

No. _____

16-51025

IN THE
SUPREME COURT OF THE UNITED STATES

De'won Lewis — PETITIONER
(Your Name)

vs.

UNITED STATES OF AMERICA — RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT
(NAME OF COURT THAT LAST RULED ON MERITS OF YOUR CASE)

PETITION FOR WRIT OF CERTIORARI

De'won Lewis

(Your Name)

U.S.P ATLANTA FCI P.O.BOX 150160

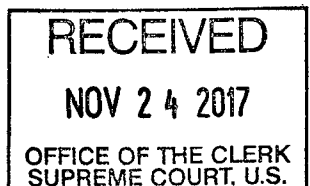
(Address)

Atlanta Georgia 30315

(City, State, Zip Code)

N/A

(Phone Number)



QUESTIONS PRESENTED

1. Did the Fifth Cir. err in dismissing Mr. Lewis for lack of jurisdiction based on the district court's determination that his notice of appeal was not the result of excusable neglect or good cause when it could have assessed on its own whether excusable neglect or good cause existed for Mr. Lewis' delay in noting his appeal?
2. Did the district court err in making such a determination in light of the circumstances surrounding the reasons for the "untimely" filing of Mr. Lewis' notice of appeal and, did the district court err in not extending the time to include a 30 days grace period?

LIST OF PARTIES

- ☒ All parties appear in the caption of the case on the cover page.
- [] All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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IN THE
SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

☒ For cases from **federal courts**:

The opinion of the United States court of appeals appears at Appendix _____ the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

The opinion of the United States district court appears at Appendix _____ the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☒ is unpublished.

☐ For cases from **state courts**:

The opinion of the highest state court to review the merits appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

The opinion of the _____ court appears at Appendix _____ to the petition and is

☐ reported at _____; or,
☐ has been designated for publication but is not yet reported; or,
☐ is unpublished.

JURISDICTION

☒ For cases from **federal courts**:

The date on which the United States Court of Appeals decided my case was _____.

☒ No petition for rehearing was timely filed in my case.

☐ A timely petition for rehearing was denied by the United States Court of Appeals on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

☐ For cases from **state courts**:

The date on which the highest state court decided my case was _____.
A copy of that decision appears at Appendix _____.

☐ A timely petition for rehearing was thereafter denied on the following date: _____, and a copy of the order denying rehearing appears at Appendix _____.

☐ An extension of time to file the petition for a writ of certiorari was granted to and including _____ (date) on _____ (date) in Application No. ____ A _____.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fed. R. App. P. 26 (a) (2) (as amended and effective December 1, 2002)

Fed. R. App. P. 4 (b) (1) (A)

Fed. R. App. P. 4 (b) (4)

Fed. R. App. P. 4 (a) (5)

STATEMENT OF THE CASE

Defendant-Petitioner Mr. Lewis (Hereinafter, "Mr. Lewis") petitioned the United States District Court for the EASTERN District of Texas AUSTIN Division pursuant to 18 U.S.C. § 3582 to reduce the term of his imprisonment.

On Tuesday August 26, 2016 the District Court filed/docketed an Order Denying Mr. Lewis Motion and electronically mailed a copy of the order to "counsel of record." "Notice" to Mr. Lewis was placed in the mail on Tuesday August 26, 2016 at 23:57:46 Hours (just minutes before Wednesday August 27, 2016).

August 28, 2016 was a Thursday and August 29, 2016 was a Friday. August 30, 2016 and August 31, 2016 were both week-end days and Monday September 1, 2016 was Labor Day (a Federal Holiday). Mr. Lewis is incarcerated and does not receive mail on week-end days or holidays and did not receive the district court's order until the evening of Tuesday September 2, 2016. Mr. Lewis proceeded with alacrity and due diligence to find someone to interpret the order and to file a notice of appeal. Unfortunately, Mr. Lewis Sierra's ten day period in which to file his notice of appeal expired two days from the date he received the court's order.

Mr. Lewis timely filed his opening appeal brief to the Fifth Circuit Court of Appeals. On November 5, 2016, the Fifth Circuit Court of Appeals remanded Mr. Lewis appeal for the limited purpose of determining whether Mr. Lewis “untimely notice of appeal was a result of excusable neglect or good cause.” On Limited Remand the district court, on January 12, 2017, determined that Mr. Lewis untimely notice of appeal was not the result of either excusable neglect or good cause.

On June 4, 2016 the Fifth Circuit dismissed Mr. Lewis appeal for lack of jurisdiction, “as the district court has declined to grant excusable neglect.”

This petition for writ of certiorari is a result of the Fifth Circuit’s dismissal of Mr. Lewis appeal based on the district court’s determination that Mr. Lewis untimely notice of appeal was not the result of either excusable neglect or good cause.

The questions presented are whether the Fifth Circuit should have made an independent determination when it could have assessed on its own whether excusable neglect or good cause existed for Mr. Lewis delay in noting his appeal and, whether the district court erred in not extending the time to include a 30 days grace period.

REASONS FOR GRANTING THE WRIT

1. Did the Fifth Circuit err in dismissing Mr. Lewis appeal for lack of jurisdiction based on the district court's determination that his notice of appeal was not the result of excusable neglect or good cause when it could have assessed on its own whether excusable neglect or good cause existed for Mr. Lewis delay in noting his appeal?
2. Did the district court err in making such a determination in light of the circumstances surrounding the reasons for the "untimely" filing of Mr. Lewis notice of appeal and, did the district court err in not extending the time to include a 30 days grace period?

On Tuesday August 26, 2015 the District Court filed/docketed an Order Denying Defendant-Appellant's Motion for reduction of term of imprisonment pursuant to 18 U.S.C. § 3582.

On Tuesday August 26, 2015 the district court electronically mailed a copy of the district court's order to "counsel of record." "Notice" to Mr. Lewis was placed in the mail on Tuesday August 26, 2015 at 23:57:46 Hours (just minutes before Wednesday August 27, 2015).

August 28, 2015 was a Thursday and August 29, 2015 was a Friday. August 30, 2015 and August 31, 2015 were both week-end days and Monday September 1, 2015 was Labor Day (a Federal Holiday). Mr. Lewis a sixty-one year old, incarcerated male at an FCI, does not receive mail on week-end days or holidays and did not receive the district court's order until the evening of Tuesday September 2, 2015 in inmate mail. Mr. Lewis, who does not speak, read or write in the English Language, and does not have access to the

Federal Rules of Appellate Procedure in his language in the prison library proceeded with alacrity and due diligence to find someone to interpret the district court's order and to file a notice of appeal. Unfortunately, Mr. Lewis ten day period in which to file his notice of appeal (if the August 26, 2015 date was included) expired two days from the date he received the district court's order. It was not humanly possible for Mr. Lewis to find someone to interpret the district court's order, find someone to interpret the Federal Rules, find someone to write or type a notice of appeal in the English Language, and get a notice of appeal to the district court in two (2) days.

Under amended Rule 26(a) (2), when calculating a period of limitations of less than eleven days, weekend days and legal holidays are excluded. See Fed. R. App. P. 26(a) (2) (as amended and effective December 1, 2002).

Under Rule 4(b) (1) (A), a notice of appeal must be filed within ten days of the entry of a judgment or order being appealed. Rule 4 (b) (4) allows the district court to extend the time in which a party may appeal if the party files a motion for an extension of time no later than 30 days from the end of the ten-day period provided in Rule 4(b) (1) (A). A notice of appeal filed after the ten day deadline, but before the expiration of the thirty-day grace period, should be treated by the district court as a request for an extension.

Because the end of the ten-day limitation period marks the beginning of the thirty-day grace period provided in Rule 4(b) (4), the applicability of the amendment of Rule 26 (a) determines whether Mr. Lewis's notice of appeal was filed within the thirty-day grace period extended until approximately October 5, 2016. If amended Rule 26 applies to Mr. Lewis's notice of appeal, his notice of appeal was filed within the thirty-day grace period.

The district court in this case should have considered that an incarcerated pro se prisoner such as Mr. Lewis, unlike other litigants, cannot personally ensure that his notice of appeal is filed in a timely manner. Applying the amended rule and the thirty day grace period would not have prejudiced the government. By applying amended Rule 26, the district court and the parties are spared the time and expense of additional fact-finding regarding whether defendant's notice of appeal was filed within the grace period provided in Rule 4 (b) (4).

Amended Rule 26 (a) (2), which excludes weekend days and legal holidays from the calculation of any period less than eleven days contained in the Federal Rules of Appellate Procedure, applies to the calculation of the timeliness of Mr. Lewis's notice of appeal. Under the amended Rule, his notice of appeal was filed within the thirty-day grace period and, hence, should have been construed as a motion to extend the period in which to file a notice of appeal.

The district court was unreasonable in concluding that Mr. Lewis untimely notice of appeal was not the result of excusable neglect or good cause.

The clock does not start until a judgment is entered on the docket, and when the time is 10 days or fewer intermediate weekends and holidays are excluded.

Under Federal Rules of Appellate Procedure, upon a showing of excusable neglect, Mr. Lewis could have filed an effective notice of appeal as late as October 05, 2016. Rules of Appellate Procedure provides, where excusable neglect is shown, a thirty day extension from the end of the initial ten-day period should apply. Thus, Mr. Lewis would have had to note his appeal by October 05, 2016 but, because that date fell on a Sunday, the deadline would have extended to October 06, 2016. See Fed. R. App. P. 26 (a).

Mr. Lewis notice of appeal was dated September 11, 2016, mailed to the district court by way of priority mail on Friday September 12, 2016, received by the district court clerk on Monday September 15, 2016, and docketed on September 16, 2016.

Mr. Lewis submits that from the date the district court mailed its order to him and the date the district court received his notice of appeal there are twenty (20) days. Out of that twenty (20) days there were six (6) week-end days and one (1) Federal Holiday.

The United States Supreme Court rejected the narrow view of excusable neglect in favor of a "flexible understanding." Considerations in finding excusable neglect include 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."

"Good cause" requires a lesser showing than excusable neglect but is intended to "take account of a narrow class of cases in which a traditional 'excusable neglect' analysis would be inapposite." Good cause is a factor "in situations in which there is no fault – excusable or otherwise.

The Supreme Court established a flexible analysis of excusable neglect. In *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993), the Court held that an attorney's inadvertent failure to file a proof of claim can constitute excusable neglect.... (Note that an attorney may be excused from a timely filing for simply failing to correctly calendar the event, yet an incarcerated pro se litigant is denied his right to appeal for being one or two days beyond the ten day period even though he made a good faith effort and did everything within his power to timely file.)

Interpreting the plain meaning of the phrase "excusable neglect," the Court concluded, "Congress plainly contemplated that the courts would be permitted, [when] appropriate, to accept late filings caused by inadvertence, mistake, or

carelessness, as well as by intervening circumstances beyond the party's control."

Id. at 388, 113 S.Ct. at 1495.

Unrepresented, incarcerated appellants are unfairly disadvantaged by a ten (10) day time limit for filing a notice of appeal, or for that matter, for filing anything in a ten (10) day time limit. Allowing a few extra days for filing of a notice of appeal by an incarcerated appellant, whether represented or not, would not offend the notion of judicial fairness.

The district court's order finding that Mr. Lewis's notice of appeal was outside the excusable neglect period should be vacated, and the case again remanded to the district court.

Alternatively, the FIFTH Circuit Court of Appeals may assess on its own whether excusable neglect or good cause existed for Mr. Lewis's delay in noting his appeal. A district court's order declining to extend the time under either Fed. R. App. P. 4 (a) (5) or (6) is an appealable final judgment, which is reviewed by a court of appeals for abuse of discretion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,


DeQwon Lewis

Date: November 14, 2017,