No. _____

In The

Supreme Court of the United States

GARLIN RAYMOND FARRIS, a/k/a G,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented, on which the federal appellate courts are currently divided, is whether appointed counsel's misconduct can serve as excusable neglect for an indigent federal criminal defendant's late filing of a dispositive motion.

In *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), this Court outlined factors for assessing whether a filing deadline may be extended for excusable neglect pursuant to Fed. R. Crim. P. 45(b). Petitioner seeks to resolve the significant problems caused by the varying applications of the *Pioneer* factors to indigent federal criminal defendants who face procedural hurdles caused by their appointed counsel's ineffectiveness.

PARTIES TO THE PROCEEDING

Petitioner, defendant-appellant below, is Garlin Raymond Farris.

Respondent is the United States of America, appellee below.

RELATED PROCEEDINGS

United States v. Farris (4th Cir. Mar. 29, 2021) (No. 20-4142) (ECF No. 58).

United States v. Farris, 834 F. App'x 811 (4th Cir. Feb. 3, 2021) (No. 20-4142) (ECF No. 45).

United States v. Farris (W.D.N.C. Feb. 7, 2020) (No. 3:18-CR-99-RJC) (ECF No. 115).

United States v. Farris (W.D.N.C. Jan. 30, 2020) (No. 3:18-CR-99-RJC) (ECF No. 114).

United States v. Farris (W.D.N.C. Jan. 16, 2020) (No. 3:18-CR-99-RJC) (ECF No. 109).

United States v. Farris, 2019 WL 4254503 (W.D.N.C. Sept. 6, 2019) (No. 3:18-CR-99-RJC) (ECF No. 82).

United States v. Farris, 2018 WL 5722666 (W.D.N.C. Nov. 1, 2018) (No. 3:18-CR-99-MOC) (ECF No. 33).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The decision of the Fourth Circuit is reported at 834 F. App'x 811 and reprinted in the Appendix to the Petition ("App.") at A1. The district court's orders denying Petitioner's motions for an extension of time and for a new trial are not reported, but they are available at ECF Nos. 109, 114 and reprinted at App. C1–D1.

JURISDICTION

On November 13, 2020, this Court issued guidance reflecting that the 150-day extension "from the date of the lower court judgment, order denying discretionary review, or order denying a timely petition for rehearing," directed by the Chief Justice on March 19, 2020, remains in effect. The decision of the court of appeals was issued on February 3, 2021. App. A. The court of appeals denied rehearing and rehearing en banc on March 29, 2021. App. B. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND REGULATORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part, that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. Amend. VI.

This Court has held that "[t]he Sixth Amendment safeguards to an accused who faces incarceration the right to counsel at all critical stages of the criminal

process." *Iowa v. Tovar*, 541 U.S. 77, 80 (2004), and this Court has assumed, without holding, that a "preappeal motion for a new trial is a critical stage of the prosecution." *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013).

The Federal Rules of Criminal Procedure provide that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). "Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2).

The Federal Rules of Criminal Procedure also provide that "[w]hen an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(1).

INTRODUCTION

Garlin Raymond Farris, an indigent federal criminal defendant, was represented by court-appointed counsel. His lawyer made several serious errors during the trial, which called into question the validity of the eventual jury verdict and judgment. Post-trial, Farris instructed two different appointed attorneys to raise these attorney errors in a Rule 33 motion for a new trial, but they neglected to do so (for more than six months).

Farris also sought a new trial on his own, but the district court explained that Farris was not permitted to submit *pro se* filings while represented by counsel (per Local Criminal Rule 47.1(g)).

As a result, the district court held Farris responsible for his attorney's untimely filing and then denied the motion for a new trial because it was untimely.

The U.S. Court of Appeals for the Fourth Circuit affirmed the district court's decision on the ground that Farris had not established "excusable neglect" for the delay pursuant to Federal Rule of Criminal Procedure 45.

The federal appellate courts are currently divided on this question. Most Circuits have recognized that because an attorney's failure to timely file is directly adverse to the client's rights and interests, the misconduct may support "excusable neglect." A minority of federal courts, however, have concluded that litigants are *always* bound by the misconduct or untimeliness of their attorneys.

The agency principles articulated by this Court in *Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), require that indigent criminal defendants not be held responsible for such errors by their appointed counsel. Otherwise, such litigants will be systematically denied the opportunity to safeguard their constitutional right to effective counsel in these important dispositive motions. Because this case is a good vehicle to resolve the circuit split, and in order to correct the Fourth Circuit's cursory and inaccurate application of the relevant law, Petitioner respectfully requests this Court's review.

STATEMENT OF THE CASE

I. Legal Framework

A. Sixth Amendment Principles

"The Sixth Amendment withholds from federal courts, in all criminal proceedings, the power and authority to deprive an accused of his life or liberty unless he has . . . the assistance of counsel." *Johnson v. Zerbst*, 304 U.S. 458, 463 (1938). "Left without the aid of counsel[, a defendant] may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible." *Powell v. Alabama*, 287 U.S. 45, 68–69 (1932). Accordingly, the purpose of the Sixth Amendment's guarantee is "to protect an accused from [a] conviction resulting from his own ignorance of his legal and constitutional rights." *Johnson*, 304 U.S. at 465.

The right to counsel is rarely a controversial subject for wealthy criminal defendants; after all, "there are few defendants charged with crime, few indeed, who fail to hire the best lawyers they can get to prepare and present their defenses." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). But "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him." *Id.* Thus, the Constitution also requires "the inherent right to have counsel appointed . . . [lending] convincing support to the conclusion . . . as to the fundamental nature of that right." *Powell*, 287 U.S. at 73.

For those who must rely on appointed defense counsel, the contours of the right are less certain. *See, e.g.*, *McKaskle v. Wiggins*, 465 U.S. 168, 174–78 (exploring the balance of control over the defense between indigent defendants and their appointed

attorneys). For example, this Court has sought to delineate certain "critical stages" of a criminal proceeding at which the Sixth Amendment's guarantee of counsel must be strictly applied. *See Maine v. Moulton*, 474 U.S. 159, 170 (1985); *United States v. Wade*, 388 U.S. 218, 224 (1967). As relevant here, this Court has assumed, without holding, that a "preappeal motion for a new trial is a critical stage of the prosecution." *Marshall v. Rodgers*, 569 U.S. 58, 61 (2013), and this Court need not answer that question in this case.

In addition to his appointed trial counsel's constitutionally ineffective assistance, Petitioner never had the opportunity to raise that deficiency in the district court because appointed counsel refused to raise her own ineffectiveness and because the district court prohibited Petitioner's *pro se* filing of a motion for a new trial on this basis. Instead, Petitioner challenges the district court's denial of his motion for a new trial caused by his attorney's failure to timely file that motion as instructed. The principles articulated by this Court in support of the right to counsel are relevant in that they highlight indigent criminal defendants' inability to navigate these technical procedural deadlines without a lawyer to assist them.

B. Timeliness of Motion for a New Trial

The Federal Rules of Criminal Procedure provide that "[u]pon the defendant's motion, the court may vacate any judgment and grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). The federal courts have explicitly recognized ineffective assistance of counsel as a proper basis for a new trial pursuant to Rule 33. *See, e.g.*, *United States v. Russell*, 221 F.3d 615, 619 (4th Cir. 2000).

"Any motion for a new trial grounded on any reason other than newly discovered evidence must be filed within 14 days after the verdict or finding of guilty." Fed. R. Crim. P. 33(b)(2). *See United States v. Smith*, 62 F.3d 641, 648, 650–51 (4th Cir. 1995). But the Federal Rules of Criminal Procedure also provide that "[w]hen an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(1); *see* Advisory Comm. Notes to 2005 Amendments to Rule 33 ("[U]nder Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion for new trial within the specified time, the court may nonetheless consider that untimely underlying motion if the court determines that the failure to file it on time was the result of excusable neglect.").

In *Eberhart v. United States*, this Court "firmly classif[ied] Rules 33 and 45 as claim-processing rules." 546 U.S. 12, 16 (2005). As such, these time periods may be considered "unalterable on a party's application," but do not constitute jurisdictional requirements with mandatory application to "a court's adjudicatory authority." *Id.* at 15–16.

This Court has also articulated a set of principles to guide the federal courts' analysis of when the filing period prescribed by Rule 33 should be extended based on the excusable neglect exception set forth in Rule 45. *See Pioneer Investment Services Company v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). These factors include "the danger of prejudice to the [adverse party], the length of the delay

and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." *Id.* at 395. As outlined in detail below, the federal appellate courts disagree on the application of these factors to the post-trial misconduct of appointed counsel.

II. Proceedings Below

A. Factual Background

In March 2018, a federal grand jury indicted Garlin Raymond Farris for conspiracy to possess and distribute methamphetamine, in violation of 21 U.S.C. § 846, and possession with intent to distribute of methamphetamine, fentanyl, and cocaine base, in violation of 21 U.S.C. § 841. No. 3:18-CR-99-RJC, ECF No. 10. In April 2019, the case proceeded to trial. *See id.*, ECF Nos. 90–92. The jury convicted Farris of conspiracy to distribute methamphetamine and of possession with intent to distribute methamphetamine, but the jury acquitted Farris of possessing fentanyl and cocaine base with intent to distribute. *Id.*, ECF No. 61.

B. District Court

Following the trial, Farris moved for judgment of acquittal, arguing that the Government's evidence was speculative and failed to establish an agreement to distribute methamphetamine with the alleged co-conspirators. No. 3:18-CR-99-RJC, ECF Nos. 64, 79. Farris also asserted that evidence revealed neither a significant quantity of methamphetamine nor his intent to distribute any such drug quantities. *Id.* The district court summarily concluded that there was substantial evidence

supporting Farris's guilt beyond a reasonable doubt and then denied the motion. No. 3:18-CR-99-RJC, ECF No. 82.

In June 2019, Farris claimed that his trial counsel had been "completely ineffective," raising as examples counsel's repeated failures to object to the testimony from certain law enforcement witnesses and counsel's failure to challenge the evidentiary deficiencies regarding the purported Wal-Mart drug transaction. *Id.*, ECF No. 67. The district court responded by first entering an oral order terminating trial counsel's representation of Farris, and then appointing new counsel. *Id.*, ECF text entries dated June 28, 2019 and July 2, 2019.

Farris swiftly instructed this new counsel to file a Rule 33 motion for a new trial. *Id.*, ECF No. 70. Farris noted that such a motion would be outside the time constraints set forth in Rule 33, but he plainly asserted that he had been unable to timely file the motion due to his prior attorney's ineffective assistance of counsel. *Id.* Farris's new counsel did not comply with these instructions until more than four (4) months later when, in November 2019, counsel filed a Rule 33 motion for a new trial together with a motion for an extension of time to do so based on excusable neglect. No. 3:18-CR-99-RJC, ECF Nos. 97–98. Farris also filed additional *pro se* letters asserting that his new attorney had likewise been ineffective in failing to promptly file the requested Rule 33 motion. *Id.*, ECF Nos. 102–07.

The Government opposed the motion as untimely and unsupported by excusable neglect, *id.*, ECF No. 101, and in January 2020, the district court denied Farris's motion for a new trial. App. C (No. 3:18-CR-99-RJC, ECF No. 109). The

court concluded that because the Government had properly invoked the timeliness of Farris's motion, it was obligated to apply the claim-processing rule of Rule 33 (pursuant to *Eberhart*, 546 U.S. at 17–18). *Id.* In the alternative, the court declined to find excusable neglect on the theory that Farris should have moved for a new trial as soon as his trial counsel's ineffectiveness became apparent in April 2019. *Id.*

In January 2020, Farris filed a *pro se* motion for a new trial pursuant to Rule 33. No. 3:18-CR-99-RJC, ECF No. 112. The district court denied this motion as well, expressly explaining that Farris was not permitted to directly submit a motion while represented by counsel, pursuant to Local Criminal Rule 47.1(g). *Id.*, ECF No. 114.

At the sentencing hearing, the district court overruled Farris's objection to a sentencing enhancement for his role as a manager or supervisor of the offense but sustained his objection to the drug quantity in the presentence report. *See id.*, ECF No. 123. The court ultimately sentenced Farris to 288 months' imprisonment, near the middle of the advisory Sentencing Guidelines range. *Id.*, ECF No. 115. Farris timely appealed. *Id.*, ECF Nos. 118–19.

C. Court of Appeals

On appeal, the Fourth Circuit promptly granted Farris's request for a third attorney to handle the appeal. No. 20-4142, ECF No. 2. However, the court denied Farris's subsequent motions to appoint new counsel and to proceed *pro se*. No. 20-4142, ECF Nos. 11, 25, 29, 30, 31, 32.

The Fourth Circuit affirmed the conviction and sentence imposed by the district court. App. A (No. 20-4142, ECF Nos. 45–46). The court did not consider or rule on the district court's holding regarding the application of *Eberhart*. *Id.* Instead, the Fourth Circuit simply concluded that Farris had failed to justify the late filing of his motion based on his "threadbare assertion of excusable neglect." *Id.* The court also held that the district court did not clearly err in applying the challenged sentencing enhancement for Farris's role as a manager or supervisor of the drug distribution scheme. *Id.*

Significantly, the Fourth Circuit also denied Farris's motion to file a supplemental *pro se* brief, similarly explaining that "an appellant who is represented by counsel has no right to file *pro se* briefs or raise additional substantive issues in an appeal." *Id.* (citing *United States v. Cohen*, 888 F.3d 667, 682 (4th Cir. 2018)).

The Fourth Circuit also denied Farris's petition for rehearing and rehearing en banc. No. 20-4142, ECF Nos. 50, 54; App. B (No. 20-4142, ECF No. 58). At Farris's request, the court appointed current appellate counsel for purposes of filing this petition for certiorari with this Court. No. 20-4142, ECF Nos. 63, 66, 69, 70, 79, 80.

REASONS FOR GRANTING THE PETITION

I. The decision below conflicts with decisions of other Circuits.

The principles articulated by this Court in *Pioneer* require that indigent federal criminal defendants not be held responsible for their attorneys' failure to timely file a dispositive motion as instructed by the client. The majority of federal appellate courts to consider the matter have adopted this analysis, holding that

agency theory requires extension of filing deadlines in cases of serious attorney misconduct. But a few isolated circuit holdings—including the Fourth Circuit's short opinion here—disagree, insisting that defendants must always bear the consequences of their lawyers' misconduct, regardless of the procedural or substantive context. Petitioner respectfully requests that this Court resolve this conflict of law by holding that ineffective assistance of counsel can be a proper basis for an indigent defendant's excusable neglect under Rule 45.

A. The majority of federal appellate courts have concluded that attorney misconduct supports tolling of filing deadlines.

The Fifth, Sixth, and Seventh Circuits have specifically applied agency theory to their analysis of the *Pioneer* factors. *United States v. Clark*, 193 F.3d 845, 846–47 (5th Cir. 1999) ("[W]e are faced with a clear case of ineffective assistance of counsel, which is sufficient to prove excusable neglect."); *United States v. Munoz*, 605 F.3d 359, 369-71 (6th Cir. 2010) ("[C]lients may be excused under the *Pioneer* standard for their agents' egregious acts or omissions not because those acts or omissions violated the Sixth Amendment right to counsel, but because of the agency-law axion that a principal is not bound by his agent's conduct where the agent is acting adversely to the principal's interests." (internal quotation marks omitted)); *United States v. McKenzie*, 99 F.3d 813, 816 (7th Cir. 1996) (holding that "it was not an abuse of discretion for the district court to find [defendant's] neglect excusable and to grant an extension of time to file his notice of appeal" where defendant's attorney "le[ft] town and bec[ame] totally inaccessible" during relevant time period).

Although it ultimately decided against the defendant on the merits, the Ninth Circuit has also heavily implied that on different facts, an attorney's failure to timely file could constitute excusable neglect. *United States v. Jassal*, 388 F. App'x 748, 750 (9th Cir. 2010). Similarly, the Fourth Circuit has favorably discussed agency theory, though only in dicta. *Rouse v. Lee*, 339 F.3d 238, 249 (4th Cir. 2003) (en banc).

B. A minority of federal appellate courts have concluded that attorney misconduct may never justify a delayed filing.

A few federal appellate courts have refused to even entertain the possibility that appointed counsel's delay in filing a dispositive motion might excuse the defendant's noncompliance with the applicable deadline. For example, the D.C. Circuit has stated without elaboration that "[a]ppellants are bound . . . by the acts and omissions of their attorney." *Cullis Raggett Ltd. v. Constandy*, 2001 WL 1699359 (D.C. Cir. Dec. 6, 2001). Similarly, in the equitable tolling context, the Seventh Circuit has held that attorney misconduct—no matter how severe—is irrelevant for purposes of determining the defendant's compliance with a filing deadline, because all "attorney misconduct, whether labeled negligent, grossly negligent, or willful, is attributable to the client." *Powell v. Davis*, 415 F.3d 722, 727 (7th Cir. 2005).

The Fourth Circuit's ruling here seems to align with the Seventh Circuit's approach in the setting of equitable tolling. The Fourth Circuit concluded that Farris's attorneys' failure to file the requested motion "offered no excuse for the delay." App. A3 (No. 20-4142, ECF Nos. 45–46). But Farris repeatedly and vocally raised his counsel's failure to timely file the motion as a basis for excusable neglect, so the Fourth Circuit must have concluded that such failures could never constitute an "excuse for the delay."

This lies in distinct tension with the conclusions of nearly every other court of appeals—including the Fourth Circuit's own prior dicta in *Rouse*, 339 F.3d at 249—and represents a clear misapplication of the agency principles articulated by this Court in *Pioneer* (as detailed in Section II).

Accordingly, Petitioner submits that the Fourth Circuit's decision would benefit from this Court's review to conclusively determine the appropriate consideration of attorney misconduct under the analysis of excusable neglect under Rule 45.

II. The decision below conflicts with the agency principles that this Court articulated in *Pioneer*.

Under Federal Rule of Criminal Procedure 33, a federal district court may grant a defendant's motion to vacate a criminal judgment and grant a new trial in the interest of justice—for example, if the defendant received constitutionally ineffective assistance from trial counsel. Fed. R. Crim. P. 33(a); *see Russell*, 221 F.3d at 619. By default, this motion must be filed within 14 days after the criminal judgment. Fed. R. Crim. P. 33(b)(2); *see Smith*, 62 F.3d at 648, 650–51.

However, this deadline must be applied in conjunction with Federal Rule of Criminal Procedure 45, which provides that "[w]hen an act must or may be done within a specified period, the court on its own may extend the time, or for good cause may do so on a party's motion made . . . after the time expires if the party failed to act because of excusable neglect." Fed. R. Crim. P. 45(b)(1). Rule 45 has been specifically interpreted to apply in the context of a motion for a new trial pursuant to Rule 33.

This Court has instructed the federal courts to apply the factors articulated in *Pioneer Investment Services Company* in analyzing whether a defendant has established excusable neglect. The well-known *Pioneer* factors include "the danger of prejudice to the [adverse party], the length of the delay and its potential impact on judicial proceedings, the reason for the delay, including whether it was within the reasonable control of the movant, and whether the movant acted in good faith." 507 U.S. at 395. Of particular importance here, in determining whether respondents' failure to [timely] file . . . was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable." *Id.* at 396–97.

A. Though other *Pioneer* factors overwhelmingly favor Farris, the reason-for-the-delay factor is likely dispositive.

The majority of the factors articulated in *Pioneer* weigh in favor of a finding that Farris's delay in filing his motion for a new trial stemmed from excusable neglect. For example, other federal circuits have held that—as here—a six-month delay does not create prejudice to the Government or to the courts in retrying a criminal case, especially given that the Government would be entitled to respond to the new trial motion in any case. *See, e.g.*, *United States v. Hall*, 979 F.3d 1107, 1125 (6th Cir. 2020).

Similarly, as detailed in Section III below, Farris had no reasonable control over the filing of his motion for a new trial while his allegedly ineffective attorneys still represented him. *See id.* at 1126. And the facts and Farris's attempted *pro se* filings show that he acted in good faith throughout the proceedings, consistently raising his substantive claims about the ineffectiveness of his counsel concurrently

with his concerns that his lawyer(s) had failed to file a new trial motion as instructed. *See id.*

But unfortunately for Farris, the *Pioneer* factors "do not carry equal weight; the excuse given for the late filing must have the greatest import. While [the other factors] might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry." *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000); *accord United States v. Munoz*, 605 F.3d 359, 372–73 (6th Cir. 2010); *United States v. Torres*, 372 F.3d 1159, 1163 (10th Cir. 2004); *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355, 366 n.7 (2d Cir. 2003); *Hosp. del Maestro v. NLRB*, 263 F.3d 173, 175 (1st Cir. 2001). Accordingly, the Fourth Circuit's misapplication of the reason-for-the-delay factor to Farris's filing under Rules 33 and 45 is a critical error that must be resolved to properly determine the correct outcome. *See United States v. Cates*, 716 F.3d 445, 448 (7th Cir. 2013) (providing standard of review).

B. The context of an indigent criminal defendant requires a deferential application of the *Pioneer* factors.

The *Pioneer* factors must be applied with careful regard to the procedural and substantive setting in which the delay occurred. As the Sixth Circuit has held, it is significant that *Pioneer* was a bankruptcy case[.] . . . *Pioneer*'s 'your lawyer, your fault' principle should be applied less stringently in the criminal context, where 'our legal traditions reflect a certain solicitude for [a defendant's] rights." *Munoz*, 605 F.3d at 369 (citing *Stutson v. United States*, 516 U.S. 193, 196 (1996)).

Other federal appellate courts have noted that in the context of late notices of appeal pursuant to Federal Rule of Appellate Procedure 4(b), determinations of excusable neglect under the *Pioneer* factors must recognize that an "attorney's failure to file . . . constitutes *per se* ineffectiveness of counsel." *United States v. McKenzie*, 99 F.3d 813, 816 (7th Cir. 1996); *see United States v. Foster*, 68 F.3d 86, 88 (4th Cir. 1995); *United States v. Clark*, 51 F.3d 42, 44 (5th Cir. 1995); *United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993). On the other hand, this Court has noted that attorney misconduct does not excuse a defendant's errors in the context of federal habeas proceedings, because defendants there have no constitutional right to counsel and cannot impute their attorneys' ineffective assistance to the Government. *See Coleman v. Thompson*, 501 U.S. 722, 753 (1991).

The delay in filing a motion for a new trial more closely resembles the Rule 4(b) context. This Court has suggested—without conclusively holding—that a "preappeal motion for a new trial is a critical stage of the prosecution" to which the constitutional right to counsel should attach. *Marshall*, 569 U.S. at 61; *see Tovar*, 541 U.S. at 81. And indigent federal criminal defendants cannot file such motions independently; instead, they must rely on the representation of their court-appointed counsel (with whom they often have limited communication and even less control, as discussed in Section III below). Accordingly, the courts' application of the Rules 33 and 45 filing deadlines must give special deference to the constitutional rights of these criminal defendants in light of the agency principles safeguarded by this court in *Pioneer*.

C. Agency theory requires that indigent criminal defendants not be held responsible for the errors of their appointed counsel.

This Court noted in *Pioneer* that "clients must generally bear the consequences of their attorneys' inexcusable errors." *Munoz*, 605 F.3d at 370. And while this may be true in the bankruptcy and federal habeas settings, the unique context of indigent federal criminal defendants requires a distinct application of the agency principles recognized in *Pioneer*. Unlike others, indigent defendants may not exert control over their representatives and consequently must not be bound by conduct that is adverse to their fundamental constitutional rights.

Agency law requires that a principal not be charged with his agent's actions or knowledge where the agent acts adversely to his interests. *See In re JLJ Inc.*, 988 F.2d 1112, 1116 (11th Cir. 1993) ("The general rule is that an agent's act against the interest of the principal is void."); *Schlueter v. Varner*, 384 F.3d 69, 81 (3d Cir. 2004) (Ambro, J., dissenting) ("[W]hen . . . an attorney ceases altogether to serve the interests of his client, the law of agency is clear that the attorney acts alone."); *Baldayaque v. United States*, 338 F.3d 145, 154 (2d Cir. 2003) (Jacobs, J., concurring) ("[W]hen an agent acts completely adverse to the principal's interest, the principal is not charged with the agent's misdeeds."); *see also* RESTATEMENT (THIRD) OF AGENCY § 5.04 (2006) ("Notice of a fact that an agent knows or has reason to know is not imputed to the principal if the agent acts adversely to the principal in a transaction or matter."). Accordingly, indigent criminal defendants may be excused under the *Pioneer* factors for their agents' omissions because they must not be held responsible for actions that neither furthers their interests nor lies within their control. *Downs v. McNeil*, 520 F.3d 1311, 1322 (11th Cir. 2008).

The acceptance of agency theory also comes through clearly in the adjacent field of equitable tolling based on the errors of counsel. Every federal appellate court to have addressed the matter—excepting only the Seventh Circuit—has concluded that serious attorney misconduct may justify tolling of the applicable filing period. *United States v. Martin*, 408 F.3d 1089, 1093 (8th Cir. 2005); *Downs*, 520 F.3d 1311; *Felming v. Evans*, 481 F.3d 1249 (10th Cir. 2007); *Baldayaque*, 338 F.3d 145; *Spitsyn v. Moore*, 345 F.3d 796 (9th Cir. 2003); *United States v. Wynn*, 292 F.3d 226 (5th Cir. 2002); *Nara v. Frank*, 264 F.3d 310 (3d Cir. 2001).

Here, as in those cases, the failure of Farris's lawyers to file the requested new trial motion for more than six months after the jury's verdict is "far [ ] outside the range of behavior that reasonably could be expected by a client." *Baldayaque*, 338 F.3d at 152. In light of the foregoing, these failures must be considered significantly adverse to Farris's interests as the principal of the agency relationship. Thus, the reason for the delayed filing of the new trial motion should not be attributed to the defendant here, and the final, dispositive *Pioneer* factor should weigh heavily in Farris's favor.

III. The Court of Appeals wrongly decided an important and recurring question.

The uncertainty regarding the appropriate application of the *Pioneer* factors to indigent federal criminal defendants creates widespread and serious impacts on important constitutional rights. "Fully 90 percent of defendants in federal court cannot afford to hire their own attorney," totaling "roughly 250,000 people every year in federal courts throughout the country" who are represented by court appointed

counsel. 2017 REPORT OF THE AD HOC COMMITTEE TO REVIEW THE CRIMINAL JUSTICE ACT (rev. Apr. 2018) at x, xiv, *available at* https://perma.cc/NA3X-CXKF. As outlined above, the tone and nature of a defendant's agency relationship differs significantly between appointed and retained counsel. This disparity is important not necessarily because it consistently affects defendants' substantive outcomes, but rather because it creates significant challenges in protecting defendants' procedural rights. Indigent criminal defendants who receive ineffective assistance of appointed trial counsel have increasingly narrow options to raise a claim that their representation was defective.

First, as a descriptive matter, "[e]ven the scrupulous attorney searching the record in good faith would likely be blind to his [own] derelictions at . . . trial." *Billy-Eko v. United States*, 8 F.3d 111, 114 (2d Cir. 1993), *abrogated on other grounds by Massaro v. United States*, 538 U.S. 500, 504 (2003). Second, "there [is] a clear conflict between [a client's] interest in presenting and prevailing in his ineffective assistance claim and [his attorney's] interest in protecting himself from the damage such an outcome would do to his professional reputation and from exposure to potential malpractice liability or bar discipline." *Manning v. Foster*, 224 F.3d 1129, 1134–35 (9th Cir. 2000); *see also Fautenberry v. Mitchell*, 515 F.3d 614, 640 (6th Cir. 2008) ("[W]e conclude that it would be unreasonable to expect counsel to raise an ineffective assistance claim against himself."); *Massaro*, 538 U.S. at 503 ("[A]n attorney . . . is unlikely to raise an ineffective-assistance claim against himself.").

In this light, the ineffective assistance of appointed counsel might be considered analogous to the torts concept of "recurring misses," in which a harmful

behavior goes undeterred because the relevant actors' failure to avoid that behavior never reaches the threshold of the applicable liability rule. *See* Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 705 (1990). The matter is also similar in that the negligence itself leads to a dearth of evidence regarding the merits of the claim. *See id.* Indigent criminal defendants may not raise a timely claim of their attorneys' misconduct on their own; in fact, Farris repeatedly and unsuccessfully attempted to do in both the district court and Fourth Circuit. *Accord Downs*, 520 F.3d at 1322. Instead, the appointed attorneys themselves are the only ones who can raise their own alleged ineffectiveness. Due to their vested interest in declining to effectively do so, their misconduct will go systematically undetected.

Law and economics theory counsels correcting the distorted incentives of recurring misses by imposing proportionate liability relative to the degree of causal relationship between the negligence and the injury. *See* Omri Ben-Shahar, *Causation and Foreseeability*, *in* 1 ENCYCLOPEDIA OF LAW AND ECONOMICS 655–57 (2d ed. 2009). The application of the agency principles discussed above supports a similar solution. Instead of adopting an all-or-nothing approach in which an indigent defendant is fully responsible for the omissions and misconduct of his appointed attorney, the courts should proportionately allocate the cause of the delay between the agent and the principal. In this way, they can create a proper incentive for appointed counsel to advance the necessary plans, while only holding the defendant responsible for the delay caused by his own neglect, precisely as commanded by *Pioneer*. *See* 507 U.S. at 396–97.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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