuit specifically reaffirmed its prior decisions in *Villegas-Hernandez* and *De La Rosa-Hernandez*.

II. THIS COURT SHOULD REOPEN THE CASE AND RECONSIDER ITS DECISION IN LIGHT OF *RICO-MEJIA*

Rico-Mejia represents an "intervening change in the controlling law." *Schiller*, 342 F.3d at 567–568; *Benjamin Moore,* 318 F.3d at 629; *Naquin* 817 F.3d at 240 n.4. The Government's position was at least arguable or debatable before that decision issued. However, there is now controlling authority reaffirming the precedent upon which Mr. Patton's petition relies.

Texas has chosen to define simple robbery in terms that are essentially identical to other assaultive offenses that are not categorically violent:

> (a) A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he:
>
> (1) intentionally, knowingly, or recklessly causes bodily injury to another; or
>
> (2) intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Tex. Penal Code Ann. § 29.02(a). The language in § 29.01(a)(1) is identical to the assault statute analyzed in *Villegas-Hernandez*. And the language in § 29.01(a)(2) is almost identical to the statutes analyzed in *Cruz-Rodriguez*, *Ortiz-Gomez*, *White*, and *Rico-Mejia*. Neither subsection satisfies the Fifth Circuit interpretation of the elements clause.

Alternatively, if *Rico-Mejia* does not represent a change in the law, this Court should grant this Motion and re-open the case because it reveals that the Court made a clear error of law. Causing bodily injury, or even putting someone in fear of suffering bodily injury, do not have any element of "force."

III. ALTERNATIVELY, THIS COURT SHOULD GRANT A CERTIFICATE OF APPEALABILITY BECAUSE REASONABLE JURISTS HAVE CONCLUDED THAT TEXAS SIMPLE ROBBERY LACKS ANY ELEMENT OF PHYSICAL FORCE.

For the reasons expressed above, this Court should fully reopen this case and reconsider it in light of *Rico-Mejia*. But, if the Court declines to reopen the case, the Court should grant a certificate of appealability because the matter is at least debatable.

Mr. Patton is entitled to the issuance of a COA if he shows that "reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Government argued that Texas simple robbery

remains a violent felony after *Johnson*, and this Court agreed. But U.S. District Judge Lindsay recently held that Texas simple robbery is *no longer* a violent felony after *Johnson* because neither "bodily injury" robbery nor "fear" robbery satisfies the elements clause. Mr. Patton has attached copies of Judge Lindsay's carefully reasoned opinions. While Mr. Patton would urge the Court to adopt Judge Lindsay's analysis fully and grant the motion to vacate, these opinions show that Mr. Patton's position is at least reasonably debatable. For these reasons, a COA should issue.

Respectfully submitted,

/s/ J. Matthew Wright

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Certificate of Service and Conference

I filed this motion via ECF. I also sent a separate copy of the motion via e-mail to AUSAs Jeff Haag and Wes Hendrix, who represent the Government in this matter now that Mr. Nickols and Ms. Williams have departed the office. Mr. Haag informed me via email that the Government opposes the relief requested in this motion.

/s/ J. Matthew Wright

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
SAN ANGELO DIVISION

JOEL DARNELL PATTON,	)	
	)	
Movant,	)	CIVIL ACTION NO.
	)	6:16-CV-049-C
V.	)	CRIMINAL NO.
	)	6:00-CR-029-01-C
UNITED STATES OF AMERICA,	)	
	)	
Respondent.	)	

ORDER

On February 22, 2017, Movant filed his Motion to Reopen the Judgment, Reconsider Denial of Certificate of Appealability.

Movant was convicted for being a felon in possession of a firearm and sentenced under the Armed Career Criminal Act ("ACCA"), 18 U.S.C. § 924(e). This Court entered a written judgment in the criminal case on January 12, 2001. Following an appeal challenging his conviction, which was affirmed, he filed his first motion pursuant to 28 U.S.C. § 2255. That motion was dismissed with prejudice on September 22, 2009. On August 1, 2016, the United States Court of Appeals for the Fifth Circuit tentatively granted Movant's request for an order authorizing this Court to consider a successive motion filed under 28 U.S.C. § 2255. The appellate court directed this Court to "dismiss the § 2255 motion without reaching the merits if [this Court] determines that Patton has failed to make the showing required to file such a motion."

The Government responded to Movant's motion and argued that Patton has failed to make the showing required to file his successive § 2255 motion. The Court found that Movant failed to demonstrate that this Court regarded his robberies as violent felonies under the residual clause of the ACCA and that Movant's robbery convictions continued to qualify as violent felonies under the force clause of the ACCA at the time of conviction and sentencing. Thus, the Court denied and dismissed Movant's *Johnson* motion.

Subsequently, Movant filed his Motion to Reopen the Judgment, Reconsider Denial of Certificate of Appealability, which is presently before the Court. The Court interprets the Fifth Circuit's directive to "dismiss the § 2255 motion without reaching the merits if [this Court] determines that Patton has failed to make the showing required to file such a motion[,]" as a narrow opportunity for Movant to make a challenge to his ACCA sentence under the holding of *Johnson v. United States*, 135 S. Ct. 2552 (2015), made retroactive by the United States Supreme Court. As such, Movant's challenge must be restricted to the holding of *Johnson* and the residual clause of the ACCA. Movant's ability to file a successive § 2255 motion is not a broad opportunity to challenge other provisions of the ACCA or any holding not made retroactive. *See In re: Lott*, 838 F.3d 522, 523 (5th Cir. 2016). Movant's opportunity to challenge any other provision of the ACCA or his sentence has long since expired when his criminal conviction and his prior § 2255 motion became final.[1]

Thus, Movant has failed to meet his burden for showing that this Court should reopen its prior judgment or reconsider denial of the certificate of appealabilty. Therefore, the Court finds

[1]Or put differently, Movant's use of § 2255 as a vehicle to bring a *Johnson* claim does not entitle him to challenge other aspects of the ACCA (beyond the residual clause) or apply holdings subsequently decided, and not made retroactive, to his conviction and sentence.

that Movant's Motion to Reopen the Judgment and Reconsider Denial of Certificate of Appealability should be **DENIED**.

All relief not expressly granted is denied.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability is denied. For the reasons set forth herein, Defendant has failed to show that a reasonable jurist would find (1) this Court's "assessment of the constitutional claims debatable or wrong" or (2) "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

SO ORDERED.

Dated this 8th day of August, 2017.

SAM R. CUMMINGS
SENIOR UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17-10942

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

JOEL DARNELL PATTON,

Defendant-Appellant

Appeal from the United States District Court
for the Northern District of Texas

O R D E R:

Joel Darnell Patton, federal prisoner # 34351-077, seeks a certificate of appealability (COA) to challenge the district court's rejection of his authorized successive 28 U.S.C. § 2255 motion. Further, he seeks an expedited COA ruling and an expedited appeal.

Patton has met the required standard for a COA. *See* 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 483-84 (2000). Accordingly, a COA is GRANTED as to the following issues: (1) whether Patton's postjudgment motion, filed pursuant to Federal Rules of Civil Procedure 52(b) and 59(a) and (e), was an unauthorized successive § 2255 motion, *see Gonzalez v. Crosby*, 545 U.S. 524, 531-32 (2005); (2) whether an unauthorized successive § 2255 motion extends the period for filing a timely notice of appeal, *see United States v. Brown*, 547 F. App'x 637, 640-41 (5th Cir. 2013), and *Uranga v. Davis*,

879 F.3d 646, 648 (5th Cir. 2018) (mandate held, petition for rehearing en banc pending); and (3) whether Patton's Texas robbery offenses qualify as violent felonies under the force clause of the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(B)(i).

Patton's request for an expedited COA ruling is DENIED as moot. His motion for an expedited appeal is GRANTED. The clerk is DIRECTED to establish an expedited briefing schedule in light of Patton's projected release date of September 18, 2018.

/s/ Leslie H. Southwick
LESLIE H. SOUTHWICK
UNITED STATES CIRCUIT JUDGE

In the United States District Court
For the Northern District of Texas
San Angelo Division

Joel Darnell Patton, Petitioner, v. United States of America, Respondent.	§ § § § § § § §	Case No. 6:16-CV-49-C Related to: 6:00-CR-29-C

Petitioner's Notice of Appeal

Petitioner Joel Darnell Patton appeals this Court's judgment (ECF Doc. 9) and order denying his post-judgment motion to reopen case, alter judgment, or for reconsideration (ECF Doc 12) to the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

/s/ J. Matthew Wright

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Certificate of Service and Conference

I filed this motion via ECF. I also sent a separate copy of the motion via e-mail to AUSAs Jeff Haag and Wes Hendrix, who represent the Government in this matter.

/s/ J. Matthew Wright

Statutory Provisions Involved

28 U.S.C. § 2107. Time for appeal to court of appeals

(a) Except as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.

(b) In any such action, suit, or proceeding, the time as to all parties shall be 60 days from such entry if one of the parties is--

(1) the United States;

(2) a United States agency;

(3) a United States officer or employee sued in an official capacity; or

(4) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on behalf of the United States, including all instances in which the United States represents that officer or employee when the judgment, order, or decree is entered or files the appeal for that officer or employee.

(c) The district court may, upon motion filed not later than 30 days after the expiration of the time otherwise set for bringing appeal, extend the time for appeal upon a showing of excusable neglect or good cause. In addition, if the district court finds--

(1) that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry, and

(2) that no party would be prejudiced,

the district court may, upon motion filed within 180 days after entry of the judgment or order or within 14 days after receipt of such notice, whichever is earlier, reopen the time for appeal for a period of 14 days from the date of entry of the order reopening the time for appeal.

(d) This section shall not apply to bankruptcy matters or other proceedings under Title 11.

28 U.S.C. § 2244. Finality of determination

(a) No circuit or district judge shall be required to entertain an application for a writ of habeas corpus to inquire into the detention of a person pursuant to a judgment of a court of the United States if it appears that the legality of such detention has been determined by a judge or court of the United States on a prior application for a writ of habeas corpus, except as provided in section 2255.

(b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.

(2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--

(A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and

(ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.

(B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.

(C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

(D) The court of appeals shall grant or deny the authorization to file a second or successive application not later than 30 days after the filing of the motion.

(E) The grant or denial of an authorization by a court of appeals to file a second or successive application shall not be appealable and shall not be the subject of a petition for rehearing or for a writ of certiorari.

(4) A district court shall dismiss any claim presented in a second or successive application that the court of appeals has authorized to be filed unless the applicant shows that the claim satisfies the requirements of this section.

(c) In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United

States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein, unless the applicant for the writ of habeas corpus shall plead and the court shall find the existence of a material and controlling fact which did not appear in the record of the proceeding in the Supreme Court and the court shall further find that the applicant for the writ of habeas corpus could not have caused such fact to appear in such record by the exercise of reasonable diligence.

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of--

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

§ 2255. Federal custody; remedies on motion attacking sentence

(a) A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

(b) Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

(c) A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

(d) An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

(e) An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention.

(f) A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of--

(1) the date on which the judgment of conviction becomes final;

(2) the date on which the impediment to making a motion created by governmental action in violation of the Constitution or laws of the United States is removed, if the movant was prevented from making a motion by such governmental action;

(3) the date on which the right asserted was initially recognized by the Supreme Court, if that right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or

(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

(g) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review,

the court may appoint counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(h) A second or successive motion must be certified as provided in section 2244 by a panel of the appropriate court of appeals to contain--

(1) newly discovered evidence that, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that no reasonable factfinder would have found the movant guilty of the offense; or

(2) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable.

Federal Rules of Appellate Procedure

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;

(ii) a United States agency;

(iii) a United States officer or employee sued in an official capacity; or

(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf--including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party files in the district court any of the following motions under the Federal Rules of Civil Procedure--and does so within the time allowed by those rules--the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77(d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77(d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 14 days after the entry of the order disposing of the last such remaining motion, or within 14 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 14 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an institution has a system designed for legal mail, an inmate confined there must use that system to receive the benefit of this Rule 4(c)(1). If an inmate files a notice of appeal in either a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing and:

(A) it is accompanied by:

(i) a declaration in compliance with 28 U.S.C. § 1746--or a notarized statement--setting out the date of deposit and stating that first-class postage is being prepaid; or

(ii) evidence (such as a postmark or date stamp) showing that the notice was so deposited and that postage was prepaid; or

(B) the court of appeals exercises its discretion to permit the later filing of a declaration or notarized statement that satisfies Rule 4(c)(1)(A)(i).

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

CREDIT(S)

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100-690, Title VII, § 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005; Mar. 26, 2009, eff. Dec. 1, 2009; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 26, 2011, eff. Dec. 1, 2011; Apr. 28, 2016, eff. Dec. 1, 2016; Apr. 27, 2017, eff. Dec. 1, 2017.)

ADVISORY COMMITTEE NOTES

1967 Adoption

Subdivision (a). This subdivision is derived from FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title] without any change of substance. The requirement that a request for an extension of time for filing the notice of appeal made after expiration of the time be made by motion and on notice codifies the result reached under the present provisions of FRCP 73(a) and 6(b) [rules 73(a) and 6(b), Federal Rules of Civil Procedure]. North Umberland Mining Co. v. Standard Accident Ins. Co., 193 F.2d 951 (9th Cir., 1952); Cohen v. Plateau Natural Gas Co., 303 F.2d 273 (10th Cir., 1962); Plant Economy, Inc. v. Mirror Insulation Co., 308 F.2d 275 (3d Cir., 1962).

Since this subdivision governs appeals in all civil cases, it supersedes the provisions of § 25 of the Bankruptcy Act (11 U.S.C. § 48). Except in cases to which the United States or an officer or agency thereof is a party, the change is a minor one, since a successful litigant in a bankruptcy proceeding may, under § 25, oblige an aggrieved party to appeal within 30 days after entry of judgment--the time fixed by this subdivision in cases involving private parties only--by serving him with notice of entry on the day thereof, and by the terms of § 25 and aggrieved party must in any event appeal within 40 days after entry of judgment. No reason appears why the time for appeal in bankruptcy should not be the same as that in civil cases generally. Furthermore, § 25 is a potential trap for the uninitiated. The time for appeal which it provides is not applicable to all appeals which may fairly be termed appeals in bankruptcy. Section 25 governs only those cause referred to in § 24 as "proceedings in bankruptcy" and "controversies arising in proceedings in bankruptcy." Lowenstein v. Reikes, 54 F.2d 481 (2d Cir., 1931), cert. den., 285 U.S. 539, 52 S.Ct. 311, 76 L.Ed. 932 (1932). The distinction between such cases and other cases which arise out of bankruptcy is often difficult to determine. See 2 Moore's Collier on Bankruptcy ¶24.12 through ¶24.36 (1962). As a result it is not always clear whether an appeal is governed by § 25 or by FRCP 73(a) [rule 73(a), Federal Rules of Civil Procedure, this title], which is applicable to such appeals in bankruptcy as are not governed by § 25.

In view of the unification of the civil and admiralty procedure accomplished by the amendments of the Federal Rules of Civil Procedure effective July 1, 1966, this subdivision governs appeals in those civil actions which involve admiralty or maritime claims and which prior to that date were known as suits in admiralty.

The only other change possibly effected by this subdivision is in the time for appeal from a decision of a district court on a petition for impeachment of an award of a board of arbitration under the Act of May 20, 1926, c. 347, § 9 (44 Stat. 585), 45 U.S.C. § 159. The act provides that a notice of appeal from such a decision shall be filed within 10 days of the decision. This singular provision was apparently repealed by the enactment in 1948 of 28 U.S.C. § 2107, which fixed 30 days from the date of entry of judgment as the time for appeal in all actions a civil nature except actions in admiralty or bankruptcy matters or those in which the United States is a party. But it was not expressly repealed, and its status

is in doubt. See 7 Moore's Federal Practice ¶73.09[2] (1966). The doubt should be resolved, and no reason appears why appeals in such cases should not be taken within the time provided for civil cases generally.

Subdivision (b). This subdivision is derived from FRCrP 37(a)(2) [rule 37(a)(2), Federal Rules of Criminal Procedure] without change of substance.

1979 Amendment

Subdivision (a)(1). The words "(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)," which appear in the present rule are struck out as unnecessary and perhaps misleading in suggesting that there may be other categories that are not either civil or criminal within the meaning of Rule 4(a) and (b).

The phrases "within 30 days of such entry" and "within 60 days of such entry" have been changed to read "after" instead of "or." The change is for clarity only, since the word "of" in the present rule appears to be used to mean "after." Since the proposed amended rule deals directly with the premature filing of a notice of appeal, it was thought useful to emphasize the fact that except as provided, the period during which a notice of appeal may be filed is the 30 days, or 60 days as the case may be, following the entry of the judgment or order appealed from. See Notes to Rule 4(a)(2) and (4), below.

Subdivision (a)(2). The proposed amendment to Rule 4(a)(2) would extend to civil cases the provisions of Rule 4(b), dealing with criminal cases, designed to avoid the loss of the right to appeal by filing the notice of appeal prematurely. Despite the absence of such a provision in Rule 4(a) the courts of appeals quite generally have held premature appeals effective. See, e.g., Matter of Grand Jury Empanelled Jan. 21, 1975, 541 F.2d 373 (3d Cir. 1976); Hodge v. Hodge, 507 F.2d 87 (3d Cir. 1976); Song Jook Suh v. Rosenberg, 437 F.2d 1098 (9th Cir. 1971); Ruby v. Secretary of the Navy, 365 F.2d 385 (9th Cir. 1966); Firchau v. Diamond Nat'l Corp., 345 F.2d 269 (9th Cir. 1965).

The proposed amended rule would recognize this practice but make an exception in cases in which a post trial motion has destroyed the finality of the judgment. See Note to Rule 4(a)(4) below.

Subdivision (a)(4). The proposed amendment would make it clear that after the filing of the specified post trial motions, a notice of appeal should await disposition of the motion. Since the proposed amendments to Rules 3, 10, and 12 contemplate that immediately upon the filing of the notice of appeal the fees will be paid and the case docketed in the court of appeals, and the steps toward its disposition set in motion, it would be undesirable to proceed with the appeal while the district court has before it a motion the granting of which would vacate or alter the judgment appealed from. See, e.g., Keith v. Newcourt, 530 F.2d 826 (8th Cir. 1976). Under the present rule, since docketing may not take place until the record is transmitted, premature filing is much less likely to involve waste effort. See, e.g. Stockes v. Peyton's Inc., 508 F.2d 1287 (5th Cir. 1975). Further, since a notice of appeal filed before the disposition of a post trial motion, even if it were treated as valid for purposes of jurisdiction, would not embrace objections to the denial of the motion, it is obviously preferable to postpone the notice of appeal until after the motion is disposed of.

The present rule, since it provides for the "termination" of the "running" of the appeal time, is ambiguous in its application to a notice of appeal filed prior to a post trial motion filed within the 10 day limit. The amendment would make it clear that in such circumstances the appellant should not proceed with the appeal during pendency of the motion but should file a new notice of appeal after the motion is disposed of.

Subdivision (a)(5). Under the present rule it is provided that upon a showing of excusable neglect the district court at any time may extend the time for the filing of a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by the rule, but that if the application is made after the original time has run, the order may be made only on motion with such notice as the court deems appropriate.

A literal reading of this provision would require that the extension be ordered and the notice of appeal filed within the 30 day period, but despite the surface clarity of the rule, it has produced considerable confusion. See the discussion by Judge Friendly in In re Orbitek, 520 F.2d 358 (2d Cir. 1975). The proposed amendment would make it clear that a motion to extend the time must be filed no later than 30 days after the expiration of the original appeal time, and that if the motion is timely filed the district court may act upon the motion at a later date, and may extend the time not in excess of 10 days measured from the date on which the order granting the motion is entered.

Under the present rule there is a possible implication that prior to the time the initial appeal time has run, the district court may extend the time on the basis of an informal application. The amendment would require that the application must be made by motion, though the motion may be made ex parte. After the expiration of the initial time a motion for the extension of the time must be made in compliance with the F.R.C.P. [Federal Rules of Civil Procedure] and local rules of the district court. See Note to proposed amended Rule 1, supra. And see Rules 6(d), 7(b) of the F.R.C.P. [rules 6(d) and 7(b), Federal Rules of Civil Procedure].

The proposed amended rule expands to some extent the standard for the grant of an extension of time. The present rule requires a "showing of excusable neglect." While this was an appropriate standard in cases in which the motion is made after the time for filing the notice of appeal has run, and remains so, it has never fit exactly the situation in which the appellant seeks an extension before the expiration of the initial time. In such a case "good cause," which is the standard that is applied in the granting of other extensions of time under Rule 26(b) seems to be more appropriate.

Subdivision (a)(6). The proposed amendment would call attention to the requirement of Rule 58 of the F.R.C.P. [Federal Rules of Civil Procedure] that the judgment constitute a separate document. See United States v. Indrelunas, 411 U.S. 216 (1973). When a notice of appeal is filed, the clerk should ascertain whether any judgment designated therein has been entered in compliance with Rules 58 and 79(a) and if not, so advise all parties and the district judge. While the requirement of Rule 58 is not jurisdictional, (see Bankers Trust Co. v. Mallis, 431 U.S. 928 (1977)), compliance is important since the time for the filing of a notice of appeal by other parties is measured by the time at which the judgment is properly entered.

1991 Amendment

The amendment provides a limited opportunity for relief in circumstances where the notice of entry of a judgment or order, required to be mailed by the clerk of the district court pursuant to Rule 77(d) of the Federal Rules of Civil Procedure, is either not received by a party or is received so late as to impair the opportunity to file a timely notice of appeal. The amendment adds a new subdivision (6) allowing a district court to reopen for a brief period the time for appeal upon a finding that notice of entry of a judgment or order was not received from the clerk or a party within 21 days of its entry and that no party would be prejudiced. By "prejudice" the Committee means some adverse consequence other than the cost of having to oppose the appeal and encounter the risk of reversal, consequences that are present in every appeal. Prejudice might arise, for example, if the appellee had taken some action in reliance on the expiration of the normal time period for filing a notice of appeal.

Reopening may be ordered only upon a motion filed within 180 days of the entry of a judgment or order or within 7 days of receipt of notice of such entry, whichever is earlier. This provision establishes an outer time limit of 180 days for a party who fails to receive timely notice of entry of a judgment to seek additional time to appeal and enables any winning party to shorten the 180-day period by sending (and establishing proof of receipt of) its own notice of entry of a judgment, as authorized by Fed.R.Civ.P. 77(d). Winning parties are encouraged to send their own notice in order to lessen the chance that a judge will accept a claim of non-receipt in the face of evidence that notices were sent by both the clerk and the winning party. Receipt of a winning party's notice will shorten only the time for reopening the time for appeal under this subdivision, leaving the normal time periods for appeal unaffected.

If the motion is granted, the district court may reopen the time for filing a notice of appeal only for a period of 14 days from the date of entry of the order reopening the time for appeal.

Transmittal Note: Upon transmittal of this rule to Congress, the Advisory Committee recommends that the attention of Congress be called to the fact that language in the fourth paragraph of 28 U.S.C. § 2107 might appropriately be revised in light of this proposed rule.

1993 Amendment

Note to Paragraph (a)(1). The amendment is intended to alert readers to the fact that paragraph (a)(4) extends the time for filing an appeal when certain posttrial motions are filed. The Committee hopes that awareness of the provisions of paragraph (a)(4) will prevent the filing of a notice of appeal when a posttrial tolling motion is pending.

Note to Paragraph (a)(2). The amendment treats a notice of appeal filed after the announcement of a decision or order, but before its formal entry, as if the notice had been filed after entry. The amendment deletes the language that made paragraph (a)(2) inapplicable to a notice of appeal filed after announcement of the disposition of a posttrial motion enumerated in paragraph (a)(4) but before the entry of the order, see Acosta v. Louisiana Dep't of Health & Human Resources, 478 U.S. 251 (1986) (per curiam); Alerte v. McGinnis, 898 F.2d 69 (7th Cir.1990). Because the amendment of paragraph (a)(4) recognizes all notices of appeal filed after announcement or entry of judgment--even those that are filed while the posttrial motions enumerated in paragraph (a)(4) are pending--the amendment of this paragraph is consistent with the amendment of paragraph (a)(4).

Note to Paragraph (a)(3). The amendment is technical in nature; no substantive change is intended.

Note to Paragraph (a)(4). The 1979 amendment of this paragraph created a trap for an unsuspecting litigant who files a notice of appeal before a posttrial motion, or while a posttrial motion is pending. The 1979 amendment requires a party to file a new notice of appeal after the motion's disposition. Unless a new notice is filed, the court of appeals lacks jurisdiction to hear the appeal. Griggs v. Provident Consumer Discount Co., 459 U.S. 56 (1982). Many litigants, especially pro se litigants, fail to file the second notice of appeal, and several courts have expressed dissatisfaction with the rule. See, e.g., Averhart v. Arrendondo, 773 F.2d 919 (7th Cir.1985); Harcon Barge Co. v. D & G Boat Rentals, Inc., 746 F.2d 278 (5th Cir.1984), cert. denied, 479 U.S. 930 (1986).

The amendment provides that a notice of appeal filed before the disposition of a specified posttrial motion will become effective upon disposition of the motion. A notice filed before the filing of one of the specified motions or after the filing of a motion but before disposition of the motion is, in effect, suspended until the motion is disposed of, whereupon, the previously filed notice effectively places jurisdiction in the court of appeals.

Because a notice of appeal will ripen into an effective appeal upon disposition of a posttrial motion, in some instances there will be an appeal from a judgment that has been altered substantially because the motion was granted in whole or in part. Many such appeals will be dismissed for want of prosecution when the appellant fails to meet the briefing schedule. But, the appellee may also move to strike the appeal. When responding to such a motion, the appellant would have an opportunity to state that, even though some relief sought in a posttrial motion was granted, the appellant still plans to pursue the appeal. Because the appellant's response would provide the appellee with sufficient notice of the appellant's intentions, the Committee does not believe that an additional notice of appeal is needed.

The amendment provides that a notice of appeal filed before the disposition of a posttrial tolling motion is sufficient to bring the underlying case, as well as any orders specified in the original notice, to the court of appeals. If the judgment is altered upon disposition of a posttrial motion, however, and if a party wishes to appeal from the disposition of the motion, the party must amend the notice to so indicate. When a party files an amended notice, no additional fees are required because the notice is an amendment of the original and not a new notice of appeal.

Paragraph (a)(4) is also amended to include, among motions that extend the time for filing a notice of appeal, a Rule 60 motion that is served within 10 days after entry of judgment. This eliminates the difficulty of determining whether a posttrial motion made within 10 days after entry of a judgment is a Rule 59(e) motion, which tolls the time for filing an appeal, or a Rule 60 motion, which historically has not tolled the time. The amendment comports with the practice in several circuits of treating all motions to alter or amend judgments that are made within 10 days after entry of judgment as Rule 59(e) motions for purposes of Rule 4(a)(4). See, e.g., Finch v. City of Vernon, 845 F.2d 256 (11th Cir.1988); Rados v. Celotex Corp., 809 F.2d 170 (2d Cir.1986); Skagerberg v. Oklahoma, 797 F.2d 881 (10th Cir.1986). To conform to a recent Supreme Court decision, however--Budinich v. Becton Dickinson and Co., 486 U.S. 196 (1988)--the amendment excludes motions for attorney's fees from the class of motions that extend the filing time unless a district court, acting under Rule 58, enters an order extending the time for appeal. This amendment is to be read in conjunction with the amendment of Fed.R.Civ.P. 58.

Note to subdivision (b). The amendment grammatically restructures the portion of this subdivision that lists the types of motions that toll the time for filing an appeal. This restructuring is intended to make the rule easier to read. No substantive change is intended other than to add a motion for judgment of acquittal under Criminal Rule 29 to the list of tolling motions. Such a motion is the equivalent of a Fed.R.Civ.P. 50(b) motion for judgment notwithstanding the verdict, which tolls the running of time for an appeal in a civil case.

The proposed amendment also eliminates an ambiguity from the third sentence of this subdivision. Prior to this amendment, the third sentence provided that if one of the specified motions was filed, the time for filing an appeal would run from the entry of an order denying the motion. That sentence, like the parallel provision in Rule 4(a)(4), was intended to toll the running of time for appeal if one of the posttrial motions is timely filed. In a criminal case, however, the time for filing the motions runs not from entry of judgment (as it does in civil cases), but from the verdict or finding of guilt. Thus, in a criminal case, a posttrial motion may be disposed of more than 10 days before sentence is imposed, i.e. before the entry of judgment. United States v. Hashagen, 816 F.2d 899, 902 n. 5 (3d Cir.1987). To make it clear that a notice of appeal need not be filed before entry of judgment, the amendment states that an appeal may be taken within 10 days after the entry of an order disposing of the motion, or within 10 days after the entry of judgment, whichever is later. The amendment also changes the language in the third sentence providing that an appeal may be taken within 10 days after the entry of an order denying the motion; the amendment says instead that an appeal may be taken within 10 days after the entry of an order disposing of the last such motion outstanding. (Emphasis added) The change recognizes that there may be multiple posttrial motions filed and that, although one or more motions may be granted in whole or in part, a defendant may still wish to pursue an appeal.

The amendment also states that a notice of appeal filed before the disposition of any of the posttrial tolling motions becomes effective upon disposition of the motions. In most circuits this language simply restates the current practice. See United States v. Cortes, 895 F.2d 1245 (9th Cir.), cert. denied, 495 U.S. 939 (1990). Two circuits, however, have questioned that practice in light of the language of the rule, see United States v. Gargano, 826 F.2d 610 (7th Cir.1987), and United States v. Jones, 669 F.2d 559 (8th Cir.1982), and the Committee wishes to clarify the rule. The amendment is consistent with the proposed amendment of Rule 4(a)(4).

Subdivision (b) is further amended in light of new Fed.R.Crim.P. 35(c), which authorizes a sentencing court to correct any arithmetical, technical, or other clear errors in sentencing within 7 days after imposing the sentence. The Committee believes that a sentencing court should be able to act under Criminal Rule 35(c) even if a notice of appeal has already been filed; and that a notice of appeal should not be affected by the filing of a Rule 35(c) motion or by correction of a sentence under Rule 35(c).

Note to subdivision (c). In Houston v. Lack, 487 U.S. 266 (1988), the Supreme Court held that a pro se prisoner's notice of appeal is “filed” at the moment of delivery to prison authorities for forwarding to the district court. The amendment reflects that decision. The language of the amendment is similar to that in Supreme Court Rule 29.2.

Permitting an inmate to file a notice of appeal by depositing it in an institutional mail system requires adjustment of the rules governing the filing of cross-appeals. In a civil case, the time for filing a cross-appeal ordinarily runs from the date when the first notice of appeal is filed. If an inmate's notice of appeal is filed by depositing it in an institution's mail system, it is possible that the notice of appeal will not arrive in the district court until several days after the "filing" date and perhaps even after the time for filing a cross-appeal has expired. To avoid that problem, subdivision (c) provides that in a civil case when an institutionalized person files a notice of appeal by depositing it in the institution's mail system, the time for filing a cross-appeal runs from the district court's receipt of the notice. The amendment makes a parallel change regarding the time for the government to appeal in a criminal case.

1995 Amendment

Subdivision (a). Fed.R.Civ.P. 50, 52, and 59 were previously inconsistent with respect to whether certain postjudgment motions had to be filed or merely served no later than 10 days after entry of judgment. As a consequence Rule 4(a)(4) spoke of making or serving such motions rather than filing them. Civil Rules 50, 52, and 59, are being revised to require filing before the end of the 10-day period. As a consequence, this rule is being amended to provide that 'filing' must occur within the 10 day period in order to affect the finality of the judgment and extend the period for filing a notice of appeal.

The Civil Rules require the filing of postjudgment motions 'no later than 10 days after entry of judgment'--rather than 'within' 10 days--to include postjudgment motions that are filed before actual entry of the judgment by the clerk. This rule is amended, therefore, to use the same terminology.

The rule is further amended to clarify the fact that a party who wants to obtain review of an alteration or amendment of a judgment must file a notice of appeal or amend a previously filed notice to indicate intent to appeal from the altered judgment.

1998 Amendments

The language and organization of the rule are amended to make the rule more easily understood. In addition to changes made to improve the understanding the Advisory Committee has changed language to make style and terminology consistent throughout the appellate rules. These changes are intended to be stylistic only; in this rule, however, substantive changes are made in paragraphs (a)(6) and (b)(4), and in subdivision (c).

Subdivision (a), paragraph (1). Although the Advisory Committee does not intend to make any substantive changes in this paragraph, cross-references to Rules 4(a)(1)(B) and (4)(c) have been added to subparagraph (a)(1)(A).

Subdivision (a), paragraph (4). Item (iv) in subparagraph (A) of Rule 4(a)(4) provides that filing a motion for relief under Fed.R.Civ.P. 60 will extend the time for filing a notice of appeal if the Rule 60 motion is filed no later than 10 days after judgment is entered. Again, the Advisory Committee does not intend to make any substantive change in this paragraph. But because Fed.R.Civ.P. 6(a) and Fed.R.App.P. 26(a) have different methods for computing time, one might be uncertain whether the 10-day period referred to in Rule 4(a)(4) is computed using Civil Rule 6(a) or Appellate Rule 26(a). Because the Rule 60 motion is filed in the district court, and because Fed.R.App.P. 1(a)(2) says that when the appellate rules provide for filing a motion in the district court, "the procedure must comply with the practice of the district court," the rule provides that the 10-day period is computed using Fed.R.Civ.P. 6(a)

Subdivision (a), paragraph (6). Paragraph (6) permits a district court to reopen the time for appeal if a party has not received notice of the entry of judgment and no party would be prejudiced by the reopening. Before reopening the time for appeal, the existing rule requires the district court to find that the moving party was entitled to notice of the entry of judgment and did not receive it "from the clerk or any party within 21 days of its entry." The Advisory Committee makes a substantive change. The finding must be that the movant did not receive notice "from the district court or any party within 21 days after entry." This change broadens the type of notice that can preclude reopening the time for

appeal. The existing rule provides that only notice from a party or from the clerk bars reopening. The new language precludes reopening if the movant has received notice from "the court."

Subdivision (b). Two substantive changes are made in what will be paragraph (b)(4). The current rule permits an extension of time to file a notice of appeal if there is a "showing of excusable neglect." First, the rule is amended to permit a court to extend the time for "good cause" as well as for excusable neglect. Rule 4(a) permits extensions for both reasons in civil cases and the Advisory Committee believes that "good cause" should be sufficient in criminal cases as well. The amendment does not limit extensions for good cause to instances in which the motion for extension of time is filed before the original time has expired. The rule gives the district court discretion to grant extensions for good cause whenever the court believes it appropriate to do so provided that the extended period does not exceed 30 days after the expiration of the time otherwise prescribed by Rule 4(b). Second, paragraph (b)(4) is amended to require only a "finding" of excusable neglect or good cause and not a "showing" of them. Because the rule authorizes the court to provide an extension without a motion, a "showing" is obviously not required; a "finding" is sufficient.

Subdivision (c). Substantive amendments are made in this subdivision. The current rule provides that if an inmate confined in an institution files a notice of appeal by depositing it in the institution's internal mail system, the notice is timely filed if deposited on or before the last day for filing. Some institutions have special internal mail systems for handling legal mail; such systems often record the date of deposit of mail by an inmate, the date of delivery of mail to an inmate, etc. The Advisory Committee amends the rule to require an inmate to use the system designed for legal mail, if there is one, in order to receive the benefit of this subdivision.

When an inmate uses the filing method authorized by subdivision (c), the current rule provides that the time for other parties to appeal begins to run from the date the district court "receives" the inmate's notice of appeal. The rule is amended so that the time for other parties begins to run when the district court "dockets" the inmates appeal. A court may "receive" a paper when its mail is delivered to it even if the mail is not processed for a day or two, making the date of receipt uncertain. "Docketing" is an easily identified event. The change eliminates uncertainty. Paragraph (c)(3) is further amended to make it clear that the time for the government to file its appeal runs from the later of the entry of the judgment or order appealed from or the district court's docketing of a defendant's notice filed under this paragraph (c).

2002 Amendments

Subdivision (a)(1)(C). The federal courts of appeals have reached conflicting conclusions about whether an appeal from an order granting or denying an application for a writ of error coram nobis is governed by the time limitations of Rule 4(a) (which apply in civil cases) or by the time limitations of Rule 4(b) (which apply in criminal cases). Compare United States v. Craig, 907 F.2d 653, 655-57, amended 919 F.2d 57 (7th Cir. 1990); United States v. Cooper, 876 F.2d 1192, 1193-94 (5th Cir. 1989); and United States v. Keogh, 391 F.2d 138, 140 (2d Cir. 1968) (applying the time limitations of Rule 4(a)); with Yasui v. United States, 772 F.2d 1496, 1498-99 (9th Cir. 1985); and United States v. Mills, 430 F.2d 526, 527-28 (8th Cir. 1970) (applying the time limitations of Rule 4(b)). A new part (C) has been added to Rule 4(a)(1) to resolve this conflict by providing that the time limitations of Rule 4(a) will apply.

Subsequent to the enactment of Fed. R. Civ. P. 60(b) and 28 U.S.C. § 2255, the Supreme Court has recognized the continued availability of a writ of error coram nobis in at least one narrow circumstance. In 1954, the Court permitted a litigant who had been convicted of a crime, served his full sentence, and been released from prison, but who was continuing to suffer a legal disability on account of the conviction, to seek a writ of error coram nobis to set aside the conviction. United States v. Morgan, 346 U.S. 502 (1954). As the Court recognized, in the Morgan situation an application for a writ of error coram nobis "is of the same general character as [a motion] under 28 U.S.C. § 2255." Id. at 506 n.4. Thus, it seems appropriate that the time limitations of Rule 4(a), which apply when a district court grants or denies relief under 28 U.S.C. § 2255, should also apply when a district court grants or denies a writ of error coram nobis. In addition, the strong public interest in the speedy resolution of criminal

appeals that is reflected in the shortened deadlines of Rule 4(b) is not present in the Morgan situation, as the party seeking the writ of error coram nobis has already served his or her full sentence.

Notwithstanding Morgan, it is not clear whether the Supreme Court continues to believe that the writ of error coram nobis is available in federal court. In civil cases, the writ has been expressly abolished by Fed. R. Civ. P. 60(b). In criminal cases, the Supreme Court has recently stated that it has become " 'difficult to conceive of a situation' " in which the writ " 'would be necessary or appropriate.' " Carlisle v. United States, 517 U.S. 416, 429 (1996) (quoting United States v. Smith, 331 U.S. 469, 475 n.4 (1947)). The amendment to Rule 4(a)(1) is not intended to express any view on this issue; rather, it is merely meant to specify time limitations for appeals.

Rule 4(a)(1)(C) applies only to motions that are in substance, and not merely in form, applications for writs of error coram nobis. Litigants may bring and label as applications for a writ of error coram nobis what are in reality motions for a new trial under Fed. R. Crim. P. 33 or motions for correction or reduction of a sentence under Fed. R. Crim. P. 35. In such cases, the time limitations of Rule 4(b), and not those of Rule 4(a), should be enforced.

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(4)(A)(vi). Rule 4(a)(4)(A)(vi) has been amended to remove a parenthetical that directed that the 10-day deadline be "computed using Federal Rule of Civil Procedure 6(a)." That parenthetical has become superfluous because Rule 26(a)(2) has been amended to require that all deadlines under 11 days be calculated as they are under Fed. R. Civ. P. 6(a).

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(5)(A)(ii). Rule 4(a)(5)(A) permits the district court to extend the time to file a notice of appeal if two conditions are met. First, the party seeking the extension must file its motion no later than 30 days after the expiration of the time originally prescribed by Rule 4(a). Second, the party seeking the extension must show either excusable neglect or good cause. The text of Rule 4(a)(5)(A) does not distinguish between motions filed prior to the expiration of the original deadline and those filed after the expiration of the original deadline. Regardless of whether the motion is filed before or during the 30 days after the original deadline expires, the district court may grant an extension if a party shows either excusable neglect or good cause.

Despite the text of Rule 4(a)(5)(A), most of the courts of appeals have held that the good cause standard applies only to motions brought prior to the expiration of the original deadline and that the excusable neglect standard applies only to motions brought during the 30 days following the expiration of the original deadline. See Pontarelli v. Stone, 930 F.2d 104, 109-10 (1st Cir. 1991) (collecting cases from the Second, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits). These courts have relied heavily upon the Advisory Committee Note to the 1979 amendment to Rule 4(a)(5). But the Advisory Committee Note refers to a draft of the 1979 amendment that was ultimately rejected. The rejected draft directed that the good cause standard apply only to motions filed prior to the expiration of the original deadline. Rule 4(a)(5), as actually amended, did not. See 16A CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3950.3, at 148-49 (2d ed. 1996).

The failure of the courts of appeals to apply Rule 4(a)(5)(A) as written has also created tension between that rule and Rule 4(b)(4). As amended in 1998, Rule 4(b)(4) permits the district court to extend the time for filing a notice of appeal in a criminal case for an additional 30 days upon a finding of excusable neglect or good cause. Both Rule 4(b)(4) and the Advisory Committee Note to the 1998 amendment make it clear that an extension can be granted for either excusable neglect or good cause, regardless of whether a motion for an extension is filed before or during the 30 days following the expiration of the original deadline.

Rule 4(a)(5)(A)(ii) has been amended to correct this misunderstanding and to bring the rule in harmony in this respect with Rule 4(b)(4). A motion for an extension filed prior to the expiration of the original

deadline may be granted if the movant shows either excusable neglect or good cause. Likewise, a motion for an extension filed during the 30 days following the expiration of the original deadline may be granted if the movant shows either excusable neglect or good cause.

The good cause and excusable neglect standards have "different domains." Lorenzen v. Employees Retirement Plan, 896 F.2d 228, 232 (7th Cir. 1990). They are not interchangeable, and one is not inclusive of the other. The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault--excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Thus, the good cause standard can apply to motions brought during the 30 days following the expiration of the original deadline. If, for example, the Postal Service fails to deliver a notice of appeal, a movant might have good cause to seek a post-expiration extension. It may be unfair to make such a movant prove that its "neglect" was excusable, given that the movant may not have been neglectful at all. Similarly, the excusable neglect standard can apply to motions brought prior to the expiration of the original deadline. For example, a movant may bring a pre-expiration motion for an extension of time when an error committed by the movant makes it unlikely that the movant will be able to meet the original deadline.

Changes Made After Publication and Comments No changes were made to the text of the proposed amendment. The stylistic changes to the Committee Note suggested by Judge Newman were adopted. In addition, two paragraphs were added at the end of the Committee Note to clarify the difference between the good cause and excusable neglect standards.

Subdivision (a)(7). Several circuit splits have arisen out of uncertainties about how Rule 4(a)(7)'s definition of when a judgment or order is "entered" interacts with the requirement in Fed. R. Civ. P. 58 that, to be "effective," a judgment must be set forth on a separate document. Rule 4(a)(7) and Fed. R. Civ. P. 58 have been amended to resolve those splits.

1. The first circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the extent to which orders that dispose of post-judgment motions must be set forth on separate documents. Under Rule 4(a)(4)(A), the filing of certain post-judgment motions tolls the time to appeal the underlying judgment until the "entry" of the order disposing of the last such remaining motion. Courts have disagreed about whether such an order must be set forth on a separate document before it is treated as "entered." This disagreement reflects a broader dispute among courts about whether Rule 4(a)(7) independently imposes a separate document requirement (a requirement that is distinct from the separate document requirement that is imposed by the Federal Rules of Civil Procedure ("FRCP")) or whether Rule 4(a)(7) instead incorporates the separate document requirement as it exists in the FRCP. Further complicating the matter, courts in the former "camp" disagree among themselves about the scope of the separate document requirement that they interpret Rule 4(a)(7) as imposing, and courts in the latter "camp" disagree among themselves about the scope of the separate document requirement imposed by the FRCP.

Rule 4(a)(7) has been amended to make clear that it simply incorporates the separate document requirement as it exists in Fed. R. Civ. P. 58. If Fed. R. Civ. P. 58 does not require that a judgment or order be set forth on a separate document, then neither does Rule 4(a)(7); the judgment or order will be deemed entered for purposes of Rule 4(a) when it is entered in the civil docket. If Fed. R. Civ. P. 58 requires that a judgment or order be set forth on a separate document, then so does Rule 4(a)(7); the judgment or order will not be deemed entered for purposes of Rule 4(a) until it is so set forth and entered in the civil docket (with one important exception, described below).

In conjunction with the amendment to Rule 4(a)(7), Fed. R. Civ. P. 58 has been amended to provide that orders disposing of the postjudgment motions listed in new Fed. R. Civ. P. 58(a)(1) (which postjudgment motions include, but are not limited to, the post-judgment motions that can toll the time to appeal under Rule 4(a)(4)(A)) do not have to be set forth on separate documents. See Fed. R. Civ. P.

58(a)(1). Thus, such orders are entered for purposes of Rule 4(a) when they are entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). See Rule 4(a)(7)(A)(1).

2. The second circuit split addressed by the amendments to Rule 4(a)(7) and Fed. R. Civ. P. 58 concerns the following question: When a judgment or order is required to be set forth on a separate document under Fed. R. Civ. P. 58 but is not, does the time to appeal the judgment or order--or the time to bring post-judgment motions, such as a motion for a new trial under Fed. R. Civ. P. 59--ever begin to run? According to every circuit except the First Circuit, the answer is "no." The First Circuit alone holds that parties will be deemed to have waived their right to have a judgment or order entered on a separate document three months after the judgment or order is entered in the civil docket. See Fiore v. Washington County Community Mental Health Ctr., 960 F.2d 229, 236 (1st Cir. 1992) (en banc). Other circuits have rejected this cap as contrary to the relevant rules. See, e.g., United States v. Haynes, 158 F.3d 1327, 1331 (D.C. Cir. 1998); Hammack v. Baroid Corp., 142 F.3d 266, 269-70 (5th Cir. 1998); Rubin v. Schottenstein, Zox & Dunn, 110 F.3d 1247, 1253 n.4 (6th Cir. 1997), vacated on other grounds, 143 F.3d 263 (6th Cir. 1998) (en banc). However, no court has questioned the wisdom of imposing such a cap as a matter of policy.

Both Rule 4(a)(7)(A) and Fed. R. Civ. P. 58 have been amended to impose such a cap. Under the amendments, a judgment or order is generally treated as entered when it is entered in the civil docket pursuant to Fed. R. Civ. P. 79(a). There is one exception: When Fed. R. Civ. P. 58(a)(1) requires the judgment or order to be set forth on a separate document, that judgment or order is not treated as entered until it is set forth on a separate document (in addition to being entered in the civil docket) or until the expiration of 150 days after its entry in the civil docket, whichever occurs first. This cap will ensure that parties will not be given forever to appeal (or to bring a postjudgment motion) when a court fails to set forth a judgment or order on a separate document in violation of Fed. R. Civ. P. 58(a)(1).

3. The third circuit split--this split addressed only by the amendment to Rule 4(a)(7)--concerns whether the appellant may waive the separate document requirement over the objection of the appellee. In Bankers Trust Co. v. Mallis, 435 U.S. 381, 387 (1978) (per curiam), the Supreme Court held that the "parties to an appeal may waive the separate-judgment requirement of Rule 58." Specifically, the Supreme Court held that when a district court enters an order and "clearly evidence[s] its intent that the ... order ... represent[s] the final decision in the case," the order is a "final decision" for purposes of 28 U.S.C. § 1291, even if the order has not been set forth on a separate document for purposes of Fed. R. Civ. P. 58. Id. Thus, the parties can choose to appeal without waiting for the order to be set forth on a separate document.

Courts have disagreed about whether the consent of all parties is necessary to waive the separate document requirement. Some circuits permit appellees to object to attempted Mallis waivers and to force appellants to return to the trial court, request that judgment be set forth on a separate document, and appeal a second time. See, e.g., Selletti v. Carey, 173 F.3d 104, 109-10 (2d Cir. 1999); Williams v. Borg, 139 F.3d 737, 739-40 (9th Cir. 1998); Silver Star Enters., Inc. v. M/V Saramacca, 19 F.3d 1008, 1013 (5th Cir. 1994). Other courts disagree and permit Mallis waivers even if the appellee objects. See, e.g., Haynes, 158 F.3d at 1331; Miller v. Artistic Cleaners, 153 F.3d 781, 783-84 (7th Cir. 1998); Alvord-Polk, Inc. v. F. Schumacher & Co., 37 F.3d 996, 1006 n.8 (3d Cir. 1994).

New Rule 4(a)(7)(B) is intended both to codify the Supreme Court's holding in Mallis and to make clear that the decision whether to waive the requirement that the judgment or order be set forth on a separate document is the appellant's alone. It is, after all, the appellant who needs a clear signal as to when the time to file a notice of appeal has begun to run. If the appellant chooses to bring an appeal without waiting for the judgment or order to be set forth on a separate document, then there is no reason why the appellee should be able to object. All that would result from honoring the appellee's objection would be delay.

4. The final circuit split addressed by the amendment to Rule 4(a)(7) concerns the question whether an appellant who chooses to waive the separate document requirement must appeal within 30 days

(60 days if the government is a party) from the entry in the civil docket of the judgment or order that should have been set forth on a separate document but was not. In Townsend v. Lucas, 745 F.2d 933 (5th Cir. 1984), the district court dismissed a 28 U.S.C. § 2254 action on May 6, 1983, but failed to set forth the judgment on a separate document. The plaintiff appealed on January 10, 1984. The Fifth Circuit dismissed the appeal, reasoning that, if the plaintiff waived the separate document requirement, then his appeal would be from the May 6 order, and if his appeal was from the May 6 order, then it was untimely under Rule 4(a)(1). The Fifth Circuit stressed that the plaintiff could return to the district court, move that the judgment be set forth on a separate document, and appeal from that judgment within 30 days. Id. at 934. Several other cases have embraced the Townsend approach. See, e.g., Armstrong v. Ahitow, 36 F.3d 574, 575 (7th Cir. 1994) (per curiam); Hughes v. Halifax County Sch. Bd., 823 F.2d 832, 835-36 (4th Cir. 1987); Harris v. McCarthy, 790 F.2d 753, 756 n.1 (9th Cir. 1986).

Those cases are in the distinct minority. There are numerous cases in which courts have heard appeals that were not filed within 30 days (60 days if the government was a party) from the judgment or order that should have been set forth on a separate document but was not. See, e.g., Haynes, 158 F.3d at 1330-31; Clough v. Rush, 959 F.2d 182, 186 (10th Cir. 1992); McCalden v. California Library Ass'n, 955 F.2d 1214, 1218-19 (9th Cir. 1990). In the view of these courts, the remand in Townsend was "precisely the purposeless spinning of wheels abjured by the Court in the [Mallis] case." 15B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3915, at 259 n.8 (3d ed. 1992).

The Committee agrees with the majority of courts that have rejected the Townsend approach. In drafting new Rule 4(a)(7)(B), the Committee has been careful to avoid phrases such as "otherwise timely appeal" that might imply an endorsement of Townsend.

Changes Made After Publication and Comments No changes were made to the text of proposed Rule 4(a)(7)(B) or to the third or fourth numbered sections of the Committee Note, except that, in several places, references to a judgment being "entered" on a separate document were changed to references to a judgment being "set forth" on a separate document. This was to maintain stylistic consistency. The appellate rules and the civil rules consistently refer to "entering" judgments on the civil docket and to "setting forth" judgments on separate documents.

Two major changes were made to the text of proposed Rule 4(a)(7)(A)--one substantive and one stylistic. The substantive change was to increase the "cap" from 60 days to 150 days. The Appellate Rules Committee and the Civil Rules Committee had to balance two concerns that are implicated whenever a court fails to enter its final decision on a separate document. On the one hand, potential appellants need a clear signal that the time to appeal has begun to run, so that they do not unknowingly forfeit their rights. On the other hand, the time to appeal cannot be allowed to run forever. A party who receives no notice whatsoever of a judgment has only 180 days to move to reopen the time to appeal from that judgment. See Rule 4(a)(6)(A). It hardly seems fair to give a party who does receive notice of a judgment an unlimited amount of time to appeal, merely because that judgment was not set forth on a separate piece of paper. Potential appellees and the judicial system need some limit on the time within which appeals can be brought.

The 150-day cap properly balances these two concerns. When an order is not set forth on a separate document, what signals litigants that the order is final and appealable is a lack of further activity from the court. A 60-day period of inactivity is not sufficiently rare to signal to litigants that the court has entered its last order. By contrast, 150 days of inactivity is much less common and thus more clearly signals to litigants that the court is done with their case.

The major stylistic change to Rule 4(a)(7) requires some explanation. In the published draft, proposed Rule 4(a)(7)(A) provided that "[a] judgment or order is entered for purposes of this Rule 4(a) when it is entered for purposes of Rule 58(b) of the Federal Rules of Civil Procedure." In other words, Rule 4(a)(7)(A) told readers to look to FRCP 58(b) to ascertain when a judgment is entered for purposes of starting the running of the time to appeal. Sending appellate lawyers to the civil rules to discover

when time began to run for purposes of the appellate rules was itself somewhat awkward, but it was made more confusing by the fact that, when readers went to proposed FRCP 58(b), they found this introductory clause: "Judgment is entered for purposes of Rules 50, 52, 54(d)(2)(B), 59, 60, and 62 when.... "

This introductory clause was confusing for both appellate lawyers and trial lawyers. It was confusing for appellate lawyers because Rule 4(a)(7) informed them that FRCP 58(b) would tell them when the time begins to run for purposes of the appellate rules, but when they got to FRCP 58(b) they found a rule that, by its terms, dictated only when the time begins to run for purposes of certain civil rules. The introductory clause was confusing for trial lawyers because FRCP 58(b) described when judgment is entered for some purposes under the civil rules, but then was completely silent about when judgment is entered for other purposes.

To avoid this confusion, the Civil Rules Committee, on the recommendation of the Appellate Rules Committee, changed the introductory clause in FRCP 58(b) to read simply: "Judgment is entered for purposes of these Rules when.... " In addition, Rule 4(a)(7)(A) was redrafted1 so that the triggering events for the running of the time to appeal (entry in the civil docket, and being set forth on a separate document or passage of 150 days) were incorporated directly into Rule 4(a)(7), rather than indirectly through a reference to FRCP 58(b). This eliminates the need for appellate lawyers to examine Rule 58(b) and any chance that Rule 58(b)'s introductory clause (even as modified) might confuse them.

We do not believe that republication of Rule 4(a)(7) or FRCP 58 is necessary. In substance, rewritten Rule 4(a)(7)(A) and FRCP 58(b) operate identically to the published versions, except that the 60-day cap has been replaced with a 150-day cap--a change that was suggested by some of the commentators and that makes the cap more forgiving.

Subdivision (b)(5). Federal Rule of Criminal Procedure 35(a) permits a district court, acting within 7 days after the imposition of sentence, to correct an erroneous sentence in a criminal case. Some courts have held that the filing of a motion for correction of a sentence suspends the time for filing a notice of appeal from the judgment of conviction. See, e.g., United States v. Carmouche, 138 F.3d 1014, 1016 (5th Cir. 1998) (per curiam); United States v. Morillo, 8 F.3d 864, 869 (1st Cir. 1993). Those courts establish conflicting timetables for appealing a judgment of conviction after the filing of a motion to correct a sentence. In the First Circuit, the time to appeal is suspended only for the period provided by Fed. R. Crim. P. 35(a) for the district court to correct a sentence; the time to appeal begins to run again once 7 days have passed after sentencing, even if the motion is still pending. By contrast, in the Fifth Circuit, the time to appeal does not begin to run again until the district court actually issues an order disposing of the motion.

Rule 4(b)(5) has been amended to eliminate the inconsistency concerning the effect of a motion to correct a sentence on the time for filing a notice of appeal. The amended rule makes clear that the time to appeal continues to run, even if a motion to correct a sentence is filed. The amendment is consistent with Rule 4(b)(3)(A), which lists the motions that toll the time to appeal, and notably omits any mention of a Fed. R. Crim. P. 35(a) motion. The amendment also should promote certainty and minimize the likelihood of confusion concerning the time to appeal a judgment of conviction.

If a district court corrects a sentence pursuant to Fed. R. Crim. P. 35(a), the time for filing a notice of appeal of the corrected sentence under Rule 4(b)(1) would begin to run when the court enters a new judgment reflecting the corrected sentence.

Changes Made After Publication and Comments The reference to Federal Rule of Criminal Procedure 35(c) was changed to Rule 35(a) to reflect the pending amendment of Rule 35. The proposed amendment to Criminal Rule 35, if approved, will take effect at the same time that the proposed amendment to Appellate Rule 4 will take effect, if approved.

2005 Amendments

Rule 4(a)(6) has permitted a district court to reopen the time to appeal a judgment or order upon finding that four conditions were satisfied. First, the district court had to find that the appellant did

not receive notice of the entry of the judgment or order from the district court or any party within 21 days after the judgment or order was entered. Second, the district court had to find that the appellant moved to reopen the time to appeal within 7 days after the appellant received notice of the entry of the judgment or order. Third, the district court had to find that the appellant moved to reopen the time to appeal within 180 days after the judgment or order was entered. Finally, the district court had to find that no party would be prejudiced by the reopening of the time to appeal.

Rule 4(a)(6) has been amended to specify more clearly what type of "notice" of the entry of a judgment or order precludes a party from later moving to reopen the time to appeal. In addition, Rule 4(a)(6) has been amended to address confusion about what type of "notice" triggers the 7-day period to bring a motion to reopen. Finally, Rule 4(a)(6) has been reorganized to set forth more logically the conditions that must be met before a district court may reopen the time to appeal.

Subdivision (a)(6)(A). Former subdivision (a)(6)(B) has been redesignated as subdivision (a)(6)(A), and one substantive change has been made. As amended, the subdivision will preclude a party from moving to reopen the time to appeal a judgment or order only if the party receives (within 21 days) formal notice of the entry of that judgment or order under Civil Rule 77(d). No other type of notice will preclude a party.

The reasons for this change take some explanation. Prior to 1998, former subdivision (a)(6)(B) permitted a district court to reopen the time to appeal if it found "that a party entitled to notice of the entry of a judgment or order did not receive such notice from the clerk or any party within 21 days of its entry." The rule was clear that the "notice" to which it referred was the notice required under Civil Rule 77(d), which must be served by the clerk pursuant to Civil Rule 5(b) and may also be served by a party pursuant to that same rule. In other words, prior to 1998, former subdivision (a)(6)(B) was clear that, if a party did not receive formal notice of the entry of a judgment or order under Civil Rule 77(d), that party could later move to reopen the time to appeal (assuming that the other requirements of subdivision (a)(6) were met).

In 1998, former subdivision (a)(6)(B) was amended to change the description of the type of notice that would preclude a party from moving to reopen. As a result of the amendment, former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive "such notice"--that is, the notice required by Civil Rule 77(d)--but instead referred to the failure of the moving party to receive "the notice." And former subdivision (a)(6)(B) no longer referred to the failure of the moving party to receive notice from "the clerk or any party," both of whom are explicitly mentioned in Civil Rule 77(d). Rather, former subdivision (a)(6)(B) referred to the failure of the moving party to receive notice from "the district court or any party."

The 1998 amendment meant, then, that the type of notice that precluded a party from moving to reopen the time to appeal was no longer limited to Civil Rule 77(d) notice. Under the 1998 amendment, some type of notice, in addition to Civil Rule 77(d) notice, precluded a party. But the text of the amended rule did not make clear what type of notice qualified. This was an invitation for litigation, confusion, and possible circuit splits.

To avoid such problems, former subdivision (a)(6)(B)--new subdivision (a)(6)(A)--has been amended to restore its pre-1998 simplicity. Under new subdivision (a)(6)(A), if the court finds that the moving party was not notified under Civil Rule 77(d) of the entry of the judgment or order that the party seeks to appeal within 21 days after that judgment or order was entered, then the court is authorized to reopen the time to appeal (if all of the other requirements of subdivision (a)(6) are met). Because Civil Rule 77(d) requires that notice of the entry of a judgment or order be formally served under Civil Rule 5(b), any notice that is not so served will not operate to preclude the reopening of the time to appeal under new subdivision (a)(6)(A).

Subdivision (a)(6)(B). Former subdivision (a)(6)(A) required a party to move to reopen the time to appeal "within 7 days after the moving party receives notice of the entry [of the judgment or order sought to be appealed]." Former subdivision (a)(6)(A) has been redesignated as subdivision (a)(6)(B), and one important substantive change has been made: The subdivision now makes clear that only

formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period to move to reopen the time to appeal.

The circuits have been split over what type of "notice" is sufficient to trigger the 7-day period. The majority of circuits that addressed the question held that only written notice was sufficient, although nothing in the text of the rule suggested such a limitation. See, e.g., Bass v. United States Dep't of Agric., 211 F.3d 959, 963 (5th Cir. 2000). By contrast, the Ninth Circuit held that while former subdivision (a)(6)(A) did not require written notice, "the quality of the communication [had to] rise to the functional equivalent of written notice." Nguyen v. Southwest Leasing & Rental, Inc., 282 F.3d 1061, 1066 (9th Cir. 2002). Other circuits suggested in dicta that former subdivision (a)(6)(A) required only "actual notice," which, presumably, could have included oral notice that was not "the functional equivalent of written notice." See, e.g., Lowry v. McDonnell Douglas Corp., 211 F.3d 457, 464 (8th Cir. 2000). And still other circuits read into former subdivision (a)(6)(A) restrictions that appeared only in former subdivision (a)(6)(B) (such as the requirement that notice be received "from the district court or any party," see Benavides v. Bureau of Prisons, 79 F.3d 1211, 1214 (D.C. Cir. 1996)) or that appeared in neither former subdivision (a)(6)(A) nor former subdivision (a)(6)(B) (such as the requirement that notice be served in the manner prescribed by Civil Rule 5, see Ryan v. First Unum Life Ins. Co., 174 F.3d 302, 304-05 (2d Cir. 1999)).

Former subdivision (a)(6)(A)--new subdivision (a)(6)(B)--has been amended to resolve this circuit split by providing that only formal notice of the entry of a judgment or order under Civil Rule 77(d) will trigger the 7-day period. Using Civil Rule 77(d) notice as the trigger has two advantages: First, because Civil Rule 77(d) is clear and familiar, circuit splits are unlikely to develop over its meaning. Second, because Civil Rule 77(d) notice must be served under Civil Rule 5(b), establishing whether and when such notice was provided should generally not be difficult.

Using Civil Rule 77(d) notice to trigger the 7-day period will not unduly delay appellate proceedings. Rule 4(a)(6) applies to only a small number of cases--cases in which a party was not notified of a judgment or order by either the clerk or another party within 21 days after entry. Even with respect to those cases, an appeal cannot be brought more than 180 days after entry, no matter what the circumstances. In addition, Civil Rule 77(d) permits parties to serve notice of the entry of a judgment or order. The winning party can prevent Rule 4(a)(6) from even coming into play simply by serving notice of entry within 21 days. Failing that, the winning party can always trigger the 7-day deadline to move to reopen by serving belated notice.

2009 Amendments

Subdivision (a)(4)(A)(vi). Subdivision (a)(4) provides that certain timely post-trial motions extend the time for filing an appeal. Lawyers sometimes move under Civil Rule 60 for relief that is still available under another rule such as Civil Rule 59. Subdivision (a)(4)(A)(vi) provides for such eventualities by extending the time for filing an appeal so long as the Rule 60 motion is filed within a limited time. Formerly, the time limit under subdivision (a)(4)(A)(vi) was 10 days, reflecting the 10-day limits for making motions under Civil Rules 50(b), 52(b), and 59. Subdivision (a)(4)(A)(vi) now contains a 28-day limit to match the revisions to the time limits in the Civil Rules.

Subdivision (a)(4)(B)(ii). Subdivision (a)(4)(B)(ii) is amended to address problems that stemmed from the adoption--during the 1998 restyling project--of language referring to "a judgment altered or amended upon" a post-trial motion.

Prior to the restyling, subdivision (a)(4) instructed that "[a]ppellate review of an order disposing of any of [the post-trial motions listed in subdivision (a)(4)] requires the party, in compliance with Appellate Rule 3(c), to amend a previously filed notice of appeal. A party intending to challenge an alteration or amendment of the judgment shall file a notice, or amended notice, of appeal within the time prescribed by this Rule 4 measured from the entry of the order disposing of the last such motion outstanding." After the restyling, subdivision (a)(4)(B)(ii) provided: "A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the

time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion."

One court has explained that the 1998 amendment introduced ambiguity into the Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." Sorensen v. City of New York, 413 F.3d 292, 296 n.2 (2d Cir. 2005). The current amendment removes that ambiguous reference to "a judgment altered or amended upon" a post-trial motion, and refers instead to "a judgment's alteration or amendment" upon such a motion. Thus, subdivision (a)(4)(B)(ii) requires a new or amended notice of appeal when an appellant wishes to challenge an order disposing of a motion listed in Rule 4(a)(4)(A) or a judgment's alteration or amendment upon such a motion.

Subdivision (a)(5)(C). The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 26.

Subdivision (a)(6)(B). The time set in the former rule at 7 days has been revised to 14 days. Under the time-computation approach set by former Rule 26(a), "7 days" always meant at least 9 days and could mean as many as 11 or even 13 days. Under current Rule 26(a), intermediate weekends and holidays are counted. Changing the period from 7 to 14 days offsets the change in computation approach. See the Note to Rule 26.

Subdivisions (b)(1)(A) and (b)(3)(A). The times set in the former rule at 10 days have been revised to 14 days. See the Note to Rule 26.

2010 Amendments

Subdivision (a)(7). Subdivision (a)(7) is amended to reflect the renumbering of Civil Rule 58 as part of the 2007 restyling of the Civil Rules. References to Civil Rule "58(a)(1)" are revised to refer to Civil Rule "58(a)." No substantive change is intended.

2011 Amendments

Subdivision (a)(1)(B). Rule 4(a)(1)(B) has been amended to make clear that the 60-day appeal period applies in cases in which an officer or employee of the United States is sued in an individual capacity for acts or omissions occurring in connection with duties performed on behalf of the United States. (A concurrent amendment to Rule 40(a)(1) makes clear that the 45-day period to file a petition for panel rehearing also applies in such cases.)

The amendment to Rule 4(a)(1)(B) is consistent with a 2000 amendment to Civil Rule 12(a)(3), which specified an extended 60-day period to respond to complaints when "[a] United States officer or employee [is] sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf." The Committee Note to the 2000 amendment explained: "Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity." The same reasons justify providing additional time to the Solicitor General to decide whether to file an appeal.

However, because of the greater need for clarity of application when appeal rights are at stake, the amendment to Rule 4(a)(1)(B), and the corresponding legislative amendment to 28 U.S.C. § 2107 that is simultaneously proposed, include safe harbor provisions that parties can readily apply and rely upon. Under new subdivision 4(a)(1)(B)(iv), a case automatically qualifies for the 60-day appeal period if (1) a legal officer of the United States has appeared in the case, in an official capacity, as counsel for the current or former officer or employee and has not withdrawn the appearance at the time of the entry of the judgment or order appealed from or (2) a legal officer of the United States appears on the notice of appeal as counsel, in an official capacity, for the current or former officer or employee. There

will be cases that do not fall within either safe harbor but that qualify for the longer appeal period. An example would be a case in which a federal employee is sued in an individual capacity for an act occurring in connection with federal duties and the United States does not represent the employee either when the judgment is entered or when the appeal is filed but the United States pays for private counsel for the employee.

2016 Amendments

A clarifying amendment is made to subdivision (a)(4). Former Rule 4(a)(4) provided that "[i]f a party timely files in the district court" certain post-judgment motions, "the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion." Responding to a circuit split concerning the meaning of "timely" in this provision, the amendment adopts the majority approach and rejects the approach taken in National Ecological Foundation v. Alexander, 496 F.3d 466 (6th Cir. 2007). A motion made after the time allowed by the Civil Rules will not qualify as a motion that, under Rule 4(a)(4)(A), re-starts the appeal time--and that fact is not altered by, for example, a court order that sets a due date that is later than permitted by the Civil Rules, another party's consent or failure to object to the motion's lateness, or the court's disposition of the motion without explicit reliance on untimeliness.

Rule 4(c)(1) is revised to streamline and clarify the operation of the inmate-filing rule.

The Rule requires the inmate to show timely deposit and prepayment of postage. The Rule is amended to specify that a notice is timely if it is accompanied by a declaration or notarized statement stating the date the notice was deposited in the institution's mail system and attesting to the prepayment of first-class postage. The declaration must state that first-class postage "is being prepaid," not (as directed by the former Rule) that first-class postage "has been prepaid." This change reflects the fact that inmates may need to rely upon the institution to affix postage after the inmate has deposited the document in the institution's mail system. New Form 7 in the Appendix of Forms sets out a suggested form of the declaration.

The amended rule also provides that a notice is timely without a declaration or notarized statement if other evidence accompanying the notice shows that the notice was deposited on or before the due date and that postage was prepaid. If the notice is not accompanied by evidence that establishes timely deposit and prepayment of postage, then the court of appeals has discretion to accept a declaration or notarized statement at a later date. The Rule uses the phrase "exercises its discretion to permit"--rather than simply "permits"--to help ensure that pro se inmate litigants are aware that a court will not necessarily forgive a failure to provide the declaration initially.

2017 Amendments

Subdivision (a)(4)(B)(iii). This technical amendment restores the former subdivision (a)(4)(B)(iii) that was inadvertently deleted in 2009.

Rules Governing § 2255 Proceedings

Rule 9. Second or Successive Motions

Before presenting a second or successive motion, the moving party must obtain an order from the appropriate court of appeals authorizing the district court to consider the motion, as required by 28 U.S.C. § 2255, para. 8.

Rule 11. Certificate of Appealability; Time to Appeal

(a) Certificate of Appealability. The district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant. Before entering the final order, the court may direct the parties to submit arguments on whether a certificate should issue. If the court issues a certificate, the court must state the specific issue or issues that satisfy the showing required by 28 U.S.C. § 2253(c)(2). If the court denies a certificate, a party may not appeal the denial but may seek a certificate from the court of appeals under Federal Rule of Appellate Procedure 22. A motion to reconsider a denial does not extend the time to appeal.

(b) Time to Appeal. Federal Rule of Appellate Procedure 4(a) governs the time to appeal an order entered under these rules. A timely notice of appeal must be filed even if the district court issues a certificate of appealability.

These rules do not extend the time to appeal the original judgment of conviction.

Rule 12. Applicability of the Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure

The Federal Rules of Civil Procedure and the Federal Rules of Criminal Procedure, to the extent that they are not inconsistent with any statutory provisions or these rules, may be applied to a proceeding under these rules.

Federal Rules of Civil Procedure

Rule 59. New Trial; Altering or Amending a Judgment

Currentness

(a) In General.

(1) Grounds for New Trial. The court may, on motion, grant a new trial on all or some of the issues--and to any party--as follows:

(A) after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; or

(B) after a nonjury trial, for any reason for which a rehearing has heretofore been granted in a suit in equity in federal court.

(2) Further Action After a Nonjury Trial. After a nonjury trial, the court may, on motion for a new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.

(b) Time to File a Motion for a New Trial. A motion for a new trial must be filed no later than 28 days after the entry of judgment.

(c) Time to Serve Affidavits. When a motion for a new trial is based on affidavits, they must be filed with the motion. The opposing party has 14 days after being served to file opposing affidavits. The court may permit reply affidavits.

(d) New Trial on the Court's Initiative or for Reasons Not in the Motion. No later than 28 days after the entry of judgment, the court, on its own, may order a new trial for any reason that would justify granting one on a party's motion. After giving the parties notice and an opportunity to be heard, the court may grant a timely motion for a new trial for a reason not stated in the motion. In either event, the court must specify the reasons in its order.

(e) Motion to Alter or Amend a Judgment. A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

Rule 60. Relief From a Judgment or Order

(a) Corrections Based on Clerical Mistakes; Oversights and Omissions. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) Timing and Effect of the Motion.

(1) Timing. A motion under Rule 60(b) must be made within a reasonable time--and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) Effect on Finality. The motion does not affect the judgment's finality or suspend its operation.

(d) Other Powers to Grant Relief. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) Bills and Writs Abolished. The following are abolished: bills of review, bills in the nature of bills of review, and writs of coram nobis, coram vobis, and audita querela.