

No. _____

IN THE
Supreme Court of the United States

Michael Lynn Robertson,

Petitioner,

v.

Banner Bank,

Respondent.

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

**APPLICATION FOR EXTENSION OF TIME
TO FILE A PETITION FOR WRIT OF CERTIORARI**

Michael Lynn Robertson

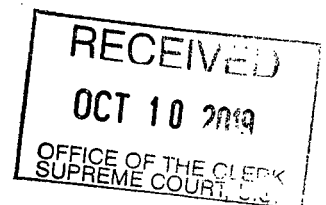
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APPLICATION

To the Honorable Sonia Sotomayor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Tenth Circuit:

Pursuant to Supreme Court Rules 13.5, 22, and 30, and 28 U.S.C. § 2101(c), Applicant Michael Lynn Robertson respectfully requests a 60-day extension of time, to and including Monday, December 23, 2019, to file a petition for a writ of certiorari to review the decision below.

1. The court of appeals entered its judgment on May 29, 2019. *In re Robertson*, Court of Appeals, Tenth Circuit 2019 (Appendix A). The Tenth Circuit denied Robertson's timely petition for rehearing and suggestion for rehearing *en bank* on July 26, 2019 (Appendix B). Currently, a petition for certiorari is due on October 24, 2019. This application is being filed over ten days before the petition is due. *See* Sup. Ct. R. 13.5. The jurisdiction of the Court would be invoked under 28 U.S.C. § 1254(1).

2. This case is a serious candidate for certiorari review because it squarely and cleanly presents important standard of review questions on the issue of jurisdictional time prescriptions in bankruptcy appeals and on the effect of a court's appropriate decision to entertain an untimely rehearing petition on which the courts of appeals are openly divided.

a. Over the past 15 years, this Court has written extensively on the jurisdictional consequences of statutory filing requirements; however, it has not yet considered the filing requirements imposed by 28 U.S.C. § 158(c)(2) on an appeal from final judgments, orders or decrees from a bankruptcy court. An appeal filing

deadline prescribed by statute is considered "jurisdictional," meaning that late filing of the appeal notice necessitates dismissal of the appeal. See *Bowles v. Russell*, 551 U.S. 205, 210-213, 127 S.Ct. 2360, 168 L.Ed.2d 96. In contrast, a time limit prescribed only in a court-made rule is not jurisdictional. It is a mandatory claim-processing rule that may be waived or forfeited. *Ibid.* This Court and other forums have sometimes overlooked this critical distinction. See *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 161, 130 S.Ct. 1237, 176 L.Ed.2d 18. The time limit in 28 U.S.C. § 158(c)(2) is only contained in Federal Rule of Bankruptcy Procedure 8002 yet all the circuits hold that time limit as jurisdictional, reasoning that "Rule 8002(a) defines the statutory time period for filing an appeal under Section 158(c)(2), rather than the reverse. [T]reating Rule 8002(a) as jurisdictional arguably conflicts with the principle espoused in Rule 9030 because doing so allows a bankruptcy rule to set the time within in which a party must file an appeal and, thereby, allows a bankruptcy rule to affect the subject-matter jurisdiction of a federal court. But, ultimately this argument fails. It is true that bankruptcy rules *alone* cannot create or withdraw jurisdiction. Here, however, it is Section 158(c)(2) that is determining jurisdiction by incorporating the time limits prescribed in Rule 8002(a)." *Emann v. Latture (In re Latture)*, 605 F.3d 830, 837 (10th Cir. 2010). This case presents an important issue concerning the rights and responsibilities of those parties in bankruptcy proceedings that should to be addressed by this Court.

b. This case also concerns an issue over which the circuits are openly divided. Robertson filed a rehearing petition under Federal Rule of Bankruptcy Procedure 9023 and Federal Rule of Civil Procedure 59(e) which the bankruptcy

court properly entertained and decided on the merits. The Tenth Circuit held that the petition was untimely filed. Following opinions from the First, Third, Fourth, Fifth, Seventh, and Eleventh Circuits, which follow this Court's decision in *Browder v. Director, Department of Corrections*, 434 U.S. 257, 265 (1978). "It was untimely under the Civil Rules and therefore could not toll the running of time to appeal under Rule 4(a)", the Tenth Circuit held that, even if the petition was properly entertained by the bankruptcy court because Rule 9023 and Rule 59(e) are claim processing rules, it did not toll the running of the time to appeal.

In contrast, the Second, Sixth, Ninth, and D.C. Circuits have concluded that an untimely post-judgment motion can toll the appeal period under Appellate Rule 4(a)(4)(A). *See Demaree v. Pederson*, 887 F.3d 870, 876 (9th Cir. 2018) (per curiam); *Weitzner v. Cynosure, Inc.*, 802 F.3d 307, 312 (2d Cir. 2015); *Obaydullah, v. Obama*, 688 F.3d 784 (D.C. Cir. 2012); *Nat'l Ecological Found.*, 496 F.3d at 476. The Eighth Circuit has implied as much. *See Dill v. Gen. Am. Life Ins. Co.*, 525 F.3d 612, 619 (8th Cir. 2008).

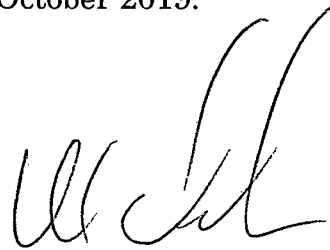
This is also in keeping with this Court's finding in *Hibbs v. Winn*, 542 U.S. 88, (2004) "That order, we conclude, suspended the judgment's finality under § 2101(c), just as a timely filed rehearing petition would, or a court's appropriate decision to consider a late-filed rehearing petition. Compare *Young v. Harper*, 520 U. S. 143, 147, n. 1 (1997) (appeals court agreed to consider a late-filed rehearing petition; timeliness of petition for certiorari measured from date court disposed of rehearing petition). Since a court of appeals only has jurisdiction of final orders, the time could not begin to run until a petition for rehearing was resolved. This circuit split is a

critical issue for this Court's resolution.

3. This application is not filed for the purpose of delay. Petitioner is filing this petition pro se. On September 7, 2019 his mother passed away. During the preceding three weeks she required round the clock care which was provided by Petitioner and his siblings. Thereafter, Petitioner was appointed as the executor of her estate and heavily involved in the funeral and other estate matters. This heavy load has restricted the amount of time needed to adequately research and address the critical issues needed to provide a well-researched and comprehensive petition that will assist the Court in evaluating the Federal Circuit's decision.

For these reasons, Applicant respectfully request that the due date for his petition for a writ of certiorari be extended for 60 days to and including December 23, 2019.

Respectfully submitted this 4th day of October 2019.



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