



The Record

JOURNAL • OF • THE • APPELLATE • PRACTICE • SECTION

www.flabarappellate.org

Volume XVI, No. 8

THE FLORIDA BAR

Fall-Winter 2009

INSIDE:

First District Court of Appeal Takes Creative Step in Addressing Workload with Tight Budget2

Message from the Chair.....3

Three Strikes & You're Out-A Proposal to Modify the Rule Regarding 3,800 Motions.....5

The United States Supreme Court Clarifies When a Deadline to File a Notice of Appeal is "Jurisdictional.".....6

Florida's Budget Crisis Does Not Provide Justification for Permitting an Illegal Criminal Sentence to Stand: Counterpoint to Three Strikes & You're Out - A Proposal to Modify the Rule Regarding 3,800 Motions. 10

The Office of the Florida Solicitor General: an Appellate Lawyer's Field of Dreams.... 14

Family Feud: Appellate Edition..... 16

Florida's Appellate Courts Hit with Budget Cuts 20

Successful Appellate Practice Workshop 2008..... 20

14th Appellate Practice Institute.....22-27

Judge Nelly Khouzam Elevated to the Second District Court of Appeal

By Duane A. Daiker¹



The Honorable Nelly Khouzam's enthusiasm for her new role is unmistakable. After serving many years on the circuit bench, Judge Khouzam welcomes the new challenges she faces on the appellate bench at the Second District Court of Appeal. By Judge Khouzam's third day on the Court she sat for oral argument and became fully engrossed in the work of an appellate judge. She credits some of the ease of her transition with the time she spent with the Second District as a visiting judge. Judge Khouzam was immediately very impressed with the collegiality of the court and the accessibility of her fellow judges. Far from being isolated, she feels very much a part of a team.

The burden of her responsibility to the law, to the court system, and to the litigants is very clear to her, and she takes the role of the Second District very seriously. Judge Khouzam

has a strong desire to make the right decision in every case and to make each opinion clear and unambiguous. She puts considerable time into both writing her own opinions and carefully reviewing those of her colleagues. She feels a personal sense of responsibility for the proper development of the law in the Second District.

Judge Khouzam quickly developed an appreciation for the relative quiet of her new office in Lakeland. The quiet efficiency of an appellate court was a

welcome change to the faster pace of the circuit bench.

Coincidentally, Judge Khouzam is married to Second District Judge Morris Silberman. Judge Silberman, who maintains his office at the Tampa branch, has been proudly serving since 2001. Judge Khouzam and Judge Silberman have chosen not to serve on any three judge panels to-

gether, although no ethical restriction would prevent them from doing so.

Judge Khouzam's appointment by



Judge Khouzam

See "Judge Khouzam" page 7

The United States Supreme Court Clarifies When a Deadline to File a Notice of Appeal is “Jurisdictional.”

By Paul A. Avron¹



Most attorneys have worked under the assumption that the deadline to file a Notice of Appeal (“NOA”) is “jurisdictional,” that is, the filing of a late NOA means that a federal appellate court lacks jurisdiction to review a district court’s judgment. There is ample case law providing support for that working assumption; however, recent case law from the Supreme Court clarifies that not all deadlines are jurisdictional.

Bowles v. Russell, 551 U.S. 205, 127 S. Ct. 2360 (2007), holds that where the deadline to file a NOA is statute-based, it is jurisdictional, but where that deadline is rule-based, that is, a “claim-processing” rule, it may be mandatory but it does not otherwise affect the appellate court’s power to hear an appeal from a district court and can, therefore, be waived. *Accord Kontrick v. Ryan*, 540 U.S. 443, 454-55 (2004) (“Courts, including this Court, ... have more than occasionally [mis]used the term ‘jurisdictional’ to describe emphatic time prescriptions in [claim processing] rules.... Classifying time prescriptions, even rigid ones, under the heading ‘subject matter jurisdic-

tion’ can be confounding. Clarity would be facilitated if courts and litigants used the label ‘jurisdictional’ not for claim-processing rules, but only for prescriptions delineating the classes of cases (subject-matter jurisdiction) and the persons (personal jurisdiction) falling within a court’s adjudicatory authority.”) (citation, some internal quotation marks, and brackets omitted).

The Court’s rationale was that Congress has the power to determine the subject matter jurisdiction of a lower federal court. *Bowles*, 127 S. Ct. at 2364-65 (“Because [o]nly Congress may determine a lower federal court’s subject matter jurisdiction...it was improper for courts to use the term ‘jurisdictional’ to describe emphatic time prescriptions in rules of court.... Because Congress decides whether federal courts can hear cases at all, it can also determine when, and under what conditions, federal courts can hear them.”) (internal quotation marks omitted). Specifically, the *Bowles* Court recognized that filing deadlines not dictated by statute are “procedural rules adopted by the [Court] for the orderly transaction of its business” and “are not jurisdictional.” *Id.* (quoting *Schacht v. United States*, 398 U.S. 58, 64 (1970)). The term “jurisdictional” means the power of a federal

court to hear a class of cases. *TrustedNet Media Holdings, LLC v. The Morrison Agency, Inc. (In re TrustedNet Media Holdings, LLC)*, 525 F.3d 1095, 1101 (11th Cir. 2008) (“the basic nature of subject matter jurisdiction - i.e., that it is the statutorily conferred power of the court to hear a class of cases.”).

Prior to *Bowles*, the Supreme Court has recognized that its past use of the term “jurisdictional” had “been less than meticulous,” and it has “more than occasionally used the term ‘jurisdictional’ to describe emphatic time prescriptions in rules of court.” *Kontrick*, 540 U.S. at 454; *see also, e.g., Griggs v Provident Consumer Discount Co.*, 459 U.S. 56, 61 (1982) (filing a NOA within the prescribed time frame is mandatory and jurisdictional) (internal quotation marks omitted); *Browder v. Director, Dept. of Corrections, IL*, 434 U.S. 257, 264 (1978) (same); *United States v Robinson*, 361 U.S. 220, 224 (1960) (same).

Factually, *Bowles* involved an appeal from a judgment entered by a district court denying a petition for habeas corpus. The petitioner had thirty days to appeal pursuant to Federal Rule of Appellate Procedure 4(a)(1)(A) and 28 U.S.C. § 2107(a).² After the time to file a NOA ran, petitioner filed a motion pursuant to Rule 4(a)(6),³ seeking an extension of time within which to file a NOA. The district court granted the motion; the petitioner filed his NOA within the extended period granted by the district court (but outside the fourteen day deadline provided by Rule 4(a)(6)). The Court held that the deadline to file a NOA set forth in Rule 4(a) was jurisdictional since the Rule derived from a statute, 28 U.S.C. § 2107(a) and (c). *Bowles*, 127 S. Ct. at 2366; *see, e.g., Ruiz-Martinez*, 516 F.3d 102, 118-19 (2d Cir. 2008) (thirty day deadline set forth in 8 U.S.C. § 1252(b)(1) for review of final orders of removal by the Board of Im-

THE APPELLATE PRACTICE SECTION OF THE FLORIDA BAR PREPARES AND PUBLISHES THIS JOURNAL

Siobhan Helene Shea, Palm Beach	Chair
Dorothy F. Easley, Miami	Chair-Elect
Raoul G. Cantero, III, Miami	Vice-Chair
Matthew J. Conigliaro, St. Petersburg	Secretary / Treasurer
Jack R. Reiter, Miami	Editor-in-Chief, The Record
Alina Alonso, Miami	Assistant Editor
Robert Mandel, Miami	Assistant Editor
Valerie Yarbrough, Tallahassee	Program Administrator
Clay Shaw, Tallahassee	Layout/Art Design

Unless expressly stated otherwise, The Record’s articles reflect only the opinions and ideas of The Record’s authors.

See “Deadline to File” page 21

DEADLINE TO FILE

from page 6

migration Appeals is jurisdictional). The Court explained that while several of its past decisions attempted “to clarify the distinction between claims-processing rules and jurisdictional rules, none of them calls into question our long-standing treatment of statutory time limits for taking an appeal as jurisdictional.” *Bowles*, 127 S. Ct. at 2364.⁴

On the other hand, *Kontrick* involved application of Federal Rule of Bankruptcy Procedure 4004(a), which provides that a complaint objecting to a debtor’s discharge pursuant to § 727(a) of the Bankruptcy Code must be filed within sixty days after the initial meeting of creditors. Rule 4004(a), as it then existed, provided for an extension of this deadline if filed prior to expiration of the sixty-day period. After noting Bankruptcy Rule 9006(b)(3) which provides that the deadline in Rule 4004(a) could only be extended to extent provided thereunder, the *Kontrick* Court explained that claim-processing rules like Rule 4004 and Rule 9006⁵ did not affect the lower court’s subject matter jurisdiction. The Court noted the difference between “a rule governing subject-matter jurisdiction and an inflexible claim-processing rule.... [A] claim-processing rule, ... even if unalterable on a party’s application, can nonetheless be forfeited if the party asserting the rule waits too long to raise the point.” *Kontrick*, 540 U.S. at 456. *See, e.g., National Ecological Foundation v. Alexander*, 496 F.3d 466, 475-76 (6th Cir. 2007) (holding that Federal Rules of Civil Procedure 6(b) and 59(e) are claims-processing rules that provided for “a forfeitable affirmative defense”).

Eberheart v. United States, 546 U.S. 12 (2005), extended the rule enunciated in *Kontrick*. *Eberheart* held that Federal Rules of Criminal Procedure 33 and 45(b)(2),⁶ were claims-processing rules like those at issue in *Kontrick*. In short, the *Eberheart* Court correctly saw no functional difference between the bankruptcy rules of procedure at issue in *Kontrick* and the criminal rules of procedure before it.

While *Bowles* appears to have erased

any doubt as to the distinction between statutory-based deadlines to file NOAs and rule-based deadlines, the seemingly straight-forward holding of that case has been called into question, at least according to a panel of the Seventh Circuit, by a subsequent decision of the Supreme Court. In *Ross-Tousey v. Neary*, 2008 WL 5234070 (7th Cir. Dec. 17, 2008), the Seventh Circuit stated that it did not believe that the Supreme Court “intended *Bowles* to apply to every statutory deadline, especially in light of the fact that such an interpretation would overturn huge swaths of established case law.” Making reference to the post-*Bowles* decision in *John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008), the Seventh Circuit explained that the Supreme Court “distinguished between the majority of statutes of limitations that ‘seek primarily to protect defendants against stale or unduly delayed claim,’ which are non-jurisdictional and subject to waiver...and statutes of limitation that seek to ‘achieve a broader system-related goal’ such as ‘promoting judicial efficiency,’ which are ‘more absolute’ and have been referred to as ‘jurisdictional.’” (Internal and external citations omitted).

While making that distinction, *John R. Sand & Gravel* (which concerned a “special” statute of limitations governing suits against the United States in the Court of Federal Claims) did not retreat, at least not explicitly, from its holding in *Bowles* (which concerned a statute setting a deadline for an adverse litigant to file a NOA). The *John R. Sand & Gravel* Court determined that 28 U.S.C. § 2501 (the statute of limitations for suits brought in the Court of Federal Claims) was of the second, “more absolute,” type, 128 S. Ct. at 753-54, and therefore it was “not susceptible to equitable tolling,” *id.* at 755, which makes it consistent with the holding in *Bowles*. *See Marsoun v. United States*, 2008 WL 5351754, *3-4 (D. D.C. Dec. 23, 2008) (rejecting argument that *John R. Sand & Gravel* limited the holding in *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) that “when Congress does not rank a statutory limitation ... as jurisdictional, courts should treat the restriction as nonjurisdictional in character,” which, like *Bowles*, was cited to

favorably in *John R. Sand & Gravel*). As such, the author submits that the holding in *Bowles* that statutory-based deadlines are “jurisdictional” in that failing to file a NOA within that deadline results in the appellate court lacking the power to review a district court judgment, while the failure to meet a rule-based deadline, however mandatory, does not and cannot displace the power of a federal appellate court to review such a judgment, remains intact.

(Endnotes)

1. Paul A. Avron is an attorney with the law firm of Berger Singerman, P.A. Mr. Avron’s primary practice areas are business bankruptcy law and appellate litigation in both state and federal courts. Mr. Avron has published several appellate-related articles in *The Record*, and is a member of the Appellate Practice Section of The Florida Bar.
2. Federal Rule of Appellate Procedure 4(a)(1)(A), provides, in part, that “[i]n a civil case...the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed is entered.” The Court explained that Rule 4, Fed. R. App. P. “carries § 2107 into practice.” *Bowles*, 127 S. Ct. at 2363. Section 2107(a) provides that “[e]xcept as otherwise provided in this section, no appeal shall bring any judgment, order or decree in an action, suit or proceeding of a civil nature before a court of appeals for review unless notice of appeal is filed, within thirty days after the entry of such judgment, order or decree.” 28 U.S.C. § 2107(a).
3. Federal Rule of Appellate Procedure 4(a)(6) provides the authority for a district court to reopen, for a period of fourteen days, the time for a litigant to file a NOA after the deadline for doing so has expired. *Accord* 28 U.S.C. § 2107(c) (same).
4. Of note, the *Bowles* Court overruled prior case law providing for an equitable exception to the requirement that a NOA be timely filed—the “unique circumstances” doctrine—finding that the Court lacked the authority to create such exceptions. *Bowles*, 127 S. Ct. at 2366 (“Because this Court has no authority to create equitable exceptions to jurisdictional requirements, use of the ‘unique circumstances’ doctrine is illegitimate.”). The dissent strenuously took issue with this pronouncement. *See id.* at 2369-71.
5. Federal Rule of Bankruptcy Procedure 9006(b)-(c) provides the authority for both an enlargement and reduction of time within certain acts must be done.
6. At the time of *Eberheart*, Federal Rule of Criminal Procedure 33 provided that a district court could vacate a judgment and grant a new trial if the interest of justice so required, but required that a motion seeking that relief had to be filed within seven days after the verdict or finding of guilt or within such time as the court directed within that seven day period. Like Bankruptcy Rule 9006(b)(3), Rule 45(b)(2) provided that a district court could not extend the seven day deadline set forth in Rule 33(a).