APPELLATE PRACTICE
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Winter 2018, Vol. 37 No. 2

The Supreme Court's Current Cases on Jurisdictional Rules, Consolidation, and Plain Error

By Taylor H. Crabtree – February 26, 2018

In a term chock-full of blockbuster cases, the three cases featured here won't make many top 10 lists. But for appellate litigators, these cases are likely to figure much more prominently in their daily practice than cases involving cake bakers, travel bans, or the efficiency gap.

Hamer v. Neighborhood Housing Services of Chicago

In its first decision in an argued case for the term, the U.S. Supreme Court gave appellate litigators an early gift leading into the holidays: a bright-line rule to determine when deadlines that relate to transferring a case from one court to another are jurisdictional.

The particular rule at issue in *Hamer v. Neighborhood Housing Services of Chicago*, 138 S. Ct. 13 (2017), was Federal Rule of Appellate Procedure 4(a)(5)(C), which limits the length of extension that a district court may grant to file a notice of appeal. Rule 4(a)(5) implements 28 U.S.C. section 2107(c), providing authority to grant extensions but making no mention of the 30-day cap.

The circuit split arose out of two Supreme Court cases that seem to point in opposite directions. In *Bowles v. Russell*, the Court held that "the timely filing of a notice of appeal in a civil case is a jurisdictional requirement." 551 U.S. 205, 214 (2007). Because a deficient extension renders the appeal untimely, several circuits reasoned that the time cap must be jurisdictional. *See, e.g.*, *Freidzon v. OAO LUKOIL*, 644 F. App'x 52, 53 (2d Cir. 2016); *Pettaway v. Dep't of Educ.*, 627 F. App'x 259 (4th Cir. 2016); *Peters v. Williams*, 353 F. App'x 136, 137 (10th Cir. 2009). Pointing in a different direction, in *Kontrick v. Ryan*, the Supreme Court held that only Congress may set the limits of a lower federal court's jurisdiction. 540 U.S. 443, 452 (2004). Looking to *Kontrick*, the D.C. Circuit held that Rule 4(a)(5)(C) was not jurisdictional because the time cap did not appear in the statute. *See, e.g.*, *Youkelsone v. F.D.I.C.*, 660 F.3d 473, 476 (D.C. Cir. 2011).

Ultimately, the Supreme Court sided with the D.C. Circuit and held that Rule 4(a)(5)(C)'s deadline was a mandatory claim-processing rule rather than a jurisdictional limitation: "If a time prescription governing the transfer of adjudicatory authority from one Article III court to

APPELLATE PRACTICE
ABA Section of Litigation

Winter 2018, Vol. 37 No. 2

another appears in a statute, the limitation is jurisdictional; otherwise, the time specification fits within the claim-processing category." *Hamer*, 138 S. Ct. at 20 (internal citations omitted).

Hall v. Hall

In *Hall v. Hall*, No. 16-1150, set for argument on January 16, 2018, the Court may answer a question that has long been the subject of a circuit split: Where two actions have been consolidated pursuant to Rule 42(a)(2), is a decision resolving all of the claims in one action final and immediately appealable if claims from the other action remain pending?

The two actions that form the basis for this case arose out of a dispute between Samuel Hall and his sister, Elsa Hall, over the management of their late mother's assets. The district court consolidated the two cases and tried them together. Following a jury verdict in favor of Samuel on all of the claims, the court entered separate judgments disposing of the claims in each of the cases. Elsa filed a motion for a new trial as to the claims in one judgment and, while that motion was still pending, a notice of appeal as to the other judgment. After the district court granted the motion for a new trial, the Third Circuit dismissed the appeal for lack of jurisdiction, holding that the pendency of the claims in the consolidated action deprived it of jurisdiction. *Hall v. Hall*, 679 F. App'x 142 (3d Cir. 2017).

The essential question is the effect of a consolidation order under Rule 42: Does it merge the cases into a single action such that all issues in all of the consolidated cases must be resolved before any is final, or do they remain distinct such that an order resolving one but not all of those consolidated cases is nonetheless a final decision for purposes of 28 U.S.C. section 1291?

The federal circuit courts have developed four different approaches to answering this question. At one end of the spectrum, some circuits hold that consolidated actions retain their separate identities, and so an order that resolves all of the claims in one of the consolidated cases is final and immediately appealable even if claims in the other remain pending. *See, e.g.*, *Albert v. Maine Cent. R.R. Co.*, 898 F.2d 5, 6–7 (1st Cir. 1990); *Beil v. Lakewood Eng'g & Mfg. Co.*, 15 F.3d 546, 551 (6th Cir. 1994). At the other end of the spectrum, the Ninth, Tenth, and Federal Circuits treat consolidated cases as a single action, and so an order resolving only one of two or more consolidated cases is not immediately appealable absent a Rule 54(b) certification. *Huene v. United States*, 743 F.2d 703, 705 (9th Cir. 1984); *Trinity Broad. Corp. v. Eller*, 827 F.2d 673, 675 (10th Cir. 1987); *Spraytex, Inc. v. DJS&T*, 96 F.3d 1377, 1382 (Fed. Cir. 1996). A plurality of circuits takes an intermediate position, considering on a case-by-case basis the nature and

APPELLATE PRACTICE
Section of Litigation

Winter 2018, Vol. 37 No. 2

extent of the consolidation to determine whether the actions retain their separate identities or merge into a single cause for purposes of section 1291. *See, e.g.*, *Watson v. Adams*, 642 F. App'x 240, 241 (4th Cir. 2016); *Tri-State Hotels, Inc. v. F.D.I.C.*, 79 F.3d 707, 711–12 (8th Cir. 1996); *Lewis Charters, Inc. v. Huckins Yacht Corp.*, 871 F.2d 1046, 1048–49 (11th Cir. 1989); *Bergman v. City of Atl. City*, 860 F.2d 560, 565–66 (3d Cir. 1988); *Sandwiches, Inc. v. Wendy's Int'l, Inc.*, 822 F.2d 707, 710 (7th Cir. 1987); *Ringwald v. Harris*, 675 F.2d 768 (5th Cir. 1982). Finally, the Second Circuit applies a modified case-by-case approach with a heavy thumb on the scale in favor of treating consolidated cases as a single action for purposes of section 1291. *Hageman v. City Investing Co.*, 851 F.2d 69, 71 (2d Cir. 1988) (holding that "when there is a judgment in a consolidated case that does not dispose of all claims which have been consolidated, there is a strong presumption that the judgment is not appealable absent Rule 54(b) certification").

In *Gelboim v. Bank of America Corp.*, 135 S. Ct. 897 (2015), the Supreme Court addressed this question with respect to cases consolidated in multidistrict litigation (MDL). It held that a decision by a court overseeing an MDL that resolves all issues in a transferred case renders that case immediately appealable notwithstanding the fact that claims in other consolidated cases remain unresolved. *Id.* at 904. The Court limited its holding to the MDL context and expressly left open the question of whether, where two actions have been consolidated for all purposes pursuant to Rule 42, a judgment resolving all of the claims in one action is final and appealable if claims from the other action remain pending. *Id.* at 904 n.4.

In *Hall v. Hall*, the petitioner argues that the Court should resolve the split by extending the rule from *Gelboim* to cases consolidated under Rule 42(a)(2), but I don't think that's likely. Unlike Rule 42 consolidations, MDL consolidations are generally limited to pretrial purposes, and the statute contemplates that those actions will be remanded separately to the districts from whence they came once those pretrial proceedings are completed. 28 U.S.C. § 1407(a).

Instead, I predict the Court will hold that an order resolving only one of two or more consolidated cases is not final, making *Gelboim* the exception to the general rule. Unlike MDL consolidations, Rule 42(a)(2) consolidations are generally treated as a single action in district courts, and the Supreme Court has emphasized the importance of reading section 1291 functionally, with an eye toward preserving the principle of finality. *See Microsoft Corp. v. Baker*, 137 S. Ct. 1702, 1712 (2017). While there are some benefits to the case-by-case approach of assessing the extent of consolidation, a bright-line rule affords certainty to

APPELLATE PRACTICE
ABA Section of Litigation

Winter 2018, Vol. 37 No. 2

litigants—a feature that is of paramount importance for a rule with jurisdictional consequences. Finally, the availability of Rule 54(b) will likely assuage any concern that members of the Court might have that adopting this rule will leave cases languishing in district courts unable to receive review while tangentially related consolidated actions proceed.

Regardless of the particular approach the Supreme Court chooses, multijurisdiction appellate litigators will likely welcome any decision that establishes a consistent nationwide practice.

Rosales-Mireles v. United States

For criminal appellate litigators, *Rosales-Mireles v. United States*, No. 16-9493, set for argument February 21, 2018,may seem like déjà vu. Following closely on the heels of *Molina-Martinez v. United States*, 136 S. Ct. 1338 (2016), *Rosales-Mireles* is the second case in as many years in which the Supreme Court will weigh in on a Fifth Circuit standard that treats unpreserved Federal Sentencing Guidelines (Guidelines) errors more harshly than its sister circuits do.

In 2016, the Supreme Court addressed what a defendant must show to establish that a Guidelines calculations error affected substantial rights when the sentence imposed fell within the corrected Guidelines range. *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1345 (2016). Unlike the other federal courts of appeals, which had generally held that the application of an incorrect Guidelines range was itself evidence that the error affected substantial rights, the Fifth Circuit required a defendant to present "additional evidence" that the incorrect range did in fact affect the defendant's sentence. *Id.* at 1345. In a decision that emphasized the primacy of the Guidelines in federal criminal sentencing, the Supreme Court held that "[w]hen a defendant is sentenced under an incorrect Guidelines range—whether or not the defendant's ultimate sentence falls within the correct range—the error itself can, and most often will, be sufficient to show a reasonable probability of a different outcome absent the error." *Id.*

For those not schooled in federal criminal appellate procedure, Federal Rule of Criminal Procedure 52(b) allows a court of appeals to grant relief on an error not raised below if (1) there was an error, (2) that error was plain, and (3) the error affected substantial rights. *United States v. Olano*,507 U.S. 725, 732–34 (1993). In what's often called the fourth prong, the courts of appeals exercise their discretion to correct plain errors when failing to do so would "seriously affect the fairness, integrity or public reputation of judicial proceedings." *Id.* at 736. In *Rosales-Mireles*, the Court will address the application of the fourth prong in the same context as that of *Molina-Martinez*.

APPELLATE PRACTICE
ABA Section of Litigation

Winter 2018, Vol. 37 No. 2

The relevant facts of *Rosales-Mireles* are simple. Due to an error that went unnoticed at Rosales-Mireles's sentencing, the district court double counted one of his convictions and sentenced him to a term of 78 months, near the bottom of the 77–96 months' Guidelines range. *United States v. Rosales-Mireles*, 850 F.3d 246, 248 (5th Cir. 2017). Without the double counting, his Guidelines range would have been 70–87 months. *Id.* Consistent with *Molina-Martinez*, the Fifth Circuit determined that Rosales-Mireles had met the first three prongs of the plain error standard. *Id.* at 249. However, the court declined to grant relief under the Fifth Circuit's own articulation of the fourth prong, which requires that the error "shock the conscience of the common man, serve as a powerful indictment against our system of justice, or seriously call into question the competence or integrity of the district judge." *See id.* at 250 (quoting *United States v. Segura*, 747 F.3d 323, 331 (5th Cir. 2014)). In a passage sure to be the focus of much attention, the Fifth Circuit explained thus:

> Where the difference between the imposed sentence and the properly calculated range is small, we generally decline to correct the error. Here, there is no discrepancy between the sentence and the correctly calculated range. The court sentenced Rosales–Mireles to 78 months, which is in the middle of the proper range of 70–87 months. We cannot say that the error or resulting sentence would shock the conscience.

Id. (footnote omitted). Here again, the Fifth Circuit stands apart from its sister circuits. *See, e.g.*, *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333 (10th Cir. 2014) (collecting cases from six other circuits presuming that a plain Guidelines error will satisfy the fourth prong).

Set against the backdrop of *Molina-Martinez*, the government's odds do not look good. Although in *Molina-Martinez* the Court recognized that appellate courts retain discretion under *Olano* to deny relief even in Guidelines error cases, I doubt that the Court will look favorably on the Fifth Circuit applying its discretion in a way that categorically bars defendants in Rosales-Mireles's position from relief. The essential lesson of *Molina-Martinez* is that if a defendant can show that the district court calculated an inordinately high Guidelines range, that alone is usually sufficient to establish that the district court sentenced the defendant to more time in prison than it would have absent the error.

APPELLATE PRACTICE
Section of Litigation

Winter 2018, Vol. 37 No. 2

And as the most junior member of the Court put it recently, "[W]ho wouldn't hold a rightly diminished view of our courts if we allowed individuals to linger longer in prison than the law requires only because we were unwilling to correct our own obvious mistakes?" *Hicks v. United States*, 137 S. Ct. 2000, 2001 (2017) (Gorsuch, J., concurring).

Taylor H. Crabtree is a business litigator and appellate practitioner at Ellis & Winters LLP in Raleigh, North Carolina.