No. 16-1022

IN THE
Supreme Court of the United States

TIMOTHY BELL,

Petitioner,

v.

EUGENE MCADORY, *ET AL.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY IN SUPPORT OF CERTIORARI

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This Petition presents a single, straightforward question for the Court: Is the denial of a Federal Rule of Appellate Procedure 4(a)(5) motion a separately appealable final order? As discussed *infra*, the Circuits are split on this question. What is more, this case—as an appeal from the denial of a Rule 4(a)(5) motion—provides the Court with an easy opportunity to address this important issue without having to consider the merits or the procedural history of Petitioner's earlier appeal. Certiorari, or, in the alternative, summary reversal, is warranted.

I. THE COURTS OF APPEALS ARE SPLIT AS TO WHETHER DENIAL OF A RULE 4(a)(5) MOTION IS SEPARATELY APPEALABLE

Respondents' Brief in Opposition is perhaps most remarkable for what it does not deny. Respondents do not deny that Rule 4(a)(5) motions should be treated as final appealable orders; they do not deny that twelve other circuits have held—in either published or unpublished opinions—that denial of a Rule 4(a)(5) motion is separately appealable; and they do not deny that unless a Rule 4(a)(5) motion is considered a final order, the issues raised in such a motion may be completely insulated from appellate review. *See* Opp. 10-11; *see also* Pet. 20-22.

Instead, Respondents attempt to explain away this Circuit split by twisting the Seventh Circuit's order into conformity with the prevailing case law. Respondents argue that the Seventh Circuit did not apply the generally applicable rule of *Cooper v. IBM Personal Pension Plan*, 163 F. App'x 424 (7th Cir. 2006), when it dismissed this appeal (*Bell II*) for lack jurisdiction. "Instead, the court simply stated that where there already was an appeal pending . . . it was unnecessary to file a second appeal from" denial of Petitioner's Rule 4(a)(5) motion. Opp. 10. This argument does not stand up to scrutiny—the plain language of the Seventh Circuit's order in *Bell II* makes it clear that the Court believed it lacked jurisdiction over Petitioner's Rule 4(a)(5) appeal. Quoted in full, the Court of Appeals held:

> After Timothy Bell had filed a notice of appeal (No. 15-1036), the district court denied a motion to extend the time for appeal. See Fed. R. App. P. 4(a)(5). Bell has filed another notice of appeal, directed to that order.
>
> The only appealable order in this case is the district court's final decision. Procedural matters such as orders under Rule 4(a)(5) are not separately appealable. Instead they are reviewable in the initial appeal. The current appeal therefore is dismissed for want of jurisdiction.

Pet. App. 1a-2a.

As the Seventh Circuit explained, it "dismissed for want of jurisdiction"—it did not dismiss the appeal because it was simply "unnecessary," as

Respondents argue. The next sentence of the opinion—noting that Rule 4(a)(5) denials are reviewed in the initial appeal—does not change this; it merely explains *why* the Seventh Circuit treats Rule 4(a)(5) denials as non-final orders. There is no suggestion that this ruling is limited to a certain subset of cases, as Respondents argue. The Seventh Circuit's ruling in this case was unequivocal: "[p]rocedural matters such as orders under Rule 4(a)(5) are not separately appealable." This lies in stark contrast with the rule that, as even Respondents admit, every other circuit has adopted: denial of a Rule 4(a)(5) motion is a final order subject to its own appeal.

What is more, Respondents' argument that this case is simply an anomaly in the Seventh Circuit—creating an "intramural" conflict, Opp. 9, between precedential and non-precedential opinions—is at odds with a proper understanding of the case law. Respondents argue that precedential opinions from the Seventh Circuit have permitted appeals from Rule 4(a)(5) motions. There is a reason, however, that Respondents do not quote from any of these opinions. Not one actually addresses the Court's jurisdiction to hear the case; instead, jurisdiction is either overlooked or simply assumed.

While every court has an obligation to assess its own jurisdiction, this Court has "repeatedly held that the existence of unaddressed jurisdictional defects has no precedential effect." *Lewis v. Casey*, 518 U.S. 343, 352 n.2 (1996). In other words, "[w]hen a potential jurisdictional defect is neither noted nor discussed in a federal decision, the decision does not stand for the proposition that no defect existed."

Arizona Christian Sch. Tuition Org. v. Winn, 563 U.S. 125, 144 (2011); *see Will v. Mich. Dep't of State Police*, 491 U.S. 58, 63 n. 4 (1989) ("[T]his Court has never considered itself bound by prior *sub silentio* holdings when a subsequent case finally brings the jurisdictional issue before us.") (citation and internal quotation marks omitted); *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 38 (1952) (same); *see also Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 91 (1998) (cases of "drive-by jurisdictio[n]" "have no precedential effect"). Thus, the only cases cited by Respondents for the proposition that "the Seventh Circuit has . . . recognized that the denial of a FRAP 4(a)(5) motion can be a separately appealable order," Opp. 11, do not actually support this proposition at all. They merely assume jurisdiction and thus have no precedential value in the Seventh Circuit or elsewhere.

In reality, the only two cases in the Seventh Circuit to address the question whether a Rule 4(a)(5) order is separately appealable are *Cooper* and *Bell II*. In both, the Seventh Circuit made its position clear: "[a]ction on a motion under Rule 4(a)(5) is not independently appealable, as it is not a 'final decision' by the district court." *Cooper*, 163 F. App'x at 425; *see* Pet. App. 2a (same).[1] As

[1] The fact that the orders dismissing the appeals in *Cooper* and *Bell II* were unpublished is not surprising given the jurisdictional nature of the question presented. In any event, this Court frequently grants review of unpublished decisions. *See, e.g., Beckles v. United States*, 137 S. Ct. 886, 891 (2017); *Buck v. Davis*, 137 S. Ct. 759, 773 (2017); *Montanile v. Bd. of*

commentators have expressly noted, the Seventh Circuit's position is directly contrary to the prevailing rule in the other Courts of Appeals that "[i]f the district court denies the extension of time and the original appeal deadline has run out, the appellant should appeal the denial [of the Rule 4(a)(5) motion]." 16A C. Wright & A. Miller, *Federal Practice and Procedure* § 3950.3 & n.130 (4th ed.) (citing *Cooper* as contrary to the majority rule). Respondents cannot explain away this real and acknowledged Circuit split.

II. THIS CASE IS A GOOD VEHICLE FOR DECIDING WHETHER AN ORDER DENYING RULE 4(a)(5) RELIEF IS SEPARATELY APPEALABLE

Respondents further contend that this case is not an appropriate vehicle to resolve the acknowledged split because it presents an "idiosyncratic and factbound" procedural history unsuitable for review. Opp. 12. That is incorrect.

The procedural history of this Petition is straightforward: On appeal from the District Court's final order denying Rule 60(b) relief ("*Bell I*"), the Seventh Circuit determined that a document filed by Bell should be treated as a Rule 4(a)(5) motion. Pet. 11. On remand, the District Court denied the Rule 4(a)(5) motion, and Bell filed the appeal giving rise to this Petition ("*Bell II*"). Pet. 12-13; Opp. 12-13. The Seventh Circuit, however, dismissed that appeal,

(continued…)

Trustees of Nat. Elevator Indus. Health Benefit Plan, 136 S. Ct. 651, 656 (2016).

ruling that "[p]rocedural matters such as orders under Rule 4(a)(5) are not separately appealable." Pet. App. 2a; *see* Opp. 12. In response, Bell filed this Petition. This Petition therefore directly raises the question whether the denial of a motion under Rule 4(a)(5) is a separately appealable final order.

Respondents try to confuse the straightforward procedural posture of this Petition by reciting the admittedly complex procedural history surrounding the *Bell I* appeal and arguing that such a "unique" series of procedural twists and turns will not be repeated again. Opp. 12-13. But that complex history is irrelevant to the *Bell II* appeal. In *Bell II*, the Seventh Circuit dismissed Petitioner's appeal for want of jurisdiction on the sole ground that orders denying Rule 4(a)(5) relief are not separately appealable. Resolution of that jurisdictional question had nothing to do with the Seventh Circuit's ruling in *Bell I*, which was a separate appeal involving separate issues. And the Seventh Circuit considered the jurisdictional question of *Bell II* in the most common way such a dispute could arise: a party seeking appellate review of an order denying an extension after missing the time within which to file an appeal. The procedural history of this appeal thus cleanly raises the question presented before the Court.

Nor is there any merit to Respondents' suggestion that Petitioner's appeal in *Bell II* was "duplicative" because Petitioner should have challenged the District Court's denial of his Rule 4(a)(5) motion in *Bell I*. Opp. 13. In filing the appeal in *Bell II*, Petitioner was following the great weight of published authority in the Courts of Appeals, which confirms that "[a] district court's order refusing to extend the time for filing a notice of appeal is itself an appealable final judgment." *Bishop v. Corsentino*, 371 F.3d 1203, 1206 (10th Cir. 2004); *see also* Wright & Miller, *supra* at § 3950.3 ("If the district court denies the extension of time and the original appeal deadline has run out, the appellant should appeal the denial."). These cases make clear that appeals from orders denying Rule 4(a)(5) relief are not duplicative of appeals from a final judgment on the merits. Rather, as Petitioner's case perfectly illustrates, they raise an entirely separate issue: did good cause or excusable neglect exist such that the district court should have permitted the belated filing of a notice of appeal. If those orders are not separately appealable, the wholly distinct issues presented there will often not be reviewable in any court. Indeed, that is exactly what has happened here, as Petitioner has been unable to present any argument before the Seventh Circuit about the District Court's erroneous Rule 4(a)(5) order.

Petitioner, moreover, has been diligently attempting to obtain review of the District Court's Rule 4(a)(5) order since it was issued: Not only did he file the appeal in *Bell II*, but, on the same day, Petitioner notified the panel in *Bell I* of the appeal and his intent to challenge the District Court's Rule 4(a)(5) denial. *Bell I* App. Ct. Dkt. No. 55. Petitioner could not have known at that time that the Seventh Circuit would erroneously dismiss his appeal in *Bell II*. Rather, Petitioner reasonably assumed that because the Seventh Circuit had indicated the *Bell I* appeal would be dismissed if Rule 4(a)(5) relief was denied, Petitioner's only avenue for review would be to file a new appeal of the Rule 4(a)(5) denial, consistent with the weight of published authority. *See Bell I* App. Ct. Dkt. No. 49. Nor could Petitioner have anticipated that the Seventh Circuit would *sua sponte* take a cursory look at the District Court's Rule 4(a)(5) order in *Bell I* without allowing him to present any arguments against it. Even at that point, however, Petitioner did not stop attempting to obtain review, but instead filed a petition for panel rehearing in *Bell I* which argued that the Seventh Circuit should have allowed him to present his arguments against the District Court's Rule 4(a)(5) order. *Bell I* App. Ct. Dkt. No. 63. When the Seventh Circuit denied rehearing, Petitioner was left with no recourse but to file this Petition.

Indeed, Respondents wrongly assert several times that "this Court's review is unnecessary because Petitioner . . . could have asked the Seventh Circuit for leave to brief whether the district court abused its discretion in denying his motion under FRAP 4(a)(5) or sought rehearing after the Seventh Circuit dismissed *Bell I* . . . [b]ut he did neither of those things." Opp. 13; *see also* Opp. 8-9. But Respondents' assertion is simply not true. As explained above, Petitioner *did* seek rehearing in *Bell I* after the Seventh Circuit's unexpected *sua sponte* cursory review and dismissal of *Bell I*. *See Bell I* App. Ct. Dkt. 63. In that petition for rehearing, Petitioner argued that he should be allowed to present arguments against the District Court's Rule 4(a)(5) order and that if he were allowed to present these arguments, he would likely prevail, but his request was denied. *Id.* Contrary to

Respondents' assertions, the Seventh Circuit's erroneous dismissal of *Bell II* (contrary to precedent from every other Circuit) and its declining to hear Petitioner's arguments in *Bell I* have eliminated Petitioner's ability to have his appeal heard outside of this Petition. Clearly, the Petition was not "unnecessary," as Respondents would have the Court believe.

As a last resort, Respondents contend that any decision on remand will be bound by the law of the case doctrine. Opp. 13-14. That doctrine, however, "merely expresses the practice of courts generally to refuse to reopen what has been decided, [it is] not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (Holmes, J.). And its animating principle is to "protect both court and parties against the burdens of repeated reargument by indefatigable diehards." 18B C. Wright & A. Miller, *Federal Practice and Procedure* § 4478 (2d ed. Supp. 2017). Petitioner has never had an opportunity to fully present his arguments to the Seventh Circuit about why the denial of his Rule 4(a)(5) motion was an abuse of discretion, and, given the weight of authority in his favor, such an opportunity may well convince the Seventh Circuit that the District Court's denial was improper. *See* Pet. 24-27; *see also* *Pepper v. United States*, 562 U.S. 476, 506-07 (2011) ("[T]he [law of the case] doctrine does not apply if the court is convinced that its prior decision is clearly erroneous and would work a manifest injustice.") (quotation omitted); *Agostini v. Felton*, 521 U.S. 203, 236 (1997) (similar). It is unlikely that the Seventh Circuit will consider itself bound by a *sua sponte* cursory review made without even knowing what

Petitioner's arguments against the Rule 4(a)(5) order were.

III. RESPONDENTS' BELATED CLAIM OF ANTECEDENT LEGAL ERROR CANNOT BE CONSIDERED NOW

Respondents assert that the need to answer the question presented by Petitioner would be obviated if review was granted because of the answer to an "antecedent legal question—whether a district court must treat *any* document filed within 60 days after judgment is entered as a motion for extension of time to file a notice of appeal." Opp. 15-20. Again, however, because this Petition arises out of the Seventh Circuit's dismissal for want of jurisdiction of Petitioner's appeal in *Bell II*, the only question presented is a jurisdictional one: whether orders denying Rule 4(a)(5) relief are separately appealable. This Petition does not even present the merits of the District Court's Rule 4(a)(5) order, let alone whether the Seventh Circuit ruled correctly in the separate appeal in *Bell I*, from which the Respondents never filed a petition for certiorari. Simply put, the rightness or wrongness of the Seventh Circuit's ruling in *Bell I* has nothing to do with its jurisdictional ruling in *Bell II*.

* * *

Petitioner has suffered one hardship after another. First, he was forcibly taken to a large-windowed observation cell, stripped naked, and left for eight days with nothing to cover himself when visitors arrived except a small piece of cardboard. Then, the District Court mistakenly applied Eighth

Amendment cases and rationales in rejecting his claims regarding that mistreatment, even though he was a civilly committed mental patient, not a convicted criminal. After Petitioner's case was remanded in *Bell I*, the District Court denied him an extension even though he was a *pro se* mental patient who had no legal training and no access to a copy of the relevant federal rules. Compounding these errors, the Seventh Circuit stumbled by *sua sponte* dismissing *Bell II* on a basis rejected by every other Circuit and then refusing in *Bell I* to hear Petitioner's challenge to the District Court's Rule 4(a)(5) order.

This Petition now presents a straightforward legal question of jurisdiction: Are orders denying relief under Rule 4(a)(5) separately appealable? The Seventh Circuit's resolution of that issue was case dispositive in *Bell II*; it is directly contrary to the rule applicable in every other Court of Appeals; and it has both insulated Petitioner's Rule 4(a)(5) arguments from appellate review and created a potential trap for would-be appellants, particularly those, like Petitioner, who are proceeding *pro se*. This issue therefore warrants this Court's review.

In the alternative, however, this Court should summarily reverse the Seventh Circuit and remand this case for further proceedings. Respondents do not even attempt to argue that Rule 4(a)(5) orders are not separately appealable. Nor do they deny the clear weight of authority in favor of the view that such orders are separately appealable. Instead, they claim only that *Bell II* was not dismissed on that basis—a rationale belied by the order itself. Summarily reversing the Seventh Circuit's erroneous jurisdictional ruling would allow Petitioner to finally present his arguments before the Seventh Circuit—likely paving the way for him to obtain relief from the District Court's questionable denial of his Rule 4(a)(5) motion. And, more importantly, it would place the Seventh Circuit's jurisprudence in accord with every other Circuit to have considered this issue.

CONCLUSION

For the foregoing reasons, the Court should grant certiorari or, in the alternative, summarily reverse the Seventh Circuit and remand the case for further proceedings.

Respectfully submitted,

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