

**APPENDIX TO THE PETITION FOR A WRIT
OF CERTIORARI**

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FILED: May 23, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-4183
(4:12-cr-00106-RGD-LRL-2)

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

ISAIAH JERMALE LEGALL,

Defendant - Appellant.

O R D E R

Isaiah Jermale Legall seeks to appeal his criminal judgment. The Government has moved to dismiss the appeal as untimely.

In criminal cases, the defendant must file the notice of appeal within 14 days after the entry of judgment. Fed. R. App. P. 4(b)(1)(A). With or without a motion, upon a showing of excusable neglect or good cause, the district court may grant an extension of up to 30 days to file a notice of appeal. Fed. R. App. P. 4(b)(4); *United States v. Reyes*, 759 F.2d 351, 353 (4th Cir. 1985).

The district court entered judgment on January 13, 2014. Legall filed his notice of appeal at the earliest on March 5, 2019. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (holding that pro se prisoner's notice of appeal is considered filed the moment it is delivered to prison authorities for mailing to court). The Government has moved to enforce Fed. R. App. P. 4(b)'s time limit. "When the Government promptly invokes [Rule 4(b)(1)(A)] in response to a late-filed criminal appeal," as it did here, "we must dismiss." *United States v. Oliver*, 878 F.3d 120, 123 (4th Cir. 2017). Because Legall failed to file a timely notice of appeal or to obtain an extension of the appeal period, we grant the Government's motion to dismiss the appeal.*

Entered at the direction of the panel: Judge King, Judge Richardson, and Senior Judge Shedd.

For the Court

/s/ Patricia S. Connor, Clerk

* Currently pending in the district court are Legall's two motions to reopen the appeal period, filed at the earliest on March 5, 2019, and March 18, 2019, respectively. Because these pending motions are futile, they do not require us to defer action on the Government's motion to dismiss Legall's appeal.

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UNITED STATES COURT OF APPEALS
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No. 19-4183
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UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

ISAIAH JERMALE LEGALL

Defendant - Appellant

J U D G M E N T

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

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

/s/ PATRICIA S. CONNOR, CLERK

IN THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,)	
)	
Appellee,)	
)	
v.)	No. 19-4183
)	
ISAIAH LEGALL,)	
)	
Defendant-Appellant.)	
_____)	

**United States' Motion to Dismiss Appeal
and Stay Briefing Schedule**

The United States respectfully moves to dismiss the appeal filed by defendant Isaiah Legall because his notice of appeal is untimely and requests that the briefing schedule be suspended until this Court rules on the motion to dismiss.

Defendant was convicted of Conspiracy to Distribute more than Five Kilograms of Cocaine, in violation of 21 U.S.C. § 846.

The district court entered the judgment in defendant's case on January 10, 2014. The district court's docket shows that defendant's notice of appeal was filed on March 18, 2019.

Under Fed. R. App. P. 4(b)(1)(A)(i), defendant was required to file his notice of appeal within 14 days of the date that the judgment of conviction was entered. *See, e.g., United States v. Hyman*, 884 F.3d 496, 498 (4th Cir. 2018).

When a defendant can show “excusable neglect or good cause,” a district court may extend the time for filing the notice of appeal. *See* Fed. R. App. P. 4(b)(4). But any such extension is limited to “a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).” *Id.* *See also United States v. Moore*, 24 F.3d 624, 626 (4th Cir. 1994); *United States v. Reyes*, 759 F.2d 351, 354 (4th Cir. 1985). Here, defendant’s notice of appeal was filed far more than 44 days beyond the time for filing an appeal, so no adequate extension could have been granted.

Because defendant is incarcerated and filed the notice of appeal himself, the filing date runs from the date when he deposited his notice of appeal in the prison’s mail system. Fed. R. App. P. 4(c); *Houston v. Lack*, 487 U.S. 266 (1988). But even giving defendant the benefit of the mailbox rule leaves his appeal far out of time.

Although the timeliness of a criminal direct appeal is not jurisdictional, *see, e.g., Hyman*, 884 F.3d at 498 (citing *United States v. Urutyan*, 564 F.3d 679, 685 (4th Cir. 2009)), the timeliness requirement in Rule 4(b) must be enforced when the government invokes it. “If a party ‘properly raise[s]’ a mandatory claim-

processing rule like the timeliness of a notice of appeal, the rule is “unalterable” and must be enforced. *Manrique v. United States*, 137 S. Ct. 1266, 1272 (2017) (citations omitted). *See also Hyman*, 884 F.3d at 498; *United States v. Mitchell*, 518 F.3d 740, 744 (10th Cir. 2008).

The United States respectfully requests that defendant's appeal be dismissed as untimely.

Respectfully submitted,

G. Zachary Terwilliger
United States Attorney

By: /s/
Eric M. Hurt
Assistant United States Attorney

Certificate of Service and Compliance

I certify that this motion does not exceed 5,200 words and complies with the requirements of Fed. R. App. P. 27. I also certify that on April 11, 2019, I filed electronically the foregoing with the Clerk of the Court using the CM/ECF system, which will send notice of the filing to all counsel of record.

/s/

Eric M. Hurt

Assistant United States Attorney

No. 19-4183

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,
Appellee

v.

ISAIAH LEGALL,
Appellant

On Appeal from the United States District Court
for the Eastern District of Virginia
Newport News Division (Hon. Robert G. Doumar)

**Response in Opposition to Motion to Dismiss and
Brief in Support of Jurisdiction**

This Court has jurisdiction to consider Mr. Legall's appeal of the final judgment against him from the Eastern District of Virginia and should consider the appeal despite the Government's invocation of the claim-processing rule in Federal Rule of Appellate Procedure 4.

I. Procedural Background

Mr. Legall was indicted on April 10, 2013 for conspiracy to possess with intent to distribute cocaine. *See* Ex. A, docket from Case No. 4:12-cr-106, at No. 39. On September 25, 2013, Mr. Legall pled guilty pursuant to a written plea agreement. *Id.* at

No. 84. On January 10, 2014, a final judgment was entered, finding Mr. Legall guilty and sentencing him to 160 months of imprisonment. *Id.* at No. 102.

At the sentencing, Mr. Legall's counsel raised a guideline objection to the attribution of two points for a firearm. In response, the district court referenced the sentencing factors in 18 U.S.C. § 3553 as relevant in determining the guideline objection and ultimately applied the enhancement. *See* Ex. B, Transcript from Sentencing at pp. 13-14. After determining the final criminal history category and offense level, and prior to inviting Mr. Legall to allocute, the district court explained its reasoning for sentencing in a drug case such as this one as requiring an understanding of the fact that "history constantly repeats itself." Judge Doumar then provided an overview of history that constitutes 14 pages in the transcript of the sentencing hearing, tracing the import and export of opium from China in the 18th and 19th centuries, the way that the opium trade led to the sale of slaves, General Patton, and the United States invasion of Iraq. Ex. B at pp. 22-35. The district court concluded by explaining that "[w]e're not trying to prohibit the use of cocaine, we're trying to prohibit slavery, pure and simple. Because it is the natural conclusion one draws from the ultimate utilization of narcotics, and we know it because we've seen what it did to China, and we've seen what has happened since they have eradicated it." Ex. B at p. 35.¹

¹ *Cf. United States v. Martinovich*, 810 F.3d 232, 239 & n.6 (4th Cir. 2016); *see also id.* at 246 (Wynn, J., concurring)

After announcing that his final guideline range was 151 to 188 months the district court remarked that “It’s a long time. At least you’re not in China and they don’t shoot you. It’s very difficult to accept a sentence in this day and time.” Ex. B at pp. 38-39. Ultimately the court imposed a sentence of 160 months of incarceration. *Id.*

On June 29, 2015, Mr. Legall submitted a motion to reduce his sentence in accordance with Amendment 782 and 18 U.S.C. § 3582(c)(2). Ex. A at No. 122. The district court granted this motion and reduced his sentence from 160 months to 128 months on August 21, 2015. Ex A. at No. 124.

On February 4, 2019 the district court docketed a letter from Mr. Legall asking “if my attorney ever filed an appeal on my behalf, and if so, why did I not receive a copy” and stating that “I requested my attorney to file an appeal on my behalf after sentencing, and have been trying to contact his office for years now via mail as well as phone calls and to no avail have I ever received a response.” *See* Exhibit C, Letter filed February 4, 2019.

On March 15, 2019, Mr. Legall submitted a motion asking the district court to reopen the time to file an appeal. The motion stated that Mr. Legall advised his attorney that he wanted to appeal, that his attorney stated his appeal would be filed within ten days, and that Mr. Legall was moved frequently in the months following his sentencing. On the same day, Mr. Legall submitted a motion requesting appointed

counsel. On March 18, 2019, the district court docketed Mr. Legall's Notice of Appeal submitted pro se. *See* Ex. A at No. 133.

II. Legal Argument

The Federal Rules of Appellate Procedure specify that in a criminal case, a defendant's notice of appeal must be filed in the district court within 14 days after the entry of the judgment or order being appealed. Fed. R. Ap. Pr. 4(b)(1)(A). Rule 4 specifies that "[u]pon 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).

These filing deadlines are inflexible claim-processing rules, and do not govern this Court's subject-matter jurisdiction. *See United States v. Oliver*, 878 F.3d 120 (4th Cir. 2017); *United States v. Hyman*, 884 F.3d 496 (4th Cir. 2018). Rule 4(b) is judicially created and "not backstopped by any federal statutory deadline." *Id.* quoting *Hamer v. Neighborhood Hous. Servs. of Chi.*, 583 U.S. ___, 138 S. Ct. 13, 17 (2017) ("A time limit not prescribed by Congress ranks as a mandatory claim-processing rule, serving 'to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times'). As a result, if the Government fails to object promptly to an appeal's untimeliness it generally forfeits the right to do so. *See Eberhart v. United States*, 546 U.S. 12, 15 (2005) (internal quotation omitted).

The Government has filed a motion to dismiss his appeal on timeliness grounds, which generally triggers the claim-processing rule. However, this Court should not dismiss the appeal because of the inherent authority this Court retains and the doctrine of equitable tolling. In *Oliver*, this Court explained the basis for this Court's authority to *sua sponte* dismiss an appeal for untimeliness in this way: “[c]ourts invested with the judicial power of the United States have certain inherent authority to protect their proceedings and judgments in the course of discharging their traditional responsibilities.” 878 F.3d at 124 quoting *Degen v. United States*, 517 U.S. 820 (1996). Indeed, the Court retains inherent power not “from a particular rule or statute but ‘the very nature of the court as an institution.’” *Id.* quoting *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 461-62 (4th Cir. 1993). For the same reason the Court has the inherent power to dismiss an untimely appeal to protect “the efficiency and fairness of our justice system,” this Court has the inherent power to refuse to dismiss an untimely appeal where there are equitable reasons supporting the late filing by the defendant.

Equitable tolling is a doctrine that courts can use to extend claim-processing rules. In contrast, equitable tolling cannot be applied to extend a jurisdictional time period. The Supreme Court explained this doctrine in *United States v. Kwai Fun Wong*, 135 S. Ct. 1625 (2015) where it held that equitable tolling applied to the time limit set forth in 28 U.S.C. § 2401(b) – the statute that sets forth the time limit to commence a civil action against the United States. The Court examined § 2401(b) and concluded

that the statute of limitations set forth therein was not jurisdictional, but a procedural rule. *Id.* at 1632-33.

Equitable tolling applies for non-jurisdictional time limits, unless the text of the statute or rule make it clear that the deadline is not subject to equitable tolling. The Supreme Court recently considered this doctrine in *Nutraceutical Corp. v. Lambert*, 139 S. Ct. 710 (2019). Federal Rule of Civil Procedure 23(f) sets forth a 14-day time limit for parties to seek permission to appeal an order concerning class certification. The Supreme Court began by affirming that Rule 23(f) was not jurisdictional but a claim-processing rule, and explained that “[w]hether a rule precludes equitable tolling turns not on its jurisdictional character but rather on whether the text of the rule leaves room for such flexibility.” 139 S. Ct. at 715. The Court then considered the interaction between Federal Rule of Civil Procedure 23(f) and Federal Rule of Appellate Procedure 26(b) which “generally authorizes extensions of time” but “includes this express carveout: A court of appeals ‘may not extend the time to file . . . a petition for permission to appeal.’” *Id.* Because “Appellate Rule 26(b) says that the deadline for the precise type of filing at issue here may not be extend” the rule expressed “a clear intent to compel rigorous enforcement of Rule 23(f)’s deadline, even where good cause for equitable tolling might otherwise exist.” *Id.*

However, there is an important difference between the way that Federal Rule of Appellate Procedure 26(b) interacts with the relevant rule in this case – Rule 4 – which sets forth the relevant deadlines for appeals after final judgments. Rule 26(b)

states that a court may not extend the time to file a notice of appeal “except as authorized in Rule 4.” In contrast to the civil rule concerning appeals of a class certification order, Rule 4 evidences a more flexible intent with respect to the time period to notice a criminal appeal. Specifically, Rule 4(b)(4) permits extensions of the typical time periods “[u]pon a finding of excusable neglect or good cause.” While this part of the Rule states that the district court may extend the time to appeal on these grounds “for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b),” the inclusion of *any* exception to the rule suggests more flexibility than that set forth by Federal Rule of Civil Procedure 23(f).

Finally, there are good policy reasons for the equitable tolling doctrine to permit extensions in this context. If Mr. Legall’s attorney did fail to file a notice of appeal after Mr. Legall asked for an appeal, Mr. Legall was presumptively prejudiced. *Garza v. Idaho*, 138 S. Ct. 2649 (2018). In contrast, Federal Rule of Civil Procedure 23(f), considered in *Nutraceutical Corp.*, was an interlocutory appeal provision that allowed for faster review of the very significant decision concerning class certification. 139 S. Ct. 710. But a failure to appeal at that time does not preclude review of that same issue or decision at the end of a civil case after judgment is entered.

In asking the Court to find that equitable tolling applies to the criminal appeal deadlines under Rule 4, Mr. Legall acknowledges that the Supreme Court in *Manrique v. United States*, 137 S.Ct. 1266 (2017) described the time period to file a notice of appeal as a “mandatory claim-processing rule” and cited *Eberhart v. United States*, 546

U.S. 12 (2005) for the principle that if a party properly raises a mandatory claim-processing rule, they are “unalterable.” However, *Manrique* was a case about whether a notice to appeal filed after a judgment that was later amended to include restitution was sufficient to cover the later-filed amended judgment. 137 S. Ct. 1266. The Supreme Court concluded that there were two judgments and that a notice to appeal had to be taken after the amended judgment imposing restitution to appeal the order of restitution in that case. *Id.* Neither *Manrique* or *Eberhart* addressed whether equitable tolling applied to this claim-processing rule.

III. Conclusion

For these reasons, and any other reasons appearing to this Court, Mr. Legall submits that the Court has jurisdiction over his appeal and should deny the Government’s Motion to Dismiss on grounds of untimeliness.

Respectfully submitted this 12th day of April, 2019.

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/s/ Lisa M. Lorish
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CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2019, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: counsel of record; and I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: none.

s/ Lisa M. Lorish

Asst. Federal Public Defender