

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 01-1323

UNITED STATES OF AMERICA,
Appellee

v.

ALFRED W. TRENKLER,
Defendant/Appellant

**MEMORANDUM REGARDING COURT'S ORDER
OF MARCH 14, 2001 REGARDING TIMELINESS OF APPEAL**

The defendant/appellant Alfred W. Trenkler submits this Memorandum in response to the Court's March 14, 2001 Order regarding whether the notice of appeal was timely filed. The defendant-appellant is submitting herewith the Affidavit of Jack Wallace. In this Memorandum, the defendant contends that the Court should permit the appeal to go forward because of the doctrine of "unique circumstances."

The district court denied the defendant's new trial motion on December 28, 2000. The defendant was shortly thereafter notified that his attorney, Morris M. Goldings, had become disabled and retired from the firm. The defendant was advised that he will be represented by Bruce Edmands. On January 2, 2001, Mr. Edmands told Jack Wallace, the defendant's step-father, that he would protect the defendant's right to appeal the denial of the new trial motion. Mr. Edmands also expressed his desire to meet with Mr. Wallace, but stated that he was unable to do so because he was busy with the chaos resulting from Mr. Goldings' departure. On January 5, 2001, Mr. Edmands sought a thirty day extension of time in which to file the notice of appeal from the denial of the new

trial motion. On January 8, 2001, Mr. Edmands filed a brief for Mr. Trenkler in an appeal from the denial of a federal habeas petition. *Trenkler v. United States*, United States Court of Appeals for the First Circuit No. 00-1657.

On January 22, 2001, Judge Zobel allowed the motion to enlarge the time for filing the notice of appeal by thirty days. Mr. Edmands sent a copy of the allowed motion to Mr. Wallace, and told Mr. Wallace that he should seek other counsel for his step-son. On January 29, 2001, Mary Cummings, Courtroom Supervisor of the district court told Mr. Wallace that the time for filing the notice of appeal would begin running when the allowance of the motion was docketed, and said that the allowance had not been docketed. On February 2, 2001, Lisa Urso, Judge Zobel's deputy clerk, told Mr. Wallace that the allowed motion had been docketed on February 1, and that the notice of appeal was due no later than 30 days after February 1. Has he been told that the notice of appeal was due on February 6, Mr. Wallace would have hired an attorney by that date to file the notice of appeal.

Mr. Wallace hired new counsel on February 11, 2001, and new counsel filed a notice of appeal on February 20, 2001.

I. The Court Should Permit the Appeal to Go Forward Because of the Doctrine of Unique Circumstances.

The deadline for filing a notice of appeal is jurisdictional. It is, however, subject to the doctrine of unique circumstances. In *Thompson v. Immigration and Naturalization Service*, 375 U.S. 384, 386-87 (1964)(Per curium), the Supreme Court permitted a litigant to pursue post-trial motions that had been served in an admittedly untimely manner, thereby defeating jurisdiction. The Court held that the litigant's reliance on the District Court's explicit statements that the motions were

timely, and the fact that the litigant could have cured the problem had a question been raised, were “unique circumstances” that warranted relief.

In *Osterneck v. Ernst & Whinney*, 489 U.S. 169 (1989), the Court again addressed the doctrine. While declining to apply the *Thompson* doctrine, the Court reiterated its vitality:

By its terms, *Thompson* applies only where a party has performed an act which, if properly done, would postpone the deadline for filing his appeal and has received specific assurance by a judicial officer that this act has been properly done.

489 U.S. at 179.

In *United States v. Heller*, 957 F.2d 26 (1st Cir. 1992), recognized the continuing viability of the doctrine. It explained that the appellate court is the proper forum to determine whether to apply the doctrine, although it recognized that it might be appropriate to remand the matter to the trial court for fact findings. 957 F.2d at 28.

The Court recognized that there is a split among the courts of appeals as to whether the misleading statement must be made by a judge, or whether it could also be made by a person from the clerk’s office. The Court held that the misstatement must be made by a judge. The Eleventh Circuit, on the other hand, applies the doctrine even to statements by clerk’s office personnel. *Willis v. Newsome*, 747 F.2d 605 (11th Cir. 1984); *Hollins v. Department of Corrections*, 191 F.3d 1324 (11th Cir. 1999). This Circuit gives the *Thompson* doctrine a narrow reading, while the Eleventh Circuit gives it a liberal reading. *Cf. Heller* 957 F.2d at 31 with *Hollins*, 191 F.3d at 1327.

The Court should use this case as a vehicle for reexamining its attitude towards this doctrine. Here there are important equitable factors favoring relief. The defendant was left in the lurch created by his lawyer’s disability. His step-father set out to retain new counsel for the defendant, who is

incarcerated. Mr. Wallace was assured by two ranking members of the district court's clerk's office – the Courtroom Supervisor and Judge Zobel's courtroom deputy – that the time for filing a notice of appeal would expire thirty days after the docketing of the judge's order allowing an extra thirty days to file the notice of appeal. Reliance on that advice was reasonable, and indeed it appeared to come directly from the judge herself. Moreover, it was given at a time when it would have been possible to file a timely notice of appeal if proper advice had been given. Under the law the time to appeal expired on February 6, 2001. Mr. Wallace was told by clerk's office personnel on January 30 and February 2 that he had at least until the end of February. In these circumstances, the doctrine of unique circumstances should be applied. In the alternative, the Court should remand the matter for a fact-finding by Judge Zobel.

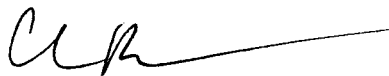
Respectfully submitted
The defendant/appellant Alfred Trenkler
By his attorneys



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CERTIFICATE OF SERVICE

I certify that I have served the foregoing by delivering a copy to AUSA Dina M. Chaitowitz on March 28, 2001.



Charles W. Rankin

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AFFIDAVIT OF JACK WALLACE

Jack Wallace, being duly sworn according to law, hereby deposes and says as follows:

1. My name is Jack Wallace. I am the stepfather of defendant/appellant Alfred W. Trenkler. I am not an attorney and I do not have legal training. My stepson is incarcerated at USP-Allenwood, where he is serving a life sentence. In the years since his conviction, I have tried to assist him by helping him obtain counsel and by staying in regular communication with his attorneys.
2. Attorney Morris M. Goldings had represented my son on his direct appeal and on various post-conviction matters for many years. Mr. Goldings had litigated a new trial motion that was filed in August 2000 before Judge Zobel. On Saturday, December 30, 2000, I learned that Judge Zobel had denied the new trial motion by reading an article in *The Boston Globe*. A copy of the article is attached as Exhibit 1.

3. At some point during the long holiday weekend between December 30, 2000 and January 1, 2001, I learned by talking on the telephone to my stepson that he had received a letter from James B. Cox, Managing Partner of Mahoney, Hawkes & Goldings. A copy of that letter is attached hereto as *Exhibit A*. The letter informed my stepson that Mr. Goldings had become disabled and retired from the firm. The letter indicated that my stepson would hereafter be represented by Bruce Edmands of the Mahoney, Hawkes & Goldings firm.
4. On January 2, 2001, I attempted to reach Morris Goldings. On that date, I was unable to speak with Mr. Goldings, but I did speak with Mr. Edmands. Mr. Edmands advised me that he would be handling Alfred's case. He wanted to meet with me, but would be unable to meet with me for at least another week because of the chaos in the firm created by Mr. Goldings' departure. He promised to send me a copy of the letter he had sent to my step-son, and he told me that he would file a motion with Judge Zobel to protect my step-son's rights regarding the new trial motion. I received a copy of the letter sent to my son on January 5, 2001.
5. On January 3, 2001, I called Lisa Urso, Deputy Clerk to Judge Zobel, to request a copy of the Memorandum of Decision because the Mahoney, Hawkes & Goldings firm had not received it. . She was kind enough to fax it to me.
6. The firm of Mahoney, Hawkes & Goldings was also representing my son in an appeal from the denial of a federal *habeas* petition pursuant to 28 U.S.C. § 2255. *Alfred W. Trenkler v. United States*, U.S. Court of Appeals for the First Circuit No. 00-1657. Mr. Edmands and Mr. Jacobs from Mahoney, Hawkes & Goldings filed a brief in that appeal on my stepson's behalf on January 8, 2001.

7. During the week of January 22, 2001, I spoke to Mr. Edmands. He was still unable to meet with me because he was busy with the problems created by Mr. Goldings' departure. He advised me that we should retain new counsel because there could be a conflict-of-interest if the Mahoney, Hawkes & Goldings firm continued to represent my stepson.
8. On January 22, 2001, Judge Zobel allowed Mr. Edmands' motion for extension of time in which to file the notice of appeal. I learned of that decision a couple of days later when I received a copy of the endorsed motion from Mr. Edmands. To this day I have never met Mr. Edmands.
9. On January 29, 2001, I spoke with Mary Cummings, Courtroom Supervisor of the District Court Clerk's Office, to clarify when the 30-day extension of time began running. Ms. Cummings informed me that the 30 days to file a notice of appeal would commence when the order allowing the extension was docketed. She informed me that it had not yet been docketed.
10. On February 2, 2001, I spoke with Lisa Urso, Deputy Clerk to Judge Zobel. Ms. Urso told me that she had docketed the motion on February 1st and that the 30-day extension of time would begin running on that day.
11. If I had been told by Ms. Cummings or Ms. Urso that the deadline for filing the notice of appeal was February 6, 2001, I would have had an attorney file the notice of appeal in a timely fashion.
12. On February 11, 2001, I hired the firm of Rankin & Sultan to represent my stepson. That firm filed a notice of appeal on my stepson's behalf in this matter on February 20, 2001.

Signed and sworn to under the pains and penalties of perjury this 28th day of March 2001.

Jack Wallace

Jack Wallace

THE BOSTON GLOBE

SATURDAY, DECEMBER 30, 2000

B25 City & Region

New England
in brief

BOSTON

Witness says van driver was aggressor

A woman who witnessed a deadly case of road rage that led to the death of a school van driver says it was the school van driver who was the aggressor. Creda Carney said yesterday that she watched the confrontation unfold as she sat in an MBTA bus during rush hour on Nov. 30. Dana Lombardi, 45, of Chelsea has pleaded not guilty in the incident that left Sandra Thomas, 57, of Everett dead. Prosecutors said Lombardi and Thomas got into an altercation after a minor fender-bender in Charlestown. Lombardi has been accused of driving off with Thomas clinging to his car hood and running her over after she fell off. After a pretrial court hearing yesterday, Carney told WHDH-TV, Channel 7, that Lombardi had cut off several vehicles, but was not involved in an accident with Thomas's van. She said she saw Thomas approach Lombardi's car, trying to open the driver-side door and jumping onto the hood, after a traffic incident. (AP)

BOSTON

Convicted 1991 bomber loses bid

A federal judge has rejected a bid by convicted bomber Alfred Trenkler for a new trial, saying it was filed too late. Trenkler, serving a life sentence for building a bomb in 1991 that killed Boston Police Bomb Squad technician Jeremiah Hurley and maimed his partner, Francis X. Foley, contended that federal agents fabricated a receipt introduced as evidence during his trial. Federal agents said corporate records disprove the allegation, but US District Court Judge Rya W. Zobel ruled the point was moot because Trenkler's motion was filed at least two years too late under federal court rules.

December 29, 2000

Mr. Alfred W. Trenkler
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Morris M. Goldings
Loyd M. Starrett
Mark Peters
Frances Allou Gershwint
Bruce Winthrop Edmands
James B. Cox
Laurence M. Johnson
Daniel J. Goldberg
Douglas L. Jones
Brian W. McClair
Richard S. Jacobs
Matthew P. Zayotti
Brenda A. Swan
Alison J. Little

Of Counsel
William S. Hawkes
Diane Rubin

Dear Mr. Trenkler:

I write to inform you that our partner, Morris Goldings, has very recently become disabled. His condition prevents him from practicing law, and he has retired from the Firm. For that reason, we must advise you that Morris has no authority to act in any capacity on behalf of this law firm. We regret this news, and we wish Morris well.

We have arranged to have another partner of our firm experienced in this area, Bruce Winthrop Edmands, assume responsibility for each matter of yours that is now pending. That partner will be directly responsible for the matter unless you advise me that you prefer some other arrangement. Bruce Winthrop Edmands will be in touch with you very soon to discuss this transition.

I regret any inconvenience this unexpected announcement may cause you. I also wish to assure you that we are fully capable and desirous of continuing to represent your interests effectively and immediately. We very much appreciate the opportunity to serve you and hope you will permit us to continue to do so.

Please feel free to telephone me with any concerns you may have, and please accept our best wishes for a healthy and prosperous New Year.

Very truly yours,

James B. Cox
Managing Partner

JBC/dmh:67479