

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 KEITH BOWLES, :

4 Petitioner :

5 v. : No. 06-5306

6 HARRY RUSSELL, WARDEN :

7 - - - - - x

8 Washington, D.C.

9 Monday, March 26, 2007

10

11 The above-entitled matter came on for oral  
12 argument before the Supreme Court of the United States  
13 at 11:06 a.m.

14 APPEARANCES:

15 PAUL MANCINO, JR., ESQ., Cleveland, Ohio; on behalf of  
16 Petitioner.

17 WILLIAM P. MARSHALL, ESQ., Special Counsel for the  
18 Attorney General of Ohio, Chapel Hill, N.C.; on  
19 behalf of Respondent.

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21 General, Department of Justice, Washington, D.C.; on  
22 behalf of the United States, as amicus curiae,  
23 supporting Respondent.

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P R O C E E D I N G S

(11:06a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in case 06-5306, Bowles versus Russell.

Mr. Mancino.

ORAL ARGUMENT OF PAUL MANCINO, JR.

ON BEHALF OF THE PETITIONER

MR. MANCINO: Mr. Chief Justice, and may it please the Court:

Petitioner is before this Court because he followed an order of the district court. He filed his notice of appeal within the time authorized by the district court. It was only when the matter came before the court of appeals was it raised that the district court apparently had no authority to grant a 17-day extension, although it specified a specific date rather than the 14 days in connection with the case.

JUSTICE KENNEDY: Yes, it was authorized by the district court in the sense that the district court put it on a piece of paper. It wasn't authorized because the district court had no authority to extend that.

MR. MANCINO: The district court put it on there. When you look at the actual entry itself, it's a handwritten entry. There's no way of telling from the handwritten entry whether that entry was even entered on

1 the docket on the same day because all you have is the  
2 handwritten entry, February 10, file your appeal by  
3 February 27, which is unusual in a civil case because  
4 normally in a civil case you get a judgment; you don't  
5 get a directive from the court that you have 30 days to  
6 file a notice of appeal or anything in connection with  
7 this. So I don't think it's unreasonable to rely upon a  
8 directive from a court.

9 CHIEF JUSTICE ROBERTS: But you knew that 14  
10 days was the maximum because the motion asking for it  
11 cited and quoted from the rule.

12 MR. MANCINO: Well, that -- we did cite from  
13 the rule. That is correct. When the order came out --  
14 well, first of all, we were glad to get the order to  
15 allow time to appeal; but looking at the order, or just  
16 looking at the date, something had to be done. And of  
17 course, we filed on one day before the end date --

18 CHIEF JUSTICE ROBERTS: What if, what if the  
19 district court had given you an extra month? Would your  
20 argument still be the same, that that -- because the  
21 court set it, that trumps the limitation in the rule?

22 MR. MANCINO: Well, then you get into  
23 certain time limits, whether it's reasonable under the  
24 circumstances, would a reasonable attorney or litigant  
25 rely upon a, you know, expansive period of time that the

1 court gave to it. But here certainly this order is not  
2 unreasonable. It's certainly within the confines. And  
3 you have a specific end date, do your notice of appeal  
4 by this date.

5 JUSTICE GINSBURG: But wouldn't a reasonable  
6 lawyer have said see, I referred to the rule, when I  
7 made this motion for extension of time. The rule said  
8 14 days; this judge obviously made a slip. He  
9 miscalculated.

10 Wouldn't a lawyer faced with what the rule  
11 clearly says and an inconsistency scribbled on an order,  
12 say the judge probably made a mistake? So I better, if  
13 I want to protect my client, do what the rule says?

14 MR. MANCINO: Well, looking back, that is  
15 probably correct. But looking at the order, and the way  
16 it came out, and the fact that you know, the -- the rule  
17 allowed for a reopening of the appeal, just looking at  
18 the end date of the order, make sure the notice of  
19 appeal is filed by that date, it would seem to me that  
20 the party who is adversely affected by it may object on  
21 that basis, saying judge, you have no authority to do  
22 this, what are you doing in connection with --

23 CHIEF JUSTICE ROBERTS: Why isn't -- this is  
24 just a notice of appeal. Why would you -- why not file  
25 it the same day? In terms of looking at it from some

1 equitable sense, I don't understand why you'd wait toward  
2 the end of the period assuming it hadn't focused on the  
3 difference between the 14 days and the days allowed.

4           What -- why, why would you delay filing the  
5 notice of appeal?

6           MR. MANCINO: Well, the only reason for  
7 delaying it is obviously is workload. And you don't want  
8 to get all briefs due within a short period of time,  
9 once you get your notice of appeal filed in a particular  
10 case, because you have time limits for getting your  
11 record, your briefing, and you know, there's a number of  
12 appeals going out -- not in this Court, but you know  
13 there were a number of appeals going on.

14           And my normal practice is you know, file  
15 your notice of appeal near the end of the applicable  
16 appeals time.

17           CHIEF JUSTICE ROBERTS: Does it make -- does  
18 it make a difference that we're dealing with the safety  
19 valve provision? In other words, you've got the 30 days  
20 to file; and then this rule allows you to -- it's a safety  
21 valve, if you didn't get the notice or whatever, you've  
22 got a certain procedure that can give you the extra 14  
23 days. And now it seems to me that you're asking for a  
24 safety valve on top of a safety valve.

25           And I wonder if there's some point where you

1 cut off the -- allowing an out for missing the deadline.

2 MR. MANCINO: Well, I suppose at some point,  
3 someone may say well, if the court gave you 180 days to  
4 do the act, someone may say well, that appears to be  
5 unreasonable in connection with that. I think the safer  
6 thing is just to put the order down, say application,  
7 reopen the appeal time, granted.

8 And then it would cause someone to go you  
9 know, go back, look at the rule, see how much time is  
10 allotted under the rule in connection with the case.

11 But I don't think it's unreasonable; in these  
12 circumstances we're only talking about three days to do  
13 an act. The act was done in two days.

14 CHIEF JUSTICE ROBERTS: Well, but as soon as  
15 you start talking about an exception from the provision  
16 in the rules, then you're going to get a lot of  
17 applications and there are going to be a lot of  
18 different reasons for why it wasn't filed on the last  
19 day. Once that -- it seems to me, you open it up for an  
20 indeterminate ruling.

21 MR. MANCINO: Well, this is an equitable  
22 rule in itself. Because it allows something where an  
23 appeal time has expired, can you come in and show the  
24 circumstances, one, you were not notified, which obviously  
25 the court did, and is the other side prejudiced --

1 JUSTICE KENNEDY: Well it is an equitable  
2 rule conditioned upon compliance with time limits.

3 MR. MANCINO: Well, that's -- that's once  
4 it's granted. It's not -- the time limit is 180 days or  
5 the seven day after you received or became aware actual  
6 notice --

7 CHIEF JUSTICE ROBERTS: No, but  
8 Justice Kennedy's point I think is critical. In other  
9 words, the drafters of the rule obviously wanted to  
10 provide a safety valve. But they also appreciated that  
11 you can't have it open-ended. So they did impose limits  
12 on the -- if you want to call it equitable exception to  
13 the 30-day rule. And it seems to me that you sort of  
14 restrike the balance the drafters of the rule struck if  
15 you allow further equitable departures from their, their  
16 rule.

17 MR. MANCINO: Well, I think in past cases  
18 the Court has always recognized there are deadlines but  
19 there are exceptions to deadlines. And the most  
20 compelling exception is where a court says do the act at  
21 this particular time. And you know, it's coming from a  
22 judicial officer, it's not coming from someone  
23 miscalculating on the calendar, calculating the time out  
24 when it's 30 days run, when it's 14 days run, when it's 10  
25 days run in connection with the case. Because in civil



1 litigation you are not given any specific time to do an  
2 act. Criminal cases are a little bit different. You  
3 are told about an appeal, when an appeal has to be filed  
4 in connection with a case. You do not have that in civil,  
5 and already when you get your final order -- you know you  
6 have 30 days to do it.

7 JUSTICE SCALIA: Mr. Mancino, your position  
8 here is that this rule is not jurisdictional.

9 Now, what -- what are the consequences of  
10 that? I take it that that would mean that the court of  
11 appeals has no obligation to inquire on its own whether  
12 the matter has been filed too late?

13 MR. MANCINO: Well, I believe --

14 JUSTICE SCALIA: If the parties don't make  
15 anything of it, the court of appeals can -- can take a  
16 late, a late filing?

17 MR. MANCINO: Well, I think when the court  
18 of appeals does that, I think in all fairness, they  
19 should advise the parties in advance that were  
20 considering this on our own, that the appeal was out of  
21 time, and would you like to --

22 JUSTICE SCALIA: No, no, but I'm asking  
23 whether a court of appeals has to even worry about that?  
24 If the parties don't make anything of it, the court of  
25 appeals can just assume it's okay and go ahead, right?

1 MR. MANCINO: Correct. Because I think  
2 they've waived any -- the other side obviously has  
3 waived or forfeited any right to object to the -- you  
4 know, to the -- efficiency

5 JUSTICE SCALIA: And you need an objection  
6 or else it's, it will be okay?

7 MR. MANCINO: I'm sorry?

8 JUSTICE SCALIA: And you need an objection  
9 or else it will be all right?

10 MR. MANCINO: Yes. The objection in this  
11 case came -- you know, in the --

12 JUSTICE GINSBURG: That means that a rule  
13 that says 14 days is really a rule left to the discretion  
14 of the district judge. Because, if the district judge  
15 feels like giving a little more, this would be no control,  
16 unless the opposing side objects; is that right?

17 MR. MANCINO: Well, I -- I believe it does  
18 call for a timely objection by somebody to say  
19 something, rather than to just sit back and let it  
20 expire, knowing that someone did something that they  
21 should not do in connection with --

22 JUSTICE SCALIA: Suppose you have problems  
23 at home. I don't know, you have an illness at home.  
24 And you ask counsel for the other side, you know, I know  
25 it's a 14-day limit, but would you give me 20 days?

1 Right? And opposing counsel being as friendly as they  
2 are nowadays --

3 (Some laughter.)

4 JUSTICE SCALIA: -- the other, the other  
5 side would say sure, take 20 days. Okay? So you  
6 prepare a paper for signature by the judge and he signs  
7 off on it, gives you 20 days. That's okay then, right?

8 MR. MANCINO: Well I think --

9 JUSTICE SCALIA: Because the other side's  
10 agreed. He won't object on the court of appeals. And  
11 suddenly, suddenly, you've got 20 days even though the  
12 rule says 14.

13 MR. MANCINO: Well, there you have somewhat  
14 advance knowledge that you're doing something possibly  
15 contrary to a rule. But then you have the issue once  
16 you do it, are you forfeiting your right to object or  
17 claim a deficiency in the process.

18 Here you're only -- what you're doing --

19 JUSTICE KENNEDY: Well, I mean, that -- that  
20 may, that may be true as of this stage; but Justice  
21 Scalia's question points up the problem of what do we do  
22 if we write this case? How do we formulate this rule?  
23 And if we say that it is not jurisdictional, it's not  
24 binding, then going forward, it seems to me to allow  
25 the hypothetical that he puts to you.

1 MR. MANCINO: Well, I believe you can come  
2 up with all sorts of scenarios. What I think is the  
3 thing --

4 JUSTICE KENNEDY: That's why we're wondering  
5 how to write the opinion.

6 (Laughter.)

7 JUSTICE STEVENS: Mr. Mancino --

8 MR. MANCINO: And where did a litigant  
9 reasonably rely upon an order of the court, which  
10 apparently the court had authority to issue, regardless  
11 of the court making a mistake or doing something  
12 intentionally --

13 JUSTICE STEVENS: And the person who did the  
14 reliance was you, I guess?

15 MR. MANCINO: Yes, that's correct.

16 JUSTICE STEVENS: And is it correct that --  
17 who -- was this litigant represented by counsel during  
18 the period when he didn't get the notice of the  
19 September 9 order?

20 MR. MANCINO: Yes. I filed the habeas  
21 petition. I did anything in connection with the case.

22 JUSTICE STEVENS: So neither the, neither  
23 the prisoner nor you received any notice of the first  
24 goof up?

25 MR. MANCINO: Well, the first -- well, we

1 received notice of the judgment on the merits. Then we  
2 filed a motion to alter judgment or for a new trial. It  
3 was not -- the order overruling the motion to alter or  
4 amend judgment or the motion for a new trial date was  
5 not received. And the clerk's docket showed it wasn't  
6 mailed out.

7 JUSTICE STEVENS: I see.

8 MR. MANCINO: But in the, in that court,  
9 they were transitioning to this electronic filing,  
10 which not everybody was set up at that particular time;  
11 so apparently the order may have only gone to -- on the  
12 electronic filing system to those who were set up, and  
13 we were not set up on that thing. But the clerk still  
14 had the obligation to send it out. The court found that  
15 the clerk did not send it out. The clerk found that, or  
16 the court found that we did not have notification. And  
17 the court found that the other side is not prejudiced by  
18 any application.

19 CHIEF JUSTICE ROBERTS: Would your -- would  
20 your proposed exception, does it work the other way? I  
21 mean, let's say the district court entered this order  
22 and set a date certain for you to file the notice of  
23 appeal, and only gave you seven days on his count rather  
24 than 14, and you filed it on the ninth day, in other  
25 words within the 14 days given under the rule.

1           Would you be out of luck because of what the  
2 district court set out in its order as what's binding,  
3 as opposed to what the rule says? Or could you rely  
4 on the fact that the rule says you get 14 days?

5           MR. MANCINO: Well I would believe you could  
6 then argue that the rule says that, the judge was wrong  
7 in -- you know -- in truncating your appeal time to file  
8 the appeal.

9           CHIEF JUSTICE ROBERTS: Why wouldn't the  
10 same approach work the other way? The rule says 14 and  
11 the judge was wrong to give you more?

12           MR. MANCINO: Well, because the exceptions  
13 to all of these time deadlines, you have cases from this  
14 Court where people untimely file a motion for a new  
15 trial. A new trial motion by rule has to be timely  
16 filed in order to toll your time. And there have been  
17 cases where the motion for new trial has been untimely  
18 filed. The other side didn't say anything. And then  
19 when the ruling is made, the appeal is filed within the  
20 appropriate time.

21           And this Court has sanctioned that procedure  
22 in connection. I see no difference here, where a  
23 litigant before a court, the court issues an order, you  
24 look at the order. And you abide by the order in  
25 connection with the case.

1                   They do have a reasonable reliance in the  
2 case. And in looking back later on, in connection with  
3 the -- the issue, in connection with the case.

4                   JUSTICE SCALIA: You know sometimes,  
5 sometimes district courts take jurisdiction over a case  
6 that they -- that they shouldn't have jurisdiction over.

7                   MR. MANCINO: Well --

8                   JUSTICE SCALIA: And sometimes in reliance  
9 on that, you go through a whole trial and it comes up to  
10 the court of appeals and we say huh, there was no  
11 jurisdiction here; too bad.

12                  MR. MANCINO: Well --

13                  JUSTICE SCALIA: Even though the court said  
14 it and you went through a whole trial in reliance on the  
15 district judge. District judges make mistakes.

16                  MR. MANCINO: Well, that's a whole -- I  
17 believe that's a whole different scenario than presented  
18 here. That goes to whether the court had  
19 subject-matter --

20                  JUSTICE SCALIA: It's even worse, it seems  
21 to me. I mean, you've wasted, you know, weeks in trial  
22 and so forth.

23                  MR. MANCINO: Right.

24                  JUSTICE SCALIA: But if it's jurisdictional,  
25 we have to say, you know, too bad. Yes, you were misled

1 by the judge. In reliance on the district judge, you  
2 expended a lot of time and money, but there was no  
3 jurisdiction. And that's the end of the matter.

4 MR. MANCINO: Well, the rule I always  
5 remember from law school is that parties cannot  
6 voluntarily confer jurisdiction on a court that does not  
7 have it. And the court, at any point, if they do not  
8 have subject-matter jurisdiction, is free to dismiss the  
9 case whether it's at trial level, the appeal level, or  
10 whatever.

11 This is not that situation. Obviously, the  
12 court by the rule could look into this matter. The  
13 court by the rule could grant relief in connection with  
14 this matter. It's a question whether the three days --

15 JUSTICE STEVENS: I know I could find this  
16 out by looking at a calendar. Do you remember what day  
17 of the week February 24th was, or 26th?

18 MR. MANCINO: I believe --

19 JUSTICE STEVENS: We don't have a weekend  
20 problem, do we?

21 MR. MANCINO: I believe it was not -- I  
22 don't believe it was a weekend, no.

23 JUSTICE KENNEDY: I looked at this. There's  
24 a time stamp. And I think it might be the time stamp  
25 when this document was entered on the ultimate appeal.



1           But -- but something you said at the outset  
2 prompts this question, that -- did you think that -- the  
3 time runs from 14 days after the date when the district  
4 court's order is entered.

5           MR. MANCINO: When it's entered. That's  
6 correct.

7           JUSTICE KENNEDY: And was there a submission  
8 or an implication in your remarks that you thought that  
9 the order was not entered until three days later?

10          MR. MANCINO: No.

11          JUSTICE KENNEDY: Is there an entry -- is  
12 there a time entry on the dock -- on court's order?

13          MR. MANCINO: No. It's a handwritten one  
14 that doesn't say anything --

15          JUSTICE KENNEDY: I know that it's a  
16 handwritten one. But that that -- that shows how long  
17 he has to appeal. Is there a date when the order was  
18 put on the docket? Does that show on this sheet?

19          MR. MANCINO: No. There's nothing from the  
20 clerk indicating -- on the docket there is, but nothing  
21 on the document that was sent, because the document only  
22 was sent -- it was just handwritten over the -- on top  
23 of the motion, so there was no way of telling when it  
24 was entered. Because you look back at the history of  
25 this case, when the court dismissed the original

1 petition, the court had a date on it. It was only 18  
2 days later that it was actually entered by the clerk,  
3 and of course that triggered the time for asking for  
4 reconsideration.

5 So -- but --

6 JUSTICE BREYER: What about the weekends? I  
7 mean, maybe the judge -- I -- it looks from my  
8 calendar -- I wondered what day of the week it was. You  
9 don't remember. 2/10, February 10, 2004, what day of  
10 the week is it?

11 MR. MANCINO: That I cannot answer.

12 JUSTICE BREYER: It looks like it was the  
13 middle of the week. So maybe there were one or two  
14 weekends. So maybe what the judge's mistake was, he  
15 didn't know how to count the weekend rule.

16 MR. MANCINO: Well, what I think was done --

17 JUSTICE BREYER: Which may not be  
18 jurisdictional, the weekend rule.

19 MR. MANCINO: What I believe is that this  
20 was sent out by mail. So they had, you know, the  
21 three-day mail rule, and that's how you came to the 14  
22 days in connection with the -- put in the 17-day limit  
23 on --

24 JUSTICE SCALIA: Maybe Arabic numerals  
25 aren't jurisdictional either.

1 JUSTICE BREYER: They're not. A numeral is  
2 not jurisdictional.

3 What's -- what's -- what's the three-day  
4 mail rule?

5 MR. MANCINO: Well, normally if you are  
6 allowed to do an act by mail, you have three days, you  
7 can serve a party and then you have three days to file  
8 with the court as part of the Civil Rules. I sort of  
9 think that's what the judge -- because this was going  
10 out by mail -- he probably didn't get -- I wish I would  
11 have saved the envelope, but I don't have the envelope,  
12 but it probably didn't get to my office for three days  
13 anyway.

14 JUSTICE BREYER: Speaking of the three-day  
15 mail rule, maybe the judge's intent when he signed this  
16 was that it actually was entered, took effect as of  
17 three days later.

18 MR. MANCINO: Well, there's really no --  
19 looking at the document, there's no way of telling that.  
20 That is correct. There's no way of telling that, and I  
21 believe that was probably the reasoning of the court  
22 that, you know, it took three days to get mail because  
23 you didn't get -- it wasn't sent out last time,  
24 obviously you did not get the mail the last time, so  
25 they added the three days, and then you have the full 14

1 days to, you know, perfect or file your notice of appeal  
2 to get it to the court in this case.

3 So --

4 CHIEF JUSTICE ROBERTS: All of that might  
5 have -- all those things might have been going on in the  
6 judge's mind, but you don't contest that the 14-day  
7 period was not complied with? You don't have an  
8 argument that you complied with the 14-day period?

9 MR. MANCINO: No, I do not. We're relying  
10 to the exceptions, and there's a number of exceptions on  
11 deadlines that have come out. You have the equitable  
12 tolling, you have the waiver, forfeiture issue. And, you  
13 know, in this case, specific assurance by a court which  
14 in a past opinion seemed to control the date, where a  
15 judge gave you a specific assurance that you could do  
16 something in connection with the case.

17 The old Harris Truck case is where the  
18 lawyer was on vacation. The judge said well, I'll give  
19 you some extra time. Even though they knew of the  
20 judgment, they knew the time would run, he said I'll  
21 give you extra time to file the appeal because you want  
22 to contact the lawyer who was on vacation. The court of  
23 appeals then said well, the rule didn't apply because  
24 you knew of the order, so -- but that was overlooked  
25 even though by time calculation, everybody was out of

1 time.

2           The Eberhart case, they were out of time  
3 because the motion for new trial was filed untimely,  
4 which under the rule required a timely filing of a  
5 motion for a new trial in order to toll your appeal  
6 time.

7           So this, obviously the motion to reopen was  
8 timely filed, was filed within the 180 days required by  
9 the rule. The other side was served. The other side  
10 had no objection to it and didn't oppose it. The real  
11 issue when you're looking at an equitable -- sort of an  
12 equitable rule like this, is the other side prejudiced,  
13 and obviously they are not prejudiced.

14           CHIEF JUSTICE ROBERTS: One of the things I  
15 think the drafters of the rule wanted to ensure is that  
16 there would be a point at which the prevailing party in  
17 the district court could know with certainty that there  
18 wasn't going to be further proceedings in the case, and  
19 that's the purpose of the 180-day period and all that.  
20 It's not open-ended.

21           Under your rule where the actual time for  
22 filing could be at some indefinite point, they'd never  
23 really quite have that assurance, would they?

24           MR. MANCINO: Well, unless the court  
25 specifically granted to the litigant a specific period

1 of time, and you know, normally litigants and lawyers do  
2 not ignore what the court says.

3 At least I think as, you know, anyone -- if  
4 the court says that, you have a right to reasonably  
5 rely on what the court said. And it certainly wasn't an  
6 unreasonable period of time that the court was giving in  
7 the case. It wasn't --

8 CHIEF JUSTICE ROBERTS: Well, what would be  
9 an unreasonable period of time if the two or three days  
10 is not? Would another 10 days?

11 MR. MANCINO: Well, if you go back to the  
12 rules, you're going into the six months, 180 days, and  
13 then, you know, you would say something. Or if the  
14 court, you know, gave you a year or something by  
15 mistake, you know, it would -- you know, that something  
16 does not sound right here. And then you would look at  
17 it. At least if that were the case, you could probably  
18 go in and get the court to reconsider, bring it to the  
19 attention of the court, that Your Honor, we do not have  
20 all of this time. Did you make a mistake? You can  
21 always correct mistakes. But that was not done here,  
22 it was not done by the Respondent in this case because  
23 they didn't -- the Respondent did not object to the  
24 application to reopen the appeal, did not say anything  
25 --

1 JUSTICE GINSBURG: But the Respondent said  
2 it had no reason at that time to believe that you  
3 wouldn't follow the rule and file within the 14 days.  
4 So if they made an objection, the moment the judge put  
5 down a date that's 17 days later, the judge might say  
6 that's premature.

7 MR. MANCINO: Well then, the judge may have  
8 said well, I don't -- look at the rule. I don't have  
9 it. I'm going to redraft the order, vacate my order and  
10 put a proper order on in connection with the case. It  
11 would seem to me that at some point in the appellate  
12 process, because when you look at the history that the  
13 Sixth Circuit in this case -- at least when the court  
14 then granted a certificate of appealability, you would  
15 think the Respondent would -- what are -- why are you  
16 granting a certificate of appealability when you've told  
17 us we have no jurisdiction over this case, or at least  
18 from the two orders anyway, they said they had  
19 jurisdiction over the February 10th order that -- on the  
20 appeal. And the -- then the certificate of appealability  
21 was denied, and normally that would end the case.

22 The court granted the -- my motion for  
23 reconsideration, and then granted certain issues that  
24 could be briefed on the merits. But once the court  
25 granted the certificate of appealability, it seemed to

1 me that the other side, well, what is happening here?

2 JUSTICE SOUTER: Mr. Mancino, I take it that  
3 what you are really proposing is sort of a rule that if  
4 -- if counsel could reasonably be misled to overlook the  
5 mistake by the court, that your reliance upon the  
6 court's mistake should -- should, in fact, be respected.  
7 It's kind of a rule of -- reasonably misleading; is that  
8 about right?

9 MR. MANCINO: I believe so.

10 JUSTICE SOUTER: I mean, that's how we  
11 distinguish your case on your view from the case in  
12 which you get 180 days instead of 14?

13 MR. MANCINO: Right. Sort of, you know,  
14 reasonably reliant, is it fair?

15 CHIEF JUSTICE ROBERTS: You think we should  
16 have a rule of reason rather than a per se rule.

17 (Laughter.)

18 MR. MANCINO: That's the prior case, they made  
19 that.

20 JUSTICE STEVENS: Let me ask this question:  
21 Is the order on page 151 of the joint appendix, just  
22 those three lines, that's the entire order that the  
23 judge entered? It just says granted, and motion --

24 MR. MANCINO: That is what's handwritten on  
25 the original documents. That's it.



1 JUSTICE STEVENS: He did not make the  
2 findings that the rule requires?

3 MR. MANCINO: No. But presumably you would  
4 assume that those findings are subsumed within the rule  
5 because the judge found in our favor. The judge denied  
6 the motion to vacate part of it but granted the  
7 reopening to vacate, and of course on the --

8 JUSTICE STEVENS: Because the motion  
9 requires --

10 MR. MANCINO: -- motion to vacate, you have  
11 30 days to appeal.

12 JUSTICE STEVENS: The rule requires that he  
13 make three specific findings which he did not make.

14 MR. MANCINO: He did not make it, but you  
15 assume that the judge did by granting the motion, and  
16 nobody else said anything about it anyway.

17 I reserve the time.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Marshall.

20 ORAL ARGUMENT OF WILLIAM P. MARSHALL

21 ON BEHALF OF THE RESPONDENT

22 MR. MARSHALL: Mr. Chief Justice, and may it  
23 please the Court:

24 The Petitioner's failure to meet the 14-day  
25 statutory deadline for filing his notice of appeal is

1 fatal to his case for three reasons.

2 First, the 14-day period is mandatory and  
3 jurisdictional, and Federal district courts do not have  
4 the power to enlarge this time period.

5 Second, the 14-day rule was not forfeited by  
6 the State of Ohio and may be raised by the court sua  
7 sponte in any event.

8 Third, even if there could be some sort of  
9 limited equitable exception to the 14-day time  
10 requirement, the Petitioner here falls far short of  
11 demonstrating why he is entitled to such extraordinary  
12 relief.

13 Let me explain why. The Petitioner's claim  
14 that notice of appeal time requirements are not  
15 jurisdictional contradicts 150 years of practice,  
16 countless lower court decisions, settled congressional  
17 understanding as to the meaning of its governing  
18 statutes --

19 JUSTICE GINSBURG: What type of jurisdiction  
20 are you speaking of? It's certainly not Federal  
21 jurisdiction in the sense of subject-matter  
22 jurisdiction, like is this a case arising under Federal  
23 law. What kind of jurisdiction do you have in mind?

24 MR. MARSHALL: Your Honor, I think it is its  
25 own form of subject-matter jurisdiction in the same way

1 that final judgments on appeals are subject-matter  
2 jurisdiction. And the reason why is that notice of  
3 appeals are classically jurisdictional in that sense, in  
4 that they transfer the locus of a case from one court  
5 to another. In the appellate system, there's actually a  
6 changing of the jurisdiction, and the notice of appeal  
7 is that triggering mechanism. And in that sense, it is  
8 classically jurisdictional and different from the other  
9 kinds of time limits that this Court addressed in  
10 Kontrick, in versus Eberhart, because those took place  
11 within a particular court system, the district court  
12 system, where here there was a transfer of jurisdiction  
13 triggered by the notice of appeal from one court to the  
14 other.

15 JUSTICE ALITO: Isn't that just a word game?  
16 It's jurisdictional because it transfers jurisdiction  
17 from one court to another. Why should that be -- why  
18 does that make it jurisdictional?

19 MR. MARSHALL: Well, I think, Your Honor,  
20 the same way that final judgments are. I mean, final  
21 judgments are a jurisdictional prerequisite to transfer  
22 from one case to another.

23 The second reason, Your Honor, by the way,  
24 is congressional -- is the congressional reenactment of  
25 the notice of appeal time deadlines, which

1 also indicates that Congress treats these --

2 JUSTICE ALITO: Can you think of anything  
3 that's enacted by Congress as jurisdictional?

4 MR. MARSHALL: No, Your Honor, but when  
5 there is a background, as there is in this case, of 150  
6 years of practice where Congress has enacted against  
7 that background, it is presumed to be jurisdictional.  
8 And I'd also point out that with respect to this Court's  
9 jurisdiction, the Court has treated petitions for  
10 certiorari as jurisdictional in civil cases because  
11 there is a statutory underpinning, but has not treated  
12 them as jurisdictional in criminal cases in part because  
13 there is not a statutory underpinning.

14 JUSTICE ALITO: Doesn't the latter suggest  
15 that a rule that concerns the transfer of a case from  
16 one court to another is not necessarily jurisdictional?

17 MR. MARSHALL: Your Honor, I think the  
18 latter recognizes the fact that it doesn't necessarily  
19 have to be. That is correct.

20 However, that Congress and this Court can  
21 treat such a thing because it is in a -- because it is  
22 a -- because it does transfer the case from one to  
23 another. I think that the criminal -- that in the  
24 certiorari case, with respect to criminals, there might  
25 be an indication there that there might be some relation.

1 But I would also suggest that with respect to certiorari  
2 practice, you've already -- you're already in the  
3 appellate mode and you're not dividing the jurisdiction  
4 between trial courts and appellate courts.

5 But the quick answer is yes, Your Honor, I  
6 don't think it has to be jurisdictional, but certainly  
7 it can be jurisdictional. And for 150 years, this Court  
8 and Congress has treated this particular division as  
9 jurisdictional.

10 JUSTICE ALITO: Well, it seems to me that's  
11 what we're back to, that it's long been treated as  
12 jurisdictional. But you just said that it's not  
13 sufficient that it's been enacted by Congress and it's  
14 not sufficient that it transfers a case from one court  
15 to another.

16 So we're back just to history, right?

17 MR. MARSHALL: Well, Your Honor, it's more  
18 than just history, because I think Congress reenacting  
19 2107 against this background for 150 years, that this  
20 issue has been treated as jurisdictional, puts Congress  
21 behind this as well. But here it's also, 150 years is  
22 not a matter of --

23 JUSTICE GINSBURG: The provision of, is it  
24 2107?

25 MR. MARSHALL: Yes, Your Honor.

1 JUSTICE GINSBURG: Where does that appear in  
2 the judicial code? Does it appear under the provisions  
3 concerning jurisdiction?

4 MR. MARSHALL: No, Your Honor. 2107 does  
5 not itself mention jurisdiction. However, that is also  
6 true with 2101 in respect to this Court's certiorari  
7 jurisdiction in civil cases. The word "jurisdiction" is  
8 not mentioned specifically but it --

9 JUSTICE GINSBURG: But it is under the  
10 heading procedure, court procedure, right?

11 MR. MARSHALL: It's a time for appeal to  
12 court to proceed.

13 JUSTICE GINSBURG: Yes, but that's under a  
14 chapter that deals with procedure, as opposed to  
15 jurisdiction.

16 MR. MARSHALL: Yes, Your Honor. But this  
17 Court in Barnhart suggested that in determining whether  
18 something is jurisdictional or not, one looks at the  
19 context of the particular location. Here this rule 21  
20 -- excuse me. Here this statute, 2107, has been enacted  
21 and reenacted against the background of this Court  
22 consistently saying it's jurisdictional and treating  
23 this rule as jurisdictional, and that's since cases as  
24 far along as Edmonson.

25 JUSTICE GINSBURG: You know there has been

1 a spate of cases that said that the word "jurisdiction"  
2 has been vastly overused, it's a word of many meanings.  
3 And you are telling me that the meaning of these statutes  
4 is subject-matter jurisdiction, just like is there  
5 diversity, is there a Federal question?

6 MR. MARSHALL: Yes, Your Honor, in the same  
7 way that amount in controversies are also  
8 subject-matter jurisdiction.

9 JUSTICE GINSBURG: But amount in controversy  
10 is in 1332. Congress put it right there together.  
11 It says diversity of citizenship plus amount in  
12 controversy, all in 1332. Here the limit appears in a  
13 statute that deals with procedure, not jurisdiction.

14 MR. MARSHALL: Yes, Your Honor. But that  
15 statute has been enacted against -- I know I keep  
16 reemphasizing this -- 150 years of practice, including  
17 the Edmonson case in 1869, where the Court on its own  
18 motion raised the matter as being jurisdictional and  
19 because the time period had not been complied with  
20 dismissed the appeal.

21 The question essentially isn't whether we're  
22 going to call it jurisdictional or not. The question is  
23 the effect of the particular rule. Some of the lower  
24 courts call it invocation to jurisdiction or a  
25 prerequisite to jurisdiction. The question is what the

1 treatment of this particular requirement is and the  
2 treatment of this particular requirement consistently  
3 for over 150 years has been that it is mandatory,  
4 jurisdictional, non-forfeitable, and can be raised by the  
5 court sua sponte.

6 JUSTICE SCALIA: What characteristics are  
7 you asserting follow from calling it jurisdictional in  
8 this case?

9 MR. MARSHALL: Your Honor, the --

10 JUSTICE SCALIA: Number one, it can't be  
11 waived, right?

12 MR. MARSHALL: That's correct.

13 JUSTICE SCALIA: Number two --

14 MR. MARSHALL: It's non-forfeitable.

15 JUSTICE SCALIA: The court of appeals has to  
16 inquire on its own, right?

17 MR. MARSHALL: Yes, Your Honor.

18 JUSTICE SCALIA: Anything else?

19 MR. MARSHALL: Yes, Your Honor. There's no  
20 equitable exception to it. There is no equitable  
21 exception to it as well if it's jurisdictional. So all  
22 of those three attach to the term "jurisdictional." But  
23 I also think that they could equally attach to the notion  
24 that, even if we don't want to call it jurisdictional,  
25 if we don't view it as fitting easily within this



1 category of subject-matter jurisdiction.

2 JUSTICE SCALIA: Except at least as to the  
3 second, at least as to the second, I don't know any, any  
4 matter that a court has to inquire into sua sponte which  
5 is not jurisdictional. That's the one of the three  
6 characteristics that I think we have always attached the  
7 word "jurisdictional" to, I think.

8 MR. MARSHALL: Well, Your Honor, in Day  
9 versus McDonough, when dealing with a habeas, with a  
10 habeas statute of limitations, this Court approved the  
11 court of appeals raising that issue sua sponte, although  
12 they -- although in that case the Court --

13 JUSTICE SCALIA: It may.

14 MR. MARSHALL: Yes, it may.

15 JUSTICE SCALIA: But not must.

16 MR. MARSHALL: Yes, Your Honor.

17 JUSTICE SCALIA: Not must. And with -- truly  
18 things that we have called jurisdictional, you must, right?

19 MR. MARSHALL: Yes, Your Honor. However, if  
20 the lower courts wanted to play with the language a  
21 little bit and call it necessary for the invocation of  
22 jurisdiction or a prerequisite --

23 JUSTICE SCALIA: We could call it  
24 "quasi-jurisdictional." You wouldn't object to that,  
25 would you?

1 MR. MARSHALL: No, Your Honor. As  
2 Shakespeare might say, it's not the name. We are  
3 interested in the effect, and the effect here has been  
4 traditionally enforced over 150 years of court practice.

5 JUSTICE BREYER: Well, what do you think of  
6 the --

7 JUSTICE GINSBURG: How far do you take it?  
8 Suppose this slip is not noticed in the court of  
9 appeals, and then there's a petition for cert, and some  
10 clever law clerk notices that the -- notice of appeal was  
11 filed in 16 days instead of in 14 days. Would the Court  
12 then have to dismiss for want of jurisdiction?

13 MR. MARSHALL: Yes, Your Honor. I think it  
14 applies in the same way that lack of diversity would  
15 apply or lack of a Federal question could apply, as in  
16 the Mottley case. Even if it was in front of this  
17 Court, if it was recognized in front of this Court, at  
18 that time it would -- it must be dismissed.

19 JUSTICE SOUTER: Let's take it a step  
20 further. Let's assume it isn't recognized. Assume he  
21 gets his habeas relief, and three years later some eager  
22 beaver is culling through the records and says, this guy  
23 never should have been in court. Do they rearrest him  
24 and put him into prison?

25 MR. MARSHALL: Your Honor, collateral

1 attacks for lack of subject-matter jurisdiction are not  
2 normally sustained, if that's what the -- if I  
3 understand your question correctly. So that, for  
4 example, in a diversity case, if two years or three  
5 years after it proceeds to final judgment somebody  
6 realizes that both parties were from the same State, the  
7 collateral attack would normally not allow to change  
8 that, to change that result. And I would think that the  
9 same thing would happen here. If the case had proceeded  
10 to final judgment, if there was an error of this type,  
11 as with other types of errors in subject-matter  
12 jurisdiction, there would not be an opening for  
13 collateral attack.

14 JUSTICE BREYER: What about something here I  
15 hadn't run across, called the unique circumstances  
16 doctrine. This Court in Osterneck said this: Where a  
17 party has performed an act which if properly done would  
18 postpone the deadline for filing his appeal -- and  
19 indeed that's what happened here; he postponed the  
20 deadline for filing his appeal -- and has received  
21 specific assurance by a judicial officer that this act  
22 has been properly done -- and here he did receive  
23 specific assurance by a judicial officer that the act  
24 was properly done -- in those circumstances, you can  
25 make a little exception in the interests of justice.

1           MR. MARSHALL: Well, Your Honor, the unique  
2 circumstances doctrine doesn't apply here because there  
3 wasn't an act which if requested could have been  
4 properly done.

5           JUSTICE BREYER: Yes, yes, the act was that  
6 he filed a motion to reopen, which motion to reopen  
7 postponed the time of appeal. And two things have to  
8 happen with that act. One is you have to get the  
9 district judge to agree; and second, you have to file  
10 the paper.

11           So that's the act which if properly done  
12 would, in fact, have led to the appeal.

13           MR. MARSHALL: Your Honor, I think that --

14           JUSTICE BREYER: I agree there were two  
15 parts to it or two acts, if you want.

16           MR. MARSHALL: But, Justice Breyer, in this  
17 case I think that what would have had to happen is that  
18 the Petitioner would have had to move for 17 days in  
19 order for the act to be properly done. He moved for 14  
20 days.

21           JUSTICE GINSBURG: I thought what we were  
22 talking about was that if the order had said 14 days  
23 instead of 17, then the act would have been properly  
24 done. That is, the only reason that for the 16 days --  
25 according to Mr. Mancino -- the only reason he took 16

1 days was the judge authorized that. If the judge hadn't  
2 authorized that, the rule wouldn't have been discarded  
3 and he would have filed in 14 days.

4 MR. MARSHALL: Well, Your Honor, the judge  
5 -- our argument is in part that the judge had no power  
6 to authorize it. If I understand your question, with  
7 respect to the unique circumstances doctrine, this  
8 doesn't fit in because in the unique circumstances  
9 doctrine the litigant actually has to seek a particular  
10 type of relief and get granted that relief. The  
11 Petitioner here did not seek leave to file his motion of  
12 appeal within 17 days. The Petitioner here sought,  
13 which the only thing he could do under the rules, is  
14 seek to reopen for 14 days.

15 CHIEF JUSTICE ROBERTS: So he hasn't  
16 received, just quoting from Osterneck, he hasn't  
17 received assurance that the act has been properly done?

18 MR. MARSHALL: That's right.

19 CHIEF JUSTICE ROBERTS: In other words, if  
20 he came back and said, was my notice of appeal timely or  
21 something, and the judge at that point ruled, then it  
22 might come under that provision. But this is just --  
23 prospectively -- he could have filed this timely even  
24 after the judge issued the order. In other words, he  
25 could have filed it on the 14th day. He didn't have to

1 wait until the 17th day.

2 MR. MARSHALL: That's correct, Your Honor.

3 JUSTICE BREYER: Why does that matter? I  
4 mean, also Osterneck I happened to guess involved a case  
5 that took place on Tuesday. This case took place on  
6 Thursday. I mean, I grant you the language literally  
7 you could say doesn't quite fit it, but so what? The  
8 purpose of this Osterneck I take it is to have a very  
9 narrow exception where a judge tells you basically what  
10 to do, and you follow what the judge said, and then, lo  
11 and behold, they hit you with this jurisdictional thing  
12 and you didn't get it right.

13 Now, that seems to be its purpose, and the  
14 language is very close, so why not follow it?

15 MR. MARSHALL: Your Honor, the purpose of  
16 the unique circumstances doctrine is not to give a  
17 license to litigants to rely on district court errors.

18 CHIEF JUSTICE ROBERTS: That would be the  
19 very narrow circumstances doctrine, not the unique  
20 circumstances doctrine.

21 (Laughter.)

22 JUSTICE BREYER: I notice the court applied  
23 it twice, so it couldn't quite be the unique  
24 circumstances.

25 MR. MARSHALL: That's right, Your Honor.

1 JUSTICE STEVENS: May I ask this question?  
2 Supposing there was a dispute as to whether the order  
3 had been entered on February 10 or February 12. Say his  
4 handwriting was illegible. Would that be a dispute that  
5 would remain open throughout the appellate process?

6 MR. MARSHALL: Your Honor, the question is  
7 when the clerk of court would have entered for the entry  
8 of judgment.

9 JUSTICE STEVENS: In other words, if he'd  
10 entered this order on February 12th or 13th -- I forget  
11 which day it was -- the appeal would have been timely?

12 MR. MARSHALL: That's correct, Your Honor.

13 JUSTICE STEVENS: And I'm just -- and the  
14 order was defective because it didn't make findings  
15 required by the rule. And I'm just wondering, supposing  
16 it was ambiguous as to the date it was actually entered.  
17 Would the party then be entitled to rely on the date,  
18 February 27th, set in the order, or would he have a duty  
19 to investigate and find out exactly when the judge  
20 signed the order?

21 MR. MARSHALL: I think the key question,  
22 Your Honor, I think is when the -- when the order is  
23 entered into the docket, which is done by the clerk of  
24 court. I think that is the triggering time.

25 JUSTICE STEVENS: My question is what if

1 that's somewhat ambiguous? A busy court, he handed it  
2 to the clerk and the clerk didn't enter it into the  
3 docket. You're not sure, there's a fact dispute about  
4 that.

5 MR. MARSHALL: Your Honor, that's a  
6 different case. The beginning time period is a  
7 beginning case, if there was some ambiguity there --

8 JUSTICE STEVENS: I understand. I'm just  
9 wondering what your view is, how should courts resolve  
10 that kind of dispute? Should that be a dispute that  
11 remains open throughout the appellate process? There's  
12 a factual dispute as to when the judge signed the order.

13 MR. MARSHALL: Yes, Your Honor. Again, the  
14 factual dispute is when the --

15 JUSTICE STEVENS: If he had written here,  
16 instead of "2-10," he had written down "2-12," then the  
17 prosecutor three days later realized he had written down  
18 the wrong date, would that have made the appeal untimely?

19 MR. MARSHALL: Your Honor, I think the  
20 question at that point is what is the time period  
21 entered into the formal docket, and what is the actual  
22 judgment.

23 JUSTICE STEVENS: And that's ambiguous, I'm  
24 saying. That's ambiguous.

25 MR. MARSHALL: If for some reason the court



1 records are jumbled for some reason or another and  
2 nobody can determine when that entry of order is, that's  
3 a different case.

4 JUSTICE STEVENS: But in that case, you then  
5 rely on the February 27th date in the order? Then it must  
6 be permissible to rely on appeal to be filed by 2-27?  
7 In such a case it would be okay.

8 MR. MARSHALL: Again, Your Honor, the  
9 critical thing with the rule period is the time period  
10 from the entry of judgment.

11 JUSTICE STEVENS: I know, and I say it's  
12 hard to figure out when the order was actually written  
13 down in the docket.

14 MR. MARSHALL: I think that the question  
15 that would be required then is for whoever was filing  
16 the notice of appeal to determine when the entry of the  
17 docket is. If that's ambiguous, I think it's obligatory  
18 on the litigant to err on the side of caution, Your  
19 Honor.

20 JUSTICE STEVENS: And not rely on the 2-27  
21 date.

22 MR. MARSHALL: I would certainly suggest  
23 that a litigant argue on -- err on the side of caution  
24 if at all.

25 JUSTICE GINSBURG: What about the rule that

1 Justice Breyer quoted from the Osterneck case. There  
2 was another statement of the rule which goes like this:  
3 There is a sharply honed exception covering cases in  
4 which the trial judge has misled a party who could have  
5 and probably would have taken timely action had the trial  
6 judge conveyed correct rather than incorrect information.  
7 This case fits right into that description, doesn't it?

8 MR. MARSHALL: No, Your Honor. The  
9 case that they're citing to is Thompson, and in Thompson  
10 what occurred in that case is that the litigant in that  
11 case moved for --

12 JUSTICE GINSBURG: The case that I'm reading  
13 from is the concurring opinion in Carlisle against  
14 United States. It does cite Thompson.

15 MR. MARSHALL: Thompson is the case,  
16 Thompson -- this Court has not relied on the unique  
17 circumstances doctrine in 40 years. But in Thompson,  
18 what occurred was the Petitioner requested a new trial  
19 untimely, but was told by the court that they had timely  
20 requested a new trial. Because they were informed that  
21 they were entitled to a new trial, they did not do  
22 something else, which was file the notice of appeal. So  
23 the court basically sent them down the wrong avenue.  
24 Here there was no wrong avenue that the court -- that  
25 the litigant was being sent down.

1 JUSTICE GINSBURG: But they would have filed  
2 that notice of appeal earlier if the judge had said,  
3 your motion for a new trial is untimely. It seems to me  
4 it's the same as in this case. The judge said: Your  
5 motion is timely, so you're going to have the trigger so  
6 much later. Fine. If the judge had said, your motion is  
7 untimely and you know you've got to get your notice of  
8 appeal in sooner rather than later. Similarly, here the  
9 judge said, well, you've got until 17 days later.

10 If the judge had done right and said the  
11 14-day period, then surely Mr. Mancino would have filed  
12 within that period.

13 MR. MARSHALL: But, Your Honor, there is  
14 nothing that the court did that -- which prevented the  
15 litigant here from filing on time. There was nothing  
16 that would have prevented the litigation here from  
17 filing within the 14-day period.

18 And when --

19 JUSTICE GINSBURG: There was nothing in  
20 Thompson that prevented filing the notice of appeal.

21 MR. MARSHALL: Except in Thompson, Your  
22 Honor, he was told that he had the right to proceed on a  
23 motion for new trial. If he had -- Your Honor, I see  
24 that my time is up.

25 CHIEF JUSTICE ROBERTS: You can finish your

1 answer.

2 MR. MARSHALL: In Thompson, Your Honor, the  
3 difference is that -- that the litigant was sent down a  
4 different road which was inconsistent with his filing a  
5 notice of appeal. Here there is nothing inconsistent  
6 about filing a notice within 14 days as opposed to 17  
7 days.

8 CHIEF JUSTICE ROBERTS: Thank you,  
9 Mr. Marshall.

10 MR. MARSHALL: Thank you, Your Honor.

11 CHIEF JUSTICE ROBERTS: We'll hear from Mr.  
12 Stewart.

13 ORAL ARGUMENT OF MALCOLM L. STEWART,  
14 ON BEHALF OF UNITED STATES AS AMICUS CURIAE,  
15 SUPPORTING RESPONDENT

16 MR. STEWART: Thank you Mr. Chief Justice,  
17 and may it please the Court:

18 For four basic reasons the deadline for  
19 filing a notice of appeal in a civil case should be  
20 treated as jurisdictional and therefore as nonwaivable.  
21 First, the time limit set forth in section 2107  
22 directly implicates the concerns that underlie the  
23 special treatment of jurisdictional issues. It's a  
24 fundamental precept of our legal system that Federal  
25 courts should take special care to avoid adjudicating

1 cases where Congress has not authorized them to do so.  
2 Or to put it another way, our legal system has  
3 presupposed that the unauthorized exercise of  
4 jurisdiction is an error different in kind from the  
5 misapplication of law in cases that a court is  
6 authorized to adjudicate.

7 JUSTICE GINSBURG: Mr. Stewart, do you think  
8 this is subject -- a question of subject-matter  
9 jurisdiction?

10 MR. STEWART: We would -- we would  
11 characterize it as a species of appellate jurisdiction.  
12 That is, this Court has often said that it's the  
13 fundamental duty of this Court when doubt is -- when  
14 doubt is apparent, to inquire into its own jurisdiction  
15 and that of the court from which the record comes. And  
16 that division presupposes that there are cases over  
17 which the lower court had subject-matter jurisdiction,  
18 over which this Court would not have appellate  
19 jurisdiction.

20 For example, situations sometimes arise,  
21 particularly in cases that are adjudicated by  
22 three-judge district courts, in which there is a dispute  
23 as to whether a particular district court order is  
24 directly appealable to this Court or should go instead  
25 to the court of appeals. And if somebody comes to this

1 Court and this Court determines that the appeal should  
2 have gone to the court of appeals instead, the error is  
3 characterized as one of appellate jurisdiction. This  
4 Court lacks jurisdiction to review the ruling even  
5 though there's nothing to suggest that the case as a  
6 whole fell outside the subject-matter jurisdiction of  
7 the district court.

8 JUSTICE STEVENS: Mr. Stewart, that's one  
9 those interesting examples. We lack jurisdiction of the  
10 case but we have power to order it refiled -- to vacate  
11 the order and have it refiled, don't we?

12 MR. STEWART: That is an anomaly. The Court  
13 has said on occasion that because it lacks appellate  
14 jurisdiction it has no power to do anything with the  
15 case except to vacate the order. And I think that's a  
16 court that I'm not going to try to explain.

17 (Laughter.)

18 MR. STEWART: But I think Mr. Marshall has  
19 identified a second example, namely the final decision  
20 requirement of 28 U.S.C. 1291. That is, that's universally  
21 conceded to be a jurisdictional rule, even though it has  
22 nothing to do with whether the district court had  
23 subject-matter jurisdiction over the case. It is simply  
24 whether this particular decision over -- for which  
25 review is sought falls within the appellate jurisdiction

1 of the court of appeals. And our point --

2 JUSTICE SOUTER: Mr. Stewart, should we  
3 repudiate the unique circumstances doctrine?

4 MR. STEWART: I don't think you need to -- I  
5 think you should repudiate any conception that Federal  
6 courts have freewheeling authority to excuse  
7 noncompliance with statutory time limits for taking  
8 appeals.

9 JUSTICE SOUTER: Well, the unique  
10 circumstances doctrine is one circumstance in which  
11 courts, say yes, you can excuse it.

12 MR. STEWART: Well, I -- I think actually  
13 both Harris and Thompson are explicable on other  
14 grounds. And may even be correct in more limited ways.  
15 For example, Harris --

16 JUSTICE SOUTER: But on the grounds for  
17 which they have been taken as authority, is it your view  
18 that we should repudiate those grounds?

19 MR. STEWART: Yes. With respect to civil  
20 cases for which the time for taking an appeal is  
21 specified by statute, it's our view to the extent  
22 Harris and Thompson would otherwise support the  
23 proposition that district courts may excuse  
24 noncompliance with the time limits, those cases should  
25 be repudiated.

1 JUSTICE BREYER: Why -- in criminal?

2 MR. STEWART: In criminal cases the time for  
3 taking an appeal is not specified by statute. It's  
4 imposed by Federal Rule of Appellate Procedure 4(b).  
5 But there's no statutory basis for it. There was up  
6 until 1988 a provision of Title 18 of the U.S. Code,  
7 section 3772, that specifically authorized this Court to  
8 promulgate rules that would establish the time for  
9 filing a notice of appeal --

10 JUSTICE BREYER: But in -- though of course,  
11 you'd have to confine it very narrowly, I take that  
12 doctrine, if there weren't a statute, you read it into  
13 the rule. So there is a statute and you read the  
14 statute as saying well there could be very some very  
15 narrow circumstances that Congress would have been  
16 willing to make an exception. For example it is a  
17 couple of days and the judge tells you, "do it" or lets  
18 you do it. It's roughly the same thing, isn't it?

19 MR. STEWART: Well I think it makes a  
20 fundamental difference that there is a statute in place.  
21 And certainly with respect to circuit certiorari  
22 petitions coming from the court of appeals to this  
23 Court, this Court has recognized that distinction to be  
24 fundamental.

25 CHIEF JUSTICE ROBERTS: You're sure habeas



1 cases are classified for this purpose as civil rather  
2 than criminal?

3 MR. STEWART: Yes, there's no -- no dispute  
4 about that. And indeed if the -- if this case were  
5 classified as civil for purposes of -- I mean, as  
6 criminal for purposes of the time limit for taking an  
7 appeal, it would have been far out of time under Federal  
8 Rule of Appellate Procedure 4(b). Indeed the authority  
9 of the district court to have granted the reopening  
10 period 180 days later wouldn't have been present in the  
11 criminal context.

12 CHIEF JUSTICE ROBERTS: Looking at the rule,  
13 it does require these findings. Has that been  
14 interpreted to require that they be written on the  
15 record or is that simply something that's supposed to  
16 guide the district court?

17 MR. STEWART: I think the courts of appeals  
18 have not required that they be written on the record but  
19 have required that there be a basis appearing in the  
20 record for those findings. So, for instance, if  
21 Petitioner's counsel had filed a document asking to  
22 reopen in the time, but had not represented that he had  
23 not been informed of the judgment, then I think that if  
24 the court had granted the reopening, that could be set  
25 aside on appeal on the ground that there was no support

1 in the record for such a finding. But I don't believe  
2 the courts of appeals have required there be explicit  
3 findings as opposed to findings that are implicit in the  
4 grant of the reopening.

5 The point I was going to make about the  
6 certiorari petitions is that this Court's Rule 13.1  
7 imposes a 90-day limit for filing a cert petition in all  
8 cases. It is not divided between civil and criminal.  
9 But this Court has recognized that the 90-day limit has  
10 a very different status in criminal cases than in civil  
11 cases. That is Rule 13.2 of the rules of this Court  
12 states that when a cert petition is jurisdictionally out  
13 of time, the Clerk is directed not to file it. And Rule  
14 13.2 cites 28 U.S.C. 2101(c).

15 So the clear implication is that the Court  
16 recognizes the time limit imposed by statute in civil  
17 cases to be a jurisdictional limit. And the crucial  
18 point of Rule 13.2 is not simply that it uses the word  
19 jurisdictionally. It's that it gives an instruction to  
20 the Clerk not to file the petition regardless of whether  
21 any other party objects. It's the very type of thing  
22 that a court will do as to matters of its jurisdiction,  
23 as to matters over which it has an obligation to take  
24 cognizance, regardless of the other party's objection.

25 In criminal cases by contrast the 90-day

1 rule applies under the rules, but the Court has  
2 recognized that it retains the authority to grant  
3 petitions that are untimely filed even in cases where  
4 the other party objects.

5           The other thing I would say about 2107(a)  
6 and it's -- part of it is reprinted at page 16 of the  
7 Government's brief. In the last full paragraph of page  
8 16, it says, "The basic time limit for appeals in civil  
9 cases is set by 28 U.S.C 2107(a), which states that" --  
10 and then the part we haven't reproduced says except as  
11 otherwise provided in this section.

12           And then it goes on to say, "no appeal shall  
13 bring any judgment, order or decree in an action, suit or  
14 proceeding of a civil nature before a court of appeals  
15 for review unless notice of appeal is filed within 30  
16 days."

17           And the significance of this provision, this  
18 language, is it doesn't simply say a notice of appeal  
19 must be filed within 30 days. Language like that would  
20 conceivably leave open the question of what happens if  
21 the notice of appeal is untimely filed. This language  
22 actually says if a notice of appeal is not filed within  
23 30 days, the appeal will not bring the judgment --

24           JUSTICE STEVENS: Yes, Mr. Stewart, but it  
25 begins with the exception as provided in subparagraph (c).

1 MR. STEWART: That's correct. So we're not  
2 saying that the 30-day limit is absolute --

3 JUSTICE STEVENS: Yes.

4 MR. STEWART: -- but we're saying that the  
5 rule specifies that if the various time restrictions are  
6 not complied with, the appeal will not bring -- I'm  
7 sorry, the appeal shall not bring the judgment, order,  
8 or decree before the court of appeals. This is  
9 specifically framed as a limitation on the authority of  
10 the reviewing court.

11 JUSTICE BREYER: What do you think, if we  
12 did go to Thompson and looked at that, this would be a  
13 fortiori from Thompson, because Thompson as described in  
14 Osterneck, was a case in which the judge simply said from  
15 the bench look, your -- your -- new trial motion is  
16 timely, though it wasn't; it was out of time by two days.  
17 While here, we have a formal court order, it is a formal  
18 order entered with a -- you know, stamp of the judge, and  
19 it says you have till the 27th to file.

20 MR. STEWART: Well, there are two things we  
21 would say about Thompson. The first is as this Court  
22 explained in its recent decision in Hibbs versus Winn,  
23 it's long been recognized that a timely motion for  
24 reconsideration will suspend the finality of the  
25 judgment and toll the time for taking an appeal. And

1 the Court in Hibbs versus Winn further explained that  
2 under certain circumstances, even an untimely motion for  
3 reconsideration will have that effect, if the judge  
4 appropriately considers it on the merits.

5 And Thompson can be explained as holding  
6 simply that where the Government does not object and the  
7 district court evinces an intent to treat the motion as  
8 timely and consider it on the merits, it will suspend  
9 the finality of the judgment. I don't think Thompson  
10 has to read -- has to be read to stand for a broader  
11 equitable principle.

12 The other thing I'd say about Thompson is  
13 that for better or for worse, the Government's brief in  
14 opposition in Thompson, and the case was decided on the  
15 cert papers, didn't cite 28 U.S.C. 2107; it relied  
16 exclusively on the time limit that was stated in the  
17 Federal Rule of Appellate Procedure. Therefore the  
18 Court in Thompson was not required to grapple with  
19 congressionally imposed limits.

20 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
21 Stewart.

22 Mr. Mancino, you have four minutes  
23 remaining.

24 REBUTTAL ARGUMENT OF PAUL MANCINO, JR.,  
25 ON BEHALF OF PETITIONER

1           MR. MANCINO:  If this were a case where  
2 someone just missed the 30-day deadline, I don't think  
3 we would be talking.  We are talking about a case where  
4 a judge properly found, properly ruled that notice was  
5 not given and had the authority to reopen the case.  And  
6 we talk about mandatory and jurisdiction of the case.  
7 All that were involved in this case is how is the case  
8 moved from one court to another.

9           And the -- was it moved properly in this  
10 case?  The unique circumstances, I think you cannot find  
11 a more compelling case for unique circumstances.

12           Did the party rely upon the court?  Here you  
13 have a handwritten notation from the court, signed by  
14 the judge --

15           JUSTICE STEVENS:  Mr. Mancino, does the  
16 record tell us how you got notice of that order?

17           MR. MANCINO:  No, it doesn't.  But I mean, I  
18 did get notice of it.  It came in the mail, but it  
19 doesn't --

20           JUSTICE STEVENS:  You, you got that order in  
21 the mail?

22           MR. MANCINO:  In the mail, correct.  And  
23 that's why I believe the three days was added, thinking  
24 of the mail rule that we have three additional days to  
25 do it in connection with the case.  And that's how I

1 believe the, how the 17 days came up.

2 JUSTICE KENNEDY: And I asked this once  
3 before: Did the document you received show the date  
4 that it was entered on the docket, so you knew when the  
5 14 days was running from?

6 MR. MANCINO: No, the only information it  
7 had was the printed -- the printed date by the judge.  
8 Did not show it was entered that same day.

9 JUSTICE BREYER: Yes, but in the -- in this  
10 thing, it says entered on February 10.

11 MR. MANCINO: Yes, that's correct. The  
12 docket does show that.

13 JUSTICE STEVENS: But how did you find out  
14 it had been entered on February 10th? Because you did  
15 know that at the time you filed your notice of appeal.

16 MR. MANCINO: Well, I just went off what the  
17 date on the -- the handwritten date on the pleading we  
18 received from the court. It said February 10th, so we  
19 just put it in there. Didn't go to the actual docket to  
20 see if, in fact, it was entered. As you can see, orders  
21 were not -- in this case were not entered on date that  
22 the judge signified anyway.

23 JUSTICE GINSBURG: This is, this is all at  
24 the top of page 151 of the joint appendix, right?  
25 That's the that entire thing.

1           MR. MANCINO: That is the -- well, it is  
2 printed on that. But I mean, if you look at the  
3 original document --

4           JUSTICE GINSBURG: Yes. It was  
5 handwritten --

6           MR. MANCINO: It's a handwritten --  
7 handwritten by the judge in, in the case. So --

8           JUSTICE KENNEDY: But it says when it was  
9 signed by the judge. It doesn't say when it was entered  
10 on the docket, when it was entered by the clerk.

11          MR. MANCINO: No. It says when the judge  
12 signed it. That's correct.

13          JUSTICE BREYER: But it says it in the  
14 index, it says -- it says docket entries. 2-10, it says  
15 entered 2-10, on page 11. On page 11.

16          MR. MANCINO: Yes, that's correct. But  
17 that's from the docket --

18          JUSTICE BREYER: Received. So-

19          MR. MANCINO: But the document we received  
20 from the Court just has -- you know -- the handwritten  
21 notation on it, file your appeal by --

22          JUSTICE ALITO: What would you, what would  
23 you have had to do to find out when it was  
24 entered on the docket? Could you have accessed that  
25 electronically? Or would you have to go to the court,



1 to --

2 MR. MANCINO: Well, probably I could not  
3 have -- at that time, I mean I could do it now, but at  
4 that time you'd have to go over to the courthouse, just  
5 like we walked the notice of appeal over to the  
6 courthouse, had it stamped by the clerk there, and  
7 figured that was the end of it and we were on our way to  
8 the Sixth Circuit in Cincinnati. Thanks.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 Mr. Mancino. The case is submitted.

11 (Whereupon, the case in the above-entitled  
12 matter was submitted at 12:07 p.m.)

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